

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

**RECEIVED**

NOV 21 2016

SC Court of Appeals

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown. . . . . Petitioners,

v.

South Carolina Department of Health and Environmental Control and  
Roper Pond, LLC . . . . . Respondents,

Of Whom

Town of Arcadia Lakes is . . . . . Appellant,

and South Carolina Department of Health and Environmental Control and  
Roper Pond, LLC . . . . . Respondents.

**REPLY TO APPELLANT’S RESPONSE TO RESPONDENT ROPER  
POND, LLC’S MOTION TO DISMISS APPEAL**

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent Roper Pond, LLC (“Roper Pond”) respectfully submits this reply to Appellant’s Response to Respondent Roper Pond, LLC’s Motion to Dismiss Appeal (“Appellant’s Response”).

**I. THE APA GOVERNS THE APPEALABILITY OF THE SEPTEMBER 1, 2016  
ALC ORDER.**

The Town contends that the “final judgment” in this contested case was the Final Order and Decision issued by the Administrative Law Court (“ALC”) on January 21, 2010 (“2010

ALC Order”), and thereafter affirmed by this Court. The Town thus argues that the holding in *Charlotte-Mecklenburg Hosp. Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), does not apply because “this appeal occurs after the contested case has been finally decided.” (Town’s Response, p. 3). This argument disregards the procedural history of this contested case. Roper Pond filed its Petition for Attorneys’ Fees and Costs and for Sanctions Pursuant to Rule 72, SCR PALC, (“Petition for Fees”) on April 19, 2010, prior to the Town’s appeal of the 2010 ALC Order. On May 11, 2010, the ALC issued an order holding the Petition for Attorneys’ Fees and Costs and for Sanctions in abeyance pending the resolution the appeal of the 2010 ALC Order. The May 11, 2010 ALC Order clearly states that the Petition for Fees was held in abeyance by agreement of the parties. A copy of this Order is attached as **Exhibit A**. Accordingly, contrary to the Town’s argument, the Petition for Fees did not occur after the contested case. The Petition for Fees was before the ALC during the contested case. Indeed, even after the Town and other petitioners appealed the 2010 ALC Order, the ALC retained jurisdiction to hearing the Petition for Fees pursuant to Rule 241(a), SCACR. Therefore, the Town improperly characterizes the ALC’s ruling on the Petition for Fees as occurring outside of the contested case. The 2016 ALC Order on the Petition for Fees is a ruling in the contested case before the ALC and subject to appeal pursuant to the appellate procedures set forth in the Section 1-23-610 of the South Carolina Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* (“APA”).

The Town further cites to *dicta* in *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013), to argue that a final judgment does not include “award of costs . . . and enforcement of the judgment.” 404 S.C. at 78, 744 S.E.2d at 558-59.

In their petition for rehearing, Petitioners seek a “case-by-case analysis of finality” rather than “a rigid and formulaic approach that mandates dismissal of any interlocutory appeal. . . .” Petitioners essentially ask that we ignore the clear wording of section 1-23-390, which requires a “final judgment.” This Court’s jurisprudence is in accord with the definition of a final judgment found in Black’s Law Dictionary. It defines a final judgment as “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs . . . and enforcement of the judgment.” BLACK’S LAW DICTIONARY 919 (9th ed. 2009).

Petitioners assert the circuit court’s determination that the injury was compensable “constituted a final determination of the rights of the parties and left nothing to be done by the Commission on remand other than execute the judgment.” To the contrary, there is no enforceable judgment at this stage as the Commission is tasked with further obligations in determining the extent of Bone’s compensation and in setting forth a final award that constitutes an executable judgment. An order as to compensability, without addressing the claimant’s current medical status and specific benefits to be awarded, is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment.

404 S.C. at 78-79, 744 S.E.2d at 558–59 (footnotes omitted). Contrary to the Town’s arguments, the citation to the Black’s Law Dictionary definition of “final judgment” was not for the purpose of ruling of the applicability of “award of costs” as a part of a final judgment. Moreover, the Court’s holding in the next paragraph is directly on point with this case: “An order as to compensability, without addressing the claimant’s current medical status and specific benefits to be awarded, is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment.” *Id.* At 79, 744 S.E.2d at 559 (emphasis added). Such is the case here. The 2016 ALC Order holds that Roper Pond is entitled to attorney’s fees, costs, and sanctions—i.e., it is an “order as to compensability.” However, as in *Bone*, the order does not determine the amount to be awarded and therefore “is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment.” *Id.* Contrary to the Town’s arguments, the *Bone* holding supports Roper Pond’s motion to dismiss this appeal.

Additionally, and significantly, the Town relies on cases ruling on the appealability of decision of the Appellate Panel of the Workers' Compensation Commission and interpreting Section 1-23-380 and 1-23-390 of the APA. (Town's Response, pp. 4-6, citing *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013) and *Hilton v. Flakeboard Am. Ltd.*, 2016 WL 5930126 (S.C. Oct. 12, 2016)). These cases are easily distinguished. In *Bone*, the Supreme Court recognized that the APA provisions governing the appeal from a workers' compensation ruling are not the same as the APA provisions governing an appeal from the ALC:

*Charlotte-Mecklenburg* concerned the interpretation of S.C. CODE ANN. § 1-23-610(A)(1) (Supp. 2009), **which allows judicial review only from "final decisions" of the ALC.** 387 S.C. at 266, 692 S.E.2d at 894. The Court there reasoned that appeals in administrative agency matters are governed solely by the APA, not by the general appealability statute of section 14-3-330(1), which permits review of "[a]ny intermediate judgment" involving the merits. *Id.* The Court stated the concepts applicable in general appeals were not applicable under the APA, as specialized statutes prevail over more general statutes. *Id.* In doing so, the Court specifically overruled both ALC and workers' compensation cases to the extent they applied this concept of "involving the merits" under section 14-3-330. *Id.* (overruling *Canteen v. McLeod Reg'l Med. Ctr.*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) and *Oakwood Landfill, Inc. v. S.C. Dep't of Health & Envtl. Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009)).

We apply this reasoning in concluding that the meaning of a "final judgment" as used in section 1-23-390 is not defined by using the exceptions that are present in the general appealability statute, whether or not the statute is specifically referenced.

*Bone*, 404 S.C. at 75-76, 744 S.E.2d at 557 (2013) (emphasis added). While the *Charlotte-Mecklenburg* ruling "stated the concepts applicable in general appeals were not applicable under the APA," the *Bone* Court clearly recognizes that Section 1-23-610 governs appeals from the ALC and thereafter addresses those concepts in the context of a workers' compensation appeal under Section 1-23-390. *Id.* Indeed, Section 1-23-600 of the APA defines the contested cases over which the ALC presides to exclude those arising under the Workers' Compensation Commission. As such, the cases applying Section 1-23-380 and 1-23-390 to workers'

compensation appeals do not alter the Supreme Court's interpretation of Section 1-23-610 in *Charlotte-Mecklenburg*.

Additionally, the Town argues that the *Charlotte-Mecklenburg* ruling is not applicable in this appeal because the matter before the ALC was in a difference procedural posture. (Town's Response, p. 3). This attempt to distinguish *Charlotte-Mecklenburg* is without merit. The *Charlotte-Mecklenburg* Court held that "[a] final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 895 (citing *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)) (emphasis added). The Court thus recognizes that the "final judgment" concept in Section 1-23-610 can apply to an ALC proceeding other than one deciding the "whole subject matter of the action." Accordingly, the 2016 ALC Order is not appealable because there is "some further act which must be done by the court prior to a determination of the rights of the parties" and the Order "leaves open questions of fact." *Id.* at 267, 692 S.E.2d at 894 (citations omitted). As discussed more fully in Roper Pond's Motion to Dismiss, S.C. CODE ANN. § 15-77-300 requires that the ALC consider specific factors to be applied in determining an award of attorney's fees and costs and make specific written findings regarding each of those factors. S.C. CODE ANN. § 15-77-300(B). Therefore, the 2016 ALC Order is not immediately appealable and the Town's appeal should be dismissed.

## **II. THE TOWN HAS FAILED TO DEMONSTRATE THAT DISMISSING THIS APPEAL WOULD DEPRIVE THE TOWN OF AN ADEQUATE REMEDY.**

Citing the holding in *Hilton v. Flakeboard American Limited*, the Town argues that the 2016 ALC Order is immediately appealable because "it will be literally impossible for this Court to award an 'adequate remedy' in a later appeal." (Town's Response, p. 6). The Town

claims that a ruling on the amount of the award of attorney's fees, costs, and sanctions would require the Town to immediately pay the award to Roper Pond. This argument appears to be based on the presumption that this Court will reverse the decision of the ALC—which is the only “adequate remedy” for the Town. There is no basis for such argument. The Town does not lose any rights to appeal the ALC rulings on the Petition for Fees if this appeal is dismissed. The 2016 ALC Order may be appealed once the ALC rules on the amount of an award. Moreover, this Court's review of the ALC decision on the Petition for Fee would only remedy the situation of which the Town complains if the Court reserves the ALC decision. If the Court were to affirm the ALC decision, the Town would still be in the position of facing immediate payment of the award. Therefore, to the extent that the Town claims that appealing the 2016 ALC Order now would provide the requested remedy, such claim is without merit.

The Town further argues that requiring the Town to pay an award prior to an appeal would be unjust and would “divert that money away from the Town's critical operational needs.” (Town's Response, pp. 6-7). If the circumstances warrant relief from the requirement to pay the award prior to resolution of an appeal of the ALC's final decision on the Petition for Fees, the Appellate Court Rules clearly provide for such relief. Specifically, the Town's argument is based on the exception to the automatic stay for ALC decisions under Rule 241(b), SCACR. However, while there would be an automatic stay of the ALC's final decision on the Petition for Fees, the Town could move the ALC to impose a supersedeas on the final decision. Rule 241(c), SCACR. Moreover, if the ALC denies the Town's motion, Rule 241(d) provides that the Town may petition this Court for a writ of supersedeas. Accordingly, contrary to the Town's argument that “it will be literally impossible for this Court to award an ‘adequate remedy’ in a later appeal,” the concerns that the Town raises are not incapable of being

addressed, and in fact, would be addressed upon the Town's showing that it is entitled to a writ of supersedeas.

### **III. APPEAL OF THE 2016 ALC ORDER DOES NOT SERVE THE INTERESTS OF JUDICIAL ECONOMY.**

The Town argues that the interests of judicial economy "are best served through appellate consideration of the extraordinary remedy order by the ALC, prior to undertaking additional actions flowing from that order." (Town's Response, p. 7). As a preliminary matter, there can be no judicial economy in creating a situation in which there could potentially be three appeals from a single contested case. Dismissing this appeal does not deprive any party of the right to appeal any of the ALC's rulings on the Petition for Fees. On the other hand, allowing this appeal to proceed could substantially increase the costs of litigation and could prolong the final resolution of this contested case by years. The appeal from the 2010 ALC Order was filed on April 20, 2010, and the case was remitted to the ALC on April 28, 2015—five years after the filing of the notice of appeal. If this appeal is not dismissed, it could be expected that the appeal might not be finally resolved until 2020/2021. If Roper Pond prevails on appeal, the ALC would then determine the amount of the award, which would also be appealable. It is possible that the appeal of that decision might not be resolved for another four to five years. Therefore, the interest of judicial economy and the interest in economy of the parties' resources are better served by dismissing this appeal and allowing the ALC to make a determination of the amount of the award to be granted prior to an appeal of the ALC rulings of the Petition for Fees.

Additionally, the Town argues that "it would substantially prejudice the Town to require it to go through lengthy proceedings whereby the amount of sanctions, costs, and fees are to be determined with specificity, prior to the Town having an opportunity to appeal the order granting those extreme remedies." (Town's Response, p. 6). The Town misrepresents the

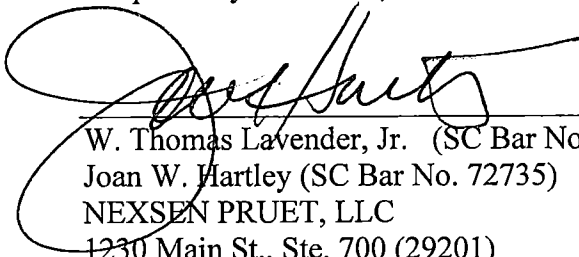
nature of the proceedings to determine the amount of such award. Roper Pond has filed affidavits in support of its Petition for Fees, including affidavits regarding the amount of the award requested. While the parties may file additional affidavits during this phase of the proceedings, Roper Pond does not expect any additional proceedings before the ALC to be either lengthy or burdensome. There will be no prejudice to the Town in allowing the ALC to make a determination on the award of attorney's fees, costs, and sanctions prior to an appeal of the ALC rulings on Roper Pond's Petition for Fees.

**CONCLUSION**

For the forgoing reasons, Respondent Roper Pond, LLC requests that the Court issue an order dismissing the appeal and remitting this case to the Administrative Law Court for further rulings on Roper Pond's Petition for Fees.

Respectfully submitted,

November 18, 2016



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Joan W. Hartley (SC Bar No. 72735)  
NEXSEN PRUET, LLC  
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Attorneys for Respondent Roper Pond, LLC

**EXHIBIT A**

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda )  
Z. Jackson, Robert E. Williams, Jr., Barbara S. )  
Williams, Elizabeth M. Walker, Louis E. Spradlin, )  
Mary Helen Spradlin, Thomas Hutto Utsey, Tony )  
Sinclair, Aaron Small, Bette Small, Gene F. Starr, )  
M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. )  
Marcus, and Steven Brown, )

Petitioners, )

vs. )

South Carolina Department of Health and )  
Environmental Control and Roper Pond, LLC, )

Respondents. )

Docket No. 09-ALC-07-0069-CC

ORDER

**FILED**

MAY 11 2010

SC ADMIN. LAW COURT

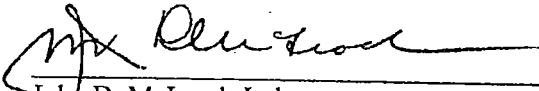
This matter comes before the Court on Respondent Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPA LC ("Petition for Attorneys' Fees") filed on April 19, 2010.

On April 20, 2010, Petitioners filed and served a Notice of Appeal of the Court's decision on the merits in this case. The parties agree to hold the Petition for Attorneys' Fees in abeyance pending the final resolution of Petitioners' appeal. The parties acknowledge and agree that the Petition for Attorneys' Fees pursuant to S.C. CODE ANN. § 15-77-300 and Rule 72, SCRPA LC, was timely filed. The Petitioners agree that for purposes of this order, they do not contest the Court's jurisdiction to hear the Petition at the time of filing. The parties agree that Roper Pond, LLC's petition for fees and costs associated with the litigation of the matter before this Court is preserved for determination by the Court upon the final resolution of the appeal on the merits. The parties further agree that within thirty (30) days of the final resolution of the appeal of the merits of this case, Respondent Roper Pond, LLC, may file a revised Petition for Attorneys' Fees and supporting affidavits to include the fees and costs incurred by Roper Pond, LLC during the appeal before the Court of Appeals. Any party may also file such petitions or motions the party may deem appropriate, and all parties shall have the right to raise such issues or defenses as they deem appropriate; no waiver is intended by this order. Within thirty (30) days of Respondent

Roper Pond, LLC's filing of a revised Petition for Attorneys' Fees, the other parties shall file their responses to such Petition.

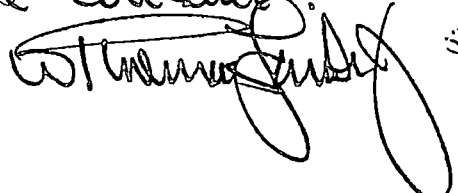
**IT IS HEREBY ORDERED** that Respondent Roper Pond, LLC's Petition for Attorneys' Fees is held in abeyance pending the final resolution of Petitioners' appeal of the decision on the merits in this matter.

**AND IT IS SO ORDERED.**

  
John D. McLeod, Judge  
South Carolina Administrative Law Court

May 11, 2010

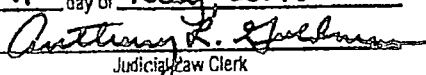
Columbia, South Carolina

We consent:  
 5/11/10

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

2

This 11 day of May, 2010  
By:   
Judicial Law Clerk

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Administrative Law Judge

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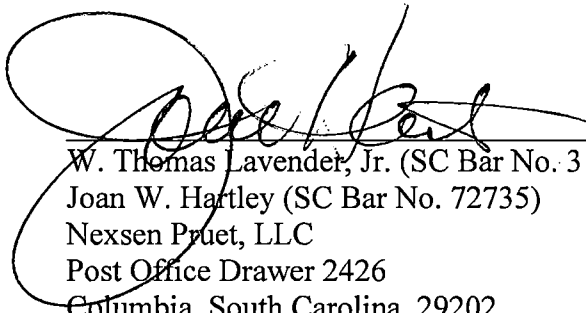
and South Carolina Department of Health and Environmental Control and Roper Pond, LLC . . . . . Respondents.

**PROOF OF SERVICE**

I certify that I have served the Reply to Appellant's Respondent Roper Pond, LLC's Motion to Dismiss Appeal on counsel of record for South Carolina Department of Health and South Carolina Environmental Law Project by depositing a copy of it in the United States Mail, postage prepaid, on November 18, 2016, addressed to:

Stephen P. Hightower, Esquire  
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Attorneys for Roper Pond, LLC

# NEXSEN | PRUET

**Joan W. Hartley**  
Special Counsel  
Admitted in SC, NC

November 18, 2016

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

Re: *Town of Arcadia Lakes, et al. v. South Carolina Department of Health and Environmental Control and Roper Pond, LLC*  
Docket No. 09-ALC-07-0069-CC

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven copies of Reply to Appellant's Response Respondent Roper Pond, LLC's Motion to Dismiss Appeal in the above-referenced matter. Please return a clocked copy to us via the enclosed envelope.

By copy of this letter, we are serving the same on counsel for Town of Arcadia Lakes and South Carolina Department of Health and Environmental Control.

Best regards,

Joan W. Hartley

Enclosure

cc: Amy E. Armstrong, Esquire  
Stephen P. Hightower, Esquire

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SC Court of Appeals

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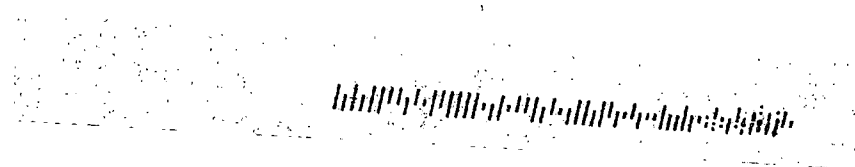
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**NEXSEN | PRUET**

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The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
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