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 . . . . . Respondent,

and

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

APPELLANT'S REPLY BRIEF OF RESPONDENT/APPELLANT ROPER POND, LLC

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Respondent/Appellant Roper Pond, LLC ("Roper Pond") submits this Reply Brief in response to Respondent's Initial Brief of Appellant/Respondent Town of Arcadia Lakes ("Town") and in further support of its cross-appeal.

ARGUMENTS

I. THE *BON SECOURS* HOLDING SUPPORTS THE AWARD OF SANCTIONS TO ROPER POND FOR THE COSTS OF DELAY IN CONSTRUCTION OF THE PROPOSED PROJECT.

The *Bon Secours* holding squarely supports Roper Pond's argument that the payment of the award of sanctions to the Administrative Law Court ("ALC") is improper. In *Bon Secours*, the South Carolina Supreme Court held that the costs incurred by the court and jurors as a result of an improper second removal to federal court could not be recovered as sanctions:

> The award to the other party of its detailed, itemized costs and fees incurred as a result of the improper removal plainly is allowed under the express language of Rule 11, SCRCP. However, we find Judge Baxley abused his discretion in going beyond the conventional awards of costs and fees when he required Appellants to reimburse the South Carolina Judicial Department for the cost of the court's salary and benefits for the week it was unable to proceed with the scheduled trial, to reimburse the Charleston County Clerk of Court for the expense it incurred in summoning and administering the jury panel, to pay $5,000.00 to the Access to Justice Commission with a letter of apology to Robin Wheeler, and to pay $50.00 to each juror with a letter of apology. Accordingly, we reverse those sanctions.

Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 600-01, 713 S.E.2d 624, 629-30 (2011). In this case, the ALC did not specify the basis for ordering the Town to pay the sanctions to the ALC; however, even if the ALC had provided an itemized details of the reimbursements to the ALC as a consequence of the Town's action in bringing the contested case solely for the purpose of delay, the *Bon Secours* holding clearly prohibits such reimbursement. However, the holding does not prohibit the

reimbursement of costs incurred by Roper Pond as result of the delay caused by the Town's action. Indeed, the *Bon Secours* holding supports the award of sanctions to Roper Pond as reimbursement of a portion of the costs incurred by Roper Pond as a result the delay in construction during the pendency of the contested case.

The Town argues *Bon Secours* "stands for the proposition that sanction in excess of legal fees and costs necessarily constitutes an abuse of discretion." (Respondent's Initial Brief, p. 5). This argument inaccurately characterizes the holding in *Bon Secours*. While the award of sanctions to be paid to the plaintiff doctor were not at issue in the appeal, the Supreme Court did consider the validity of those sanctions in its ruling. Specifically, the Supreme Court explained as follows:

> As explained in *Runyon v. Wright*, a trial judge has wide discretion in ordering sanctions. Judge Baxley found Appellants' second removal attempt to be reprehensible and an improper delay tactic that cost the court system and the other party significant resources, time, and money. For that reason, Judge Baxley imposed stiff sanctions. **While the unappealed portion of the ordered sanctions are standard and appropriate**, we find the sanctions appealed from exceed the bounds of a judge's discretion.

Id. at 600, 713 S.E.2d at 629 (emphasis added). Accordingly, the Supreme Court recognizes that the sanctions of "lost income to Dr. Wieters, trial costs and fees, and reasonable attorneys' fees" are proper under Rule 11. The Town therefore incorrectly argues that the *Bon Secours* holding prohibits an award of sanctions for any costs "in excess of legal fees and costs." Moreover, contrary to the Town's assertions, there is no ambiguity in the award of "lost income" awarded to the plaintiff doctor. This is unquestionably "lost income to Dr. Wieters" suffered as a result of the second removal to federal court which the judge found to be "interposed solely for delay." *Id.* at 595, 713 S.E.2d at 627. In this case, the ALC found that the Town brought this action solely for

the purpose of delay and imposed sanctions against the Town under Rule 72, SCRPALC. Roper Pond incurred substantial costs as a result of the delay during the pendency of the contested case. Therefore, the sanctions imposed against the Town should be paid to Roper Pond as partial reimbursement for those costs.

II. THE AVAILABILITY OF A MECHANISM TO LIFT THE AUTOMATIC STAY DURING THE CONTESTED CASE DOES NOT PRECLUDE AN AWARD OF SANCTIONS TO ROPER POND.

Pursuant to Section 1-23-600 of the South Carolina Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA"), the DHEC authorization at issue in this case was automatically stayed upon the filing of the request for a contested case. S.C. CODE ANN. § 1-23-600(H)(2). The APA further provides that "[u]pon motion by any party, the court shall lift the stay for good cause shown or if no irreparable harm will occur, then the stay shall be lifted." S.C. CODE ANN. § 1-23-600(H)(4). The Town argues that in failing to move the ALC to lift the automatic stay, "Roper Pond failed to take advantage of an administrative procedure through which those costs would have been avoided altogether." (Respondent's Initial Brief, p. 6). The Town thus argues that Roper Pond failed to mitigate the damages caused by the filing of this contested case. (Respondent's Initial Brief, p. 7). There is simply no basis for such argument when the damages to be mitigated arise from the wrongful action of a party in bringing the legal proceedings which caused the damages. Moreover, even if Roper Pond had a duty to mitigate, which it did not, there was no reasonable basis for moving to lift the automatic stay in this case. *Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997) ("A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate damages; however, the law does not require unreasonable exertion or substantial expense for this

to be accomplished."). As discussed below, the Town would almost certainly have opposed a motion to the lift the automatic stay. Moreover, the ALC has held that "good cause" and "irreparable harm" under Section 1-23-600 of the APA cannot be normal, foreseeable economic harm caused by the delay in the effect of a permit or governmental authorization.

After the ALC issued the final decision in the contested case in 2010, the Petitioners filed a Motion to Reconsider and for Stay. (*See* Order Denying Motion to Reconsider and For Stay, R. pp. 166-167). Therefore, there can be no doubt that the Petitioners would have opposed a motion to lift the automatic stay filed immediately following the initiation of the contested case in February 2009. Moreover, under the relevant precedent, there was no reasonable basis for Roper Pond to move to lift the automatic stay. As the moving party, Roper Pond would have the burden of proof to show that good cause exists to lift the automatic stay and that no irreparable harm will result from the lifting of the automatic stay. *Leventis v. South Carolina Dep't of Health and Envtl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that in administrative proceedings, the burden of proof is on the party asserting the affirmative of an issue). The ALC has found that "[t]he principle articulated in our case law is that 'good cause' requires some showing more than 'any cause,' which would render the word 'good' meaningless." *Heath Hill v. S.C. Dep't of Health and Envtl. Contro*l, Docket No. 08-ALJ-0183-CC, 2008 WL 3863539, *3 (S.C. Admin Law. J. Div. Jul. 10, 2008). In fact, in ruling on a motion to lift the automatic stay in 2008, the ALC explained: "Lifting the stay based upon the normal, foreseeable delay, expense, and lost profits associated with an applicant's inability to continue with a project due to the

operation of the automatic stay would contradict the legislative purpose of imposing one. Consequently, the court finds that a movant must show circumstances other than those generally suffered by prospective permittees or licensees to lift the stay." *Sisters of Charity Providence Hospitals v. S.C. Dept. of Health and Envtl. Control and Lexington County Health Services Dist., Inc. d/b/a Lexington Medical Center*, Docket No. 14-ALJ-07-0332 (S.C. Admin Law. J. Div. Dec. 1, 2014) (quoting *MRI at Belfair, LLC v. S.C. Dept. of Health and Envtl. Control*, Docket No. 07-ALJ-07-0538-CC (S.C. Admin Law. J. Div. May 22, 2008).[1] Accordingly, Roper Pond had no reasonable grounds for moving to lift the stay. The Town's argument that Roper Pond thus waived its right to seek sanctions under Rule 72, SCRPALC, by failing to so move is without merit.

While the foreseeable costs of delay in a project may not support a motion to lift the automatic stay under Section 1-23-600 of the APA, such costs are appropriately recovered as sanctions when an action is brought solely for the purpose of delay. The Town argues that "the entire idea of 'delay costs' is a misnomer, given the administrative context" because the ALC is part of the executive branch decision-making on a permit issuance. (Respondent's Initial Brief, p. 7). The Town thus argues that "Roper Pond cannot claim undue 'delay' during the ALC proceeding any more than it could claim the same from the ordinary process of applying for a permit and awaiting an initial DHEC staff decision." (Respondent's Initial Brief, pp. 7-8). As preliminary matter, this argument ignores the facts in this case. The DHEC staff made the decision at issue in

[1] *Sisters of Charity Providence Hospitals v. S.C. Dept. of Health and Envtl. Control and Lexington County Health Services Dist., Inc. d/b/a Lexington Medical Center*, Docket No. 14-ALJ-07-0332 (S.C. Admin Law. J. Div. Dec. 1, 2014) is publicly available of the South Carolina Administrative Law Court at http://www.scalc.net/search.aspx. Similarly, in ruling on a motion for preliminary injunction, this Court has noted that "[g]enerally, pure economic loss is not sufficient to satisfy the requirement of showing an irreparable harm where an adequate remedy is available at law." *Prof'l Wiring Installers, Inc. v. Sims*, 2008 WL 9840409, at *3 (S.C. Ct. App. Mar. 12, 2008) (citing *MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003).

this case on December 15, 2008, and the ALC issued is final decision on the contested case on January 21, 2010. Contrary to the Town's asserts, Roper Pond can unquestionably claim an undue delay as a result of the Petitioners' filing of this contested case. More importantly, the Town's argument ignores the very basis of the award of sanctions. Rule 72, SCRPALC, provides for sanctions for matters before the Administrative Law Court when "the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay." Rule 72, SCRPALC. Accordingly, the Town cannot argue that sanctions for delay under Rule 72 are not available for an action before the ALC. Such sanctions are only available for matters before the ALC.

III. THE COSTS OF DELAY OF THE PROPOSED PROJECT AS ATTESTED TO IN THE AMENDED MICKEL AFFIDAVIT IS A PROPER CONSIDERATION FOR THE AWARD OF SANCTIONS UNDER RULE 72, SCRPALC.

While the ALC properly determined the amount of sanctions based on the Town's circumstances and financial condition, the costs of delay to Roper Pond should be the primary consideration in determining the appropriate recipient of such sanctions. In striking the Amended Mickel Affidavit, the ALC incorrectly found the Affidavit "has no relevance to the determination of the type and amount of sanction to discourage the Town from like conduct in the future." (March 24, 2017 Order, p. 6, R. p. 22). Again, the South Carolina Supreme Court has acknowledged that costs incurred by an opposing party is an appropriate consideration when awarding sanctions for legal action taken solely for the purpose of delay. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. at 596, 713 S.E.2d at 627. Moreover, as discussed at length in Roper Pond's Appellant's Brief, the ALC erred in striking the Amended Mickel Affidavit because the

ALC had already relied on the Affidavit as evidence in support of findings in the September 1, 2016 Order and the March 15, 2017 Amended Order when it granted the Town's motion to strike the Amended Mickel Affidavit on May 24, 2017.

The Town argues that the Amended Mickel Affidavit "is filled with vague assertions about exorbitant delay costs without supporting documentation that would have allowed the Town to test the validity and veracity of the statements and to prepare an appropriate response." (Respondent's Initial Brief, p. 9). There is simply no basis for this argument. The ALC granted the Town's motion to strike the Amended Mickel Affidavit based on the legal conclusion that the Affidavit "has no relevance to the determination of the type and amount of sanction to discourage the Town from like conduct in the future." (March 24, 2017 Order, p. 6, R. p. 22). However, the ALC did not find that the Amended Mickel Affidavit was not valid. Contrary to the Town's assertions, the Amended Mickel Affidavit is Mr. Mickel's sworn statement of facts in his personal knowledge on a matter on which he is competent to testify and would thus satisfy the requirements for an affidavit under Rule 56, SCRCP. (Amended Mickel Affidavit, R. pp. 1307-1420). Mr. Mickel attests to the nature and basis of the costs caused by the delay in construction in Paragraph 3 of the Affidavit. (Amended Mickel Affidavit, p. 1-2, R. p. 1307-1308). Mr. Mickel further attests to the time period for which the costs were calculated. (Amended Mickel Affidavit, pp. 1-2, R. pp. 1307-1308). Additionally, the Mickel Affidavit includes and authenticates the business records used to make those calculations. (Ex. 1 to Amended Mickel Affidavit, R. pp. 1309-1420). Accordingly, there is no basis for the Town's claims that the Amended Mickel Affidavit is "filled with vague assertions about exorbitant delay costs without

supporting documentation." The Amended Mickel Affidavit was properly offered in support of Roper Pond's claims on the basis and amount of the costs of delay of the Proposed Project during the pendency of the contested case and support Roper Pond's claim that the sanctions under Rule 72, SCRPALC, should have been awarded to Roper Pond.

IV. THE ACTION PENDING IN RICHLAND COUNTY DOES NOT PRECLUDE AN AWARD OF SACTIONS TO ROPER POND.

The Town argues that a separate action filed by Roper Pond in state court against Linda Jackson, Richard Thomas, and Brian Bates was brought "in order to land a windfall off of its status as defendant in a legitimate lawsuit." (Respondent's Initial Brief, p. 3). Contrary to the Town's assertions, Roper Pond is not seeking a "windfall" as result of the costs incurred by Roper Pond as a result of the delay during the pendency of the contested case. Roper Pond has offered evidence documenting more than $600,000 in additional costs incurred as a result of the delay in the construction of the Proposed Project. The ALC awarded $200,000 in sanctions which would not make Roper Pond whole. Roper Pond acknowledges that sanctions under Rule 72, SCRPALC, is not the venue for seeking full recovery of its damages as a result of the Town's action in bringing this contested case. As such, Roper Pond is entitled to take additional legal action to recover all of the damages suffered as a result of this action. However, the state court action against three individuals does not preclude the award of sanctions against the Town for bring the contested case "solely for the purposes of delay." Rule 72, SCRPALC.

If this Court reverses the ALC and awards the $200,000 in sanctions to Roper Pond, then the individuals in the state court action may argue that they are entitled to a

setoff against damages for the sanctions awarded to Roper Pond. *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000) ("The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties."); *W. M. Kirkland, Inc. v. Providence Washington Ins. Co.*, 264 S.C. 573, 580, 216 S.E.2d 518, 521 (1975) (stating that a setoff belongs to the inherent power of a court in the exercise of its equitable jurisdiction); Tubbs v. Bowie, 308 S.C. 155, 417 S.E.2d 550 (1992) (holding one tortfeasor is entitled to credit for the amount paid by another tortfeasor). The fact that Roper Pond has taken additional action against other parties to seek full recovery of its damages does not affect its right to sanctions against the Town under Rule 72, SCRPALC. Roper Pond presented evidence and the ALC properly found that the Town brought the contested case solely for purposes of delay. The ALC further found that the delay had caused economic harm to Roper Pond. (September 1, 2016 Order, p. 38, R. p. 101; March 15, 2017 Order, p. 38, R. p. 62). Regardless of the outcome of the state court action against the individuals, Roper Pond is entitled to the award of sanctions against the Town under Rule 72.

V. CONCLUSION

For the reasons stated herein, the Court should reverse the ALC's ruling on the payment of sanctions to the ALC and hold that the sanctions of $200,000 against the Town should be paid to Respondent/Appellant Roper Pond, LLC.

Respectfully submitted,

June 7, 2018

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JUN 07 2018
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CERTIFICATION OF COUNSEL

The undersigned hereby certifies that Appellant's Reply Brief of Respondent/Appellant Roper Pond, LLC complies with Rule 211(b), SCACR.

June 7, 2018

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