

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2018-001868
Case No. 18-ALJ-07-0003-CC

South Carolina Department of
Health and Environmental Control,

Appellant/Respondent,

v.

James W. Davenport,

Respondent/Appellant.

**RESPONDENT'S BRIEF OF
APPELLANT/RESPONDENT SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL CONTROL**

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COUNTERSTATEMENT OF ISSUE ON APPEAL

- I. Did the Administrative Law Court ("ALC") abuse its discretion in calculating the attorney's fee award?

STATEMENT OF THE CASE

The South Carolina Department of Health and Environmental Control ("Department" or "DHEC") hereby adopts and incorporates the Statement of the Case contained in the brief it submitted as Appellant.

COUNTERSTATEMENT OF THE FACTS

James W. Davenport filed a Petition for Attorney's Fees and Court Costs ("the Petition") on March 21, 2018, a single day after the ALC's filing of the March 20, 2018 Final Order and Decision ("the Merits Order"). (R. pp. 13-37). DHEC filed a Memorandum in Opposition to the Petition on April 5, 2018, in which it argued, among other things, Mr. Davenport's "requested fees are unreasonable and should be substantially reduced." (R. pp. 48-49). In reply, Mr. Davenport conceded certain fees were not recoverable pursuant to § 15-77-300 and explained with respect to costs that he "submitted an itemized listing of expenses, which the Court can easily line through items that are not properly recoverable under the statute." (R. p. 60).¹ On June 13, 2018, the ALC held a hearing on the Petition. (R. pp. 1518-1569). On August 1, 2018, the ALC filed its Order Granting Mr. Davenport's Petition for Attorney's Fees in which it awarded "attorney's fees in the total amount of \$91,120.00." (R. p. 78).

On August 13, 2018, DHEC filed a Motion to Alter or Amend (Reconsider) the Order Granting the Petition again arguing that "[t]he awarded fees are unreasonable." (R. p. 99). In

¹ Mr. Davenport's counsel also explained during the hearing on the Petition that, "our position does include a request for costs under Rule 54 to the extent that, your Honor, I believe that some of this - - some of our requested costs are not recoverable. It's an easy matter to strike through." (R. pp. 1560-1561).

particular, DHEC argued unreasonably billed hours included “nearly 24 hours in travel time.” (*Id.*). Mr. Davenport did not move to alter or amend the ALC’s Order Granting the Petition. On September 20, 2018, the ALC issued its Order on DHEC’s Motion to Alter or Amend, whereby it “amend[ed] the amount of attorney’s fees awarded from \$91,120.00 to \$87,670.00” based upon its error in including “the hours [Mr. Davenport’s] attorney spent travelling to and from Columbia on July 20, 2017, and July 24, 2017 through July 28, 2017.” (R. p. 119). The ALC found such billable hours were “unreasonable.” (*Id.*) Mr. Davenport did not move to alter or amend the ALC’s Reconsideration Order. DHEC thereafter filed and served its Notice of Appeal on October 17, 2018. Mr. Davenport filed and served his Notice of Cross Appeal on October 22, 2018.

ARGUMENT

I. THE ALC’S CALCULATION OF ATTORNEY’S FEES IS SUPPORTED BY EVIDENCE AND NOT AFFECTED BY AN ERROR OF LAW.

As explained in DHEC’s Appellant brief, the ALC’s award of attorney’s fees pursuant to § 15-77-300 was an abuse of discretion and the award should be vacated *in toto*. Nonetheless, Mr. Davenport’s arguments on appeal concerning the ALC’s calculation of fees, some of which were not preserved for appellate review and/or supported by the record, are without merit. A trial court’s decision regarding an award of attorney’s fees under § 15-77-300 will not be disturbed absent an abuse of discretion. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law. *Zabrinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). Section 15-77-300(B) states, “Attorney’s fees . . . must be limited to a reasonable time expended at a reasonable rate.” Mr. Davenport fails to demonstrate how the ALC’s calculation was unsupported by evidence or affected by an error of law.

A. The ALC's exclusion of post-hearing time expended was reasonable and in accordance with § 15-77-300.

Mr. Davenport argues the ALC erred by excluding time spent following the conclusion of the contested case hearing in the awarded attorney's fees. (Davenport Initial Br., pp. 4-6). Specifically, Mr. Davenport contends the ALC erred relying on *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 405 S.E.2d 830 (1990), for holding fees earned for post-hearing matters are not recoverable. The ALC's declining to award fees earned post-hearing was reasonable and in accordance with § 15-77-300.

In fact, the ALC should have held that pursuant to *McDowell* no attorney's fees were recoverable due to this matter being an "administrative action," not a "civil action." Section 15-77-300 allows fees "in any *civil action* brought by the State, any political subdivision of the State or any party who is contesting state action" As explained in DHEC's Appellant brief, the Supreme Court held the hearing conducted by the South Carolina Department of Social Services ("DSS") in *McDowell* was not subject to attorney's fees because, at that point, DSS "was not 'pressing its claim' in litigation," but, instead, "was merely functioning as an administrative decision maker." 304 S.C. at 543. The hearing before DSS is the equivalent to the contested case hearing before the ALC, also an executive agency. A review of appellate case law does not reveal any cases where a South Carolina court has awarded fees pursuant to § 15-77-300 for proceedings before the ALC. Accordingly, the ALC should have held that attorney's fees pursuant to § 15-77-300 were not recoverable *in toto* because this was an "administrative," not "civil action."²

² South Carolina statutes are consistent with this distinction between "administrative" and "civil actions." A comparison of § 15-77-300 with *The South Carolina Frivolous Proceedings Act* ("SCFPA"), S.C. Code Ann. § 15-36-10, is instructive. The SCFPA addresses "pleading[s] filed in a civil or administrative action" or "[a] document filed in a civil or administrative action." S.C. Code Ann. § 15-36-10(A)(2) and -(3). Additionally, the SCFPA provides that, "An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned" for making frivolous filings or making frivolous arguments. *Id.* § 15-36-10(A)(4). Accordingly, our legislature's intent was to allow for SCFPA to include "administrative actions," such as this matter, whereas § 15-77-300 only captures "civil actions." *The Equal Access to Justice Act*, the federal equivalent to § 15-77-300, similarly

Nevertheless and contrary to Mr. Davenport's argument, the ALC's exclusion of fees earned for post-hearing matters is in accordance with *McDowell*.

Additionally, § 15-77-300(A)(1) allows for recovery of fees only when an "agency acted without substantial justification in pressing its claim against the party." DHEC ceased pressing its claim against Mr. Davenport at the conclusion of the contested case hearing. DHEC did not file a motion for reconsideration or notice of appeal contesting the Merits Order. The fees earned following the contested case were not associated with the pressing of DHEC's claim, and accordingly, were unrecoverable.³ Instead, any time expended related to the Petition was driven by Mr. Davenport, not DHEC.

Finally, Mr. Davenport's argument for post-hearing fees based upon time expended for the Petition is unreasonable and not supported by the ALC's findings. To award "fees on fees," as Mr. Davenport seeks, the ALC would need to find DHEC's opposition to the Petition was "without substantial justification." See S.C. Code Ann. § 15-77-300(A)(1). No such finding was made by the ALC. The ALC actually found certain DHEC arguments "compelling." (R. p. 73). More importantly, Mr. Davenport never argued DHEC lacked "substantial justification" in opposing the Petition. In essence, Mr. Davenport's "fees on fees" argument places governmental entities in the indefensible position of having to accept whatever fees submitted by the petitioner, regardless of any deficiencies with the petition, or defending with knowledge that the imposition of additional fees is automatic. Governmental entities must be able to oppose flawed fee petitions, knowing

distinguishes between a "civil action" and "adversary adjudication arising from an agency action." See 28 U.S.C. § 2412 and 5 U.S.C. § 504.

³ To the extent the billed hours following the July 2017 administrative hearing were unrelated to Petition, such hours were unreasonable and/or not in response to claims driven by DHEC, and instead relate to other matters, including but not limited to a civil action filed by Mr. Davenport against Anderson County, DHEC, and various named employees of Anderson County and DHEC, which is currently pending in the United States District Court. See 2018-CP-23-05505 and C/A No.: 6:18-cv-03178-TMC-JDA. Accordingly, such time expended is not recoverable pursuant to § 15-77-300.

that additional "fees on fees" will be imposed only upon a finding that such defense to a petition is "without substantial justification." The ALC's exclusion of time expended post-trial is supported by the record and not affected by an error of law.

B. The ALC's exclusion of costs was reasonable and in accordance with § 15-77-300.

Mr. Davenport argues the ALC erred in refusing to award any costs beyond the attorney's fees award. (Davenport Initial Br., pp. 6-8). First, Mr. Davenport points to the following language in § 15-77-300(A) as a basis for awarding court costs: "the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency." Additionally, Mr. Davenport contends SCRCF, Rule 54, and S.C. Code §§ 15-37-10 *et seq.* are bases for awarding costs. These arguments are unavailing.

At the outset, and as the ALC correctly recognized, the plain language of § 15-77-300 does not provide for the recovery of costs or expenses. (R. p. 78). Section 15-77-300(A) states:

In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

Section 15-77-300(A) only references "attorney's fees" and does not expressly authorize reimbursement of incurred "expenses" or "costs." If the General Assembly intended § 15-77-300 to include expenses or costs, it would have provided such language. In the federal *Equal Access to Justice Act* ("EAJA"), which our Supreme Court has noted similarities to § 15-77-300, Congress specifically provided for the recovery of costs and expenses. The EAJA states:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and *other expenses, in addition to any costs awarded pursuant to subsection (a)*, incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United

States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (Emphasis added). More importantly, the Supreme Court has specifically recognized that § 15-77-300 “does not mandate [reimbursement of expenses incurred by counsel].” *Layman v. State*, 376 S.C. 434, 461, 658 S.E.2d 320, 334 (2008). The plain language of § 15-77-300 simply does not provide for recovery of costs or expenses.

Rule 54(d), SCRCP, states:

Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law.

(Emphasis added). Notably, in his Petition, Reply Memorandum, and the hearing on the Petition, Mr. Davenport never cited any law providing for the imposition of costs. Mr. Davenport’s argument regarding § 15-37-200 allowing costs to be recovered against the State was raised for the first time in his Appellant’s brief and, accordingly, has not been preserved for appellate review. *See Pye v. Estate of Fox*, 369 S.C. 555, 564-65, 633 S.E.2d 505, 510 (2006) (“It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. [Internal cites omitted].”). Nevertheless, even if this matter was preserved for appeal, this matter is not a “civil action,” as that term is used in Title 15, Civil Remedies and Procedures. *See* S.C. Code Ann. § 15-3-20⁴. This was an “administrative action.” Notably, there is no case law holding § 15-37-200 applicable to hearings before the ALC. As a result, the ALC did not err by excluding costs.

⁴ “Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.” S.C. Code Ann. § 15-3-20(A). “A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.” *Id.* § 15-3-20(B).

C. The ALC's reduction of fees following the Motion for Reconsideration was reasonable and proper.

Mr. Davenport contends the ALC erred in reducing the attorney's fee award by \$3,450.00 based upon the exclusion of unreasonable travel time following DHEC's Motion for Reconsideration. (Davenport Initial Br., pp. 9-12). Mr. Davenport alleges DHEC first raised the issue of reasonableness in its Motion for Reconsideration. Mr. Davenport also alleges DHEC's counsel "waived the issue of reasonableness of the fee petition." Finally, Mr. Davenport cites various non-binding, non-South Carolina cases holding that attorney travel time is awardable. These arguments misconstrue the record and arguments before the ALC. The ALC's reduction based upon the unreasonable time expended is supported by evidence and is not affected by an error of law.

DHEC argued in its Memorandum in Opposition to the Petition that "the proposed amount [of attorney's fees] is unreasonable and inconsistent with the fees allowed pursuant to Section 15-77-300." (R. p. 48). Following the ALC's issuance of its Order Granting the Petition, which was largely silent on the reasonableness of billed hours, DHEC further argued in its Motion to Alter or Amend (Reconsider) that the awarded fees "are unreasonable" and that "[t]here are a number of unreasonable billed hours, including, among other things, nearly 24 hours in travel time, duplicate billing entries, and multiple days in which Mr. Rothstein billed over 15 hours." (R. p. 99). DHEC's arguments in the Motion to Alter or Amend (Reconsider) were proper and in accordance with the reasons for filing such motions. The Supreme Court held there are:

... two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. S.C. Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). The argument was properly raised before the ALC and DHEC filed its Motion to Alter or Amend (Reconsider) for the reasons stated in *Elam*. The ALC misunderstood, failed to fully consider, and properly rule upon DHEC's argument about the unreasonableness of the attorney's fees. Accordingly, it was appropriate for the ALC to reduce the awarded fees based upon the unreasonable travel times.

During the hearing on the Petition, the ALC asked the following of DHEC's counsel:

ALC: Now, also, Mr. Wicevic, do you have any argument that you wanted to place on the record with respect to the reasonableness of the hourly fee that's - - -

Mr. Wicevic: I think he - - Mr. Rothstein included an affidavit. We would appreciate it - - if the [court is agreeable to it], we'd be appreciative of being able to research that. At this time, no, we have no reason to dispute Mr. Rothstein's affidavit.

(R. p. 1567). Mr. Davenport erroneously misconstrues this exchange as a waiver of the on "the issue of the reasonableness of the fee petition." (Davenport Initial Br., p. 10). However, the clear subject was the "reasonableness of the [\$300.00] hourly fee" of Mr. Davenport's counsel. The exchange did not concern whether the time expended by Mr. Davenport's counsel was reasonable. Even if it did, the exchange did not constitute a waiver of any argument. In any event, the ALC agreed with Mr. Davenport and awarded fees based upon the sought-after hourly fee.

The various cases cited by Mr. Davenport supporting the assertion that travel time be included in the statutory attorney's fees award are also not persuasive. First, the cases are not from South Carolina courts and concern different attorneys' fees statutes. Additionally, the cases explain that it is within courts' discretion to award attorney's fees for travel time and courts exercise that discretion by determining whether such travel time was reasonable. See, e.g., *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 396 (8th Cir. 1987) (holding that a court should award fees for travel time "unless it determines in its discretion that such a recovery

would be unreasonable.”) and *Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984) (stating “if the travel is unnecessary the time spent in travel should be subtracted out”). In this matter, the ALC exercised such discretion and declined to award fees for the travel time.

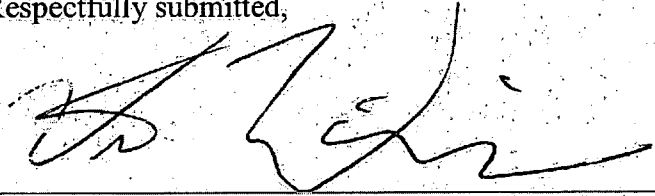
Ultimately, “[c]onsidering the number of hotels within the Columbia area,” the ALC found the “hours [Mr. Davenport’s] attorney spent travelling to and from Columbia” were “unreasonable.” (R. p. 119). In his Appellant’s brief, Mr. Davenport explains the decision not to stay overnight in Columbia, and how Mr. Davenport and his counsel worked during the commutes to and from Columbia. (Davenport Initial Br., pp. 10-11). While Mr. Davenport did provide an itemized statement of billable hours, including a supporting affidavit, there is nothing in the affidavit or record supporting the statements made in his Brief about the decision to commute and the time spent in commute. Consideration of such statements are not part of the record and would be improper. (See R. p. 57, Davenport stating in his Reply Brief in Support of the Petition, “[O]ne of the most basic aspects of every jury instruction is the admonition, ‘What the lawyers say is not evidence.’ See, e.g., *Bennett v. Angelone*, 92 F.3d 1336, 1347 (4th Cir. 1996).”). Accordingly, the ALC’s decision to exclude such time in its calculation was reasonable and supported by evidence.

CONCLUSION

For the foregoing reasons, the ALC’s calculation of the attorney’s fees award should not be increased. The ALC’s calculation is supported by evidence and not affected by an error of law.

[Signature page follows]

Respectfully submitted,



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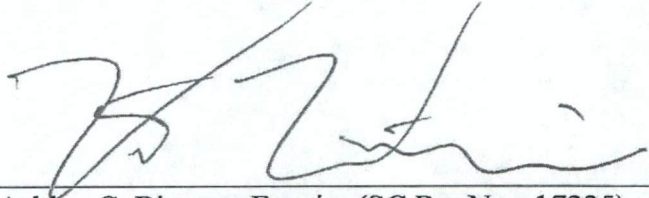
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April 1, 2019

Columbia, South Carolina

Certificate of Counsel

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



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April 1, 2019
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PROOF OF SERVICE

I, Rita D. DeCarlis, legal assistant with the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **1st day of April 2019**, served a copy of the **Respondent's Brief of Appellant/Respondent South Carolina Department of Health and Environmental Control** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid and addressed as follows:

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