STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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.

RESPONDENT'S BRIEF OF APPELLANT/RESPONDENT TOWN OF ARCADIA LAKES

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STATEMENT OF ISSUES ON APPEAL

I. Did the Administrative Law Court properly decline to consider Roper Pond's alleged construction delay costs, and properly decline to award those costs as sanctions, when no precedent exists for a post-judgment award in excess of fees and costs?

II. Did the Administrative Law Court properly decline to award Roper Pond's alleged construction delay costs as sanctions, when such costs are properly the subject of an separate civil lawsuit, and Roper Pond has indeed filed such a lawsuit?

III. Did the Administrative Law Court properly decline to award Roper Pond's alleged construction delay costs as sanctions, when Roper Pond did not take steps to mitigate those costs?

IV. Did the Administrative Law Court properly ignore Roper Pond's Mickel Affidavit, when such affidavit was not possibly relevant to the sanctions inquiry before the ALC and when the content of such affidavit could not be tested through discovery?

STATEMENT OF THE CASE

The Town of Arcadia Lakes ("the Town") hereby adopts and incorporates the Statement of the Case contained in the brief it submitted as Appellant.

ARGUMENT

Summary of Argument

As explained and examined in the Town's Appellant brief, South Carolina has no precedent for a sanction award exceeding the amount of full fees and costs incurred. When a party in South Carolina is deemed to have undertaken an unjustified course of action in litigation, the maximum reparation is, and without fail has been, the full fees and costs of the opposing party. Indeed, an award beyond full fees and costs crosses the line from post-judgment censure to the territory of compensatory or punitive damages that should be pursued through a separate legal claim for abuse of process, malicious prosecution, or some other independent cause. The Appellant brief filed by Roper Pond, LLC ("Roper Pond") reflects, and is necessitated by, the Administrative Law Court's ("ALC") confusion as to exactly what to do when it crosses that line and orders a sanctions award for which there is no precedent. The fact that nobody, including the ALC, knows exactly where the $200,000 sanction award should go is plainly indicative of the fact that the award never should have been ordered.

Given, however, that the ALC was not inclined to reconsider what the Town believes is the most punitive fee/sanction award in South Carolina history, the Court chose the better of its two options and created new law by taking the sanction award for itself, rather than paying speculative compensatory damages to Roper Pond. Specifically, some time after the ALC had awarded fees and sanctions essentially equivalent to double all of Roper Pond's fees and costs for

all proceedings related to this case, the ALC rightfully realized that it would be a serious legal error to simply hand this windfall over to Roper Pond. Rather than reevaluate its fee/sanction award, the ALC resolved the dilemma by taking the excess funds into its own coffers, though without any explanation as to why such sum was due to the Court itself.

Even though it was the entire purpose of Roper Pond's filing of a separate appeal, Roper Pond has not and cannot cite to a single authority reflecting that it should receive the $200,000 sanction in excess of fees and costs, rather than the ALC. Contrary to Roper Pond's tortured and acutely inaccurate reading of a couple of words in the Bon Secours case, infra, South Carolina has no precedent even close to supporting the proposition that a party should be paid for construction delay costs through a post-judgment sanction. Such proposition lacks any legal or logical basis, and Roper Pond's Appellant brief reflects as much.

Additional Relevant Facts

In addition to the facts discussed in the Town's Appellant brief, this Court can take judicial notice of the fact that Roper Pond has filed a separate action in the Court of Common Pleas for Richland County against Richard Thomas, who was mayor of the Town during the merits portion of this case; Linda Jackson, who is a named Petitioner in this case and was a Town Council member during the merits portion of this case; and Brian Bates who, according to Roper Pond's civil complaint, "is an engineer residing in the Town and informally advised and assisted the Town in opposing Roper's development." This action is pending as case number 2017-CP-40-07115, and is available at the Richland County public index.[1]

Roper Pond has sued Thomas, Jackson, and Bates for abuse of process and malicious

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[1]See <http://www6.rcgov.us/SCJDWeb/PublicIndex/>.

prosecution based on their alleged role in bringing and pursuing the case underlying this appeal. See Complaint, 2017-CP-40-07115. Roper Pond is seeking to recover, as "actual and consequential damages," exactly the same alleged construction delay costs it claims to be entitled to as sanctions in this appeal. See Complaint, ¶¶ 29-33 ("As a result of ... the meritless contested case challenge to the permit, Roper suffered construction delays of thirteen months and related damages... Roper has suffered actual and consequential damages resulting from the thirteen month construction delay."). The elements of alleged delay damages that Roper Pond claims in its civil suit are exactly the same, to the dollar, as the elements for which Roper Pond seeks to attribute the $200,000 sanction retained by the ALC. See Complaint, ¶ 33; Roper Pond's Appellant brief, pp. 4-5.

In short, at the same time Roper Pond has filed a separate appeal here to argue that the ALC's sanctions award should go to offset its construction delay costs, Roper Pond is suing individual parties affiliated with this case in order to recover the same alleged construction delay costs, in full. Roper Pond's actions in bringing this civil case reflect its knowledge of the proper mechanism through which to pursue recovery of delay costs, if such damages are due, and its insincerity in arguing here that such costs are the purview of a sanctions award. Apparently emboldened by the ALC's uniquely excessive fee/sanction award and one-sided findings, Roper Pond is seeking to turn our American rule for legal fees on its head, lashing out in every direction in order to land a windfall off of its status as defendant in a legitimate lawsuit.

I. Roper Pond Cannot Retain the Sanctions Award

South Carolina law does not provide legal or logical support for the proposition that Roper Pond should retain $200,000, in addition to its full fees and costs, as compensation for

alleged delay in its construction timeline for the project that was the subject of the original contested case challenge, and which project Roper Pond since completed approximately three years ago.

A. Roper Pond's Retention of Sanctions has no Support in Case Law

South Carolina jurisprudence contains an abundance of cases wherein courts have taken up the question of whether an unjustified course of action in litigation warrants sanctions or fees. See, e.g., cases cited in the Town's Appellant brief. Notably, however, not a single one of these cases has ever awarded sanctions unrelated to the direct costs of participation in legal proceedings. Any party forced to participate in a lawsuit could point to foregone opportunities, delayed or changed plans, or other setbacks that were endured personally or professionally because of the burden of litigation. But no South Carolina court has ever endeavoured to evaluate these compensatory damages and bestow them as a sanction award. Legal fees and costs, which flow directly from the requirement of prosecuting or defending legal action, has been the limit of fee and sanction awards retained by litigants.

Facing this reality, Roper Pond cites only to a single case in support of its argument that the ALC wrongfully retained the sanctions award, and Roper Pond misrepresents that case. Contrary to Roper Pond's presentation, Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 713 S.E.2d 624 (2011), is a case about reversal of sanctions in excess of legal fees and costs. Perhaps more than any other case in South Carolina jurisprudence, it stands for the proposition that a sanction in excess of fees and costs necessarily constitutes an abuse of discretion. See Bon Secours, 393 S.C. at 600, 713 S.E.2d at 629 ("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.**" (emphasis added)). Indeed, the Supreme Court in Bon Secours emphatically reversed all sanctions in excess of fees and costs that were before the Court. Id. at 596, 713 S.E.2d at 627 (reversing sanctions calculated by the court to be equivalent to the cost of disruption to court personnel and jurors from the improper filings). Again, contrary to Roper Pond's presentation, the outcome had nothing to do with whether the court or the litigant retained the excess sanctions.

In order to portray this case, which is actually in direct contradiction of its position, as a supporting case, Roper Pond places its entire focus on an issue that was not even before the Supreme Court. The Bon Secours opinion contains a single statement that Judge Baxley's original sanction order included "$53,685.65 for lost income to Dr. Wieters, trial costs and fees, and reasonable attorneys' fees." Id. The Court provides no other details about what is meant by "lost income," nor any analysis of that component of the sanctions, and it is only mentioned this one time. The reason why this part of the sanction award received so little attention (except from Roper Pond) is because it was not an issue on appeal. As stated by the Court in reference to the $53,685.65 sanction: **"These sanctions have been resolved separately by the parties and are not at issue in this appeal.**" Id. at fn.7 (emphasis added). In short, whatever was meant by "lost income" as part of the costs and fees sanction award of the trial court, it was not on appeal to the Supreme Court and was a meaningless blip in the Supreme Court's opinion affirming fees and costs as the maximum appropriate sanction.[2]

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[2]Furthermore, while not belabouring the point, it is an enormous stretch to equate Dr. Wieters' "lost income," in the context of Bon Secours, with the construction delay costs cited by Roper Pond. Sanctions were imposed in Bon Secours after the defendant made a frivolous filing

B. Roper Pond's Retention of Sanctions is Contrary to Administrative Process

The origin of this case in the Administrative Law Court, where South Carolina's administrative procedures are applicable, makes Roper Pond's retention of sanctions even more dubious than it otherwise would be.

First of all, Roper Pond is claiming sanctions to compensate for delay costs during the ALC proceedings, but Roper Pond failed to take advantage of an administrative procedure through which those costs would have been avoided altogether. The authorizations for Roper Pond's construction project were automatically stayed upon filing in the ALC by the seventeen Petitioners. See S.C. Code § 1-23-600(H)(2). It is true that Roper Pond could not proceed with the disputed portions of its project while this automatic stay was in place. However, the Administrative Law Court may lift the automatic stay upon request of the permit holder. S.C. Code § 1-23-600(H)(4). Roper Pond, though, never even asked the ALC to lift the stay so that it could proceed with construction while the ALC case was pending.[3] Rather than taking the relatively ordinary step of asking to be relieved from the automatic stay, Roper Pond allegedly placed the project on hold and endured the delay costs it now claims to be due.

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three hours before trial was set to start. Id. at 594, 713 S.E.2d at 627. The filing required cancellation of the trial at the very last minute, despite the fact that plaintiff, a physician, was prepared to move forward. Id. While the Supreme Court provides no discussion, it is reasonable to assume under the circumstances that any "lost income" awarded to Dr. Wieters by the trial court was because of the work he missed due to the cancelled trial. Such a limited ruling, again directly tied to Dr. Wieters' participation in court proceedings, is a far cry from Roper Pond's position that it is essentially entitled to be compensated for any changes in position incidental to its status as a party.

[3]Roper Pond was free to proceed with construction, and did proceed to completion, except for when this automatic stay was in place during the ALC proceedings. All of Roper Pond's alleged delay costs arise from the period of the automatic stay.

As discussed throughout this brief, the alleged delay costs sought by Roper Pond are akin to compensatory damages, rather than the fees and costs typical of a post-judgment sanction. If Roper Pond wants to treat sanctions as damages, then surely it must also be subject to the duty to mitigate those damages. It is well understood that a party cannot recover damages that could have been avoided through reasonable mitigating action. Roper Pond claims to be due the equivalent of damages, through its pursuit of compensatory delay costs, but Roper Pond did not take even the most basic step in an attempt to avoid the damages it claims. On top of all the other grounds discussed herein, Roper Pond's failure to ask for permission to proceed with construction should be disqualifying of the sanction award it seeks.

Secondly, the entire idea of "delay costs" is a misnomer, given the administrative context. The Administrative Law Court is defined under state law as an executive agency. S.C. Code §§ 1-23-310; 1-23-500. A "contested case," as was this case before the ALC, is defined as a proceeding where the legal rights of a party are determined by an agency. Id. Under these provisions and others in the Administrative Procedures Act, S.C. Code § 1-23-10, *et seq.*, an ALC hearing is for all intents and purposes part of the executive branch decision as to whether a permit is issued. See, e.g., S.C. Code § 1-23-380 ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" in the appellate courts); see also S.C. Code § 44-1-60. In other words, the ALC hearing in this case did not delay action on Roper Pond's construction permit because Roper Pond did not have a construction permit until the ALC issued a decision on the merits regarding that contested permit and the construction activity it authorized. Roper Pond cannot claim undue "delay" during the ALC proceedings any more than it could claim the same

from the ordinary process of applying for a permit and awaiting an initial DHEC staff decision. Given that Roper Pond suffered no delay from the actual judicial review of its permit (in the appellate courts), the entire basis of Roper Pond's claim to retention of the sanction award is a misconstruction of the ALC proceedings.

II. Roper Pond's Mickel Affidavit was Appropriately Stricken

On several bases, the affidavit of Charles Mickel, which purports to describe additional costs incurred by Roper Pond on account of litigation delay of its construction timeline, was properly ignored by the ALC.

First and foremost, given that a South Carolina court has never awarded sanctions unrelated to the direct costs of participation in legal proceedings, the Mickel affidavit bears no possible relevance to the ALC's sanctions inquiry. Rather, the affidavit is more appropriately suited for a civil damages action, and it has subsequently been used for that purpose by Roper Pond.

Secondly, it takes extreme legal gymnastics on the part of Roper Pond to craft an argument that its alleged delay costs somehow inform the court's consideration of what sanctions are necessary in order to deter like conduct from the Town in the future. Bound by the command in ALC Rule 72 to impose such sanction as "discouragement of like conduct in the future may require," the ALC properly focused its sanction analysis on the *Town's* financial resources in relation to the *Town's* likelihood of recidivism. Rule 72 says to craft a sanction adequate to change the offender's conduct–not a sanction adequate to make the opposing party whole–and the ALC attempted to follow that directive, in part, by ignoring the Mickel affidavit. Once again, Roper Pond's argument to the contrary rests fully on the Bon Secours case. Even though the Bon

Secours case was decided under a different sanction rule; did not award sanctions for delay or other incidental costs; did not award sanctions for purposes of deterrence or discouragement; and, in fact, rejected the only sanction award under consideration; Roper Pond attempts to argue that the case stands for the proposition that Roper Pond's alleged delay costs are relevant to "discouragement" of the Town. The Town will not reexamine all the reasons why Roper Pond's narrative of the Bon Secours case is false. See, supra, Section I.A.

Third, in the absence of discovery (which the ALC denied and Roper Pond opposed), the ALC's admission of the Mickel affidavit would have worked an unfair, inflammatory bias against the Town. Mickel's 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 or to prepare an appropriate response. Just because Roper Pond was charged and paid expenses relating to its construction project, as is reflected in Mickel's supporting documents, does not reflect that such costs were the result of any delay or that such delay was caused by the Town. Given that Roper Pond never asked to lift the automatic stay in the ALC, that no stay was imposed while the merits of this case were on appeal, and that the entire Roper Pond project was completed in-full during the pendency of the merits appeal, the exorbitant figures advanced by Mickel are incredible, but the Town has not been provided the opportunity, through discovery, to prove them a fallacy. Practically, then, the Mickel affidavit cannot be considered now without remanding these proceedings to the ALC for much more involved proceedings including discovery and submission of new evidence (as opposed to the ALC's present decision, which was confined to the existing record).

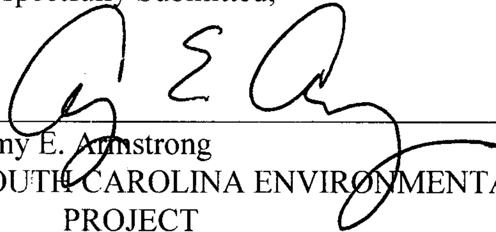
Finally, throughout its Appellant brief, Roper Pond gives undue weight and attention to

the "September 1, 2016 order," which is in fact a nullity. The order issued by the ALC on September 1, 2016 was replaced and supplanted, based on the ALC's recognition of a serious legal error, and the order's content was thereby rendered totally meaningless. The ALC's practice of signing proposed orders drafted by the prevailing party is not a revelation, and such practice was followed here in relation to this first order. Roper Pond drafted that order to say that its costs of delay should be shifted onto the Town in the form of sanctions and cited the Mickel affidavit for proof of those costs. However, once confronted with the prospect of executing this directive, the ALC independently recognized the weight of contrary legal authority and issued a new order, eliminating citation to the Mickel affidavit and all references to shifting delay costs. The fact that the Mickel affidavit was utilized in a null order carries no weight whatsoever. Further, the record reflects that the ALC ruled in Roper Pond's favor to the maximum possible extent at each step of these fee/sanction proceedings. In that light, the Town believes the fact that the ALC recognized it could not legally justify paying Roper Pond for its alleged delays or admitting the Mickel affidavit without discovery is telling as to just how strong the law is in the Town's favor here.

CONCLUSION

For all of these reasons, the Appellant/Respondent Town of Arcadia Lakes asks this Court to affirm the Administrative Law Court's ruling denying Roper Pond ownership of $200,000 in sanctions, in addition to the full fees and costs of litigation for which Roper Pond has already been compensated.

Respectfully Submitted,



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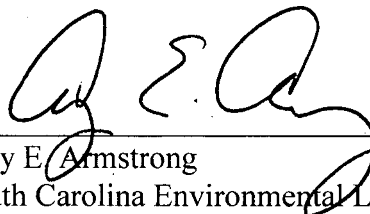
Certificate of Counsel

The undersigned does hereby certify that this Final Brief complies with SCRAP Rule 211(b).



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