STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

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, vs. South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.	Docket No. 09-ALC-07-0069-CC **ORDER GRANTING MOTION TO STRIKE**

This matter comes before the Administrative Law Court ("ALC") on Respondent Roper Pond, LLC's Motion to Strike filed on September 10, 2015 ("September 10, 2015 Motion to Strike"). The September 10, 2015 Motion to Strike was filed contemporaneously with Roper Pond, LLC's ("Roper Pond") Reply to Petitioners' Response to Roper Pond, LLC's Petition for Attorneys' Fees and Costs and For Sanctions Pursuant to Rule 72, SCRPALC ("Roper Pond's Reply"). Petitioners' Response to Roper Pond, LLC's Petition for Attorneys' Fees and Costs and For Sanctions Pursuant to Rule 72, SCRPALC ("Petitioners' Response to Petition for Fees") was supported by the following affidavits: the Affidavit of Eugene C. McCall, Jr. ("McCall Affidavit"), the Affidavit of D. Cravens Ravenel ("Ravenel Affidavit"), and the Affidavit of John P. Freeman ("Freeman Affidavit") (collectively referred to as the "Affidavits"). Roper Pond moves to strike the Affidavits and to exclude the opinions therein. Roper Pond further moves to strike statements from the oral arguments before the Supreme Court, or in the alternative, to engage a court reporter to produce a full transcript of the oral arguments to be admitted into evidence. On November 24, 2015, this Court held a hearing on the Motion to Strike. On November 30, 2015, Roper Pond filed Respondent Roper Pond, LLC's Third Amended Petition for Attorneys' Fees and Costs and For Sanctions Pursuant to Rule 72, SCRPALC ("Third Amended Petition for Fees"),

which limited Roper Pond's petition for attorneys' fees and costs to a request for an award against the Town pursuant to S.C. CODE ANN. § 15-77-300, and in the alternative, sanctions against the Town pursuant to Rule 72, SCRALC, on the grounds that the Town's challenge to the DHEC's decision in this matter was taken solely for the purpose of delay. On January 5, 2016, the Town filed its Response to Respondent Roper Pond, LLC's Third Amended petitioner for Fees, Costs, and Sanctions ("Town's Response to the Third Amended Petition for Fees"). The Town's Response to the Third Amended Petition for Fees was supported by the Affidavits, along with two additional new affidavits, the Affidavit of Amy E. Armstrong and the Affidavit of Charles Cook. On a conference call with the Court on January 13, 2016, Roper Pond moved to strike the same three Affidavits offered in support of the Town's Response to the Third Amended Petition for Fees ("January 13, 2016 Motion to Strike"), but not the Armstrong and Cook Affidavits. For the reasons set forth below, the Court grants Roper Pond's September 10, 2015 Motion to Strike and January 13, 2016 Motion to Strike.

BACKGROUND

Pursuant to S.C. CODE ANN. § 15-77-300, Roper Pond seeks an award of attorneys' fees and costs in this matter. Section 15-77-300 provides in relevant part as follows:

> (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
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> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
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> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.
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> * * *
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> (C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

S.C. CODE ANN. § 15-77-300. In addition, or in the alternative, Roper Pond seeks an award of attorneys' fees and costs and the costs of the delay of the Proposed Project pursuant to Rule 72, SCRALC. Administrative Law Court Rule 72 provides that "[i]f the presiding administrative law

judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCALCR. On November 30, 2015, Roper Pond filed its Third Amended Petition for Fees, which limited Roper Pond's petition for attorneys' fees and costs to a request for an award against the Town pursuant to S.C. CODE ANN. § 15-77-300, and in the alternative, sanctions against the Town pursuant to Rule 72, SCRALC, on the grounds that the Town's challenge to the DHEC's decision in this matter was taken solely for the purpose of delay. Roper Pond withdrew all claims for sanctions against the individual Petitioners and withdrew any argument that Roper Pond is entitled to sanctions against the Town pursuant to Rule 72, SCRPALC, because the contested case was frivolous.

LEGAL STANDARD

The admissibility of an expert's testimony is within the trial judge's sound discretion. *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998). "A motion to strike is likewise within the trial court's discretion and will not be reversed absent an abuse of discretion." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 143, 697 S.E.2d 644, 653 (Ct. App. 2010) (citing *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993)). Rule 702, which governs the admissibility of expert testimony, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

S.C.R. Evid. 702. (Emphasis added). "In general, expert testimony **on issues of law** is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (citations omitted) (emphasis in original). A court may properly refuse to consider an expert affidavit which "primarily contain[s] legal arguments and conclusions." *Id.* at 65, 580 S.E.2d at 437. A trial court's refusal to consider an expert affidavit containing legal arguments and conclusions is appropriate even when the affiant "arguably offered some helpful, factual information." *Id.* at 66-67, 580 S.E.2d at 437.

DISCUSSION

I. Freeman Affidavit

Petitioners offer Professor Freeman as "an expert in legal malpractice and professional responsibility whose expert opinion have been frequently used by courts across this state."

(Petitioners' Response to Petition for Fees, p. 2). Roper Pond moves to strike the Freeman Affidavit on the basis that Professor Freeman offers opinions which are legal conclusion to be determined by the Court upon review of the evidence presented in this matter. (September 10, 2015 Motion to Strike, p. 3). Additionally, Roper Pond contends that Professor Freeman has no "scientific, technical, or other specialized knowledge" to assist the Court to understand the evidence or to determine a fact at issue in the matters before this Court. (September 10, 2015 Motion to Strike, p. 5). Finally, Roper Pond argues that a showing of attorney misconduct is not asserted in this case, and therefore, Professor Freeman's opinions regarding whether counsel for Petitioners met the "reasonable attorney" standard is not relevant to the determinations to be made in ruling on Roper Pond's Petition for Fees. (September 10, 2015 Motion to Strike, p. 5).

In his Affidavit, Professor Freeman testifies that his opinion is based on information gleaned from the following sources and a review of the applicable law and court rules: "Besides repeatedly consulting with counsel for the Town and the Resident, I have been furnished and have reviewed the fee petition and more than 700 pages of record material starting with the Request for Contested Case Hearing filed February 16, 2009." (Freeman Affidavit, ¶ 3). The Freeman Affidavit includes the following opinions in support of Petitioners' Response to Roper Pond's Petition for Fees:

> 5. Even if the Supreme Court had rendered a favorable opinion on the main issues, I do not agree that the Town acted without substantial justification. Nor do I agree with Roper Pond's claim that the Town or Residents litigated in bad faith. Specifically, I disagree with Roper Pond's claim that the "[t]here is no doubt that the Petitioners' appeal of the Department's decision in this matter 'frivolous or taken solely for the purposes of delay.'" Roper Pond's Memorandum in Support at 35. Roper Pond provides no evidence for its bald claim that the case is frivolous and brought solely for delay, and after a thorough review of the relevant filings I have found no support for this claim of unprofessional conduct.
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> 6. In the same vein, I do not agree with Roper Pond "that Petitioners knew or should have known that there was no reasonable legal basis for its challenge to the Department's Decision," and Roper Pond again provides no evidence to support this statement. Id. at 34. In summary, I not agree that Roper Pond has been subjected to lawyer misconduct in the form of a frivolous or bad faith proceeding filed and maintained against it by its lawyers. Although the Town and Residents did not ultimately obtain the relief sought in this case, in my professional opinion it was brought with substantial justification and was not frivolous, brought in bad faith or brought solely for the purposes of delay. My opinion is that the litigation

was brought and maintained in good faith, but the reviewing court simply could not provide the relief required because construction had been completed. My opinion is that sanctions are not called for and would be inappropriate. Reasons supporting my opinions follow.

* * *

19. Accepting that the test for sanctions is "frivolity" and/or bad faith, I testify that the test has not been met here, in that, in light of all relevant facts: (1) reasonable attorneys after reasonable investigation would (and did) believe that the Residents and Town's position was meritorious and that there was good cause for bringing it; (2) a reasonable attorney would (and did) believe that the claims had not been raised in bad faith or merely to harass or injure Roper Pond; and (3) a reasonable attorney would (and did) believe that the claim was not frivolous and has not been raised for an ulterior motive. I state affirmatively that, in my opinion held to a reasonable degree of professional certainty, based on my investigation, including my review of the materials listed above, Roper Pond has no hope of proving frivolity or bad faith or lack substantial justification by a preponderance of the evidence.

(Freeman Affidavit, ¶¶ 5, 6, and 19). In offering these opinions, Professor Freeman cites to no facts outside of the record in this matter. Moreover, except for the McCall Affidavit and the Ravenel Affidavit, Professor Freeman cites to no documents outside of the record. Professor Freeman cites to select portions of the record, the McCall Affidavit, and the Ravenel Affidavit to opine on how this Court should rule on Roper Pond's Petition for Fees. Pursuant to the South Carolina Supreme Court holding in *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), the expert opinions offered by Professor Freeman are legal opinions on the ultimate issue before this Court and therefore inadmissible.

In *Dawkins*, the trial court refused to consider Professor Freeman's expert affidavit offered in opposition to defendants' motion for summary judgment. In upholding the trial court's refusal to consider the affidavit, the Supreme Court found that "Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment." *Id.* at 65, 580 S.E.2d at 437 (citation omitted). The holding in *Dawkins* provides as follows:

> Rule 702, SCRE, provides that "[i]f . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." While it is true that "an opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the

trier of fact," Rule 704, SCRE, Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment. *See O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106-07; 249 S.E.2d 734, 739-40 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court).

In general, expert testimony **on issues of law** is inadmissible. *See generally* Note, *Expert Legal Testimony,* 97 Harv. L. Rev. 797, 797 (1984); *see also Askanase v. Fatjo,* 130 F.3d 657, 673 (5th Cir.1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "[s]uch testimony is a legal opinion and inadmissible."); *United States v. Sinclair,* 74 F.3d 753, 758 n. 1 (7th Cir.1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

Recently, this Court decided the issue of whether expert testimony from a criminal defense attorney on whether trial counsel was deficient could be admitted at a post-conviction relief (PCR) hearing. *Green v. State,* 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002). Green argued that Rule 702 required the PCR judge to admit the expert opinion testimony. We disagreed, and stated the following:

> The expert offered no factual evidence. He proffered his opinion, assuming certain facts, [that] trial counsel's actions fell below acceptable legal standards of competence. **The testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence.** Such "testimony" falls outside of Rule 702, SCRE.

Id. (emphasis added).

Green is instructive to the instant case. Here, Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual information,[FN4] the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise. *See Green, supra; O'Quinn, supra.*

> FN4. For instance, Professor Freeman offered his opinion that based on the value of the south side tract, Seaside's stock value per share was approximately $800, and therefore, selling the stock for $100 per share was improper.

Dawkins v. Fields, 354 S.C. 58, 65-67, 580 S.E.2d 433, 437 (2003) (emphasis in original). The

Supreme Court held the trial court properly refused to consider Professor Freeman's affidavit because "the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied" *Id.* at 66-67, 580 S.E.2d at 437 (footnote omitted). Such is the case here. Professor Freeman offers no "helpful, factual information." Professor Freeman does not offer any factual basis for his opinions outside of the record and the affidavits of Mr. McCall and Mr. Ravenel. Professor Freeman merely reviews the record in this case and opines on how he would apply the law. Accordingly, the Freeman Affidavit inappropriately attempts to usurp this Court's role in determining whether Roper Pond is entitled the relief sought in its Petition for Fees.

Petitioners assert that "a simple search reveals a host of cases where Professor Freeman has offered expert opinions and conclusions equivalent to those in this challenged affidavit." (Petitioners' Response to Motion to Strike, p. 6). However, the cases cited by Petitioners in support of this argument have no application to the matters before this Court on Roper Pond's Petition for Fees. Petitioners cite to a number of legal malpractice cases in which the court considered the expert testimony of Professor Freeman. (*See* Petitioners' Response to Motion to Strike, pp. 6-8 (citing *Hatfield v. Van Epps*, 358 S.C. 185, 594 S.E.2d 526 (Ct. App. 2008); *Holmes v. Haynsworth, Sinkler & Boyd, PA*, 408 S.C. 620, 760 S.E.2d 399 (2014); *Tuten v. Joel*, 2014 WL 4212684 (S.C. Ct. App. Aug. 27, 2014); *Brandt v. Gooding*, 368 S.C. 618, 630 S.E.2d 259 (2006)). The admissibility of Professor Freeman's testimony in a legal malpractice case has no bearing on the admissibility in this case because a legal malpractice claim requires an expert. As the South Carolina Supreme Court explained in the *Holmes* decision:

> With respect to a legal malpractice claim, a claimant **must rely** on expert testimony to "establish both the standard of care and the deviation by the defendant from such standard." *Gilliland v. Elmwood Props.*, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990) (citation omitted); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct.App.2002). In this regard, a claimant must establish, through expert testimony, the following:
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> (1) the existence of an attorney-client relationship;
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> (2) a breach of duty by the attorney;
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> (3) damage to the client; and
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> (4) proximate cause of the plaintiff's damages by the breach.
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> *Hall*, 349 S.C. at 174, 561 S.E.2d at 656.

Holmes, 760 S.E.2d at 407 (emphasis added). Accordingly, in a legal malpractice case, a courts'

consideration of the expert testimony from Professor Freeman is not a matter of whether such testimony is admissible under Rule 702 as a subject matter requiring "scientific, technical, or other specialized knowledge." The South Carolina Supreme Court has held that expert testimony is required in a legal malpractice case.

Professor Freeman's testimony in legal malpractice cases does not support admissibility of his expert testimony with respect to the Roper Pond's petition against the Town for fees and costs under S.C. Code Ann. § 15-77-300 and for sanctions under Rule 72, SCRPALC. Professor Freeman opined the Petitioners' attorneys did not violate the "reasonable attorney" standard under S.C. CODE ANN. § 15-36-10 (Frivolous Civil Proceedings Sanctions Act). However, Roper Pond does not assert a claim for malpractice or misconduct of Petitioners' attorneys and has amended its Petition for fees to expressly limit its request for an award an award of attorneys' fees and costs against the Town under S.C. CODE ANN. § 15-77-300, and in the alternative, sanctions under Rule 72, SCRPALC, against the Town for bringing the contested case "solely for the purpose of delay." Therefore, the legal malpractice cases in which Professor Freeman's expert testimony was admitted have no bearing on the admissibility of the Freeman Affidavit in this matter.

Similarly, Petitioners cite to the admissibility of Professor Freeman's expert testimony in *Dehlinger v. U.S.*, 2012 WL 1719294 (D.S.C. May 16, 2012). That testimony was offered in support of a claim of ineffective assistance of counsel under the Sixth Amendment. Like the testimony in the legal malpractice cases, the admissibility of Professor Freeman's testimony in *Dehlinger* does not support the Petitioners' claim that his testimony is admissible in this case. Roper Pond's Petition for Fees is based on the conduct of the Town--not its attorneys.

Petitioners also cite to the recent ruling by Judge Michelle Childs on an award of attorneys' fees in a class action case under the Employee Retirement Income Security Act of 1974 ("ERISA"). Judge Child's ruling in *Savani v. URS Professional Solutions, LLC*, 2014 WL 172503, (D.S.C. Jan. 15, 2014), involved the determination of reasonable of attorneys' fees for an award under Section 1132 of ERISA, which provides for attorneys' fees in an action on behalf of an employee benefits plan. The Court did not consider Professor Freeman's opinion in determining whether plaintiffs' counsel was entitled to the award of fees. Moreover, there is no indication in this ruling that Professor Freeman offered such opinion. In her ruling, Judge Childs considered Professor Freeman's opinion of individual factors used for determining the reasonableness of the fees incurred by plaintiffs' counsel. Specifically, Judge Childs cited to the Fourth Circuit holding

in to *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978):

> Thus, **in determining reasonableness**, this court is to analyze the twelve (12) factors set forth in *Barber*: "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorney's fees awards in similar cases." *Id.* at 226 n. 28.

Savani, 2014 WL 172503, *3 (emphasis added). Judge Childs considered Professor Freeman's opinions "in determining the reasonableness" of the attorneys' fees--not in determining whether plaintiffs' counsel was entitled to such award. Specifically, Judge Childs referred to Professor Freeman's opinion on the following three *Barber* factors: (1) the time and labor expended; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose. *Id.* at *3, *6, and *7. Judge Childs also cited to Professor Freeman's opinion on the lodestar cross-check of the fee award amount under the percentage-fee method used by the Court. *Id.* at *8. Judge Childs did not refer to Professor Freeman's testimony in determining whether plaintiffs' counsel was entitled to an award under Section 1132 of ERISA. She considered Professor Freeman's testimony only in assessing the reasonableness of the fees awarded. Accordingly, the admissibility of Professor Freeman's expert opinion by Judge Childs in the *Savani* case does not support Petitioners' claim that his expert opinion is admissible in this case to show that the Town acted with substantial justification or brought this contested case solely for the purpose of delay.

Petitioners contend that the Freeman Affidavit is admissible pursuant the Supreme Court holding in *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008). However, the *Vortex* decision can be easily distinguished from the present case. In *Vortex*, the Supreme Court found that the trial properly admitted Professor Freeman's expert testimony because Professor Freeman's experience in the substantive body of law--corporate law--qualified him to opine on self-dealing by a corporation's former officer. *Id.* at 208, 662 S.E.2d at 450. The trial court qualified Professor Freeman as an expert "in the field of duties owed by corporate lawyers, officers, or shareholders in connection with transactions involving business in a South

Carolina closed corporation." *Id.* at 206, 662 S.E.2d at 449. In that case, Professor Freeman has found to have specialized knowledge regarding the underlying factual determinations in the case:

> We find Professor Freeman's testimony consisted of specialized knowledge that assisted the trier of fact to understand the evidence or to determine a fact in issue. He was qualified as an expert, and thus, was allowed to testify as to his opinion relating to those facts. **He did not make improper legal conclusions or instructions but simply opined regarding acts Ware committed that breached his fiduciary duty.**

Id. at 208, 662 S.E.2d at 450 (emphasis added). Roper Pond argues that *Vortex* does not apply in this case because Professor Freeman has no "scientific, technical, or other specialized knowledge" regarding the underlying factual determinations or the substantive body of law applicable to the claims in this contested case. Roper Pond further argues that Professor Freeman's opinions regarding the "reasonable attorney" standard are not relevant to the Court's determination of whether Roper Pond is entitled to an award under S.C. CODE ANN. § 15-77-300 or sanctions against the Town under Rule 72, SCRPALC, for bringing the contested case solely for the purpose of delay.

Professor Freeman opines that the contested case "was brought with substantial justification." (Freeman Affidavit, ¶ 6). "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." *McDowell v. South Carolina Dep't of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). An award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 is based on the actions of the state agency or political subdivision--not the attorney representing the state agency or political subdivision. Such award does not require a showing that the attorney committed malpractice or even represented a party in pressing a frivolous claim. "[A] court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification." *Heath v. Cty. of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (citing *Pierce v. Underwood*, 487 U.S. 552 (1988)). Moreover, even if the attorney for a state agency or political subdivision of the state identifies a novel question of law in the action, the state agency or political subdivision of the state may still be found to have acted without substantial justification under S.C. CODE ANN. § 15-77-300. *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (rejecting a county's argument that it acted "with 'substantial justification' within the meaning of the statute" because novel issues were raised by the county in that case). This Court's determination on whether the Town acted without substantial justification under S.C. CODE ANN. § 15-77-300 involves the application of the facts in

this case to the substantial body of case law interpreting "without substantial justification" under S.C. CODE ANN. § 15-77-300 and an analysis of the Town's claims under the substantive body of law underlying the Town's claim in the contested case. In his affidavit, Professor Freeman does not address a subject matter which is beyond the ordinary knowledge of this Court as the trier of fact on Roper Pond's Petition for Fees. Professor Freeman merely reviewed the filings before this Court and the appellate courts. Professor Freeman has not claimed any "scientific, technical, or other specialized knowledge" to assist the Court in understanding those facts or determining a fact in issue regarding the "without substantial justification" demonstration or the legal basis for the claims raised by the Town in the contested case. Professor Freeman merely cites for the McCall Affidavit and the Ravenel Affidavit in support of his position on the merits of the case. (Freeman Affidavit, ¶¶ 12-15). Therefore, in addition to offering inadmissible legal opinions pursuant to the *Dawkins* holding, the Freeman Affidavit also fails to meet the requirements for admissibility of expert opinions under Rule 702, SCRE.

II. Ravenel Affidavit

Petitioners offer the Ravenel Affidavit in which Mr. Ravenel opines on the factual and legal basis for Town's claims in this matter. Mr. Ravenel reviewed the filings in the record before this Court and the appellate courts and opined as follows: "Based on my review of the relevant documents, in my professional opinion, the Town presented a colorable, adequate, reasonable and proper factual and legal basis for their request for a contested case hearing seeking review of DHEC's authorization to Roper Pond, LLC." (Ravenel Affidavit, ¶ 8). Mr. Ravenel further opines:

> 11. In my professional opinion as an attorney, the Town of Arcadia Lakes' claims were well founded and not frivolous. In addition, I have seen no indication that the Town's actions were simply to delay the Roper Pond project, but rather that the Town has throughout this litigation, expressed a real and serious concern about the impact that the Roper Pond project would have on the aesthetic and environmental qualities of the Town that made it a desirable place to live. The Supreme Court's dismissal of this case as moot further supports my conclusion. Had the Supreme Court concluded that the Town failed to present a compelling case on the merits, it could have affirmed the Court of Appeals Opinion. Instead, the Supreme Court's opinion indicates that it believed the Town presented a meritorious case; however, it was unable to grant the requested relief because the project had been completed.

(Ravenel Affidavit, ¶ 8). As with the Freeman Affidavit, Mr. Ravenel reviewed the record in this

matter and opines on how this Court should rule based on his review of the record. Therefore, pursuant to the *Dawkins* holding, the expert opinions offered by Mr. Ravenel are legal opinions on the ultimate issue before this Court and therefore inadmissible. Moreover, as with the Freeman Affidavit, Mr. Ravenel does not address a subject matter which is beyond the ordinary knowledge of the Court as the trier of fact on Roper Pond's Petition for Fees. Mr. Ravenel testifies that his legal practice "has included providing certified mediation services, to litigation, to appellate advocacy on a wide range of issues and cases." (Ravenel Affidavit, ¶ 2). Mr. Ravenel has not claimed any "scientific, technical, or other specialized knowledge" on the applicable substantive law with respect to the claims raised by the Town in this contested case. Yet, he opines that "the Town presented colorable, adequate, reasonable and proper factual and legal basis for their request for a contested case hearing seeking review of DHEC's authorizations to Roper Pond, LLC." (Ravenel Affidavit, ¶ 8). Therefore, in addition to offering inadmissible legal opinions pursuant to the *Dawkins* holding, the Ravenel Affidavit fails to meet the requirements for admissibility of expert opinions under Rule 702, SCRE.

III. McCall Affidavit

Petitioners offer the McCall Affidavit in which Mr. McCall opines that the Petitioners' petition "contained a reasonable basis in law for pursuant their request for a contested case." (McCall Affidavit, ¶ 12). Mr. McCall further opines that "[b]ased upon the history, facts and law in this case, I have concluded, as an attorney and an engineer, that there was a reasonable basis for pursuing this litigation." (McCall Affidavit, ¶ 13). Mr. McCall further opines that "Petitioners' claims were well founded and not frivolous." (McCall Affidavit, ¶ 14). As with the Freeman Affidavit and the Ravenel Affidavit, Mr. McCall opines on the ultimate legal questions before this Court, which is impermissible pursuant to the *Dawkins* holding.

With respect to Mr. McCall's opinions as a professional engineer, he testifies that prior to the filing of this contested case he provided counsel for Petitioners with his professional engineering opinion regarding "appropriate controls" necessary to prevent sedimentation and water quality degradation. (McCall Affidavit, ¶ 8). However, that opinion is not specific to the "appropriate controls" to be utilized for the Roper Pond project, and Mr. Mc Call does not opine that the controls in the storm water pollution prevention plan ("SWPPP") approved by the Department were deficient. Mr. McCall merely opines that based on his review prior to the Petitioners' filing of the contested case, "[s]ignificant sediment deposition would most probably

occur in Roper Pond during and after construction unless appropriate controls were implemented, proper care was taken during construction, and proper maintenance was conducted after construction." (McCall Affidavit, ¶ 8(a)). Moreover, even if Mr. McCall had provided an opinion regarding the deficiency of control measures in the SWPPP, this Court found that Petitioners failed to offer any evidence that the SWPPP approved by the Department was technically deficient. (Final Order and Decision, pp. 21-22). The Court of Appeals affirmed this Court's finding on that issue: "We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control,* 404 S.C. 515, 531, 745 S.E.2d 385, 393 (Ct. App. 2013). Moreover, since the nature of any deficiencies in the SWPPP would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. However, Petitioners offered no expert to opine on the sufficiency of the SWPPP at the contested case hearing. Petitioners' only expert witness offered in this matter testified that he had not reviewed the SWPPP prepared on behalf of Roper Pond. (Administrative Hearing dated September 3 and 4, 2009, hereinafter "Tr.," p. 201, l. 12 – p. 202, l. 7). Accordingly, Mr. McCall's testimony regarding the "appropriate controls" is irrelevant to this Court's determination on whether the Town acted without substantial justification or brought the contested case solely for the purpose of delay.

Finally, the photographs attached to the McCall Affidavit and Mr. McCall's testimony regarding observations during entry onto the Roper Pond on June 14, 2015 are not properly before this Court. Any entry on Roper Pond's property to obtain evidence to be admitted in this litigation should have been undertaken in the course of discovery pursuant to Rule 21, SCRPALC, and Rule 34, SCRCP. Petitioners' served no such discovery on Roper Pond. Moreover, this Court has not authorized discovery even though a request for discovery was raised by Petitioners in its Motion to Strike or, Alternatively, to Allow Discovery filed on June 24, 2015. Additionally, the photographs are irrelevant to the determination before this Court as the conditions of the property following construction did not exist at the time of the contested case hearing and therefore do not provide support for the Town's claim that it acted with substantial justification in bringing the contested case. Accordingly, the photographs attached to the McCall Affidavit and Mr. McCall's statements regarding his observation upon entry onto the Roper Pond property are inadmissible.

IV. Oral Argument before the Supreme Court

Roper Pond moves to strike Petitioners' statements and quotes from the audio recording of the oral arguments before the Supreme Court on March 18, 2015, or in the alternative, to allow Roper Pond to engage a court reporter produce a full transcript of the oral arguments before the Supreme Court in this matter. The Supreme Court made no rulings from the bench and subsequently filed an Order dismissing the matter as moot. Therefore, the statements from oral arguments are stricken from all filings.

ORDER

IT IS THEREFORE ORDERED that Roper Pond's September 10, 2015 Motion to Strike and January 13, 2016 Motion to Strike are **GRANTED** and the Affidavit of Eugene C. McCall, Jr., the Affidavit of D. Cravens Ravenel, and the Affidavit of John P. Freeman and the opinions contained therein and the statements from the oral arguments before the Supreme Court on March 18, 2015, are hereby stricken.

IT IS FURTHER ORDERED that the Town shall file an amended response to the Third Amended Petition for Fees on or before February 5, 2016, and Roper Pond shall file a reply on or before February 15, 2016.

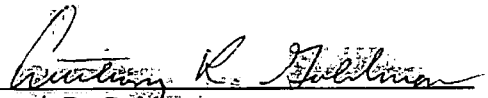
AND IT IS SO ORDERED.

January 25, 2015
Columbia, S.C.

John D. McLeod, Judge
S.C. Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



January 25, 2016
Columbia, S.C.

Anthony R. Goldman
Judicial Law Clerk