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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2016-000285  
Administrative Law Court Docket No. 12-ALJ-04-00143-AP

Thomas J. Torrence, #094651 ..... Respondent,

v.

South Carolina Department of Corrections ..... Appellant.

APPELLANT'S REPLY TO THE RESPONDENT'S RETURN  
TO ITS PETITION FOR REHEARING

Lake E. Summers  
Malone, Thompson, Summers & Ott LLC  
339 Heyward Street, Suite 200  
Columbia, South Carolina 29201  
Office: (803) 254-3300  
Fax: (803) 254-0309  
E-mail: summers@mtsollawfirm.com

Counsel for Appellant

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The Appellant, the South Carolina Department of Corrections [“SCDC”], respectfully submits, under South Carolina Appellant Court Rule [“SCACR”] 240(f), its instant Reply to the Return filed by the Respondent, Thomas J. Torrence [“Torrence”], to the Petition for Rehearing it filed January 10, 2019 in the instant matter.

## I. BACKGROUND

The Court’s November 28, 2018 unpublished decision, Unpub. Op. No. 2018-UP-432, 2018 WL 6199185 (S.C. Ct. App. Nov. 28, 2018), which dismissed SCDC’S appeal of the orders issued January 30, 2014 and January 20, 2016 by the South Carolina Administrative Law Court [“ALC”], read as follows:

Appeal dismissed pursuant to [SCACR 220(b)], and the following authorities: [*Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health and Env’l Control*, 692 S.E.2d 894, 894 (S.C. 2010)] (“The order of the ALC in this case is not a final order. If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory” and not immediately appealable.); S.C. Code Ann. § 1-23-610(A)(1) (Supp. 2018) (providing for judicial review by this court of “a final decision” of the ALC).

As SCDC clarified in its Petition,<sup>1</sup> this Court’s decision in *Ackerman, et al. v. S.C. Dep’t of Corr.*, 782 S.E.2d 757 (S.C. Ct. App. 2016), *cert. denied* (May 30, 2017), impacted SCDC’s instant appeal of the ALC’s January 30, 2014 and January 20, 2016 orders.

As SCDC acknowledged in its Petition,<sup>2</sup> and as Torrence agreed in his Return,<sup>3</sup> *Ackerman* rendered moot the issues identified by SCDC in its appeal of the ALC’s January 30, 2014 order. However, SCDC respectfully asserted in its Petition,<sup>4</sup> and it does so again here, that

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<sup>1</sup> See SCDC’s Petition, p. 2.

<sup>2</sup> *Id.*, p. 2.

<sup>3</sup> See Torrence’s Return, p. 1.

<sup>4</sup> See SCDC’s Petition, pp. 2 – 3.

*Ackerman* did not impact the following three (3) issues raised by SCDC in its appeal of the ALC's January 20, 2016 order (R. pp. 1029 – 1043):

- A. Whether the ALC erred in its January 20, 2016 order by ruling that SCDC must allow Torrence to designate persons or entities to receive an immediate distribution of his monies held in escrow pursuant to S.C. Code Ann. § 24-3-40(A)(5);
- B. Whether the ALC misapprehended the applicable state law, federal law, and federal regulations when it ruled in its January 20, 2016 order that Torrence “worked as a harness assembler for ESCOD,” the private industry sponsor during the time he participated in the prison industries project SCDC operated at Evans Correctional Institution [“Evans”]; and
- C. Whether the ALC erred in its January 20, 2016 order when it decided that it possessed the authority to calculate the “prevailing wage” SCDC owed Torrence for the labor he provided to the project SCDC operated at Evans and by the methodology it used to calculate the “prevailing wage” SCDC owed Torrence for the same.

As it asserted in its Petition,<sup>5</sup> SCDC again respectfully asserts that the decisions by the ALC in its January 20, 2016 order regarding the three (3) above-listed issues constitute final determinations under *Charlotte-Mecklenburg*.

Accordingly, SCDC again respectfully asserts that this Court should not have, by its November 28, 2018 unpublished decision, dismissed SCDC's appeal of the three (3) above-listed issues without adjudicating them.

## **II. SCDC'S REPLY TO TORRENCE'S RETURN**

In opposing SCDC's Petition, Torrence stated as follows at the outset of his Return, which he served February 6, 2019:<sup>6</sup>

Torrence enters this Return pursuant to [SCACR 240(e)]. Torrence does not request a petition for rehearing but seeks to address or call this Court's attention to SCDC's attempt to (a) raise or re-characterize issues not before the ALC; (b) introduce evidence not contained in the instant

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<sup>5</sup> See SCDC's Petition, p. 3.

<sup>6</sup> See Torrence's Return, pp. 1 – 2.

Record; and (c) delay relief from this litigation further by asking the Court to order additional procedures which are identical to those ordered by the ALC on remand to calculate the wages owed Torrence for his prison industries labor.

**A. THE PARTIES AGREE THAT THE RULING BY THE ALC FROM ITS JANUARY 20, 2016 ORDER ASSOCIATED WITH THE FIRST ISSUE SCDC DISCUSSED IN ITS PETITION WAS NOT INTERLOCUTORY**

Notwithstanding the above-quoted passage from his Return, Torrence *agreed* with SCDC's assertion that the ruling by the ALC from its January 20, 2016 order associated with the first of the three (3) issues SCDC discussed in its Petition *was not* interlocutory.<sup>7</sup>

The first issue consisted of whether the ALC properly ruled that SCDC must allow Torrence to designate persons or entities to receive an immediate distribution of his monies held in escrow pursuant to § 24-3-40(A)(5).

Given the parties' agreement, SCDC respectfully urges this Court to withdraw its November 28, 2018 unpublished decision and issue a new decision by which it determines whether the ALC properly ruled that SCDC must allow Torrence to designate persons or entities to receive an immediate distribution of his monies held in escrow pursuant to § 24-3-40(A)(5).

**B. THE PARTIES AGREE THAT THE RULING BY THE ALC FROM ITS JANUARY 20, 2016 ORDER ASSOCIATED WITH THE THIRD ISSUE SCDC DISCUSSED IN ITS PETITION WAS NOT INTERLOCUTORY**

Torrence *also agreed*, despite the above-quoted passage from his Return, with SCDC's assertion that the ruling by the ALC from its January 20, 2016 order associated with the third of the three (3) issues SCDC discussed in its Petition *was not* interlocutory.<sup>8</sup>

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<sup>7</sup> See Torrence's Return, p. 2.

<sup>8</sup> *Id.*, pp. 4 – 5.

The third issue consisted of whether the ALC erred by deciding that it possessed the authority to calculate the “prevailing wage” SCDC owed Torrence for the labor he provided to the project at Evans and by the methodology the ALC used to calculate the “prevailing wage,”

The rulings by the ALC upon which SCDC anchored the third issue it discussed in its Petition appeared in the following paragraph from the January 20, 2016 order (R. p. 1039):<sup>9</sup>

**[Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, for the years he worked as a harness assembler for ESCOD. [SCDC] must obtain the data to determine this wage from the Department of Employment and Workforce. Specifically, [SCDC] must pay [Torrence] the mean average wage reflected by OEC Code 93114 for the years 1997 through 1999 and the mean average wage reflected by that code or its counterpart for the years data is not contained in the record. [emphasis supplied].**

Given the parties’ agreement, SCDC again respectfully urges this Court to withdraw its November 28, 2018 unpublished decision and issue a new decision by which it determines whether the ALC erred by deciding that it possessed the authority to calculate the “prevailing wage” SCDC owed Torrence for the labor he provided to the project at Evans and by the methodology the ALC used to calculate the “prevailing wage” for the same.

**C. THE RULING BY THE ALC FROM ITS JANUARY 20, 2016 ORDER ASSOCIATED WITH THE SECOND ISSUE SCDC DISCUSSED IN ITS PETITION WAS NOT INTERLOCUTORY**

Torrence did not agree with SCDC that the second issue it discussed in its Petition was not interlocutory.

For that matter, Torrence disputed whether the ALC even ruled in its January 20, 2016 order that he “worked as a harness assembler for ESCOD,” the private industry sponsor during the time he participated in the prison industries project SCDC operated at Evans.<sup>10</sup>

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<sup>9</sup> See SCDC’s Petition, pp. 9 and 14.

<sup>10</sup> See Torrence’s Return, p. 2.

Moreover, Torrence asserted in his Return that SCDC raised this issue for the very first time in its Petition, and he argued as follows:<sup>11</sup>

The status of Torrence’s labor has never been raised as an issue or defense by any party other than footnotes in Torrence’s Original ALC Brief and SCDC’s Brief, p. 2, n. 3. It has nowhere been presented by number or letter designating an issue or sub-issue.

In so arguing, however, Torrence ignored the reality that the ALC explicitly ruled in the first sentence of the relevant passage from its January 20, 2016 order that he worked for ESCOD, the private industry sponsor, for the duration of his participation in the project.<sup>12</sup> (R. p. 1039). (“[Torrence] must be paid the mean average South Carolina wage of an electronic assembler, including overtime, *for the years he worked as a harness assembler for ESCOD.*”). [italicized emphasis supplied].

Torrence likewise failed to fully embrace the reality that SCDC challenged the ALC’s erroneous ruling that Torrence “worked as a harness assembler for ESCOD” in the brief it filed January 3, 2017 with this Court in support of its instant appeal:<sup>13</sup>

Torrence’s claims that he was “employed” by or otherwise worked for ESCOD or that he was “employed” by or otherwise worked for SCDC are negated by our Supreme Court’s decision in *Williams, et al., v. S.C. Dep’t of Corr., et al.*, 641 S.E.2d 885, 887 – 88 (S.C. 2007). Torrence’s claim is also negated by federal precedent. *See Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (“People are not imprisoned for the purpose of enabling them to earn a living .... **But prisoners are not employees.**”). [emphasis supplied]. Torrence’s claims are also negated by *S.C. Dep’t of Corr., v. Cartrette*, 694 S.E.2d 18, 23 (S.C. Ct. App. 2010), in which this Court relied upon [S.C. Code Ann. § 24-3-40(A)] and *Williams*, 641 S.E.2d at 887, when it ruled that an inmate was not a private industry sponsor’s employee. As an aside, the dissent in *Cartrette* quoted the above-provided passage from *Bennett*. 694 S.E.2d at 24. Notwithstanding *Williams*, *Bennett*, and *Cartrette*, the ALC declined to reject Torrence’s

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<sup>11</sup> See Torrence’s Return, p. 2.

<sup>12</sup> See SCDC’s Petition, pp. 5 and 8.

<sup>13</sup> See SCDC’s January 3, 2017 Brief, p 2, n. 3, and p. 14, n. 21.

repeated assertions that he was an “employee” or was otherwise “employed” by the private industry sponsor, SCDC, or the State in footnote 3 of its January 20, 2016 order. (R p. 1035). Moreover, in ruling in the same order that SCDC should have paid Torrence “the mean average South Carolina wage of an electronic assembler,” the ALC explicitly stated that SCDC should have done so for the years Torrence “**worked as a harness assembler for ESCOD.**” [emphasis supplied]. (R p. 1039).

Accordingly, SCDC respectfully asserts that it adequately preserved the ALC’s erroneous ruling that Torrence “worked as a harness assembler for ESCOD,” which is clearly contrary to federal precedent, precedent from our Supreme Court, and precedent from this Court, as an issue in its instant appeal of the ALC’s January 20, 2016 order, and, as it did in its Petition, it respectfully argues that the ALC’s erroneous ruling was not interlocutory.

### III. CONCLUSION

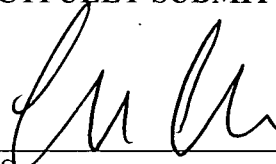
SCDC respectfully asserts that this Court should not have, by its November 28, 2018 unpublished decision, dismissed SCDC’s appeal of the three (3) issues SCDC discussed in its Petition without adjudicating them.

As Torrence, by his Return, agrees that the first and third of these three (3) issues are not interlocutory, this Court should withdraw its November 28, 2018 unpublished opinion and substitute an opinion – unpublished or published – by which it adjudicates the same.

SCDC further urges the Court to adjudicate the second of the three (3) issues, as the ALC’s ruling on this issue clearly contradicts established precedent.

Should it decline to adjudicate any of the three (3) issues SCDC discussed in its Petition, SCDC again respectfully petitions the Court to grant the alternative relief it articulated in the conclusion of its January 10, 2019 Petition.

**RESPECTFULLY SUBMITTED,**



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Lake E. Summers

**Malone, Thompson, Summers & Ott LLC**

339 Heyward Street, Suite 200

Columbia, South Carolina 29201

Office: (803) 254-3300

Fax: (803) 254-0309

E-mail: [summers@mtsollawfirm.com](mailto:summers@mtsollawfirm.com)

Counsel for the Appellant

Columbia, South Carolina  
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PROOF OF SERVICE

I certify that I have served the Appellant's Reply to the Respondent's Return to its Petition for Rehearing on the above-named Respondent by mailing a copy of it to his counsel, first class postage pre-paid, at the following address:

Thomas J. Torrence, #094651  
Perry Correctional Institution  
430 Oaklawn Drive  
Pelzer, South Carolina 29669

February 19, 2019



LAKE E. SUMMERS