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

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,

Of Which Town of Arcadia Lakes is . . . . . Appellant/Respondent,

v.

South Carolina Department of Health and Environmental Control. . . . . Respondents,

and

Roper Pond, LLC . . . . . .Respondent/Appellant.

RESPONDENT/APPELLANT'S RETURN TO PETITION FOR WRIT OF SUPERSEDEAS

Pursuant to Rules 240 and 241, SCACR, Respondent/Appellant Roper Pond, LLC ("Roper Pond") files this response to Petition for Writ of Supersedeas ("Petition"), filed by Appellant/Respondent Town of Arcadia Lakes ("Town") on September 12, 2017. The Town petitions for a writ of supersedeas staying the Order for Attorneys' Fees and Costs and for Sanctions pursuant to SCALC Rule 72 issued June 14, 2017 as amended by Order issued August 29, 2017 ("June 14, 2017 Order"), which requires the Town to pay Roper Pond an award of attorneys' fees and costs in the amount of $205,283.84 by September 11, 2017, and requires the

Town to pay the Administrative Law Court ("ALC") sanctions in the amount of $200,000 by September 11, 2017. On July 14, 2017, the Town filed a Motion to Stay Order for Attorney's Fees and Costs and for Sanctions ("Motion to Stay"). On August 29, 2017, the ALC issued an Order Denying Motion to Stay ("August 29, 2017 Order"). The Town has now petitioned this Court for a writ of supersedeas pursuant to Rule 241(d), SCACR. For the reasons stated herein, Roper Pond requests that the Court deny the Town's Petition.

I. THE TOWN HAS FAILED TO DEMONSTRATE THAT THE ADMINISTRATIVE LAW COURT UNJUSTIFIABLY DENIED ITS MOTION FOR STAY.

Pursuant to Rule 241(d)(4)(C), SCACR, a party seeking a supersedeas from this Court must show that a motion for such relief was filed with the lower court and "was unjustifiably denied or that the relief granted failed to afford the release which the petitioners requested." Rule 241(d)(4)(C), SCACR. The Town has simply failed to show that the ALC unjustifiably denied its Motion to Stay. Indeed, the ALC issued a ten-page order which considered the Town's arguments and found that the Town failed to make the requisite showing under Rule 241(c), SCACR. As provided in Rule 241(d), SCACR, a party seek a supersedeas to stay an order of the ALC must first seek such relief in the ALC. Rule 241(d)(1), SCACR. In ruling on a motion to stay an order on appeal, Rule 241(c)(2), SCACR, provides that the ALC "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. The Town failed to demonstrate that its payment of the award and sanctions under the June 14, 2017 Order would deprive this Court of jurisdiction of the appeal or is necessary to prevent any issue on appeal from becoming moot.

The Town simply fails to identify how the payment of the judgment awarded in the June 14, 2017 Order would deprive this Court of jurisdiction to hear the appeal. The Town has failed

to point to any authority which states that this Court lacks jurisdiction over money judgments paid pursuant to an order of a lower court. Indeed, pursuant to pursuant to Rule 241(b)(1), "money judgments as provided in S.C. CODE ANN. § 18-9-130" are not automatically stayed. Section 18-9-130 provides that "[a] notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." S.C. CODE ANN. § 18-9-130(A)(1). Accordingly, the default rule on an appeal of a money judgment is the execution of the judgment is not stayed. If such execution deprived an appellate court of jurisdiction, this would not be the default rule. Since the Town failed to show how payment of the award and sanctions under the June 14, 2017 Order is distinguishable from any other money judgment awarded by a lower court, the ALC properly found that the Town has not demonstrated that denial of the Motion to Stay would deprive this Court of jurisdiction of the appeal. Similarly, the ALC correctly held that payment of the judgment awarded in the June 14, 2017 Order would not render the issue moot. The Town does not identify the circumstances in which payment of the judgment by the Town would prevent the Court from giving effect to a reversal of the June 14, 2017 Order. The ALC correctly held that "[i]n the event the Court of Appeals were to reduce or modify either of these awards, the recipient would simply be required to repay money to Petitioner." (August 22, 2017 Order, p. 6). The ALC properly denied the Town a supersedeas to stay the June 14, 2017 Order because the Town has failed to demonstrate the requisite showing for a supersedeas under Rule 241(c)(2), SCACR.

The Town further argues that Rule 241(b)(11) does not apply to the June 14, 2017 Order because "the logic and legal basis for Rule 241's 'administrative tribunal' exception to the automatic stay simply does not hold up." (Petition, p. 8). Pursuant to Rule 241(b)(11), SCACR,

an order of the ALC is not automatically stayed on appeal to the Court of Appeals. Rule 241(b)(11), SCACR. However, even if Rule 241(b)(11) were not applicable, the June 14, 2017 Order would not be subject to the automatic stay under Rule 241(b)(1), which provides that "money judgments as provided in S.C. CODE ANN. § 18-9-130" are not automatically stayed. As discussed above, the default rule under S.C. CODE ANN. § 18-9-130 is that filing of a notice of appeal does not stay execution of a money judgment. Therefore, the June 14, 2017 Order is not automatically stayed under Rule 241(b), SCACR.

The Town further argues that an award of attorneys' fees is stayed on appeal under this Court's decision in a divorce case in *Woodside v. Woodside*, 290 S.C. 366, 350 S.E.2d 407 (Ct. App. 1986). The *Woodside* decision is easily distinguished from the present case. In ruling that an order for attorneys' fees "[h]istorically . . . has not been treated as a judgment that can executed upon until it has at least been settled on appeal," this Court noted that the purpose of the award of attorneys' fees in divorce actions is to provide "money necessary to enable a spouse to carry on or defend the matrimonial action, and are awarded to insure the spouse an efficient preparation of the case and a fair and impartial trial." *Woodside*, 290 S.C. at 379, 350 S.E.2d at 415 (Ct. App. 1986) (citation omitted). This Court thus held that "attorney fees awarded in domestic actions are subject to the automatic supersedeas provision of Supreme Court Rule 41, Section 1(A)." Accordingly, the *Woodside* ruling is specific to the award of attorneys' fees in divorce cases and is not determinative of the status of the award of attorneys' fees in the June 14, 2017 Order. The ALC properly found that *Woodside* does not govern in this case and relied on the rationale in the more recent South Carolina Supreme Court ruling in *Parker v. Shecut*, 359 S.C. 143, 597 S.E.2d 793 (2004). In *Parker*, the Supreme Court treated an award of attorneys' fees as a judgment to be executed upon like any other money judgment of the trial court.

Specifically, the Supreme Court held that an award of attorneys' fees by the lower court was a judgment which was subject to the accrual of post-judgment interest. *Id.* at 153–54, 597 S.E.2d at 799 (2004) ("The awarding of attorney's fees to Win was a judgment against Anne, and she failed to take any action to abate the running of the interest.") "An award of attorney's fees may be considered part of a monetary judgment and draw interest accordingly." *Id.* (citation omitted). Therefore, the ALC properly relied on *Parker* in finding that the award of fees in the June 14, 2017 Order is a money judgment and not subject to an automatic stay upon filing of an appeal.

II. THE TOWN'S ARGUMENTS ON RULE 67, SCRCP, IS NOT PROPERLY BEFORE THIS COURT.

The Town further argues that the ALC improperly denied the Town the use of the process under Rule 67. Specifically, the ALC noted that the Town proffered the alternative of depositing funds with the ALC pursuant to Rule 67 during the August 8, 2017 hearing on the Town's Motion to Stay. The ALC denied the Town's proffered alternative of depositing the funds with the ALC under Rule 67. On September 8, 2017, the Town file a Motion to Alter or Amend with the ALC seeking amendment of the Order as to its ruling on Rule 67, SCRCP. The ALC has not yet ruled on the September 8, 2017 Motion to Alter or Amend. Accordingly, the Town has improperly and prematurely sought relief on this issue from this Court. An order of the ALC is not appealable if "there is some further act which must be done by the court prior to a determination of the rights of the parties." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894 (2010). Accordingly, the Town's arguments on the ALC's ruling on the alternative of depositing funds with the ALC pursuant to Rule 67, SCRCP, is not properly before this Court.

III. EVEN IF THE TOWN'S ARGUMENTS ON RULE 67, SCRCP, WERE PROPERLY BEFORE THIS COURT, THE TOWN HAS FAILED TO DEMONSTRATE THAT THE ALC ABUSED ITS DISCRETION IN DENYING LEAVE TO DEPOSIT THE FUNDS WITH THE ALC.

Contrary to the Town's assertions, the alternative to deposit funds with the ALC under Rule 67, SCRCP, was raised by the Town in the August 8, 2017 hearing on the Motion to Stay. The Town raised the process under Rule 67 as an alternative upon the ALC's denial of the Motion to Stay. Rule 67 provides that a party subject to a money judgment, "upon notice to every other party, **and by leave of court**, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing." Rule 67, SCRCP (emphasis added). The Town asserts that the requirement to seek leave of the court "is primarily a requirement for coordination between the depositing party and the court, meant to facilitate accurate and efficient transfer of funds, rather than an invitation for the court to arbitrarily close off Rule 67." (Petition, p. 8). Contrary to this assertion, the granting or denial of leave under Rule 67 is not a perfunctory or ministerial action of a court. "The granting of leave to deposit money with the court pursuant to Rule 67, SCRCP is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006) (citing *Cajun Elec. Power Co-op., Inc. v. Riley Stoker Corp.*, 901 F.2d 441, 445 (5th Cir.1990)). In *Russo v. Sutton*, the Supreme Court held that depositing funds on a judgment with the notation "Case on Appeal-Judgment being deposited to stay interest" was ineffective to stop the accrual of interest on appeal because the party failed to give notice to the other party and failed to obtain leave of the circuit as required under Rule 67. *Russo v. Sutton*, 317 S.C. 441, 444–45, 454 S.E.2d 895, 895-897 (1995). As such, even if the ALC's decision on Rule 67 were properly before this Court, which it is not, the ALC's decision on Rule 67 can only be reversed on a finding of abuse of

discretion.

In its Petition, the Town argues that Rule 67 is necessary "to ensure that the award funds will remain available at the end of this appeal and will be returned to the Town should the Court reverse or reduce the award." (Petition, p. 9). The ALC squarely rejected this argument:

> The Petitioner has not shown that it cannot be made fully whole in the event an appellate court should reverse or otherwise modify the Court's June 14, 2017, order. While the Petitioner expresses fear that Roper Pond, a privately-owned company in existence within the state for 13 years, "could very likely sell all of its assets, go out of business, or declare bankruptcy before this appeal is heard," the Petitioner has provided no evidence which tends to make this anything more than speculation.

Having failed to present evidence to support its claims, the Town cannot show that the ALC abused its discretion in denying the alternative of depositing funds with the ALC pursuant to Rule 67, SCACR.

IV. THE IMMEDIATE PAYMENT OF THE AWARD UNDER THE JUNE 14, 2017 ORDER DOES NOT IMPOSE A SUBSTANTIAL HARDSHIP ON THE TOWN.

The Town argues that the municipality "should not be forced to suffer the fiscal calamity that would come with payment $405,283.84 to Roper Pond" pending the appeal. (Petition, p. 3). However, the Town has failed to demonstrate the "fiscal calamity" that would result from such payment, and the ALC properly found that the Town failed to show the significant hardship that would result from payment of the award and sanction under the June 14, 2017 Order. The ALC found that "[t]he factual findings in the June 14, 2017, order belie the Petitioner's arguments regarding hardship." (August 29, 2017 Order, p. 8). In the Affidavit of Mark W. Hughley ("Mayor's Affidavit") offered in support of the Town's Motion, Mayor Hughley contends that "the Town would be unable to continue the services as currently provided in the event of a large award to the defendants." (Ex. C to Petition, p. 2). As the Court found in the June 14, 2017 Order, the only service which the Town provides its citizen is municipal solid waste collection

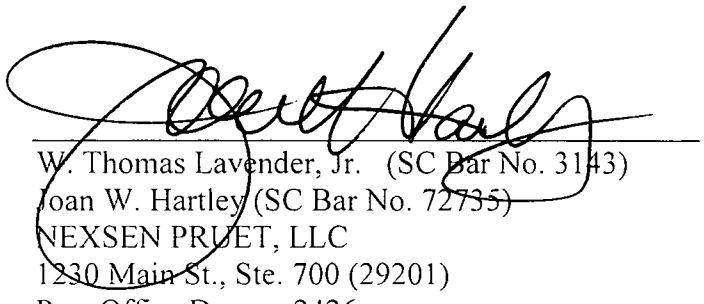
and disposal at no charge. (June 14, 2017 Order, p. 14). In 2016, the Town had revenues of $320,046 and expended only $128,562 on the waste collection and disposal services. (June 14, 2017 Order, pp. 14-15). As such, payment of the judgment awarded in the June 14, 2017 Order will not prevent the Town from providing the services currently provided to its citizens. Moreover, the payment of the judgment would not directly impact the citizens of the Town because all of the Town revenue is derived from "sales tax, insurance tax, brokers, tax, telecommunications tax, local business license tax, South Carolina Local Government Fund, and utility franchise fees." The Town imposes no tax assessment on its citizens, thus its citizens would not directly fund the payment of the judgment. (June 14, 2017 Order, p. 14).

The ALC properly found that the Town has reserves sufficient to pay the fees and sanctions and that these reserves would be used to satisfy the judgment in the June 14, 2017 Order. (August 29, 2017, p. 8). As stated in the June 14, 2017 Order, the Town has "more than $1 million in unrestricted liquid assets." (June 14, 2017 Order, p. 14). The only service provided to the Town's citizen is free garbage collection and disposal. Based on information previously provided to the Court, the annual revenue of the Town is more than sufficient to pay for this service. (June 14, 2017 Order, pp. 14-15). Contrary to the Town's assertions, the ALC correctly found that payment of the award and sanctions under the June 14, 2017 Order will not impose a significant hardship on the citizens of the Town.

V. CONCLUSION

For the reasons stated herein, Roper Pond respectfully requests that the Court deny the Town's Petition and require immediate payment of the award and sanctions pursuant to the June 14, 2017 Order.

Respectfully submitted,



September 25, 2017

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

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

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v.

South Carolina Department of Health and Environmental Control and
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Respondents,

Of Whom

Town of Arcadia Lakes is . . . . . Appellant-Respondent,
and

South Carolina Department of Health and Environmental Control. . . . . Respondent,
and

Roper Pond, LLC is . . . . . .Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent/Appellant's Return to Petition for Writ of Supersedeas on counsel of record for South Carolina Environmental Law Project and South Carolina Department of Health and Environmental Control by depositing a copy of it in the United States Mail, postage prepaid, on September 25, 2017, addressed to:

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September 25, 2017

HAND DELIVERED

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
Appellate Case No. 2017-001554

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Respondent/Appellant's Return to Petition for Writ of Supersedeas and Proof of Service in the above-referenced matter. Please return a clocked copy of each to us via our courier.

We appreciate your assistance in this matter.

Best regards,

Joan W. Hartley

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

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