

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT DIVISION  
Docket No. 07-ALJ-04-0517-A-AP

Fredrick Gatewood, )  
 )  
Appellant, )  
 )  
v. )  
 )  
South Carolina Department of )  
Corrections, )  
 )  
Respondent. )  
----- )

**COPY**

**STATUS CONFERENCE**

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**Thursday, September 7, 2017**  
10:03 a.m. - 10:34 a.m.

The Status Conference before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 7th day of September, 2017 before Carla S. Dominick, Court Reporter and Notary Public in and for the State of South Carolina.



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**EXHIBITS**

(There were no exhibits marked during this Status Conference.)

**STIPULATIONS**

It is stipulated and agreed that this Status Conference is being taken pursuant to the rules of the Administrative Law Court and the South Carolina Rules of Civil Procedure.



1     **THE COURT:**     This is a Status Conference in the  
2                   matter of Fred Gatewood, Appellant versus South  
3                   Carolina Department of Corrections, Respondent.  
4                   The Docket Number is 07-ALJ-04-0517-A-AP and I  
5                   tell you what, I'll ask real quickly before I  
6                   go into anything else, what is the status of  
7                   this case right now?

8     **MR. SUMMERS:**   Doug, if you want to go first, I'll go  
9                   after you, sir.

10    **MR. WESTBROOK:**  Well, Your Honor, if it please the  
11                   Court, Doug Westbrook for inmates.

12    **THE COURT:**    Go ahead.

13    **MR. WESTBROOK:**  We -- we have presently before the  
14                   Court three motions.  This isn't Gatewood.

15    **THE COURT:**    Well, I know about those.

16    **MR. WESTBROOK:**  And -- and ---

17    **THE COURT:**    I'm talking about -- go ahead.  At the -  
18                   - I was asking more about on the department  
19                   level.

20    **MR. WESTBROOK:**  Oh, I'm sorry.  I'm sorry.

21    **MR. SUMMERS:**   And I didn't want to cut Mr. Westbrook  
22                   off.  For the record, Your Honor, this is Lake  
23                   Summers on behalf of the Department of  
24                   Corrections.  Mr. Westbrook, as he mentioned to  
25                   the Court a moment ago, had the three motions



1 that are pending with the Court. The Court  
2 obviously issued its remand order, if my memory  
3 serves accurately, June the 13th of this year.  
4 Subsequent to the remand order, Mr. Westbrook  
5 on June the 30th filed and served the three  
6 motions he just mentioned. There are also, I  
7 think, Mr. Westbrook still has a petition for  
8 a hearing pending with the Court of Appeals.  
9 Mr. Westbrook filed a petition for writ.

10 **THE COURT:** Well, if that's true, then I wouldn't be  
11 hearing those motions anyway.

12 **MR. SUMMERS:** Yes, sir. I just wanted, for the sake  
13 of the record, to -- maybe Mr. Westbrook has  
14 more information than me, but I believe that  
15 there might still be a petition for a rehearing  
16 pending with the Court of Appeals. It may be  
17 in Ackerman, not in Gatewood because obviously  
18 ---

19 **THE COURT:** Okay.

20 **MR. SUMMERS:** --- you mentioned this morning,  
21 Gatewood, as the Court recalls, Mr. Gatewood  
22 ...

23 **THE COURT:** Yeah, we're here on Gatewood today.

24 **MR. SUMMERS:** Yes, sir. Yes, sir. No, Mr. Gatewood  
25 is a participant in the Ackerman litigation.



1 He is, however, distinguished because Your  
2 Honor found that he had -- when the parameters  
3 were what they were, had timely filed his step  
4 one grievance. Consequentially, as the Court  
5 recalls and Mr. Westbrook recalls, the Court  
6 made findings and recommendations and issued an  
7 order on the merits of Mr. Gatewood's case.  
8 That is why we are split, if you will, between  
9 the Gatewood ---

10 **THE COURT:** Yeah, I had all that.

11 **MR. SUMMERS:** Yes, sir. So as far as activity  
12 before on remand, we have been working on our  
13 side towards looking at how the Court of  
14 Appeals decision in Gatewood influences the --  
15 or directs the calculation of back pay for Mr.  
16 Gatewood. We have had some communication with  
17 Mr. Westbrook in the form of correspondence,  
18 but the potential of submitting Mr. Gatewood's  
19 claims to mediation. I can certainly defer to  
20 Mr. Westbrook and his perspective on that. The  
21 Department feels it's right for mediation. Mr.  
22 Westbrook, I believe, without speaking for him,  
23 has a different perspective on it. We're  
24 prepared to undertake activities on remand up  
25 to and including issuing a new final decision,



1 but again, to the best of my recollection, I  
2 think there may be and I just want to clarify  
3 for the record, a petition for rehearing based  
4 upon the Court of Appeals denial of Mr.  
5 Westbrook's petition for writ of mandamus.  
6 Again, that may be in Ackerman, not in  
7 Gatewood, so ---

8 **THE COURT:** Okay.

9 **MR. SUMMERS:** Yes, sir. I apologize for digressing  
10 a bit.

11 **THE COURT:** All right. Mr. Westbrook?

12 **MR. WESTBROOK:** Your Honor, the two remands have  
13 been appealed to the Court of Appeals and both  
14 of these are now pending on petition for  
15 rehearing.

16 **THE COURT:** Okay.

17 **MR. WESTBROOK:** The mandamus petitions the -- as  
18 you, I'm sure know, the Court of Appeals sent  
19 back stating they no longer had jurisdiction of  
20 the cases. So -- and that's both -- and -- and  
21 I'm speaking of both Ackerman and Gatewood.  
22 That is, I think, the present status of -- of  
23 the matters.

24 **THE COURT:** And if you do a motion for rehearing on  
25 both of those?



1 **MR. WESTBROOK:** Yes, sir, it's pending.

2 **THE COURT:** Then, I -- I don't have any jurisdiction  
3 to issue any of the -- any orders in this case  
4 right now anyway. I don't think. I mean,  
5 you've made a -- you've take the position it's  
6 a contested case. You wish to have a special  
7 referee. I don't think I would even determine  
8 that at this point. Do you have a position on  
9 any of that? Is there anything that is left to  
10 determine at this point in time?

11 **MR. WESTBROOK:** Judge, our -- our position in -- in  
12 very to be -- to concisely state our position  
13 is that each Court of Appeals remand order  
14 should be and I implore this Court to carry out  
15 those remands.

16 **THE COURT:** I -- I -- just -- I'm going to have to  
17 humbly disagree with you. I don't even think  
18 this -- the Court of Appeals can, even if it  
19 was before this Court to do -- hear it as a  
20 contested case, can do that because the  
21 jurisdiction -- the only Court that can grant  
22 -- create jurisdiction like that would be the  
23 Supreme Court. Our Court has been granted only  
24 appellate jurisdiction by the Supreme Court and  
25 that jurisdiction has been affirmed through



1           legislation by the -- the -- by the General  
2           Assembly. All right. So I cannot do what I do  
3           not have the authority to do unless the Supreme  
4           Court orders me to do it, but I say that. I  
5           don't know if the Court of Appeals can do that  
6           or not, but I'm not challenging them in any  
7           way. It's just at this point in time, I'm  
8           saying that -- that I would not do that because  
9           I just think that would be an improper exercise  
10          of my authority and I don't wish to head down  
11          that path.

12       **MR. WESTBROOK:** Uh-huh. May I respond to that?

13       **THE COURT:** Yes, sir.

14       **MR. WESTBROOK:** I do think that we do have these  
15          petitions for rehearing that are pending, but  
16          our position as I have stated, Your Honor, is  
17          that the remand orders of this Court to the  
18          Department of Corrections are void because they  
19          were outside this Court's jurisdiction to carry  
20          out the Court of Appeals remand to this Court.

21       **THE COURT:** I'm just curious, was it ---

22       **MR. WESTBROOK:** And I -- and I ---

23       **THE COURT:** --- was it at all an argument before the  
24          Court of Appeals as to what this Court's  
25          jurisdiction is? I mean, did anybody ever take



1 the position that this Court has contested case  
2 jurisdiction? Was that -- in other words, how  
3 can -- how can anything that the Court of  
4 Appeals have done in its -- in its remand order  
5 be nothing but dictum as far as -- as any  
6 pronouncement of what the Court's jurisdiction  
7 is.

8 **MR. WESTBROOK:** No, Your Honor, to -- to -- to  
9 answer your question very shortly, no,  
10 jurisdiction not addressed, but in the remand,  
11 the Court of Appeals gave this Court  
12 jurisdiction to do -- in each case to  
13 reconsider the grievances in the Ackerman case  
14 and in the Gatewood case -- I'm sorry, to  
15 consider the grievances in Ackerman and in  
16 Gatewood to reconsider the attorney fees.

17 **THE COURT:** Well, what I'm asking ---

18 **MR. WESTBROOK:** That's where this Court's  
19 jurisdiction comes from right now.

20 **THE COURT:** How can the Court in a remand order  
21 where the jurisdiction of the Court has never  
22 been addressed, create jurisdiction out of  
23 whole cloth that never existed before and that  
24 both the General Assembly and the Supreme Court  
25 have stated otherwise?



1 **MR. WESTBROOK:** Muller v. Myrtle Beach, the Supreme  
2 -- the Circuit Court, on remand, acquires  
3 jurisdiction to enforce the judgment of the  
4 Appellate Court and take any action consistent  
5 ---

6 **THE COURT:** Yeah, I read ...

7 **MR. WESTBROOK:** --- with the Supreme Court.

8 **THE COURT:** I read that, but that was a Circuit  
9 Court case. That was a case in which the  
10 Circuit Court had jurisdiction.

11 **MR. WESTBROOK:** Well, Your Honor, ---

12 **THE COURT:** I mean, it had the subject matter  
13 jurisdiction. When I keep saying jurisdiction,  
14 I'm talking about subject matter. We don't  
15 have contested case subject matter. We only  
16 have Appellate case subject matter.

17 **MR. WESTBROOK:** Well, first of all, in -- in -- in  
18 Justice Toal's 2016 edition of -- of the  
19 Appellate Practice in South Carolina, they  
20 mention in there, and I don't have the page  
21 number from memory, but there are times when  
22 this Court can have concurrent appellate and  
23 / contested case jurisdiction.

24 **THE COURT:** She -- she's very smart, Justice Toal,  
25 and she is very correct on that and -- and as



1 a matter of fact, we can have both appellate  
2 and contested jurisdiction with the same agency  
3 and she is -- but if you go and read where she  
4 got that from, she got that from the statutes.  
5 For instance, the Department of Insurance, we  
6 have both appellate and contested case  
7 jurisdiction with that agency because  
8 statutorily, there are instances in which we  
9 hear some of an appellate and some of it  
10 contested and so that's where she's making that  
11 statement.

12 **MR. WESTBROOK:** Well, let's -- let's -- let's talk,  
13 if I might, Ackerman and Gatewood, because  
14 they're two different, procedurally,  
15 situations. Ackerman, the Court has remanded  
16 to this Court to consider grievances on the  
17 merits, which is exactly what you have already  
18 done in Gatewood.

19 **THE COURT:** I haven't considered -- I treated both  
20 Gatewood and Ackerman as appellate cases.

21 **MR. WESTBROOK:** No, no, no, the -- it's been  
22 remanded to this Court in Ackerman to consider  
23 grievances on the merits and that's what our  
24 position is that this Court should carry out.

25 **THE COURT:** Okay.



1 **MR. WESTBROOK:** Because the Court of Appeals has  
2 ordered this Court to do that.

3 **THE COURT:** Now, if they ...

4 **MR. WESTBROOK:** In Gatewood, Your Honor, they have  
5 ordered this Court in the remand order to  
6 reconsider the question of attorney fees, which  
7 is statutorily supposed to be handled ---

8 **THE COURT:** I ---

9 **MR. WESTBROOK:** --- in the lower Court.

10 **THE COURT:** --- well, I do intend to hear the  
11 attorney's fees, but I -- I don't think I can  
12 hear the attorney's fees until -- until there  
13 is a determination made as to what -- what  
14 actually the official results obtained and I  
15 also -- I will tell you looking at this case  
16 down the road because we're not going to get  
17 anywhere on this today because the Appellate  
18 Court's got jurisdiction to hear this now and  
19 once you took the -- you took that action, I --  
20 I'm removed from it anyway.

21 **MR. WESTBROOK:** Uh-huh.

22 **THE COURT:** So I would really just now discussing  
23 this with you because I really want to  
24 understand your position.

25 **MR. WESTBROOK:** Uh-huh.



1     **THE COURT:**       But I think one of the major  
2                    considerations we're going to have down the  
3                    road in this case is the current 15-77-300 sets  
4                    forth that -- that in no instance shall the  
5                    Court grant attorney's fees greater than the  
6                    contingency fee arrangement and -- and honestly,  
7                    I think, I don't know what your position is,  
8                    Mr. Summers, but I think that I've researched  
9                    the case law and I -- I can give y'all a fair  
10                   amount of cases if you want down the road, but  
11                   -- in Kansas, North Carolina, Washington, New  
12                   York, they've all held that attorney's --  
13                   attorney fees is a remedial -- remedial action  
14                   by the -- by the General Assembly and obviously  
15                   if it's a remedial action by the General  
16                   Assembly, then -- then, actions taken regarding  
17                   those fees are retroactive, so that would make  
18                   15-77-300 retroactive and then I -- when I look  
19                   at 15-77-300, and I'm just talking. I haven't  
20                   heard your briefing on this and I'm going to  
21                   ask y'all both to brief it if you don't sell  
22                   it, but when I look at 15-77-300, even if I was  
23                   not to consider that provision about  
24                   contingency's fees, it would take me right back  
25                   to Layman as a good example of the six criteria



1 that I consider in determining attorney's fees,  
2 one of which takes you right back to  
3 contingency fee arrangements, which is number  
4 six. So either way, I'm going to be  
5 considering that provision and -- and I think  
6 that would probably -- could solve everything  
7 is I award you the contingency fees that you're  
8 getting, the 40 percent on all these cases and  
9 -- and hopefully that would be -- you'd be well  
10 compensated, but I -- I mean, I don't know  
11 because I don't know what the ultimate decision  
12 of the amounts are going to be. But I just  
13 think that's a -

14 **MR. WESTBROOK:** Well ...

15 **THE COURT:** --- looking at the statute that 15-77-  
16 300 is a good way to resolve that issue down  
17 the road.

18 **MR. WESTBROOK:** Your Honor, respectfully, if you  
19 look at my brief ---

20 **THE COURT:** I've read it twice.

21 **MR. WESTBROOK:** --- on Gatewood, it -- it's a  
22 lengthy one.

23 **THE COURT:** Yes, sir.

24 **MR. WESTBROOK:** And I apologize for that, but it's -

25 --



1 THE COURT: No, no, no.

2 MR. WESTBROOK: --- it's a lot of ground to cover.

3 THE COURT: I know.

4 MR. WESTBROOK: But, Your Honor, I am -- I -- I -- I  
5 -- I -- I -- I don't say never. I've learned  
6 because I've been wrong too many times, but I  
7 feel very comfortable -- I've got about three  
8 or four bases to say those amendments don't  
9 apply in this case, but perhaps the most ---

10 THE COURT: What amendments?

11 MR. WESTBROOK: The -- the amendments to 15-77-300  
12 in 2010.

13 THE COURT: Well, some of them I -- I ---

14 MR. WESTBROOK: And -- and ---

15 THE COURT: --- I was just talking about -- only  
16 about the provision dealing with contingency  
17 fee because the law is interesting on that is  
18 if it -- if even if it's involving attorney's  
19 fees, if it changes the subject matter aspect  
20 of it, in other words, the right -- the right  
21 to -- to attorney's fees and you -- I think you  
22 pointed out that I can -- it is considered  
23 remedial if it doesn't effect and one of the  
24 things is vested contract and so we can't  
25 effect your vested contract concerning



1 contingency fee.

2 **MR. WESTBROOK:** Precise -- precisely.

3 **THE COURT:** Well, I'm agreeing with all of that.  
4 What I'm saying is that you had a vested  
5 contract regarding contingency fee. I would  
6 not step on that in any way, but the  
7 compilation of those fees is a remedial aspect  
8 that I can take into account.

9 **MR. WESTBROOK:** Your Honor -- Your Honor, my  
10 contract expressly -- it doesn't have to  
11 expressly mention it, but it expressly mentions  
12 15-77-300. The contract is dated September 14,  
13 2004. The law is very clear in the Wilkinson  
14 Case in the Court of Appeals and -- and -- and  
15 -- and -- and the Catawba Indian's Case in the  
16 Supreme Court that the law in effect at the  
17 time of a contract ---

18 **THE COURT:** Well, I ---

19 **MR. WESTBROOK:** --- governs that contract. That ---

20 **THE COURT:** Well, I think contingency ---

21 **MR. WESTBROOK:** --- means the 1985 version is what  
22 is applicable here.

23 **THE COURT:** Even if I consider that version, I would  
24 go back and consider the six criteria under  
25 Layman that -- that the Court set forth that I



1 consider and which includes ---

2 **MR. WESTBROOK:** The Court ---

3 **THE COURT:** --- contingency here.

4 **MR. WESTBROOK:** --- but the Court, Your Honor, only  
5 considers the -- the -- the -- those factors in  
6 -- in -- in -- in -- in enhancing the fee, not  
7 on the lodestar. The only -- Judge -- Judge,  
8 please.

9 **THE COURT:** Well, I'm very familiar with this  
10 hearing.

11 **MR. WESTBROOK:** I -- I -- I -- I know you are, but -  
12 - but Judge, unfortunately, I'm more familiar  
13 than I ever wanted to be. The only -- the  
14 criteria, the only things for the lodestar are  
15 the -- the -- the -- the -- the -- the hours  
16 times the -- the fee, per hourly fee. The  
17 factors are considered to enhance the lodestar  
18 if you find a lodestar ---

19 **THE COURT:** Yeah ...

20 **MR. WESTBROOK:** --- but not to figure the lodestar  
21 itself.

22 **THE COURT:** Well, you're talking -- there -- you  
23 first consider the attorney's fees, then  
24 afterward you consider the lodestar.

25 **MR. WESTBROOK:** You're -- whether under the -- the



1 three factors ---

2 **THE COURT:** What I'm saying is to get to the  
3 attorney's fees, you consider the six factors,  
4 which includes the contingency of compensation  
5 and then you would make a determination where  
6 you believe that there is a necessity to  
7 consider a lodestar based on evaluation of the  
8 case.

9 **MR. WESTBROOK:** Your Honor, respectfully, the  
10 lodestar is -- is calculated first.

11 **THE COURT:** Well, I'll go back ---

12 **MR. WESTBROOK:** --- and then ---

13 **THE COURT:** --- and look at that.

14 **MR. WESTBROOK:** --- and then ...

15 **THE COURT:** I didn't read that.

16 **MR. WESTBROOK:** Yes, sir. The lodestar is  
17 calculated first, then the -- the Court  
18 considers whether to enhance the lodestar. You  
19 can't enhance something that doesn't exist yet.

20 **THE COURT:** Right. Well, can I stop you. Mr.  
21 Summers, it was my understanding that the  
22 lodestar is the enhancement.

23 **MR. WESTBROOK:** No.

24 **MR. SUMMERS:** With respect to Mr. Westbrook, I -- I  
25 -- that would be my and the Department's



1 assessment as well.

2 **THE COURT:** Okay.

3 **MR. SUMMERS:** But this is not an area ---

4 **THE COURT:** I just wanted to ---

5 **MR. SUMMERS:** --- that we've briefed extensively in  
6 this matter.

7 **THE COURT:** Okay. Well, even ---

8 **MR. SUMMERS:** But my -- my general understanding if  
9 -- and I'll call it general, is what the Court  
10 has been articulating to Mr. Westbrook.

11 **THE COURT:** And you know I'm just tell -- I want to  
12 be right on this.

13 **MR. SUMMERS:** Yes, sir.

14 **THE COURT:** You're not just telling me that because  
15 that's your position.

16 **MR. SUMMERS:** Oh, no.

17 **THE COURT:** I want ---

18 **MR. SUMMERS:** That is what my initial assessment  
19 was. Ultimately, Mr. Westbrook obviously is  
20 articulating his position.

21 **THE COURT:** Yeah.

22 **MR. SUMMERS:** And he briefed it, I think,  
23 extensively in the materials.

24 **THE COURT:** Okay. Well, I'll address it down the  
25 road, but what I was trying to explain to all



1 of y'all is I'm going to give, I think, the  
2 contingency compensation is going to be a  
3 consideration. We'll find out if you have a  
4 different position on that. I thought maybe I  
5 had a good compromise for y'all, but apparently  
6 I don't. So that's what I ---

7 **MR. WESTBROOK:** Judge, I mean, it's all in my memo.

8 **THE COURT:** Yeah.

9 **MR. WESTBROOK:** It's all in the memo.

10 **THE COURT:** Okay.

11 **MR. WESTBROOK:** And if you read Layman it -- it --  
12 it's Layman ...

13 **THE COURT:** I think you may also want to consider  
14 it's Duvall. I don't have the cite right off,  
15 but even if I go back and consider -- if we  
16 take the position that -- that I don't find  
17 that it's retro -- retroactive and I consider  
18 the -- the statute in 2009 and later but I  
19 think in 2010 is when it changed, I still would  
20 have to make a determination of the meaning of  
21 that statute and I think it's called Duvall.  
22 That is a case in which in interpreting a  
23 statute, the -- it's Duvall v. South Carolina  
24 Budget Control Board. Basically, it says that  
25 a change to the statute may be considered a



1 change to existing law and you consider the  
2 existing law and the subsequent change to make  
3 that determination or it could be clarifying  
4 original legislative intent. In other words,  
5 in interpreting the 2010 version of the  
6 statute, I could -- reading that -- that most  
7 current version, I could read that version as  
8 clarifying what 15 -- 15-77-300 originally  
9 intended, so I'm just letting you know that,  
10 that's a way of interpreting ---

11 **MR. WESTBROOK:** Your Honor, you have constitutional  
12 -- that's a due process clear violation to --  
13 to -- to apply a statute to divest vested  
14 rights.

15 **THE COURT:** Well, I agree with you on that.

16 **MR. WESTBROOK:** I've briefed -- what you -- you  
17 can't apply the new statute because -- because  
18 the contract is made per the old statute and if  
19 you use the new statute to uproot the old, it's  
20 a violation of due process. That's very clear.

21 **THE COURT:** So you're saying that you can draft a  
22 contract to -- to give you vested rights into  
23 what statute or the -- or the interpretation of  
24 a statute. Is that what you're saying?

25 **MR. WESTBROOK:** I'm saying that a contract -- if a



1 statute applies to a contract and not even have  
2 to be written in the contract, which is what  
3 this is, it's written in it.

4 **THE COURT:** Yeah.

5 **MR. WESTBROOK:** But even if it's applicable, our  
6 cases say that -- that you can't come along  
7 later and amend that statute. That's an  
8 impairment of contract and it also divests  
9 those vested interests that the -- the signees  
10 of that contract have to enforce that contract  
11 and -- and you can't -- you can't do that and  
12 so you've got impairment of contract.

13 **THE COURT:** Well, how in the -- how would -- if the  
14 -- if we did a shifting because maybe you're  
15 missing the point. I -- I think you really  
16 are.

17 **MR. WESTBROOK:** It's possible, Judge.

18 **THE COURT:** Yeah, is what 15-77-300 deals with is it  
19 takes us and Layman interpreted it, it takes  
20 us from the American Rules and shifts the  
21 requirement to pay the attorney's fees, so the  
22 individuals -- the inmates would not be harmed  
23 in any way by the shift because they would get  
24 all of the -- they would get all the  
25 compensation that they were due under -- and we



1 -- we even have to go -- let me go down that  
2 and then I'll tell you, but so the only issue  
3 is it shifts to the Department to pay the --  
4 pay the appropriate attorney's fees. Now under  
5 the current version of 15-77-300, that shift  
6 when it occurs limits the -- the agency from  
7 having to pay it -- attorney's fees in any  
8 amount greater than the original contingency of  
9 compensation or what was appropriate  
10 contingency compensation. But so I'm not  
11 talking about eliminating the -- the inmates  
12 from receiving compensation. We're just  
13 dealing with the calculation thereof, but I --  
14 what I wanted to tell you was, even before I  
15 get there, we've got to determine, number one,  
16 whether -- because there -- there's been  
17 divergency in this view in this area and -- and  
18 what I'm about to discuss in this Court as to  
19 whether any action in the Administrative Law  
20 Court is a civil action, so because 15-77-300  
21 only applies to civil actions. None of y'all  
22 have briefed that issue, but clearly under, I  
23 think it's McDowell. I'd have to go back and  
24 look at that. Anything that happens at the  
25 agency level is not considered a civil action.



1 The only Court that has ever interpreted  
2 anything regarding the APA action to be a civil  
3 action involved litigation in the Court of --  
4 in the Circuit Court and -- and I won't get  
5 into what this time about all that, but I've  
6 got to make a determination of whether it's a  
7 civil action. I've got to look at the  
8 substantial -- whether it was a substantial  
9 justification. I will tell you from -- from  
10 Ackerman standpoint that's going to make your  
11 -- your sledding pretty difficult because  
12 Ackerman said it was all arbitrarily increased.  
13 Now that holding wasn't in this case.

14 **MR. SUMMERS:** Correct, sir. But we're aware of the  
15 language that the Court just referenced.

16 **THE COURT:** Okay. But then -- then I've got to go  
17 through the time sheets and make determinations  
18 in -- at least in this case of the application  
19 of those time sheets to this case. I've got to  
20 make a contingency fee because consideration  
21 about the implications of that, then after all  
22 of that I've got to make a calculation of which  
23 one of the -- one of the considerations is, you  
24 know, the beneficial results obtained and --  
25 and I've got to make that analysis. So I'm



1 just telling you that those are all analyses  
2 I've got to make once I get jurisdiction of  
3 this case down the road. So that's one of the  
4 things I just wanted to explain to y'all.

5 **MR. WESTBROOK:** May I speak to one of those points  
6 you made?

7 **THE COURT:** Yes, well, I -- I don't want to address  
8 them quite yet. You can if you want, but I'm  
9 just -- I was just telling y'all both some  
10 considerations -- this is a status conference  
11 ---

12 **MR. WESTBROOK:** Yes, sir.

13 **THE COURT:** --- and I'm trying to let you know ---

14 **MR. WESTBROOK:** Yes, sir.

15 **THE COURT:** --- the status of the case.

16 **MR. WESTBROOK:** You mentioned -- I believe you  
17 mentioned, correct me if I'm wrong, that we  
18 didn't address the civil action issue. In the  
19 Ackerman -- Gatewood, you see, is not -- it's  
20 not addressed in that because the -- the  
21 petition for attorney fees in Gatewood, which  
22 we now have presently, only goes back through  
23 -- it doesn't go back to the Department because  
24 Gatewood here. ---

25 **THE COURT:** But ...



1 MR. WESTBROOK: --- only starts in 2012 after the  
2 Department ---

3 THE COURT: I -- I recognize that but ...

4 MR. WESTBROOK: It will be addressed in the Ackerman  
5 brief when I file that.

6 THE COURT: But even the litigation that occurred  
7 here, there is a question of law as to whether  
8 or not the litigation that occurs at the  
9 Administrative Law Court is a civil action.

10 MR. WESTBROOK: No, Judge, McDowell they said the  
11 Circuit Court, Judicial Review Court, in that  
12 case the Circuit Court, it was a Circuit Court,  
13 it was a civil action.

14 THE COURT: I'll just tell you that, that's an issue  
15 that's got to be addressed.

16 MR. WESTBROOK: Well, sure, anything can be an  
17 issue, but it's clear that -- that ---

18 THE COURT: We've got ---

19 MR. WESTBROOK: --- this is ...

20 THE COURT: --- we've got Judges of our Court who  
21 have held that actions in our Court are not a  
22 civil action, so you may ---

23 MR. WESTBROOK: It's -

24 THE COURT: --- disagree with them, but ---

25 MR. WESTBROOK: This is judicial review and that's



1           what the Court in McDowell said enabled Mrs.  
2           McDowell to take the case up because it was a  
3           judicial review ---

4           **THE COURT:** I -- I understand.

5           **MR. WESTBROOK:** --- matter.

6           **THE COURT:** I read that case. So, but I'm just  
7           saying I've got to make that determination.

8           **MR. WESTBROOK:** I know. But, to me the ...

9           **THE COURT:** There -- there's a dispute in my Court  
10          about that.

11          **MR. WESTBROOK:** Well, you had -- do -- does the  
12          Court have any cases ---

13          **THE COURT:** Well, we have this ---

14          **MR. WESTBROOK:** --- that have been litigated in the  
15          Appellate Courts on that?

16          **THE COURT:** No, that's what I'm saying, there --  
17          that I've got at least one Judge who is now a  
18          Federal Judge, who took the position that it's  
19          not a civil action in this case, but ---

20          **MR. WESTBROOK:** Was it on judicial review from an  
21          agency?

22          **THE COURT:** Well, it's either a contested case or  
23          appellate case. I think it was contested case.

24          **MR. WESTBROOK:** See, that was not judicial review  
25          then.



1     **THE COURT:**     I recognize and you can make that  
2                    argument, I'm just telling you that's something  
3                    I have to consider, Mr. Westbrook.

4     **MR. WESTBROOK:**   Well, it's not just an argument,  
5                    it's what McDowell said enabled her to have  
6                    review -- because it was the Judicial Review  
7                    Court that enabled her to do it.

8     **THE COURT:**   I'll consider -- I'm just telling -- all  
9                    I'm telling you it's an issue that I have to  
10                   decide in the case.

11    **MR. WESTBROOK:**   Yes, sir.

12    **THE COURT:**    I was trying to let y'all know the  
13                    status is these are the issues that I have to  
14                    decide. I wasn't trying to create an argument  
15                    or -- or raise anybody's blood pressure. So --  
16                    but -- it's something that I need to address  
17                    because that -- 15-77-300 brings it up. All  
18                    right. So with that, I now know the status of  
19                    the case. Is there anything else we need to  
20                    consider because I won't address this or do  
21                    anything today, anyway?

22    **MR. SUMMERS:**    I believe that is accurate, Your  
23                    Honor, based upon the current status of the  
24                    petitions for a hearing from the orders issued  
25                    by the Court of Appeals in both Ackerman and



1 Gatewood, which dismissed Mr. Westbrook's  
2 appeals. Those are still pending, those  
3 petitions for rehearing are still pending ---

4 **THE COURT:** So ...

5 **MR. SUMMERS:** --- and therefore, the Court's  
6 assessment is accurate.

7 **THE COURT:** All right. Thank y'all for your time.

8 **MR. WESTBROOK:** Thank you, Your Honor.

9 **MR. SUMMERS:** Thank you, Judge. Good to see you,  
10 sir.

11 **THE COURT:** All right.

12 **(There being nothing further, the Status Conference**  
13 **concluded at 10:34 a.m.)**

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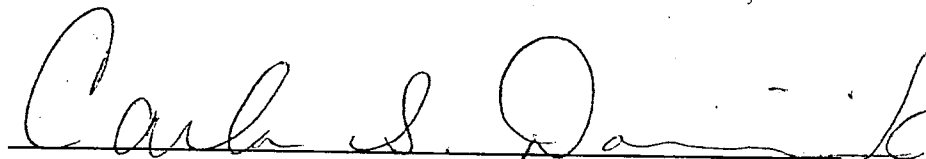


**CERTIFICATE**

This is to certify that the within Status Conference consisting of twenty nine (29) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said Status Conference was reported by the method of Stenomask with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on September 25, 2017.



Carla S. Dominick  
Court Reporter

Notary Public for South Carolina  
My Commission Expires: 3/13/2022



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