

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

JUL 06 2018

Deborah Brooks Durden, Administrative Law Judge

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S.C. SUPREME COURT

Case No. 14-ALJ-30-0539-CC  
Appellate Case No. 2015-00002228  
Supreme Court Case No. 2018-001167

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Edward W. Miller, ..... Petitioner,

v.

South Carolina Public Employee Benefit Authority,  
South Carolina Retirement Systems, ..... Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the court of appeals on May 24, 2018.

### QUESTIONS PRESENTED

1. Did the court of appeals err in finding that there had been no breach of Respondent's fiduciary duties?
2. Did the court of appeals err in holding that Petitioner could not establish unequal treatment of like situated beneficiaries?
3. Did the court of appeals err in failing to address a novel issue of law by not imposing a discovery rule to prevent the application of a regulatory statute of limitations?
4. Did the court of appeals err in holding that Summary Judgement was proper?
5. Did the court of appeals err in holding it was constitutional and proper for the Administrative Law Court to rely on a phone call in its order?

### STATEMENT OF THE CASE

This case arises from Petitioner's August 7, 2014 letter, to Respondent, requesting formal review of Respondent's December 2002 determination of the amount of public service credit which Petitioner was eligible to purchase in the Judges and Solicitors Retirement System ("JSRS") for his employment with the Greenville County Public Defender Office. In his letter to Respondent, Petitioner asserted that he should be allowed to purchase an additional 15 months of earned service credit at the cost in effect in 2003. By Final Agency Determination NO. 14-015, Respondent found that Petitioner's request for review of the December 2002 Determination was not timely filed and Petitioner's request would, therefore, not be granted. Petitioner sought a review of the Final Agency Determination in a contested case proceeding before the South Carolina Administrative Law Court. Petitioner filed a Request for Contested Case Hearing with the ALC on November 20, 2014.

By way of letter, dated May 2, 2015, the parties submitted Petitioner's claim to the ALC. Therein the parties agreed to waive an evidentiary hearing and submit the matter to the ALC for decision as a matter of law based upon stipulations of fact, joint exhibits, and memoranda of law submitted by the parties. The ALC issued an Order Granting Respondent's Motion for Summary Judgment, dated August, 24, 2015. On September 2, 2015, in response to that Order, Petitioner filed a Motion to Alter or Amend. On September 23, 2015, the ALC sent an email scheduling a "teleconference" with the parties; this telephonic communication was held on September 24, 2015, the ALC issued its Order Denying Petitioner's Motion to Alter or Amend. In the Order the ALC refers to the September 24, 2015 telephonic communication and called it a "telephonic hearing" and recited alleged comments made by the Petitioner as partial basis for the ruling. Petitioner expressed concern that there had been no notice given to him that the September 24, 2015 communication was to be a hearing. The ALC acknowledged that no record of any type was made from the September 24, 2015 communication.

On October 27, 2015, Petitioner filed a Notice of Appeal with the South Carolina Court of Appeals. In compliance with Appellate Court Rules, Petitioner continued to seek a transcript of the "telephonic hearing." On December 2, 2015, the Clerk of the ALC formally acknowledged to the court of appeals, that no transcript of the "telephonic hearing" was made and, consequently no record of the "telephonic hearing" exists.

In its *per curiam* Opinion, ("Opinion"), filed in the instant case on February 7, 2018, the court of appeals, affirmed the Administrative Law Court's, ("ALC's") order granting summary judgment in favor of Respondent. However, the court of appeals found that the Respondent owed fiduciary duties to Petitioner, but stated, without any explanation or discussion of the facts, that no breach of the duty was committed.

The Petitioner will explain with particularity each item which the Court of Appeals overlooked or misapprehended in its opinion. Additionally, Petitioner asserts that even if the court of appeals was not in error on the items discussed below, the appropriate remedy for the court of appeal's ruling recognizing the ALC erred in failing to find the existence of a fiduciary duty, would be to remand the case for an evidentiary hearing on these issues rather than affirming

and dismissing it in full. As a result, the Petitioner prays that this Court grant his Petition for Certiorari.

1  
ARGUMENT

1. THE COURT OF APPEALS ERRED, IN CONFLICT WITH PRIOR SOUTH CAROLINA SUPREME COURT DECISIONS, BY FINDING, WITHOUT A FULL FACTUAL RECORD REQUIRED FOR PROPER ADJUDICATION, THAT THERE HAD BEEN NO BREACH OF RESPONDENT'S FIDUCIARY DUTIES.

In South Carolina jurisprudence, it is well-established that the existence of a fiduciary relationship, and attendant fiduciary duties, is a question of law. The determination of whether a breach of fiduciary duties has occurred, on the other hand, is a question of fact. *Turpin v. Lowther*, 404 SC 581, 745 SE2nd 397 (S.C. 2013); *Vortex Sports and Entertainment, Inc. v. Ware and Associates, Inc.*, 378 SC 197, 662 SE 2<sup>nd</sup> 444 (S.C. Ct. App. 2008). In this case, the ALC did not reach the issue of whether Respondent had breached its fiduciary duties to Petitioner because the ALC did not recognize, as the court of appeals did, that Respondent was a fiduciary. Though the court of appeals correctly held that Respondent is a fiduciary, the court of appeals incorrectly held that there had been no breach of the fiduciary duty by Respondent without a full, factual record before the Court.

Alternatively, it is uncontested that this appeal arises from the ALC Court's adjudication of Petitioner's claims for breach of fiduciary duty by Respondent. Thus, this case is one in equity. The court of appeals may, therefore, find facts, *de novo*, according to its own view of the preponderance of the evidence. *S.C. Dept. of Transp. v. Horry Cnty.*, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (S.C. 2011). In this case, however, there is **no** factual record available for review of an action in equity by the court of appeals. Due to the lack of adequate factual record for review, Petitioner submits that the finding of the court of appeals that there was no breach of fiduciary duty is unsupported by any factual record from the ALC.

The court of appeals' error should be corrected by remanding this case to the ALC for the development of a full factual record to determine whether Respondent breached its fiduciary

duties owed to Petitioner.

2. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT PETITIONER COULD NOT ESTABLISH UNEQUAL TREATMENT OF LIKE SITUATED BENEFICIARIES AND VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY RELYING ON UNSUBSTANTIATED EVIDENCE.

The Record on Appeal is replete with significant evidence that Petitioner's designation as a part-time employee was only nominal and for clerical, administrative purposes. The actual work performed was identical to that performed by Joe Watson, who received full-time earned service credit. This undisputed fact is found in the Record on Appeal in three separate affidavits, which are ignored in the court of appeals' Opinion.

Reference to the audiotape of the oral argument of this case will show that one of the Panel Judges asked counsel for Respondent if Joe Watson's application (which is not in the Record on Appeal) was identical to Petitioner's application. Counsel for Respondent replied that Watson's application did not contain a part-time designation and was treated differently. This assertion cannot be found in any material contained in the Record on Appeal. That the Judges had to reach outside the Record on Appeal and elicit unsubstantiated "testimony" from counsel for Respondent to form the basis of the Court's decision establishes the following:

1. There was a scintilla of evidence and, therefore, a genuine triable issue of fact about the similarity and/or difference between Petitioner's treatment and Watson's treatment, which was not in the Record on Appeal of this case;

2. The court of appeals based its affirmation of the ALC's Order on a fact which was not in the Record on Appeal but which was disclosed at oral argument by counsel for Respondent, which establishes that the ALC Trial Court's Order was not founded on adequately established fact(s);

3. The answer by counsel for Respondent to the Judge's question violates the Respondent's statutory duty of confidentiality owed to Watson, exemplifies Respondent's failure to understand its fiduciary duties owed to beneficiaries (Watson in this instance), and demonstrates the Respondent's willingness to violate its fiduciary duty to the Petitioner in handling Petitioner's application to purchase additional retirement coverage;

4. Admittedly, Petitioner's application job description was "part-time," however it is undisputed Petitioner and Watson had the same caseload and same employment requirements. Respondent's reliance on this superficial difference between Watson and Petitioner violates Respondent's fiduciary duty to look past the superficial and to treat Petitioner with full good faith and fair dealing as a fiduciary, and the mandatory requirement of equal treatment of like-situated beneficiaries;

5. This Appellate Court's reliance on unsubstantiated evidence, not in the Record on Appeal in this case, which formed the basis for its decision herein, violates Petitioner's constitutional right of due process during this stage of the proceeding;

6. Because the court of appeals has violated Appellate Rules by reaching outside of the Record on Appeal, Petitioner now informs the Court that he has, since the initiation of this Appeal, become aware of another judicial member, similarly situated to Petitioner and Watson, who has been treated similarly to Watson by being allowed to purchase full-time earned service credit, further emphasizing the unequal and disparate treatment given to Petitioner, and the Respondent's failure in exercising its fiduciary duties.

Based on the foregoing, Petitioner seeks the remand of this case to the ALC Trial Court to establish a full, proper record for adjudication of the parties' positions.

3. THE COURT OF APPEALS FAILED TO ADDRESS A NOVEL ISSUE OF LAW BY NOT IMPOSING A DISCOVERY RULE TO PREVENT THE APPLICATION OF A REGULATORY STATUTE OF LIMITATIONS WHICH WOULD ALLOW PETITIONER TO MAKE A TIMELY APPLICATION FOR ADDITIONAL RETIREMENT COVERAGE.

The court of appeals overlooks three matters in this regard:

Initially, at oral argument the court of appeals recognized that this case presents a **novel issue of law** in South Carolina jurisprudence: whether or not a "discovery rule" should apply, under these circumstances, to toll the running of the time limitation which would allow Petitioner to pursue the relief sought herein. The Court, however failed to address this seminal issue in its opinion. As a practical matter, Respondent may well have not been consciously aware of the Watson case when it made its inequitable determination in 2002 with respect to Petitioner. However, Respondent did possess that knowledge as the sole, and statutorily confidential, custodian of that information. It is undisputed that Petitioner neither knew of nor had any access to that information, which resulted in the unequal treatment of like-situated beneficiaries. This

conundrum presents the quintessential dilemma, involving important constitutional, statutory and common law rights, which can only be remedied by the imposition of a relevant discovery rule.

Second, the Respondent is a fiduciary. Respondent's fiduciary duty requires that it not simply sit mute. Rather the Respondent owes its primary, affirmative duty of vigilance and care for the beneficiaries of the retirement system of which the Respondent is the legislatively-created trustee. By affirming the ALC's Order the court of appeals allows the Respondent to circumvent its fiduciary duties by availing itself of the use of an equitable defense to avoid its unequal treatment of a beneficiary. It was to the court of appeals that Petitioner had come seeking the enforcement of equitable, fiduciary principles on Respondent's management of the retirement system. In its Opinion, the court of appeals held that Petitioner had not made timely application for the purchase of additional coverage in the retirement system. Respondent, as a fiduciary, failed to make full disclosure to Petitioner that other parties had previously, under identical circumstances, been allowed to purchase additional coverage in the retirement system. Respondent's failure to disclose, as required by Respondent's fiduciary duty, under these circumstances invites the application of equitable estoppel to correct Respondent's gross violation of Respondent's fiduciary obligations of fair dealing, full disclosure, and honesty in fact.

Finally, the Record on Appeal demonstrates that, at no time, did Respondent comply with its fiduciary duty of disclosing that Petitioner had a right to purchase additional retirement coverage. Only during the litigation of this case did Respondent acknowledge Watson's purchase of additional retirement coverage under circumstances similar to Petitioner's. As a result, it is **uncontested** that the Petitioner had neither knowledge nor notice to form any constructive knowledge of Mr. Watson's purchase. As a result, Petitioner could not have known he had a claim for full-time earned service credit or that the claim had been denied for these retirement benefits. See *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (S.C. 2009), holding a "waiver is a voluntary and intentional abandonment or relinquishment of a **known right**." 384 S.C. at 480, 682 S.E.2d at 807. The Court overlooks the fact that one can only surrender a **known right**.

For these reasons, Petitioner urges this Court to remand this case with instructions to the

ALC to establish a full record on which to enforce fiduciary and constitutional duties owed to Petitioner by Respondent.

4. THE COURT OF APPEALS SHOULD HAVE HELD THAT A GRANT OF SUMMARY JUDGMENT WAS IMPROPER.

It is axiomatic that a summary judgment cannot be granted where there is a scintilla of evidence that gives rise to a genuine, triable issue of fact. Where there is dispute as to the inferences from the facts in the record, then summary judgment cannot be granted. *Nelson v. Charleston County Parks and Recreation*, 362 S.C. 1, 3, 605 S.E.2d 744, 746 (S.C. Ct. App. 2004)(“Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.”)

As referenced above, the Record on Appeal is replete with material facts which are in dispute. Respondent acknowledged in its brief herein, that it disputes, not only the facts of the case, but the reasonable inferences which may be drawn therefrom. This case is not ripe for a decision made pursuant to the strict and harsh rule of Summary Judgment. The ALC erred in failing to require the parties to fully develop a complete evidentiary record when making its decision.

In its opinion, the court of appeals failed to address, with any specificity to allow for further appellate review, the incomplete evidentiary record below, the clearly delineated disputed facts and the clearly delineated disputed inferences reasonably drawn from those facts.

Because there is a scintilla of evidence which defeats summary judgment in this case, the case should be remanded for trial, or for development of a full factual record.

5. THE COURT OF APPEALS ERRED IN HOLDING THAT IT WAS CONSTITUTIONAL AND PROPER FOR THE ADMINISTRATIVE LAW COURT TO RELY ON AN UNSCHEDULED, UNRECORDED PHONE CALL IN ITS ORDER.

That the telephone call was unscheduled and unrecorded presents three errors which need correction:

First, Respondent asserts that the alleged agreement between counsel and the ALC Trial Judge during the telephone call constituted a “settlement” of certain procedural issues. By issuing an Opinion which upholds the ALC’s finding that the parties agreed to a “settlement” on the telephone without any record or publication in open court violates Rule 43(k) of the SCRPC.

Rule 43(k) of the South Carolina Rules of Civil Procedure provides no agreement between counsel shall be binding unless reduced in writing and entered into the record “unless made in open court and noted upon the record.” The purpose of Rule 43(k) is:

[T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character.

*Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 495, 458 S.E.2d 533, 535 (S.C. 1995) (quoting 83 C.J.S. *Stipulation* § 4 (1953)); see also *Motley v. Williams*, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (S.C. Ct. App. 2007) (stating the application of Rule 43(k) will help avoid disputes regarding the terms of settlement). The policy behind Rule 43(k) applies to the telephone call: there is a dispute as to the scope of the parties’ settlement of issues, made in an unrecorded teleconference. As set forth, *supra*, the terms and validity of the parties’ unrecorded agreement must be settled at the trial court level, rather than take up valuable appellate court time.

The second issue posed by the court of appeals’ affirmation of the ALC’s use of an unrecorded telephone conversation between the Court and counsel is constitutional: the procedural propriety of the granting of summary judgment by the ALC rests on the contents of an unrecorded judicial telephonic hearing. At the heart of the notion of “due process” rests the right to appear and to be heard. ALC’s use of an unrecorded telephone conversation between the Court and counsel is unconstitutional. The failure of notice and to make a record alone requires a new trial. The fundamental requirements of due process include notice, an opportunity to be

heard in a meaningful way and judicial review. *S.C. Const.* Art. 1, Section 22 and *Adams v H.R. Allen, Inc*, 397 S.C. 652, 726 SE.2d 9 (S.C. Ct. App. 2012). A denial of the right to appear and to be heard, without a recorded agreement by Petitioner, does not comport with the “fundamental fairness” of due process as guaranteed to Petitioner by U.S. Constitution, Amendment V and S.C. Constitution Article 3. Petitioner suggests that the ALC’s reliance on a telephonic hearing, enforced against Petitioner without a record, does not comport with the constitutional requirements. *supra*. Petitioner asserts that there should be specific guidelines for participation in telephonic hearings between a court and counsel and litigants, to protect the constitutional rights of all parties.

Finally, the court of appeals finds that the ALC “neither accepted evidence nor heard arguments of the parties during the call.” The court of appeals overlooks or misapprehends that this is the exact injury that the Petitioner suffered. The Motion to Alter or Amend was the time to raise these issues and allow the ALC to address the issue of a breach of a fiduciary duty and other issues raised. With the complete failure to give notice, conduct a legitimate hearing or create a record, the Petitioner was unfairly and wrongfully prevented from pursuing and protecting his rights.

Petitioner asserts that this error should be corrected by remanding the case to the ALC to develop a full and proper record on which the ALC might properly rule.

## CONCLUSION

Respondent owes two kinds of duties to Petitioner. First, Respondent owes fiduciary duties of good faith, fair dealing and, full disclosure to Petitioner. Second, Respondent as a state agency, owes constitutional duties of due process and equal protection of the law to Petitioner. The ALC and the opinion of the court of appeals have failed to properly correct Respondents’ breaches of fiduciary and constitutional duties.

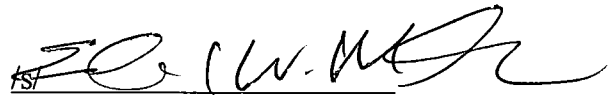
Additionally, and for purposes of further appellate review as have become necessary, Petitioner requested, from the court of appeals, specific rulings on the specific issues raised in

Petitioner's briefs and, now, in this Petition for Certiorari. Further, Petitioner asks for rulings from this Court, *inter alia*, on whether there is, or is not, a scintilla of evidence in the Record on Appeal which proves or disproves Respondent's breach of fiduciary duty and whether Respondent has breached its fiduciary duty by failure to disclose material facts to Petitioner.

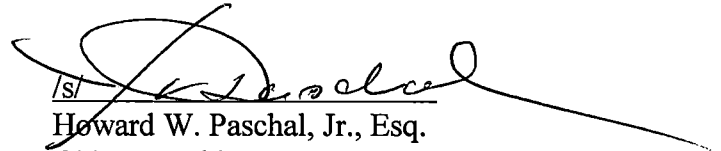
Based on the foregoing, Petitioner asks this Court to reverse the Opinion and require Respondent to sell additional coverage in the retirement program, as it did for Watson, or, in the alternative, to remand this case to the ALC Trial Court to develop a full factual record for the proper constitutional and statutory adjudication of Petitioner's claims. For the reasons stated, petitioner asks the Court to grant the Petition for a Writ of Certiorari.

July 3, 2018

Respectfully submitted,



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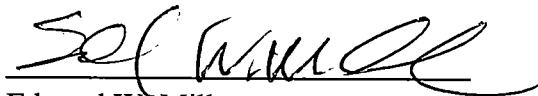
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v.

South Carolina Public Employee Benefit Authority,  
South Carolina Retirement Systems, ..... Respondent.

**CERTIFICATE OF SERVICE**

The undersigned certifies that he has served the Petitioner's Petition for a Writ of Certiorari on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on July 3, 2018, addressed to their attorney of record, Justin R. Werner, Esq., Post Office Box 11960, Columbia, South Carolina 29211-1960; and on Jenny Abbott Kitchings, Clerk of the S.C. Court of Appeals, P.O. Box 11629, Columbia, South Carolina 29211 on July 3, 2018.



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Dated: 7/3/18