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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

The Honorable Roger E. Henderson, Circuit Court Judge

Unpublished Opinion No. 2019-UP-176
Appellate Case No. 2016-001604
Circuit Court Case No. 2015-CP-46-3456

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SC Court of Appeals

Town of McBee Appellant,

v.

Alligator Rural Water & Sewer Company, Inc., Alligator Rural
Water Company, Inc. Defendants,

and

A.O. Smith Corporation..... Intervenor-
Defendant,

of whom

Alligator Rural Water & Sewer Company, Inc., Alligator Rural
Water Company, Inc. are the Respondents.

PETITION FOR PARTIAL REHEARING

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Rule 65(c), SCRCF 1, 2

ARGUMENT FOR PARTIAL REHEARING REGARDING AMOUNT OF BOND

The Town of McBee does not make this partial request for rehearing lightly, but believes it is essential to protect the Town's interests as this litigation proceeds. To be clear: the Town takes no issue with the Court's determination that the bond requirements of Rule 65(c), SCRPC, apply to the Alligator Defendants. However, towards the end of its opinion, the Court stated that "because an injunction bond requires only a percentage of the total amount of damages, posting such a bond should generally not interfere with a not-for-profit corporation's ability to continue rendering necessary services to its customers." (Op. at 4.)

This statement is dicta, as it is unnecessary to the Court's holding that the Alligator Defendants are not the equivalent of the State of South Carolina for purposes of Rule 65(c)'s bond requirement. The Alligator Defendants are simply not the State, nor are they the government in any way, as the Court rightly held. The Town is concerned, though, that the above-quoted sentence suggests that a bond may be sufficient even if it secures less than the enjoined party's full amount of damages, which is not true.

During the pendency of this litigation, the Town of McBee has been forced to expend hundreds of thousands of dollars to purchase water from the Alligator Defendants. But the law is unambiguous that the Town should have been allowed to stop purchasing water wholesale from Alligator in favor of supplying its own water using its own wells, which the Town would have done but for the preliminary injunction. *See CSL Utils., Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 136–37 (7th Cir. 1993) (holding that "there is no fair implication by which it [7 U.S.C. § 1926(b)] can be said to reach improvement by a wholesale customer of its own facilities so as to reduce the amount of water it must purchase at wholesale," and explaining that "there are degrees of protectionism which [the statute's] plain language does not reach").

In short, at the end of this case, the Town will recover every penny of public money that it has been forced to pay Alligator during this litigation because of the improper injunction.

To protect against the Alligator Defendants from taking and squandering Town (that is, taxpayer) money during the litigation, only to be broke and bankrupt once this case concludes and unable to repay the Town for damages incurred over the course of this case, the law requires the Alligator Defendants to post a bond sufficient to cover all such damages, which are already hundreds of thousands of dollars and are mounting with each passing day. *See, e.g.*, Rule 65(c), SCRCP (prohibiting the issuance of any civil injunction without posting security “for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained”); *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007) (reversing a “nominal” bond that was ordered to secure an injunction because the bond did not “provid[e] an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper”); *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 609–10, 790 S.E.2d 430, 435 (Ct. App. 2016) (reversing a trial court’s order imposing an injunction without requiring sufficient security to protect the enjoined party and holding that Rule 65(c)’s bond requirement must be enforced “strictly”); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009) (remanding a preliminary injunction because the trial court failed to “require execution of sufficient bond” to protect the enjoined party, as mandated by Rule 65(c)).¹

In order to avoid any ambiguity or uncertainty regarding the amount of security that the Alligator Defendants must post here to keep their preliminary injunction intact during the

¹ Alligator’s solvency is a serious concern, as its chronic financial mismanagement has caused it to post millions of dollars in losses over the last decade. (*E.g.*, R. pp. 195–96; Campolong Aff. ¶ 26; R. pp. 207–41; Accounting Report from Sheheen, Hancock & Godwin, LLP.)

pendency of this litigation, the Town respectfully requests that the Court delete the sentence that begins “Furthermore, because an injunction bond requires only a percentage of the total amount of damages . . .” from its opinion. The Town craves full protection on this point, and fears that the Alligator Defendants will attempt to minimize the amount of security needed so that they can continue to siphon and waste resources without consequence while this litigation proceeds.

CONCLUSION

Because it characterizes bonds that secure preliminary injunctions as “requir[ing] only a percentage of the total amount of damages,” the Court’s opinion suggests that the trial court has discretion to set a nominal bond or a bond lower than that which is required to fully secure the Town’s damages that could result from an improper injunction. Respectfully, the trial court has no such discretion, and both this Court and the Supreme Court have made this point clear in several recent decisions, as cited above.

Accordingly, to ensure that the Town and its citizens are sufficiently protected over the course of this litigation, and to ensure that the parties are not right back before the Court with an appeal regarding the amount of the injunction bond, the Town requests that the Court reconsider its opinion and delete the above-quoted sentence, which is dicta and not essential to the Court’s holding that the Alligator Defendants must post a bond that secures all damages that the Town will incur because of the preliminary injunction.

Signature Page Attached

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SC Court of Appeals

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Town of McBee, South Carolina v. Alligator Rural Water & Sewer Company,
Inc., Alligator Rural Water Company, Inc.
Appellate Case No. 2016-001604

Dear Ms. Kitchings:

Enclosed for filing please find an original and six copies of our Petition for Partial Rehearing, along with a check in the amount of \$50. Please return a clocked copy via our courier. Thank you for your consideration of this submission.

Sincerely,



M. Todd Carroll

cc: William O. Spencer, Jr.
Marguerite S. Willis