THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Jul 11 2024
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

Daniel Cobel, Circuit Court Judge

Appellate Case No. 2024-000441

Lower Court Case No. 2020-CP-40-04063

South Carolina Public Interest Foundation, and John Crangle, Individually and on behalf of all others similarly situated, Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Respondents.

INITIAL REPLY BRIEF OF APPELLANTS

July 11, 2024

s/ James M. Griffin
James M. Griffin (SC Bar # 9995)
Margaret N. Fox (SC Bar # 76228)
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
803-744-0800

Badge Humphries (SC Bar #72904)
GRIFFIN HUMPHRIES LLC
2113 Middle Street, Suite 305
Sullivan's Island, South Carolina 29482
843-883-7444

James G. Carpenter (SC Bar #1136)
THE CARPENTER LAW FIRM
819 East North Street
Greenville, South Carolina 29601
864-235-1269

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE CASE

Appellants South Carolina Public Interest Foundation and John Crangle have appealed the order granting summary judgment to Respondents and asserted the following arguments in the opening brief: (I) Attorney General Alan Wilson (the "Attorney General") lacked authority to pay Willoughby & Hoefer, P.A. ("W&H") and Davidson, Wren & DeMasters, P.A. ("DWD") (collectively, the "Law Firms") from the Department of Energy (the "DOE") settlement because $75 Million was not awarded to the Law Firms as required by S.C. Code Section 1-7-150 and (II) the lower court impermissibly limited its analysis to an uncontested hypothetical question (whether the Attorney General has authority to enter into contingency fee agreements), ignored the plain language of Section 1-7-150, relied upon dubious legislative history, and misconstrued Appellants separation of powers argument.

Respondents incorrectly state in a footnote at the outset of their brief that Appellants failed to set forth "an issue on appeal" in their opening brief. Atty Gen. Br. 2, n.1. While there is no separate heading entitled "Statement of Issues on Appeal" in Appellants' brief, the section entitled "Table of Contents" sets forth the issues on appeal because the brief's headings set forth those issues. Restating the same headings under a separate heading would be duplicative because of how the headings themselves set forth the issues on appeal as contemplated by Rule 208(b)(1)(B), SCACR.[1] Those issues are stated concisely and directly and in no way constitute the "[b]road

[1] The rule states that the brief of appellant shall contain a statement of issues on appeal under "*appropriate* headings" and "in the order [t]here indicated." Rule 208(b)(1), SCACR (emphasis added). The rule does not state that the brief must have a heading specifically entitled "Statement of Issues on Appeal," nor does it address a situation where the brief's section headings set forth the issues on appeal, which would make a separate section from the "Table of Contents" duplicative. Additionally, while common practice among many practitioners, the rule does not require that the statement of issues on appeal be stated as questions. *See* Rule 208(b)(1)(B) (providing that the statement of issues on appeal "*may* be stated in question form" (emphasis added)).

general statements" that "may be disregarded by the appellate court." *Id.* Indeed, that portion of Rule 208(b)(1)(B) suggests that the appellate court *should* consider issues on appeal when presented concisely and directly and not broadly and generally. Respondents cite to no authority holding that the method by which an appellant sets forth the issues on appeal warrants dismissal of the case. Doing so would be a drastic remedy and subvert substance to form, particularly in this case where a statement of issues on appeal would be identical to the table of contents. *See Gibbes v. Greenville & C.R. Co.*, 14 S.C. 385, 389 (1881) ("[I]n the adoption and administration of its own rules, while a proper regard will always be had to forms of procedure, in so far at least as to prevent uncertainty and confusion in the conduct of causes before the court, yet, as far as practicable, this court will also always see to it that mere forms shall not override substance."). Here, Respondents have expressed no uncertainty or confusion as to the issues on appeal because there was none. For these reasons, the Court should deny Respondents' request for dismissal of this appeal.

Respondents further argue that the payment of $75 million in fees did comport with the requirement of Section 1-7-150 because the fees were awarded by settlement, because the disposition of the settlement funds to pay attorneys' fees was required by law since the Attorney General has authority to contract with private counsel to pay a contingency fee and because the contracts are enforceable. The Law Firms rely upon Budget Proviso 59.8 and the Federal Funds Oversight Act in support of their argument.

The Attorney General on the other hand argues that because the lower court did not rely upon the Budget Proviso or the Federal Funds Oversight Act in its ruling and because Appellants did not file a motion to reconsider asking the court to address these two provisions, this Court should not consider any arguments pertaining to the same. The Attorney General then makes a

subtle attack on the constitutionality of Section 1-7-150 by claiming that the separation of powers doctrine prevents the Legislature from placing any limitations on the Attorney General's ability to pay outside counsel from litigation proceeds awarded to the State.

Respondents' arguments in response are set forth below.

ARGUMENT

I. THE ATTORNEY GENERAL'S AUTHORITY TO ENTER INTO CONTINGENCY FEE AGREEMENTS IS CIRCUMSCRIBED BY SECTION 1-7-150 OF THE SOUTH CAROLINA CODE OF LAWS

Appellants have not challenged the Attorney General's authority, in the abstract, to enter into contingency fee agreements in the prior appeal before this Court or in the lower court. Rather, the question presented is whether the Legislature, through the enactment of Section 1-7-150, placed limitations on the use of proceeds from settlement or judgment to pay private counsel's continency fee. The plain language of Section 1-7-150 clearly limits the Attorney General's authority to pay a contingency fee by only allowing litigation costs awarded by court order or settlement to be allocated by the Attorney General. If the fees have not been so awarded, then the General Assembly is the appropriate body to allocate money to pay fees as it deems appropriate.

Indeed, the Attorney General has conceded in a court filing in litigation over the proper allocation of the settlement proceeds that only the General Assembly has authority to direct funds awarded to the State through the DOE settlement:

> **The Attorney General has no authority to appropriate money**. The money in the settlement was **payable to the State of South Carolina** pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).[2]

[2] The Attorney General's position is that this constitutional limitation does not apply to the Attorney General's ability to deduct as much of the $600 million settlement proceeds as he wishes to pay personally selected private law firms. In fact, under the Attorney General's approach, the

(Pls.' Supplemental Mem. Supp. TRO and Prelim. Inj., Ex. K., Att'y Gen. Opp'n TRO or Temp. Inj., *Ex Parte Barnwell Cnty. et al. v. Wilson et al.*, C/A No. 2020-CP-06-00294 (Barnwell Cnty. Common Pleas, Oct. 6, 2020) (emphasis added, citation to exhibit omitted)).

The Law Firms argue that the Attorney General can circumvent the limitations in Section 1-7-150 simply by entering into a contingency fee agreement that provides for payment to private counsel from the proceeds of a judgment or settlement awarded to the State. The Law Firms cite to the portion of Section 1-7-150 that exempts the Attorney General from the usual requirement that the funds be deposited into the General fund "where some other disposition is required by law." W&H Br. at 17. According to Law Firms, the fulfillment of a contract entered by the State's Chief Legal Officer and approved by the EBO is a disposition "required by law." *Id.* at 19. The Law Firms also argue that the language in Budget Proviso 59.8 directing that the funds awarded to the State be held in a litigation recovery account and only "be expended only as prescribed by law" further authorizes the payment of fees under the contingency fee agreement.

The Attorney General correctly notes that the lower court did not rely upon Budget Proviso 59.8 or the EBO approval of expenditure of federal funds in its Order granting summary judgment, and neither Appellants nor the Law Firms filed a motion to reconsider asking the Court to address the Law Firms' arguments. The Attorney General argues that Appellants should not be permitted to challenge the meaning of Budget Proviso 59.8, the Federal Funds Oversight Act, or the EBO approval process on appeal. Yet, the Law Firms rely upon these same provisions, trying to salvage the lower court's flawed reasoning.

Attorney General could allocate $590 million of the $600 million to pay fees if the Attorney General so desired without any oversight whatsoever.

Appellants fully argued in their opening brief that Budget Proviso 59.8 does not authorize the payment of the attorneys' fees. Appellants Br. at 22-23. Appellants also argued that the Federal Funds Oversight Act does not apply because these settlement proceeds were neither federal funds, nor other funds as defined in the Act. *Id.* at 14-16. Appellants further pointed out the irregularities in the EBO approval process. *Id.* Those arguments are incorporated herein and will not be repeated.

The Law Firms' argument that the payment of fees is a disposition required by law, or prescribed by law, because the payment is pursuant to a valid and binding contract entered by the Attorney General is likewise flawed. The Attorney General exceeded his authority by agreeing to pay Law Firms from settlement proceeds payable to the State of South Carolina, irrespective of whether attorneys' fees are awarded by judgment or settlement. S.C. Code Section 1-7-150. Therefore, the contracts are not valid, nor binding, and the Law Firms simply have no cognizable interest in the settlement proceeds payable to the State.

As this Court observed in *Carolina Nat. Bank v. State*, 60 S.C. 465, 38 S.E. 629, 633 (1901),

> The State can only act under its constitution and through its legislative enactments pursuant thereto, and can only ratify in the manner in which it could originally authorize; and, if it could be estopped to assert the truth the effect might be to fix upon the state responsibilities in conflict with its constitution and laws. All men are bound to take notice of the special authority of the state's officers, and when dealing with them outside their authority they assume the peril with their eyes open, and cannot be heard to say that they placed reliance upon the State. The question is not one of intention, but of power; and, if the officer has not power to act, his action is not state action, and so affords no basis upon which to predicate estoppel against the State.

Id.

The legal principle that the State cannot be estopped by the unauthorized actions of a public official has been consistently enforced in South Carolina. For example, in *Service Management,, Inc. v. State Health & Human Services Finance Commission,* 298 S.C. 234, 238, 379 S.E.2d 442,

444 (Ct. App. 1989), the court ruled that the State was not estopped from seeking reimbursement of overpayments from State Medicaid funds, explaining "[a] governmental body is not immune from the estoppel doctrine where its officers or agents act within the proper scope of their authority but '[t]he public cannot be estopped . . . by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.'" 298 SC at 238, 379 S.E.2d 444. In *State v. Peake*, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001), *aff'd*, 353 S.C. 499, 579 S.E.2d 297 (2003), the court held that an agreement by the Department of Health and Environmental Control (DHEC) not to prosecute a developer was not binding on the Attorney General because the Attorney General had the exclusive power under the State Constitution to prosecute. *See also*, *Town of Hollywood v. Floyd*, 403 S.C. 466, 478, 744 S.E.2d 161, 167 (2013) (finding no estoppel where zoning administrator approved subdivision plat when he did not have authority); *Quail Hill LLC v. Richland County*, 387 S.C. 223, 236-38, 692 S.E.2d 499, 506-07 (2010) (holding that a governmental entity is not estopped from enforcing its ordinances where its employee gives erroneous information or acts in contradiction to an ordinance).

II. THE LAW FIRMS WERE NOT AWARDED $ 75 MILLION IN ATTORNEYS FEES BY SETTLEMENT WITH THE DEPARTMENT OF ENERGY

The Law Firms argue that "[i]t cannot be disputed that the fees paid to the Law Firms were 'awarded by settlement.'" W&H Br. at 17. Significantly, the Attorney General does not make such an argument and the lower court did not make any such finding. The reason is obvious. The Settlement Agreement requires the DOE to make "immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys' fees and expenses." (Am. Compl., Ex. A., Affidavit of James M. Griffin ("Griffin Aff."), Ex. 1, Settlement Agreement 2, Aug. 28, 2020).

Furthermore, not only do Appellants strongly dispute that the $75 million was awarded by settlement to the Law Firms, it appears that two members of this Court also dispute Law Firms' claim that the fees were awarded by settlement. At oral argument during the first appeal, Justice Kittredge observed as follows:

> **Justice Kittridge**:
>
> It says investigation cost, litigation costs awarded by court order or settlement.
>
> **Counsel for W&H**:
>
> Yes, sir.
>
> **Justice Kittridge**:
>
> **Those two features are not present here.** So why wouldn't it default to the general disposition of going to the state fund? (emphasis added).

Oral Argument 27:22-29, *S.C. Pub. Int. Found. et al. v. Wilson et al.*, Case No. 2021-000343 (S.C. Sup. Ct. Apr. 6, 2022) ("Apr. 6, 2022 Oral Argument") *available at* https://media.sccourts.org/videos/2021-000343.mp4.

Justice Few also stated the following:

> **Justice Few**:
>
> You're suggesting that somehow the payment of a 75 million contingent fee was a term of the settlement? **That's not correct**. . . .

Id. at 28:45 (emphasis added).

Justice Few further explained that the attorneys' fees were not awarded by settlement but instead was awarded by contract with the Attorney General. Justice Few contrasted this situation to one where a party receives an award of attorneys' fees pursuant to a fee-shifting statute. *Id.* at 31:28.

In fact, a party who prevails in litigation against the United States may obtain an award of attorneys' fees pursuant to the Equal Access to Justice Act unless the court finds that the position of the United States was substantially justified. 28 U.S.C. § 2412(d)(1)(A). Respondents never petitioned the federal courts for an award of attorneys' fees under the Equal Access to Justice Act and, therefore, never received an award of attorneys' fees by judgment or settlement under the Act.

III. ENFORCEMENT OF SECTION 1-7-150 ACCORDING TO ITS PLAIN LANGUAGE DOES NOT IMPLICATE THE SEPARATION OF POWERS OR POLITICAL QUESTION DOCTRINES

The Attorney General argues that enforcing Section 1-7-150 according to the plain meaning of the language used by the Legislature raises "constitutional concerns because legislative bodies generally lack the authority to appropriate private funds." Atty Gen. Br. at 16. The Attorney General does not cite any South Carolina law for this proposition, but instead relies upon cases from Montana and Kentucky. *Id.* Whether this Court would follow the decisions from Montana and Kentucky is purely an academic question because the DOE settlement funds are decidedly State funds.

The lawsuit was brought on behalf of the State, not an agency of the State, and the Settlement Agreement required that the full $600 million be paid to the State of South Carolina. The funds were in fact paid to the State, and the State Treasurer issued payment to the Law Firms from an account under the State Treasurer's exclusive control. Furthermore, as discussed above, the Attorney General is on record in the litigation brought by various counties and municipalities demanding that the settlement funds be used for the benefit of the counties and municipalities most affected by the shuttering of the MOX facility, stating that "the money from the settlement was payable to the State of South Carolina pursuant to the suit and by federal statute," and "[a]s such, the General Assembly has control over the appropriation of those funds." (Pls.' Supplemental Mem. Supp. TRO and Prelim. Inj., Ex. K., Att'y Gen. Opp'n TRO or Temp. Inj., *Ex Parte Barnwell*

Cnty. et al. v. Wilson et al., C/A No. 2020-CP-06-00294 (Barnwell Cnty. Common Pleas, Sept. 29, 2020).).

The Attorney General also asserts that the political question doctrine prohibits the courts from reviewing the fee. Atty Gen. Br. at 17-19. Once again, the Attorney General misconstrues the relief being sought in this litigation. Appellants seek an order declaring that the payment of $75 million in fees was improper because under S.C. Code 1-7-150 the proceeds must be deposited into the State's General Fund, except for litigation costs awarded by court order or settlement. As Justice Kittridge observed, neither of those conditions are present here. *See* Apr. 6, 2022 Oral Argument at 27:28-29. Therefore, the Attorney General lacked authority to apply funds from the DOE settlement to pay the Law Firms $75 million.

Judge Cooper's decision in *Cephalon Inc. v. Wilson*, on which the lower court relies, clearly recognizes the Court's role in approving the attorneys' fees calculated under a contingency fee agreement. Judge Cooper states the following in *Cephalon*:

> The Litigation Retention Agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the attorneys' fees **he will ultimately seek the court approve**, and provides notice that any fees approved by the court will be paid from outside counsel's contingent fee rather than the State's recovery. (emphasis added)).

Atty Gen. Opp'n to TRO or Temp. Inj., Ex. 3, Order 14, *Cephalon Inc. v. Wilson*, C/A No. 2012-CP-40-07317 (Richland Cnty. Common Pleas June 6, 2014).

Similarly, there was an opportunity for the Attorney General and the Law Firms to petition the federal courts for a fee award under the Equal Access to Justice Act, but they did not do so. If they had done so and prevailed, then the Law Firms would have been entitled to receive all the fees awarded as permitted by Section 1-7-150(B).

The Attorney General and the Law Firms could have also negotiated a separate settlement for their attorneys' fees claim, similar to the tobacco and opioid settlements. In both of those settlements, the defendants agreed to pay outside counsel separately for attorneys' fees. In addition, the amount of the fee was set by either an arbitration panel or a circuit court judge.

In the tobacco litigation, an arbitration panel awarded the attorneys representing the State of South Carolina $82.5 million to be paid directly from the tobacco companies. *S.C. Lawyers Get $82.5M Tobacco Case Fee*, ABC News, October 24, 2000.[3] According to news accounts, then Attorney General Condon insisted that the attorneys' fees would not be deducted from the State's share of the tobacco settlement, *Tobacco Settlement Proved Lucrative for Well-Connected Pair*, GoUpstate, February 23, 2004.[4] More recently, in the opioid settlement, Circuit Court Judge Gravely issued an award of $28.9 million in attorneys' fees to the nearly 40 firms involved in the settlement with drug manufacturer Johnson & Johnson and three major distributors. *Judge Awards 29.8 M to Attorneys in Massive SC Opioid Settlement*, Post & Courier, January 4, 2023.[5] The attorneys representing the State in both these cases were retained under a contingency fee arrangement. Moreover, the opioid litigation was prosecuted by attorneys who were retained by Attorney General Wilson, who presumably signed off on the settlement agreement that included a provision that authorized the presiding judge to set the amount of contingency fee.

These two settlements demonstrate that there is a well-accepted practice for third-party neutrals or courts setting the amount of attorneys' fees that defendants are ordered to pay outside

[3] https://abcnews.go.com/US/story?id=95276&page=1).

[4] https://www.goupstate.com/story/news/2004/02/24/tobacco-settlement-proved-lucrative-for-well-connected-pair/29706563007/.

[5] https://www.postandcourier.com/greenville/news/judge-awards-28-9m-to-attorneys-in-massive-sc-opioid-settlement/article_f549f024-8c67-11ed-8a63-b7598ad8084a.html.

counsel who have been retained by the Attorney General under a contingency fee agreement. These two examples also demonstrate that S.C. Code Section 1-7-150(B) is not an impediment to the Attorney General's retaining outside counsel under contingency fee arrangements, nor is Section 1-7-150 an impediment to outside counsel's being fairly compensated through fee awards.

The Respondents did not follow this well-accepted practice of having the fees awarded by court order or settlement as required by statute and, instead, short-circuited the approval process. As a result, the Law Firms received fees from the State's portion of the settlement proceeds that they were not lawfully entitled to receive.

CONCLUSION

Appellants respectfully request that this Court reverse the decision of the Circuit Court and remand the case with instructions to enter judgment as a matter of law for Appellants.

Respectfully submitted,

s/James M. Griffin

James M. Griffin, S.C. Bar No. 9995
GRIFFIN HUMPHRIES LLC
4408 Forest Drive, Suite 300
Columbia, South Carolina 29206
PO Box 999 (29202)
(803) 744-0800

Badge Humphries, S.C. Bar No. 72904
GRIFFIN HUMPHRIES LLC
2113 Middle Street, Suite 305
Sullivan's Island, South Carolina
(843) 883-7444

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 East North Street
Greenville, South Carolina 29601
(864) 235-1269

Attorneys for Appellants

Columbia, South Carolina
July 11, 2024