

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW JUDGE DIVISION**

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**

**RECEIVED**

JUL 21 2017

**SC Court of Appeals**

This matter comes before the South Carolina Administrative Law Court (“ALC” or “Court”) on Town of Arcadia Lakes’ Amended Motion to Strike or, Alternatively, to Allow Discovery (“Town’s Motion”). Petitioner Town of Arcadia Lakes (“Town”) moves to strike the following affidavits filed as exhibits to Respondent Roper Pond, LLC’s Third Amended Petition for Attorneys’ Fees and Costs and for Sanctions Pursuant to Rule 72, SCR PALC (“Roper Pond’s Third Amended Petition”) filed on November 30, 2015:

- Exhibit A: Affidavit of Joan W. Hartley dated May 28, 2015 (“First Hartley Affidavit”);
- Exhibit B: Amended Affidavit of Joan W. Hartley dated July 16, 2015 (“Second Hartley Affidavit”);
- Exhibit C: Amended Affidavit of Charles C. Mickel dated July 17, 2015 (“Mickel Affidavit”);
- Exhibit D: Affidavit of Matthew H. Mundy dated April 19, 2010 (“Mundy Affidavit”).

In the alternative, if the affidavits are not stricken, the Town moves the Court to conduct additional discovery. On March 3, 2017, Respondent Roper Pond, LLC (“Roper Pond”) filed a

**FILED**

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**SC ADMIN. LAW COURT**

response to the Town's Motion. In its response, Roper Pond withdrew the Mundy Affidavit. A hearing on the Town's Motion was held by telephone conference on March 10, 2017. For the reasons set forth below, the Court denies the Town's Motion as to First Hartley Affidavit and the Second Hartley, grants the Town's Motion as to the Mickel Affidavit, and withdraws the Mundy Affidavit. The Court also denies the Town's request to conduct additional discovery.

### **BACKGROUND**

On April 19, 2010, Roper Pond filed a Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPAALC, following this Court's ruling in favor of Respondents in this contested case. Roper Pond seeks an award of attorneys' fees and costs from Petitioner Town of Arcadia Lakes ("Town") pursuant to S.C. CODE ANN. § 15-77-300, which provides, *inter alia*, that fees will be awarded against a political subdivision of the State in a civil action when the political subdivision acted without substantial justification in pressing its claims. Roper Pond also seeks sanctions against the Town pursuant to Rule 72, SCRPAALC. On April 20, 2010, Petitioners filed and served a Notice of Appeal of the Court's decision. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPAALC, in abeyance pending the resolution of Petitioners' appeal.

On April 28, 2015, the South Carolina Supreme Court remitted the matter to this Court. On May 25, 2015, Roper Pond filed its Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPAALC. On June 24, 2015, Petitioners filed Petitioners' Motion to Strike or, Alternatively, to Allow Discovery ("Town's First Motion to Strike"). On July 16, 2015, Roper Pond filed Respondent Roper Pond, LLC's Response in Opposition to Petitioners' Motion to Strike or, Alternatively, to Allow Discovery, which included amended affidavits to address issues raised in the Town's First Motion to Strike. By order dated August 3, 2015, the issues for determination on Roper Pond's Petition were bifurcated with the first phase to determine whether Roper Pond is entitled to fees and costs under S.C. CODE ANN. § 15-77-300 and sanctions under Rule 72, SCRPAALC, and the second phase to determine the amount of any award of fees and costs and/or sanctions granted in the first phase. The August 3, 2015 Order states that "Counsel for Petitioners informed the Court as well that if the request is granted it would withdraw the motion strike with express right to re-file that motion should the Court determine that any liability exists." The Court thus "ORDERED that Petitioners may

withdraw the motion to strike without prejudice with leave to re-file.” On November 30, 2015, Roper Pond filed its Third Amended Petition which included the previously filed affidavits.

On May 9, 2016, a hearing on Roper Pond’s Third Amended Petition was held. On June 20, 2016, the Town and Roper Pond filed proposed orders on the first phase of the ruling on Roper Pond’s Third Amended Petition. On September 1, 2016, this Court issued an Order on Respondent’s Petition for Attorneys’ Fees and Costs and for Sanctions. By Order filed on March 15, 2017, the Court vacated the September 1, 2016 Order and re-issued the ruling on Roper Pond’s Third Amended Petition. Both the vacated September 1, 2016 Order and the March 15, 2017 Order found that Roper Pond was entitled to attorneys’ fees and costs pursuant to S.C. CODE ANN. § 15-77-300 and sanctions pursuant to Rule 72, SCR PALC.

## DISCUSSION

### **I. First Hartley Affidavit**

The Town objects to the First Hartley Affidavit on the basis that the documents attached thereto were not admitted into evidence during the hearing on the merits in this case. (Motion, p. 3). Pursuant to S.C. CODE ANN. § 15-77-310, a petition for attorney’s fees under Section 15-77-300 is filed “within thirty days following final disposition of the case.” S.C. CODE ANN. § 15-77-310. A petition for fees under S.C. CODE ANN. § 15-77-300 is a post-trial motion and may be filed following an appeal of the trial court’s decision. *Brackenbrook North Charleston, LP v. County of Charleston*, 366 S.C. 503, 623 S.E.2d 91 (2005) (holding that the 30 days for filing under 15-77-300 runs from the filing of the remittitur by the trial court); *McDowell v. South Carolina Dept. of Social Services*, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989) (same). “[P]ost trial motions may be heard on affidavits.” *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 122, 441 S.E.2d 835, 838 (Ct. App. 1994) (citing *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., Inc.*, 273 S.C. 784, 260 S.E.2d 178 (1979) (upholding trial court consideration of affidavits of attorneys offered in support of Rule 60(b)(5) motion); *Gaskins v. California Insurance Co.*, 195 S.C. 376, 11 S.E.2d 436 (1940) (upholding trial court’s consideration of affidavits in support of a motion for relief from default judgment). Roper Pond’s Third Amended Petition is a post-trial motion, and affidavits are admissible in support of that post-trial motion.

The Town cites to the Fourth Circuit ruling in *Spivey v. U.S.*, 912 F.2d 80 (4<sup>th</sup> Cir. 1990) which found that an affidavit of counsel is inadmissible hearsay. However, in that case, the Fourth Circuit ruled that the affidavit was inadmissible hearsay because it offered substantive evidence on the plaintiff's physical condition, the timing of the discovery of her condition and her prognosis based on statements of third parties to plaintiff's counsel for which no exception applied. *Id.* at 85. Such is not the case here, the statements in the First Hartley Affidavit provide personal knowledge of the production of the attachments thereto. The documents attached to the First Hartley Affidavit are documents produced pursuant to a subpoena issued as an officer of this Court in this matter, exhibits to a deposition in this matter, and party filings, in this matter. Therefore, the holding in *Spivey* is not applicable, and the First Hartley Affidavit and the exhibits thereto are properly offered through the First Hartley Affidavit.

The Town further argues that the First Hartley Affidavit should be stricken because the documents attached thereto contain inadmissible hearsay. As a preliminary matter, the Town failed to timely raise this objection. "The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." *Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986). The August 3, 2015 Order withdrew the Town's June 24, 2015 Motion to Strike "with express right to re-file that motion should the Court determine that any liability exists." On November 30, 2015, Roper Pond filed its Third Amended Petition which included the previously filed affidavits. On May 9, 2016, a hearing on Roper Pond's Third Amended Petition was held. On June 20, 2016, the Town and Roper Pond filed proposed orders on the first phase of the ruling on Roper Pond's Third Amended Petition. Roper Pond's proposed order included excerpts from a number of the documents attached to the First Hartley Affidavit. The Town did not object to these documents at the May 9, 2016 hearing or in response to Roper Pond's proposed order. Having failed to timely object to the admissibility of the documents attached to the First Hartley Affidavit, the Town has waived its right to so object.

However, even if the Town had timely object to the documents attached to the First Hartley Affidavit, the Town's objection on the basis of inadmissible hearsay would not preclude the admissibility of the documents. Exhibits 2 through 14 are emails to and from Richard W. Thomas, Jr., then Mayor of the Town and the Town's 30(b)(6) designee, and other individuals acting on behalf of the Town. Exhibits 15 and 16, which are exhibits to the Town's 30(b)(6) deposition, are an email communication with Mr. Thomas and a resolution of the Town Council.

The statements in these documents are party admissions. S. C. R. Evid. 801(d)(2). Therefore, even if the Town had timely objected, the Town has failed to identify inadmissible hearsay in the documents attached to the First Hartley Affidavit. The motion to strike the First Hartley Affidavit is therefore denied.

## **II. Second Hartley Affidavit**

The Town moves to strike the Second Hartley Affidavit which was offered to demonstrate the amount of attorneys' fees and costs incurred by Roper Pond in this matter. Specifically, the Town argues that the records attached to the Second Hartley Affidavit are either not included in their entirety or not sufficiently detailed to allow the Town to test the validity of the affidavit and records. An affidavit of counsel has been recognized as an appropriate means of offering evidence of attorneys' fees and costs. *See, e.g., Layman v. State*, 658 S.E.2d 320, 336, 376 S.C. 434, 463, fn. 2 (2008) (noting that costs and fees incurred were set forth in affidavits); *Catchings v. South Carolina Dep't of Motor Veh.*, 2008 WL 9841742, at \*5 (Ct. App. Jun. 9, 2008) (noting that counsel presented affidavit for fees under Section 15-7-300); Rule 55(b)(3) (requiring only an affidavit of the attorney for fees for a default judgment). The affiant is an officer of the Court. The Affidavit is based on personal knowledge of matters to which she is competent to testify. The Affidavit includes a list of daily individual time entries for the attorneys litigating this matter.<sup>1</sup> The Second Hartley Affidavit is sufficiently detailed to allow the Court to determine the time devoted to this matter as required by S.C. Code Ann. § 15-77-300. The Town's motion to strike the Second Hartley Affidavit is therefore denied.

## **III. Mickel Affidavit**

The Town moves to strike the Mickel Affidavit on the basis that the affidavit and attached exhibits are insufficient evidence of the costs of delay incurred by Roper Pond due to the Town's filing of this contested case. The Mickel Affidavit is offered by Roper Pond in support of its petition for sanction under Rule 72, SCRALC, as evidence that the contested case resulted in increased costs for the project which was the subject of this contested case. The March 15, 2017 Order vacated the September 1, 2016 Order and re-issued the ruling on Roper Pond's Third

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<sup>1</sup> The total of fees incurred on the list of individual time entries exceeds the total of fees charged on this matter because certain time entries were discounted on the bill to Roper Pond.

Amended Petition to clarify that the type and amount of sanctions are in the discretion of the Court. Rule 72 provides that “the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.” Rule 72, SCRPALC. Therefore, the Mickel Affidavit has no relevance to the determination of the type and amount of sanction to discourage the Town from like conduct in the future. The Town’s motion to strike the Mickel Affidavit is therefore granted.

#### **IV. Request for Additional Discovery**

The Town argues that it is entitled to conduct additional discovery on the evidence offered in the affidavits. As discussed in Section I above, a petition for attorneys’ fees under S.C. CODE ANN. § 15-77-300 is a post-trial motion. “[P]ost trial motions may be heard on affidavits.” *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 122, 441 S.E.2d 835, 838 (Ct. App. 1994) (citing *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., Inc.*, 273 S.C. 784, 260 S.E.2d 178 (1979) (upholding trial court consideration of affidavits of attorneys offered in support of Rule 60(b)(5) motion); *Gaskins v. California Insurance Co.*, 195 S.C. 376, 11 S.E.2d 436 (1940) (upholding trial court’s consideration of affidavits in support of a motion for relief from default judgment). Additionally, courts routinely decide petitions under S.C. CODE ANN. § 15-77-300 and other fee-shifting statutes on affidavits. *See, e.g., Layman v. State*, 658 S.E.2d 320, 336, 376 S.C. 434, 463, fn. 2 (2008) (noting that costs and fees incurred were set forth in affidavits); *Catchings v. South Carolina Dep’t of Motor Veh.*, 2008 WL 9841742, at \*5 (Ct. App. Jun. 9, 2008) (noting that counsel presented affidavit for fees under Section 15-7-300); *South Carolina Dep’t of Transp. v. Revels*, 766 S.E.2d 700, 707, 411 S.C. 1, 15 (2014) (noting that affidavit of counsel to be submitted in support of petition for attorneys’ fees); *Hunkler v. Frey*, 2012 WL 10862808, at \*3, fn. 2 (Ct. App. Oct. 3, 2012) (noting that award of attorneys’ fees was based on counsel’s affidavit). *Haley Nursery Co., Inc. v. Forrest*, 381 S.E.2d 906, 909, 298 S.C. 520, 524 (1989) (same). Similarly, there is no such basis for discovery in connection with the motion for sanctions under Rule 72, SCRPALC. The request for additional discovery is therefore denied.

#### **ORDER**

**IT IS HEREBY ORDERED** that the Town’s motion to strike the First Hartley Affidavit and the Second Hartley Affidavit is denied.

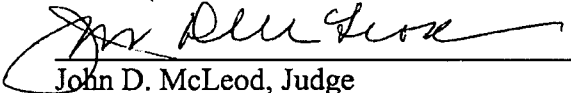
**IT IS FURTHER ORDERED** that the Town's motion to strike the Mickel Affidavit is granted.

**IT IS FURTHER ORDERED** that the Mundy Affidavit is withdrawn.

**IT IS FURTHER ORDERED** that the Town's request to conduct additional discovery is denied.

**AND IT IS SO ORDERED.**

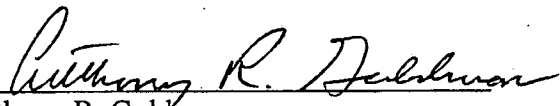
March 24, 2017  
Columbia, SC

  
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John D. McLeod, Judge  
South Carolina 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).

March 24, 2017  
Columbia, S.C.

  
\_\_\_\_\_  
Anthony R. Goldman  
Judicial Law Clerk