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

South Carolina Department of Health and
Environmental Control, ... Appellant-Respondent,

v.

James W. Davenport, ... Respondent-Appellant.

FINAL REPLY BRIEF OF RESPONDENT-APPELLANT ON CROSS APPEAL

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Respondent-Appellant, James W. Davenport, by and through his undersigned counsel, hereby submits this Final Reply Brief on Respondent-Appellant's Cross Appeal. DHEC continues to repeat its erroneous argument from its main appeal, that the underlying contested case was not a "civil action" for purposes of S.C. Code Ann. § 15-77-300. Ironically, DHEC asserts that Respondent-Appellant cannot raise certain matters because they were not presented to the ALC, either in the original petition for attorney's fees and costs or on a motion to alter or amend; yet, DHEC itself repeatedly raises new arguments for the first time in its initial brief on the cross appeal. Specifically, DHEC's initial brief raises S.C. Code Ann. § 15-36-10 of the South Carolina Frivolous Civil Proceedings Sanctions Act (mistakenly referred to by DHEC as "The South Carolina Frivolous Proceedings Act"), and S.C. Code Ann. § 15-3-20 of the civil statutes of limitations, both of which statutes were not previously cited by DHEC in any of its earlier briefs, during oral argument before the ALC, or on its motion for reconsideration. In any event, neither statute supports DHEC's position on the cross-appeal of Administrative Law Judge Robinson's award of attorney's fees.

1. RECOVERY OF POST-TRIAL ATTORNEY'S FEES, INCLUDING FEES SPENT IN CONNECTION WITH FEE PETITION ITSELF, IS NECESSARY TO PROVIDE A FULL MEASURE OF RELIEF TO RESPONDENT UNDER S.C. CODE ANN. § 15-77-300.

With all due respect, the Administrative Law Judge committed an error of law and, thus, abused her discretion, by limiting the attorney's fee award only to time spent up until the end of the trial of the case. See Maybank v. BB&T Corp., 416 S.C. 541, 570, 787 S.E.2d 498, 518 (2016) (abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions).

The post-trial time at issue included substantially more than just "fees on fees," contrary to DHEC's assertions. Approximately half of the 38.5 hours of post-trial time not awarded by Judge Robinson (specifically 19.3 hours) was for time not related to preparing or arguing the fee petition itself or responding to DHEC's motion to alter or amend on the fee order. The undersigned counsel not only had to prepare an extensive proposed order, but also had to review the equally extensive proposed order from DHEC's counsel. In addition, the undersigned counsel had to review Judge Robinson's final Order and discuss with Respondent-Appellant the implications of the Order and potential for appeals by DHEC.

None of the time in the Petition for Attorney's fees related to the pending lawsuit of James W. Davenport v. Scott Stoller et al., Civil Action No. 6:18-cv-03178-TMC-JDA (D.S.C.), which was filed in the Greenville County Court of Common Pleas on October 26, 2018, approximately six-and-a-half months after the last time entry submitted in this matter. (R. pp. 68-69). All of the undersigned counsel's time entries were recorded contemporaneously in the Clio law practice management software, and the detailed summaries were attached to the undersigned counsel's Affidavit and Supplemental Affidavit filed with the ALC. (R. pp. 19-37, 62-70). As this Court can plainly see by looking at the Affidavits and time entries, none of the time requested in the underlying Petition for Attorney's Fees involved investigation, research, or drafting the pleadings in the subsequent litigation mentioned in Footnote 3 to DHEC's brief. (Id.).

DHEC's citation to the case of McDowell v. South Carolina Dep't of Soc. Servs., 304 S.C. 539, 405 S.E.2d 830 (1990), is perplexing. The undersigned counsel previously conceded that 40.7 hours of time spent at the agency level before the request for contested case hearing was filed was not compensable under McDowell, which held that a state agency is not "pressing its case" in

litigation while the matter is still at the agency level. Respondent-Appellant conceded that time spent prior to December 7, 2016, was not compensable under Section 15-77-300, as interpreted by the McDowell court. The McDowell opinion does not stand for the proposition that administrative law matters are not within the reach of S.C. Code Ann. § 15-77-300. In fact, the McDowell case involved an appeal to the circuit court under a previous version of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380, which at the time provided for review of an administrative agency's final decision by filing a petition in circuit court. As the McDowell court noted, "To hold that § 15-77-300 does not apply to such actions [i.e., actions for judicial review under the APA] would eviscerate the statute since an agency typically 'presses its claim' in the courts in the context of actions for judicial review." 304 S.C. at 543, 405 S.E.2d at 833.

In Ross v. Medical Univ. of S.C., 312 S.C. 532, 435 S.E.2d 877 (Ct. App. 1993), rev'd on other grounds, 317 S.C. 377,453 S.E.2d 880 (1994), the South Carolina Court of Appeals specifically stated, "A proceeding under the Administrative Procedures Act is considered a civil action for purposes of recovering attorney's fees." Id. at 534, n.2, 435 S.E.2d at 878, n.2 (emphasis added) (citing McDowell, 304 S.C. 539, 405 S.E.2d 830). Of course, the APA was amended in 2006 and 2008 to provide for review by the Administrative Law Court and appeals to the South Carolina Court of Appeals, not to the circuit court. 2006 S.C. Act No. 387, § 2; 2008 S.C. Act No. 334, § 5.

The Administrative Law Judge incorrectly cited the McDowell case as authority to limit attorney's fees not just for time spent before the matter was elevated to the ALC, but also for time spent on the case after the trial of the contested case. (R. p. 78). The McDowell case actually supports Respondent-Appellant's cross appeal seeking "fees on fees," because the Supreme Court in McDowell stated, "Finally, appellant is entitled to attorney's fees under § 15-77-300 for this

litigation and appeal to secure such fees." 304 S.C. at 544, 405 S.E.2d at 833 (emphasis added). The underlined passage from the McDowell case amply supports Respondent-Appellant's request for "fees on fees." A fee-shifting statute that did not allow the successful claimant to receive attorney's fees in connection with filing and arguing a contested fee petition would not provide a full measure of relief to the claimant.

The case of Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008), also fully supports Respondent-Appellant's argument that post-trial matters, specifically including "fees on fees" are recoverable under S.C. Code Ann. § 15-77-300. In a Supplemental Order attached to the original published opinion in the Layman case, the South Carolina Supreme Court actually increased the award to plaintiffs' counsel under S.C. Code Ann. § 15-77-300 from $440,502.50 in fees and $4,724.10 in costs to $1,075,701.74 in fees and $41,602.01 in costs based on additional time and expenses incurred by plaintiffs' counsel after June 1, 2006, on the defendants' partially successful appeal and defendants' unsuccessful petition for rehearing and motion to supplement the record. Id. at 463-65, 658 S.E.2d at 335-37 (Order Modifying Attorneys' Fees Mar. 10, 2008).

The relevant issue here under S.C. Code Ann. § 15-77-300 is not whether DHEC was substantially justified in opposing the fee petition itself, but whether DHEC was substantially justified in pressing its claim against Respondent in the underlying action. The Administrative Law Judge's refusal to award any fees for post-trial matters would deprive Respondent-Appellant of substantial attorney's fees he never would have had to incur, but for DHEC's case against him that had no reasonable basis in law or fact.

DHEC's new argument relying on the language of the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, (DHEC Br., at 3-4, n.2), is not apposite.

First of all, DHEC has the name of the statute wrong. The title of the statute is actually the South Carolina Frivolous Civil Proceedings Sanctions Act. DHEC has omitted the key word "Civil" from the title of the statute. The General Assembly's express use of the phrase "civil or administrative action" under the statute entitled Frivolous Civil Proceedings Sanctions Act clearly demonstrates the legislature's intention to include administrative actions within the term "civil proceeding." This is consistent with the South Carolina Supreme Court's primary holding in McDowell, that the term "civil action" as used in Section 15-77-300 includes claims under the APA. McDowell, 304 S.C. at 543, 405 S.E.2d at 833. In addition, Section 15-36-10 was amended in 2005 as part of the same tort reform legislation that also requires complaints alleging professional negligence in certain professions to include an affidavit from an expert witness specifying at least one negligent act or omission. S.C. Code Ann. § 15-36-100. The 2005 Act repealed Sections 15-36-20 to -50 and combined those substantive provisions into a single amended Section 15-36-10. 2015 S.C. Act No. 27, § 12. Perhaps most importantly, the standard for awarding attorney's fees under Section 15-77-300 is much different than the standard under S.C. Code Ann. § 15-36-10. An award of fees under Section 15-77-300 does not require a showing that the underlying claim was frivolous or that the pleading submitted was interposed for an improper purposes, such as delay, harassment, or injury to the opposing party. See Heath v. County of Aiken, 302 S.C. 178, 183 394 S.E.2d 709, 712 (1990) (holding that "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification" for purposes of an award of attorney's fees under Section 15-77-300).

The Administrative Law Judge's refusal to award fees for work performed by the undersigned counsel after the date of the trial was an abuse of discretion.

2. THE ADMINISTRATIVE LAW JUDGE'S REFUSAL TO AWARD COSTS IN ADDITION TO ATTORNEY'S FEES WAS AN ABUSE OF DISCRETION, BECAUSE THE STANDARD FOR AWARDING COSTS IS SUBSTANTIALLY LOWER THAN THE STANDARD FOR AWARDING ATTORNEY'S FEES.

An award of costs to the prevailing party in litigation is the norm under Rule 54(d), SCRCP ("Except when express provision therefor is made either in statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."). Of course, Rule 54(d) also contains a caveat that "costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law." Id. Section 15-37-200 of the South Carolina Code expressly provides that "In all civil actions prosecuted in the name of the State by an officer duly authorized for that purpose the State shall be liable for costs in the same cases and to the same extent as private parties." S.C. Code Ann. § 15-37-200.

Judge Robinson failed to recognize that an award of attorney's fees under Section 15-77-300 is actually a part of recoverable court costs. S.C. Code Ann. § 15-77-300 ("[T]he court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency.") (emphasis added)). Although DHEC actually quotes this exact statutory language in its brief, DHEC curiously states that "as the ALC correctly recognized, the plan language of § 15-77-300 does not provide for the recovery of costs or expenses." (DHEC's Br., at 5). The statute's use of the phrase "to be taxed as court costs" plainly presumes that the court would award costs in addition to the attorney's fees.

DHEC's quotation from the South Carolina Supreme Court's opinion in Layman v. State, 376 S.C. 434, 461, 658 S.E.2d 320, 334 (2008), is grossly misleading. In the Layman case, the Supreme Court reviewed the circuit court's award of $8.66 million in attorney's fees under S.C.

Code Ann. § 15-77-300 to the plaintiff's attorneys in a class action involving the workers in the TERI program. The Supreme Court reviewed the issue of what constitutes "reasonable" attorneys' fees under the statute, after rejecting the circuit court's use of a percentage of the common fund recovered by plaintiffs. The Layman Court used the loadstar method, with an enhancement multiplier of 1.25 for the exceptional success of plaintiffs in the case. Id. The Court then added the expenses incurred by plaintiffs' counsel. Id. ("To this total, we add the expenses incurred by counsel for the TERI plaintiffs, which this Court directed the circuit judge to include in the award of attorney's fees, even though the state action statute does not mandate such requirement."). The Layman Court initially included $4,724.10 in expenses in the award of attorneys' fees under S.C. Code Ann. § 15-77-300, which amount was increased to $41,602.01 in expenses incurred in connection with defendants' appeal, petition for rehearing, and motion to supplement the record on appeal. Id. at 462, 464, 658 S.E.2d at 335, 337. DHEC's altered and manipulated quotation from the Layman case is simply a distorted representation of what that case stands for.

Next, DHEC's argument that Respondent-Appellant has waived his right to appeal on the issue of costs is also unfounded. The briefs and hearing before the ALJ focused on costs only peripherally and then only to argue what specific costs are recoverable under Rule 54(d), SCRCP. Judge Robinson's complete denial of costs was an abuse of discretion, because she only considered S.C. Code Ann. § 15-77-300 as a potential source of authority for awarding costs.

Ironically, in the very next sentence after DHEC argues that Respondent-Appellant did not raise something below, DHEC raises S.C. Code Ann. § 15-3-20 for the first time in this case, as additional support for its oft-repeated argument that the underlying contested case was not a "civil action." Section 15-3-20 has no applicability to this case, because that section deals only with the

statute of limitations for commencing a civil action. This argument was squarely rejected by the South Carolina Supreme Court in the McDowell case. 304 S.C. at 543, 405 S.E.2d at 833 ("An action for judicial review [under the Administrative Procedures Act] is one properly brought in the court of common please although it is by petition pursuant to § 1-23-380(b) and not by summons and complaint.").

3. THE ADMINISTRATIVE LAW JUDGE ERRED IN REDUCING THE ATTORNEY'S FEE AWARD FOR TRAVEL TIME WHERE APPELLANT'S COUNSEL CLEARLY WAIVED ANY ARGUMENTS REGARDING THE REASONABLENESS OF THE FEE PETITION AND WHERE NO FACTUAL EVIDENCE ACTUALLY SUPPORTS THE JUDGE'S ARBITRARY REDUCTION FOR TRAVEL TIME.

The Administrative Law Judge abused her discretion by reducing the fee award on DHEC's Rule 59(e) motion by 11.5 hours or $3,450.00 in travel time because she assumed factual matters that were not in the record before her. The only factual evidence in the record on the attorney's fee petition were the Affidavit and Supplemental Affidavit of Respondent's Counsel, David E. Rothstein, which expressly stated under oath, "I believe that all of the time recorded in Clio is reasonable and was necessary in the representation of Mr. Davenport." (R. p. 21, ¶ 13 and p. 63, ¶ 6). The undersigned counsel billed more than 15 hours some days during the trial because he actually worked more than 15 hours during those days as reflected in the contemporaneous time entries. The undersigned counsel is a solo practitioner who does not have a team of associates and paralegals to assist him with trial. DHEC had three different attorneys or record (and various staff people) participate in the discovery and trial of this case.

DHEC now contends that its counsel's concession at the hearing before Judge Robinson on the attorney's fee petition that "we have no reason to dispute Mr. Rothstein's affidavit" (R. p. 1567,

ll. 24-25), was merely a reference to the $300.00 hourly rate in the loadstar calculation. Judge Robinson's question to which Mr. Wicevic was responding was "with respect to the reasonableness of the hourly fee," (R. p. 1567, ll. 18-19), not the prevailing hourly rate requested by Respondent's counsel. The only challenge DHEC made to the reasonableness of the total amount of the fee was that it included time spent and expenses incurred prior to the filing of the request for contested case hearing (R. p. 48), which the undersigned conceded in his reply brief were not recoverable under the holding of the McDowell case. DHEC's counsel never mentioned travel time in its initial brief or during oral argument. Only on its Rule 59(e) motion did DHEC raise for the first time a single sentence about the reasonableness of the hours billed: "There 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). A Rule 59(e) motion cannot be used to make arguments that were not previously raised to the trial judge. Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion for reconsideration.").

DHEC's rather snide quotation from Davenport's Reply Brief that "one of the most basic aspects of every jury instruction is the admonition, 'What the lawyers say is not evidence,'" (DHEC Br., at 9), completely misses the mark. What the undersigned counsel was referring to in that sentence was DHEC's argument that throughout the trial of the contested case, counsel on both sides occasionally and inadvertently used the wrong words "license" or "disciplinary action" instead of the correct terms "certificate" and "enforcement action" for the underlying case against Mr. Davenport's paramedic credentials. DHEC now tries to use the citation to the Bennett v. Angelone, 92 F.3d 1336, 1347 (4th Cir. 1996), to attack the undersigned counsel's sworn affidavits in support

of the Attorney's Fees Petition. Clearly, the affidavits and contemporaneous time entries were competent evidence of the amount of time spent on the case by counsel.

Respondent-Appellant agrees that there was nothing in the record to support Judge Robinson's factual finding that the travel time requested was not reasonable. Accordingly, it was an abuse of discretion for Judge Robinson to presume that spending the night in Columbia during trial instead of driving back and forth to Greenville every day during the trial was unreasonable because it would have reduced the attorney time in the case by a total of 11.5 hours. Again, the undersigned counsel used the travel time with Mr. Davenport to work on the case.

The only evidence in the record regarding the reasonableness of Respondent's fees is the Affidavit and Supplemental Affidavit of Respondent's Counsel, along with the attachments to those Affidavits, which contain detailed entries from counsel's computerized time management system. Respondent's counsel testified in his Affidavit, "I believe that all of the time recorded in Clio is reasonable and was necessary in the representation of Mr. Davenport." (R. p. 21, ¶ 13). Although the issue of travel time was not specifically raised in Appellant's initial brief or discussed during the hearing on the attorney's fee petition, Respondent's actually counsel drove with Mr. Davenport to and from trial in Columbia every day and used the total, daily 3-hour travel time (both ways) to discuss the case, formulate trial strategy, and prepare witness testimony.

Finally, it is galling for DHEC to contest the amount of time Respondent's counsel was required to spend in the discovery and trial of this case. DHEC's mistaken view that the de novo standard for a contested case hearing before the Administrative Law Court gave DHEC an opportunity to perform the type of investigation it should have done at the agency level is what primarily drove the amount of time necessary for Respondent's counsel to defend against the case.

DHEC's case in chief at trial before the ALC took the better part of three-and-a-half days. By contrast, Respondent put on his entire defense case in chief (and also argued a motion for directed verdict) in less than one full day of trial. DHEC called several witnesses at trial who were never deposed during discovery or even interviewed by DHEC's investigators, including Kim Aiken, Keith Eudy, and its proffered expert witness, Dean Douglas, who was not even retained until the Thursday or Friday before the trial started and testified that he spent approximately 60 hours on the case the weekend before trial. DHEC never submitted any factual material to indicate how much attorney time it spent in preparing and trying this case, much of which would have been directly across a conference table from the undersigned counsel during depositions or at opposing counsel tables from the undersigned counsel during trial.

CONCLUSION

For all of the foregoing reasons and for the reasons previously set forth in the Final Brief of Respondent-Appellant on Cross Appeal, Respondent-Appellant respectfully requests that this Court increase the attorney's fee award in this case properly to include post-trial work and travel time reasonably and necessarily incurred in connection with this case. In addition, Respondent-Appellant respectfully requests that this Court award appropriate costs in the amount of $8,460.00. Respondent-Appellant reserves the right to request additional fees and costs under S.C. Code Ann. § 15-77-300 relating to this appeal, if successful, either from the Court of Appeals or from the Administrative Law Judge, as appropriate.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief of Respondent-Appellant on Cross Appeal complies with Rule 211(b), SCACR.

March 29, 2019

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