Greene, Diane

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SC Court of Appeals

From: Kitchings, Jenny
Sent: Wednesday, October 11, 2017 8:16 AM
To: Greene, Diane
Cc: Carter, Elizabeth A.; Howard, Patricia; Crater, Kate
Subject: FW: Appellate Case No. 2017-001554
Attachments: Petition for Review of Supersedeas Decision.pdf; Motion for Clarification.pdf

-----Original Message-----
From: Amy Armstrong [mailto:amy@scelp.org]
Sent: Tuesday, October 10, 2017 6:21 PM
To: Kitchings, Jenny <jkitchings@sccourts.org>
Cc: J Hartley <jhartley@nexsenpruet.com>; Tommy Lavender <TLavender@nexsenpruet.com>; Michael Corley <michael@scelp.org>; Terry Richardson <trichardson@rpwb.com>
Subject: Appellate Case No. 2017-001554

Dear Ms. Kitchings:

For the Court's convenience, I am attaching electronic versions of a Petition for Review of Supersedeas Decision and a Motion for Clarification in connection with the above-referenced matter. I am mailing the originals today.

Thank you,
Amy

--
Amy E. Armstrong
S.C. Environmental Law Project
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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2017-001554

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 Hutton 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 the Appellant/Respondent,

vs.

South Carolina Department of Health and Environmental Control, Respondent, and Roper Pond, LLC, Respondent/Appellant.

MOTION FOR CLARIFICATION OF AUTOMATIC STAY APPLICABILITY

TO: ALL PARTIES AND THE COURT OF APPEALS:

PLEASE TAKE NOTICE that Appellant/Respondent Town of Arcadia Lakes (the "Town") hereby moves the Court for an Order clarifying that the matters on appeal in this case are automatically stayed under Rule 241 of the South Carolina Appellate Court Rules and that none of the exceptions to automatic stay listed in that Rule are applicable.

Rule 241:

South Carolina Appellate Court Rule 241 governs the effectiveness of a lower court order on appeal. As a general rule, matters under appeal to this Court are automatically stayed, so as to preserve the effectuality of this Court's jurisdiction. See SCACR Rule 241(a) ("As a general rule,

the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision."). However, Rule 241(b) also provides exceptions, which are matters not automatically stayed on appeal. One of those exceptions, the "administrative tribunal exception," provides that the automatic stay does not apply to "[a]ppeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600 (G)(5)." See SCACR Rule 241(b)(11). The other relevant exception, the "money judgment exception," likewise provides that "[m]oney judgments as provided in S.C. Code Ann. § 18-9-130" are not automatically stayed. See Rule 241(b)(1).

Matters on Appeal:

This case started as a challenge to stormwater authorizations issued by the Department of Health and Environmental Control. The seventeen petitioners listed above challenged the stormwater authorizations issued to Roper Pond, LLC ("Roper Pond"), and the Administrative Law Court heard that challenge as a contested case. After the ALC upheld the authorizations, the merits of this case proceeded through the appellate system. Ultimately, the Supreme Court granted discretionary certiorari to the Town in order to consider the authorizations, but all of the disputed construction was completed during the pendency of review, so the Supreme Court was forced to dismiss the appeal as moot. (Order of April 9, 2015, attached as Exhibit A).

After final resolution of the merits of this case, the ALC considered Roper Pond's motion to recover attorneys' fees and sanctions. The ALC then awarded Roper Pond sanctions in the amount of $200,000, based on its conclusion that the Town brought this case solely for purposes of delay, and awarded Roper Pond $205,283.84 in fees and costs under the State Action Statute, S.C.

Code § 15-77-300 et seq. The orders from ALC Judge John D. McLeod imposing those sanctions and fees are presently before this Court on appeals filed by both by the Town and Roper Pond. The Town is seeking to stay its extraordinary payment obligation until the Court rules on these appeals.

Precedent for Automatic Stay:

The question of whether post-judgment fee awards are automatically stayed on appeal has been taken up directly by our appellate courts on multiple occasions, and the outcome is unequivocal: "**in this state an order for attorney fees has not been treated as a judgment that can be executed upon until it has at least been settled on appeal**." Woodside v. Woodside, 290 S.C. 366, 378, 350 S.E.2d 407, 414 (Ct. App. 1986) (emphasis added).

The Court of Appeals expressed and applied that principle in Woodside, which involved a husband who was ordered to pay the attorney fees of his wife, as part of divorce proceedings. Id. at 373, 350 S.E.2d at 411. The husband appealed the outcome of those proceedings and, during that appeal, withheld payment of certain sums awarded by the trial court. Id. This Court determined that, while other parts of the trial court's award were due immediately, the fee award was automatically stayed under Rule 241.[1] Id. at 378, 350 S.E.2d at 415. More specifically, this Court determined that fee awards are not money judgments and that payment should not be compelled prior to review on appeal:

> Supreme Court Rule 41, Section 1(A) provides that subject to the exceptions listed in Section 1(B), every appeal taken to the Supreme Court shall automatically operate as a stay of proceedings in the court below. Nothing in Section 1(B) expressly precludes attorney fees from the operation of the general rule stated in Section 1(A). **Arguably, however, attorney fees are money judgments and are excepted under provisions of Section 1(B)(1). Historically, in this state an order for attorney fees has not been treated as a judgment that can be executed upon until it has at least been settled on appeal.** Until

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[1] Woodside references Supreme Court Rule 41, sections 1(A), 1(B) and 1(B)(1), which are the same as current Rule 241(a), (b) and (b)(1).

then, it is more in the nature of a disbursement.

Id. (emphasis added).

Our Supreme Court reached the exact same conclusion by the exact same logic in State v. Cooper, wherein it held that a post-judgment fee award against the state did not have to be paid while that award was on appeal. See 342 S.C. 389, 536 S.E.2d 870 (2000). Cooper arose within the context of civil commitment proceedings, and the state had been ordered to pay fees incurred by the defendant in the underlying case. Id. at 399, 536 S.E.2d 876. Just like in this motion, the issue before the Court was whether such fee award was automatically stayed under Rule 241. Id. The Supreme Court noted Rule 241's money judgment exception, but concluded that it did not apply because a "judgment" is "a final decision of the court that **addresses the merits of the cause of action** and disposes of the cause as to all." Id. (emphasis added). In contrast, the Court concludes, "fees **are matters incidental to the case and do not constitute a traditional judgment as contemplated by the statute**." Id. (emphasis added). In short, the state did not have to pay the fee award it was appealing, because the Rule 241 automatic stay applied.

Woodside and Cooper stand as a strong precedent in favor of staying the fee/sanction award on appeal in this case. Just like in those cases, the fee/sanction award on appeal here is incidental to the underlying case and does not address the merits of the cause of action. This appeal fits squarely within the long-standing conclusion noted in Woodside that one cannot collect a fee award **"until it has at least been settled on appeal."** Indeed, if this appeal were originating from civil court, as Woodside and Cooper, there can be no doubt that the automatic stay would apply and that the $405,283.84 post-judgment award would not be due to Roper Pond until this Court decided whether to uphold that award. The only remaining question, then, is whether this appeal's origination in the Administrative Law Court changes that outcome.

Administrative Tribunal Exception:

On two separate legal bases, this Court should conclude that the automatic stay is applicable, even though this appeal arises from an administrative tribunal.

First of all, the administrative tribunal exception does not cover all appeals arising from the ALC, but rather only "[a]ppeals from administrative tribunals **as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600 (G)(5)**." SCACR Rule 241(b)(11) (Emphasis added). In other words, this exception to the automatic stay rule only covers appeals of ALC decisions that occur within the framework of those two sections. Reviewing those sections, it is clear that both relate exclusively to ALC review of the merits of a contested case. In other words, both sections describe appeals arising from the ALC's administration of its primary jurisdiction, in considering contested case challenges to permitting and licensing decisions. Neither § 1-23-380(A)(2) nor § 1-23-600(G)(5) cover the circumstance of a post-judgment award of attorneys' fees and sanctions, following final resolution of a contested case. In short, the administrative tribunal exception is not so broad as to cover the appeal before this Court.

Moving into more detailed treatment of the language, § 380(A)(2) provides that a party "who is aggrieved **by a final decision in a contested case** is entitled to judicial review pursuant to this article," but that "the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision." (emphasis added). Just the same, § 600(G)(5) also applies only to a "**final decision** issued by the Administrative Law Court **in a contested case**."[2] (Emphasis added). As described above, the Town has previously appealed the ALC's final

[2]The full language is as follows: "A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals."

decision in the contested case. And, when the Town appealed the ALC's decision on the stormwater authorizations, that decision was not automatically stayed, in accordance § 380(A)(2) and § 600(G)(5). The two statutory sections referenced in the administrative tribunal exception do not cover a fee award issued incidental and subsequent to a final decision on the merits of a contested case.

While this appeal originates from the ALC, the rulings and remedies at issue here have nothing to do with the ALC's administrative function, which is embodied in § 1-23-380(A)(2) and § 1-23-600(G)(5) . Rather, this appeal involves a monetary award, which is highly unusual territory for the ALC. Under South Carolina's Administrative Procedures Act, the ALC is an "agency" authorized to hear "contested cases," which are proceedings including "ratemaking, price fixing, and licensing." S.C. Code § 1-23-505. The typical function of the ALC is to consider permitting or licensing decisions from within executive department agencies, just as the ALC did in this underlying case. The exception in Rule 241(b)(11) recognizes that ALC decisions on such matters typically should be given immediate effect. However, when the ALC leaves the territory of licenses and permits and enters the realm of post-judgment fee/sanction awards, an entirely different set of considerations are implicated. Any other type of civil court in the state could award fees under the State Action Statute or could impose sanctions, just as the ALC has done here, and there is no basis under the plain language of the applicable law for treating this fee/sanction award differently, simply because it arises from an administrative forum.

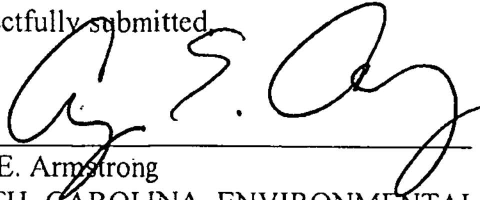
As an additional basis for dismissing the administrative tribunal exception, it would also be appropriate for this Court to read Woodside and Cooper as reflecting a principle of law that is

superior to the exception stated in Rule 241(b)(11). Both of those cases broadly state and explain the legal principle that fee awards are automatically stayed on appeal. The only way, then, to find the automatic stay inapplicable here is to put an exception stated in the procedural rules above the principles stated by this Court and the Supreme Court in Woodside and Cooper. The Supreme Court has made clear, though, that the terms of Rule 241 are modified by superior sources of law: "[c]ertain exceptions to [Rule 241] are found in **statutes**, court rules, and **case law**." Cooper, 342 S.C. at 399, 536 S.E.2d at 876 (emphasis added). Woodside and Cooper establish a legal principle as to the applicability of automatic stay to fee awards that cannot be undone by the administrative tribunal exception. As described above, the sanction/fee award's origination in an administrative tribunal is very much secondary to the legal standards under which such award was ordered, and the Court therefore should read the Woodside logic as controlling. Fee and sanction awards, like the one at issue here, cannot be executed upon until settled on appeal.

Conclusion:

For the reasons stated herein, the Town respectfully requests that the Court clarify its obligations in relation to Rule 241 by declaring that the Town's obligation to pay $405,283.84 in fees and sanctions is automatically stayed pending resolution of this appeal.

Respectfully submitted,



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October 10, 2017