THE 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

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.

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

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE ADMINISTRATIVE LAW COURT ("ALC") CORRECTLY AWARD ATTORNEYS' FEES TO ROPER POND, LLC UNDER S.C. CODE ANN. § 15-77-300?**

II. **DID THE ALC CORRECTLY IMPOSE SANCTIONS ON THE TOWN BASED ON ITS FINDING THAT THE TOWN CHALLENGED THE DHEC AUTHORIZATION IN THIS CONTESTED CASE SOLELY FOR THE PURPOSE OF DELAY?**

III. **DID THE ALC PROPERLY IMPOSE SANCTIONS IN ADDITION TO THE AWARD OF ATTORNEYS' FEES AND COSTS UNDER THE STATE ACTION STATUTE?**

STATEMENT OF THE CASE

This appeal involves the award of attorney's fees and costs pursuant to S.C. CODE ANN. § 15-77-300 ("State Action Statute") and the imposition of sanctions under Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court ("SCRPALC"). In awarding attorney's fees and costs under the State Action Statute, the Administrative Law Court ("ALC") found that Appellant/Respondent Town of Arcadia Lakes ("Town") acted without substantial justification in challenging certain authorizations by Respondent South Carolina Department of Health and Environmental Control ("DHEC") for the development of 13 acres of real property on Trenholm Road in an unincorporated area of Richland County ("Proposed Project"). (Amended Order Vacating Order on Respondents' Petitioner for Attorneys' Fees and Costs and for Sanctions Dated September 1, 2016 issued on March 15, 2017, hereinafter "March 15, 2017 Amended Order," p. 33, R. p. 57). The ALC also imposed sanctions against the Town upon finding that the Town's challenge to the DHEC authorizations was taken "for the purpose of stopping or delaying the Proposed Project." (March 15, 2017 Amended Order, p. 37, R. p. 61). By order dated June 14, 2017, the ALC awarded

attorneys' fees and costs to Respondent/Appellant Roper Pond, LLC ("Roper Pond") in the amount of $205,283.84 and sanctioned the Town in the amount of $200,000 under Rule 72, SCRPALC. (Order for Attorneys' Fees and Costs and For Sanctions Pursuant to SCALC Rule 72 dated June 14, 2017, hereinafter "June 14, 2017 Order," p. 15, R. p. 15).

The Town and 16 other petitioners (collectively, "Petitioners") brought this action in 2009 to challenge a basic authorization for stormwater discharges for the Proposed Project. By letter dated December 15, 2008, DHEC granted coverage to Roper Pond under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit"), authorizing land-disturbing activities on 9.6 acres of the Property in association with the construction of a multi-family residential housing development in an unincorporated area of Richland County. On February 16, 2009, the Petitioners filed a Request for Contested Case Hearing, asserting numerous grounds for its appeal of the Department's decision in this matter. (*See* Request for Contested Case Hearing dated February 16, 2009, pp. 3-8, R. pp. 214-219). However, at the hearing on the merits, the Town's case in chief focused almost exclusively on the excavation and lowering of the Pond on the property and allegations that Roper Pond did not secure a required federal permit to conduct such activities. On January 21, 2010, the Administrative Law Court issued an order finding that the Petitioners lacked standing, but ruling on the merits of the case. (Final Order and Decision dated January 21, 2010, hereinafter "January 21, 2010 ALC Order," R. pp. 168-196). The order affirmed the Department's decision to authorize coverage under the General Permit and rejected the Town's arguments that Roper Pond failed to obtain the

necessary Corps permits and DHEC 401 water quality certification for the Proposed Project. (January 21, 2010 ALC Order, p. 27-29, R. p. 194-196).

On April 19, 2010, Roper Pond filed a Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. (Respondent Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, dated April 19, 2010, hereinafter "April 19, 2010 Petition for Fees," R. pp. 244-341). In the April 10, 2010 Petition for Fees, Roper Pond presented evidence to show that Roper Pond was entitled to an award of attorneys' fees and costs under the State Action Statute and to sanctions under Rule 72, SCRPALC. The April 19, 2010 Petition for Fees was supported by testimony from the contested case hearing, the 30(b)(6) deposition of the Town, and documents obtained during discovery in the contested case. *Id.* Roper Pond also contemporaneously filed a 34-page memorandum of law with the relevant legal authority and application to the facts in support of its petition. (Memorandum of Law in Support of Respondent Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions pursuant to Rule 72, SCRPALC, filed April 19, 2010, R. pp. 247-280). On April 20, 2010, Petitioners filed and served a Notice of Appeal of the ALC's decision. On May 11, 2010, with the consent of the parties, the ALC issued an order holding the April 19, 2010 Petition for Fees in abeyance pending the resolution of Petitioners' appeal. (Order dated May 11, 2010, R. pp. 164-165).

On May 6, 2013, this Court issued a decision upholding the ALC's ruling on standing and the merits of the case. On June 12, 2013, this Court withdrew its March 6, 2013 Opinion and substituted a new Opinion, again affirming this ALC's Final Order and Decision on standing and the merits of the case. On July 12, 2013, Roper Pond

filed Respondent Roper Pond, LLC's Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. (Respondent Roper Pond, LLC's Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, hereinafter "July 12, 2013 Amended Petition for Fees," R. pp. 529-535).

On July 12, 2013, Petitioners filed a petition for writ of certiorari with the Supreme Court. The Supreme Court granted the writ on August 22, 2014. By letter dated March 12, 2015, the Clerk of the Supreme Court advised the parties to "be prepared to discuss whether this case is moot since the construction related to the disputed permit has apparently already been completed." (March 12, 2015 letter, R. pp. 1304-1305). On March 18, 2015, the Court heard oral arguments. By order dated April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. (Order dated April 9, 2015, hereinafter "April 9, 2015 Order," R. pp. 124-126). The Order stated that "construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated." (April 9, 2015 Order, p. 2, R. p. 125). The Supreme Court therefore dismissed the matter as moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide permit)." *Id.* In dismissing the grant of certiorari as moot, the Supreme Court did not vacate the June 12, 2013 decision of this Court or the January 21, 20101 ALC Order affirming the DHEC decision.

On May 25, 2015, Roper Pond filed Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72,

SCRPALC. (Respondent Roper Pond, LLC's Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, hereinafter "May 25, 2015 Second Amended Petition for Fees," R. pp. 615-724). On November 30, 2015, Roper Pond filed Respondent Roper Pond, LLC's Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC. (Respondent Roper Pond, LLC's Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, hereinafter "November 30, 2015 Third Amended Petition for Fees," R. pp. 810-843). The November 30, 2015 Third Amended Petition for Fees withdrew Roper Pond's claims for sanctions against the individual Petitioners and limited to the request for sanctions to those based on a determination that the contested case was "taken solely for purposes of delay." (November 30, 2015 Third Amended Petition for Fees, p. 3, R. p. 812). On May 9, 2016, the ALC heard argument on the first phase of bifurcated issues to determine whether Roper Pond is entitled to attorneys' fees and costs under the State Action Statute and sanctions under Rule 72, SCRPALC. (Notice of Hearing (Motion) dated March 30, 2016, R. pp. 1422-1423). On March 15, 2017, the ALC issued a ruling on Roper Pond's Third Amended Petition for Fees. (March 15, 2017 Amended Order, R. pp. 25-63). On June 14, 2017, the ALC issued Order for Attorneys' Fees and Costs and for Sanctions pursuant to SCALC Rule 72 ("June 14, 2017 Order"), which required the Town to pay Roper Pond an award of attorneys' fees and costs in the amount of $205,283.84, and required the Town to pay the ALC sanctions in the amount of $200,000. (June 14, 2017 Order, p. 15, R. p. 15).

ARGUMENTS

The ALC correctly found that Roper Pond is entitled to attorneys' fees and costs under the State Action Statute. "On appeal, the trial judge's decision regarding an award of attorney's fees under [the State Action Statute] will not be disturbed absent an abuse of discretion." *Jasper County Bd. of Educ. v. Jasper County Grand Jury*, 303 S.C. 49, 398 S.E.2d 498 (1990). "An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997); *see also Layman v. State*, 376 S.C 434, 444, 658 S.E.2d 320, 325 (2008) ("An 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."). As discussed more fully below, Roper Pond presented evidentiary support for all of the conclusions reached by the ALC in awarding attorneys' fees and costs to Roper Pond. Accordingly, the ALC's award of attorneys' fees and costs should be affirmed.

The evidence in the record at the ALC also supports the award of sanction pursuant to Rule 72, SCRPALC, which provides as follows:

> If the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Rule 72, SCRPALC. "The imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) (citing *Johnson v. Dailey*, 318 S.C. 318, 323, 457 S.E.2d 613, 616 (1995)). "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted

in prejudice to the rights of appellant, thereby amounting to an error of law." *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). As discussed more fully below, Roper Pond presented substantial evidence to demonstrate that the Town brought this action solely for the purpose of delay. Accordingly, the ALC's award of sanction under Rule 72 should be affirmed.

I. THE ALC CORRECTLY FOUND THAT ROPER POND IS ENTITLED TO ATTORNEYS' FEES AND COSTS UNDER THE STATE ACTION STATUTE.

The Town asserts that following the ALC's ruling on the contested case, "the ALC was poised to award fees, costs, and sanctions to Roper Pond without even the most basic information necessary for application of the legal standard, and only Roper Pond's desire for a more legally durable order prevented such action." (Initial Brief of Appellant/Respondent Town of Arcadia Lakes, hereinafter "Town's Brief," p. 2). Contrary to the Town's assertions, Roper Pond's presentation of evidence and arguments in support of its petition for fees and costs under the State Action Statute were fully developed in its initial April 19, 2010 Petition for Fees following the ALC's ruling on the contested case. While the subsequent amended Petitions were revised to include additional fees incurred during the appellate process and to incorporate further support for Roper Pond's legal position based on this Court's decision on the ALC ruling, the basic arguments and evidence presented in the initial April 29, 2010 Petition for Fees remained substantially the same.

A. <u>The ALC corrected found that the Town acted without substantial justification in challenging the DHEC decision to grant Roper Pond coverage under the General Permit.</u>

The Town argues that the ALC improperly focused on the legal arguments raised in the underlying case and the rulings on those arguments. (Town's Brief, p. 9).

However, the nature of the legal arguments raised by the Town is fundamental to the determination of whether the Town acted without substantial justification. Town asserts that merely stating legal authority for a position and arguing extensively on the interpretation of legal authority precludes a finding that the legal positions are unreasonable. (Town's Brief, pp. 9-10). This assertion mischaracterizes the standard applicable to a determination that a political subdivision of the state acted without substantial justification under the State Action Statute. In *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006), the South Carolina Supreme Court clearly stated that "substantial justification" requires more than a mere statement of legal authority and supporting arguments:

> The trial court can award attorneys' fees under the statute only if it finds the State "agency acted without substantial justification in pressing its claim. . . ." § 15–77–300(1). An agency acts with "substantial justification" within the meaning of the statute when its position has a "reasonable basis in law and fact." *McDowell v. SCDSS*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). **Contrary to County's contention, the fact that novel issues were raised does not mean County was substantially justified in opposing Cornelius.** Declaratory judgment actions by their very nature often present novel questions. *See, e.g. Eargle, supra* (authority of county administrator to suspend elected official's employees); *United Oil Marketers, supra* (constitutionality of license tax incentive statute for gas/ethanol blend); *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (to define relationship between sheriff's office and county council).

Id. at 539-40, 633 S.E.2d at 496-97 (emphasis added). To demonstrate "substantial justification," the Town must do more than show there is plausible basis in law and fact. The Town must show that there is a <u>reasonable</u> basis in law and fact. Novel issues raised by the Town do not support a showing that there is a reasonable basis in law and fact. In fact, as the ALC found, the Town failed to offer evidence at the hearing on the merits to support its allegation that the DHEC decision was contrary to the regulations and relevant

case law.

The ALC findings in support of its determination that the Town acted without substantial justification are summarized below. For each finding, the evidentiary support in the record before the ALC is also provided. Additionally, this Court's decision affirming the ALC provides further support for these findings and is included where applicable.

1) The DHEC decision at issue in this case was based on the Department's review and approval of the stormwater pollution prevent plan ("SWPPP") prepared by Roper Pond; however, the Town failed to present any evidence that the SWPPP was deficient. (March 15, 2017 Order, pp. 23-24, R. pp. 47-48).

    a) None of the Petitioners witnesses reviewed the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (Transcript of Hearing on the Merits dated September 3 and 4, 2009, hereinafter "Hrg. Tr.," p. 201, l. 12 – p. 202, l. 7, R. pp. 982-983; p. 276, ll. 14-18, R. p. 1040).

    b) "We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 531, 745 S.E.2d 385, 393 (Ct. App. 2013).

2) Any deficiencies in the SWPPP would involve technical or specialized knowledge, but the Town failed to offer an expert witness on this issue. The Town's only expert testified that he had not reviewed the SWPPP. (March 15, 2017 Order, p. 25, R. p. 49).

    a) Petitioners' only expert did not review the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and offered no opinion regarding the sufficiency of such measures. (Hrg. Tr., p. 201, l. 12 – p. 202, l. 7, R. pp. 982-983; p. 211, ll. 2-11, R. p. 992).

    b) "On cross-examination, Reice [Petitioners' expert] also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to

minimize the impact of its construction activities." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 526, 745 S.E.2d 385, 391 (Ct. App. 2013).

3) The Town claimed that the excavation of the Pond would create impacts which DHEC failed to assess in granted Roper Pond coverage under the General Permit; however, the Town's expert acknowledged that he was not qualified to opine on this matter. (March 15, 2017 Order, p. 25, R. p. 49).

    a) Petitioners' expert testified that he has no prior experience in assessing the potential impacts of excavation of a water body. (Hrg. Tr., pp. 190-91, R. pp. 971-972). Moreover, while Petitioners' expert initially opined that the proposed excavation of the pond "will simply destroy the ecosystem that is now present," he later withdrew that opinion because, as he stated, "I was trying to restrict myself to what I actually knew as opposed to my conjectures." (Roper Pond Ex. 12, R. pp. 1302-1303; Hrg. Tr., p. 200, R. p. 981).

    c) "Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that '[i]t doesn't sound good' and he would 'be surprised if they didn't,' but declined to offer an expert opinion about the probable results." *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 526, 745 S.E.2d 385, 391 (Ct. App. 2013).

4) The Town argued that Roper Pond did not have the required federal permit for impacts resulting from excavation of the pond, but the federal law is clear and well-settled that a federal permit is required for excavation of a water body only when such activity is to be conducted in a "navigable water of the United States" under Section 10 of the Federal Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq*. The Town argued that a federal permit was required as a general condition of the 401 water quality certification for a nationwide permit to fill 0.075 acres on the Property. (March 15, 2017 Order, p. 26, R. p. 50).

a) Roper Pond presented evidence that there are no navigable waters on the property. (Roper Pond Ex. 6, R. p. 1284-1296; Hrg. Tr. p. 140, , l. 13 – p. 141, l. 7, R. pp. 1030-1031; p. 332, ll. 5-9; R. pp. 1039). The ALC found that Petitioners presented no evidence that the Pond is a navigable water. (January 21, 2010 ALC Order, p. 27, R. p. 194).

b) This Court acknowledged that "there was no contention here that this activity would result in a discharge into a navigable water." *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 534, 745 S.E.2d 385, 395 (Ct. App. 2013).

5) The Town lacked standing to challenge the DHEC decision. The ALC held that "[t]here is an inherent absence of 'substantial justification' for an action where the Town failed to present evidence to establish standing to challenge the DHEC decision at issue." (March 15, 2017 Order, pp. 30-31, R. pp. 54-55).

a) The ALC's findings of fact on the Town's lack of standing based on evidence in the record at the ALC. (Hrg. Tr. p. 249, ll. 20-23, R. p. 1032); (Transcript of the Deposition of Richard W. Thomas, Jr., hereinafter " Town Dep.," p. 41, l. 11 - p. 42, l. 8, R. pp. 1146-1147; p. 43, l. 21 – p. 44, l. 10, R. pp. 1148-1149; p. 44, ll. 1-4, R. p. 1149; p. 44, l. 19 – p. 45, l. 10, R. pp. 1149-1150; p. 46, l. 24 – p. 50, l. 3, R. pp. 1151-1155).

b) "We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are 'fairly traceable' to the challenged action in this case. Similarly, Appellants have not shown any causal connection between the authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1–23–610, we affirm the ALC's determination that the Town lacks standing." *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 530-31, 745 S.E.2d 385, 393 (Ct. App. 2013).

6) The Town's primary objective in challenging the DHEC decision was to stop of delay the construction of the Proposed Project. (March 15, 2017 Order, pp. 31-32, R. pp. 55-56).

a) This finding is based on multiple communications with Town official prior to the filing of the contested case and the testimony of the Town's 30(b)(6) deponent. (Town Dep., p. 83, l. 21 – p. 86, l. 10, R. pp. 1188-1191; p. 112, l. 5 - 113, l. 17, R. pp. 1217-1218); (Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, and 15 to the Affidavit of Joan W. Hartley, hereinafter "Hartley Aff.," attached to the November 30, 2015 Petition for Fees as Exhibit A, R. pp. 290-314, 317-320, 327-331).

Accordingly, the ALC provided detailed findings based on the evidence in the record to support its determination that the Town acted without substantial justification. *Layman v. State*, 376 S.C 434, 444, 658 S.E.2d 320, 325 (2008) ("An 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."). Additionally, the ALC's application of the law to the evidence on the record was affirmed by this Court. An agency acts with "substantial justification" within the meaning of the State Action Statute when its position has a "reasonable basis in law and fact." *McDowell v. SCDSS,* 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). It cannot be argued that the Town's claims had a "reasonable basis in law and fact" when the Town did not even present evidence to demonstrate that DHEC failed to follow the regulations governing the decision at issue in the case. Instead, the Town advanced legal theories which contradict established state and federal law. Even if such theories could be described as novel, such characterization is not sufficient to meet the substantial justification standard. *Cornelius*, 369 S.C. at 539-40, 633 S.E.2d at 496-97.

Citing to *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), the Town argues that "when the state produces relevant legal authority for its position, and where 'the parties argued extensively about the proper interpretation' of such legal authority before the ALC, the state's position

cannot be viewed as unreasonable." (Town's Brief, pp. 9-10). This argument improperly broadens and misrepresents the narrow decision in *Video Gaming Consultants*. The lower court in *Video Gaming Consultants* based the award of attorneys' fees on the state agency's continuation of prosecution of the case following the United States Supreme Court decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). The lower court had further explained that an award of attorneys' fees was appropriate because the state agency did not "disclose to the ALJ Division Court and to this Court the impact and legal effect of *44 Liquormart*," which was issued during the pendency of the case. *Video Gaming Consultants, Inc.*, 358 S.C. at 651, 595 S.E.2d at 892. This Court reversed the lower court, explaining:

> Our review of the record reveals no indication of the Department being less than forthcoming with regard to the Court's decision in *44 Liquormart*. **The Department did not fail to disclose the case to the tribunals in the underlying litigation. The parties argued extensively about the proper interpretation of *44 Liquormart* during the ALJ hearing.** The circuit court likewise engaged in a substantial discussion of the case's impact in its order affirming the ALJ decision. We find no point at which the Department maintained a position that can be viewed as disingenuous.
>
> Furthermore, the Department was in no position to determine that *44 Liquormart* had rendered Section 12-21-2804 unconstitutional. All statutes are presumed constitutional. *Davis v. County of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996). As an administrative agency, the Department "must follow the law as written until its constitutionality is judicially determined; an agency has no authority to pass on the constitutionality of a statute." *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 241, 516 S.E.2d 655, 660–61 (1999). By continuing its action against Video Gaming, the Department was merely enforcing Section 12-21-2804 as it was obligated to do until a proper court determined the statute to be unconstitutional. Thus, we find the Department had a reasonable basis in law and fact for continuing its action against Video Gaming.

Id. at 651–52, 595 S.E.2d at 892 (emphasis added). The extensive arguments on the interpretation of the U.S. Supreme Court case were noted by this Court in the context of

disputing the lower court's claim that the state agency had failed to disclose the case to the lower courts. The finding that the state agency acted with substantial justification is based on the agency's obligation to enforce a statute until it is deemed unconstitutional by a court. The Town did not have enforcement authority in this case; therefore, the *Video Gaming Consultants* decision does not support the Town's position in this case. Additionally, the Town cannot avoid a finding that it acted without substantial justification merely because it argued vigorously in support of its legal theories in this case. As discussed below, those legal theories were contradictory to well-settled law and cannot support a demonstration of "substantial justification," regardless of how vehemently the Town argued in support of such theories.

The Town argues that "[t]he ALC failed to undertake meaningful consideration of pertinent legal authorities supporting the Town's position." (Town's Brief, p. 9). To the contrary, the ALC and this Court considered every contorted legal theory advanced by the Town. In the March 15, 2017 Order, the ALC detailed its ruling on those arguments as well as this Court's consideration of those arguments on appeal. (March 15, 2017 Order, pp. 26-29, R. pp. 50-53). Citing to the Supreme Court holding in *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006), the ALC noted that novel issues were not sufficient to establish substantial justification even where that there were no prior rulings directly on point as to the claims raised by the governmental entity. (March 15, 2017 Order, p. 27, R. p. 51). The ALC applied this holding to the Town's theories in this case:

> Petitioners advanced a legal theory for which there was no precedential basis in federal or state law. Moreover, despite the wealth of case law interpreting the Clean Water Act, the Rivers and Harbors Act, and the permitting programs established under those Acts, Petitioners continued to

press their claim that a 401 Certification issued for a Nationwide Permit in 2007, two years prior to the DHEC decision at issue in this case, required the Department to consider the impacts of the excavation of Roper Pond. The Court of Appeals rejected all of Petitioners' arguments regarding the sufficient of the 401 certification and the alleged error in the Department's failure to consider the impacts of the dredging of the Pond:

> Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations □arrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

Town of Arcadia Lakes, 404 S.C. at 534, 745 S.E.2d at 395. The Court of Appeal also affirmed this Court's ruling that a 404 permit was not required for coverage under the Construction General Permit:

> Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.
>
> First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.
>
> Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did

> not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444–45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

> *Id.* at 536, 745 S.E.2d at 396. Petitioners' presentation of novel legal theories in an attempt to create a 404 permitting requirement where none existing in the well-settled and substantial body of law was rejected by this Court and the Court of Appeals. Therefore, despite Petitioner's novel legal theories, the Town acted without substantial justification in bring this action.

(March 15, 2017 Order, pp. 27-29, R. pp. 51-53). The Town therefore cannot assert that the ALC failed to give "meaningful consideration of pertinent legal authorities" advanced by the Town. Both the ALC and this Court fully considered those arguments and found that there was no basis for such claims under well-settled law interpreting the Clean Water Act, the Rivers and Harbors Act, and the permitting programs established under those Acts.

The Town further argues that the ALC erred in finding that the Town acted without substantial justification because "attorneys advised the Town of their opinion that there was sufficient legal and factual basis for filing a request for contested case hearing." (Town's Brief, pp. 12-13). This argument erroneously suggests a showing of "substantial justification" would merely require a party to overcome the frivolous filing standard under Rule 11, SCRCP, or the Frivolous Civil Proceedings Sanctions Act, S.C. CODE ANN. § 15-36-10 et seq. ("FCPSA"). *Father v. South Carolina Dep't of Soc. Servs.*, 345

S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001) (finding the standard for sanctions under Rule 11 to be essentially the same as that under the FCPSA). The award of attorneys' fees and costs under the State Action Statute does not require a showing that there was no legal basis for the action. "[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." *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (citing *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S.Ct. 2541, 2251 (1988)). In *Heath*, the Court held that the county council acted without substantial justification because "[t]he statute construed in [the case] was unambiguous, and coupled with the relevant precedent clearly established that the Council's claims were without merit." *Id.* at 184, 394 S.E.2d at 712. As discussed at length in the January 21, 2010 ALC Order on the merits in this case and this Court's June 12, 2013 decision affirming this ALC's Order, the legal theories advanced by the Town are in conflict with well-settled state and federal law and do not support a demonstration that the Town acted with substantial justification in bringing this action. Moreover, as fully addressed in the ALC's March 15, 2017 Order, the reliance on the advice of counsel cannot shield a governmental entity from an award of attorneys' fees under the State Action Statute. Otherwise, the Statute "would be rendered meaningless." (March 15, 2017 Order, p. 29, R. p. 53). As the ALC noted, in every reported case awarding attorneys' fees under the State Action Statute, the state agency or political subdivision has been represented by counsel. *Id.* (citations omitted). Accordingly, the Town cannot rely on the advice of counsel to avoid a finding that the Town acted without substantial justification.

The Town further argues that "the government's loss on the merits does not create

a presumption that its position was not substantially justified." (Town's Brief, p. 9, citing *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004) and *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008)). This statement of the relevant case law is incomplete and thus misleading. In *Laymen*, the Supreme Court held as follows:

> Although an agency's loss on the merits does not create a presumption that its position was not substantially justified, *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004)*, **the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim**. *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

Id. at 445, 658 S.E.2d at 326 (emphasis added). In this case, there is no substantive ruling on which Roper Pond and DHEC did not prevail on all issues raised by the Town. Therefore, the "substance and outcome of the matter litigation" is relevant and was properly considered by the ALC in determining that the Town acted without substantial justification.

The Town improperly attempts to characterize the Supreme Court's grant of its writ for certiorari as a statement on the merits of the case. The Town asserts that "the Supreme Court could have simply denied the Petition for Writ of Certiorari if the Petitioners' case had no basis in law or fact." (Town's Brief, p. 11). As a threshold matter, the appropriate determination for the "without substantial justification" standard is not "no basis in law or fact"—it is "no <u>reasonable</u> basis in law or fact." On a more fundamental level, there is simply no basis for suggesting that the grant of a writ of certiorari can be interpreted as the Supreme Court's determination that the appeal has merit. The ALC correctly noted that "[t]he Supreme Court regularly grants certiorari to review a decision of the Court of Appeals and then subsequently dismisses the petition

for writ of certiorari as improvidently granted following oral arguments." (March 15, 2017 Order, p. 30, R. p. 54).[1] As such, the fact that the Supreme Court granted the petition for writ of certiorari in this matter cannot be construed as the Supreme Court's determination on the merits of the Town's claims in this matter.

B. The ALC correctly found that Roper Pond is a prevailing party under the State Action Statute.

The Town argues that the "ALC erred in concluding that Roper Pond is the prevailing party in this case, simply by virtue of the fact that the Town is not." (Town's Brief, p. 21). The Town argues that "sometimes no party 'wins.'" *Id.* Contrary to the Town's assertions, Roper Pond and DHEC prevailed on every issue raised by Petitioners in every substantive ruling in this case. The South Carolina Supreme Court has held that "a party need not be successful as to all issues in order to be found to be a prevailing party" under the State Action Statute. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). In *Heath*, the Court defined "prevailing party" as "'[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.'" *Id.* at 182-83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964)). In this case, the ALC correctly held that Roper Pond successfully defended against the Town's challenge. As such, Roper Pond satisfies the "prevailing party" requirement under the State Action Statute.

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[1] Citing *York County v. South Carolina Dep't of Health and Envtl. Control*, 408 S.C. 180 (2014) (dismissing writ of certiorari as improvidently granted following May 6, 2014 oral argument); *State v. Scott*, 413 S.C. 24, 773 S.E.2d 912 (2015) (dismissing writ of certiorari as improvidently granted following April 22, 2015 oral argument); *Estate of Atn Burns Livingston v. Livingston*, 412 S.C. 610, 773 S.E.2d 579, 580 (2015) (dismissing writ of certiorari as improvidently granted following May 5, 2015 oral argument).

Despite the rulings in favor of DHEC and Roper Pond at the ALC and this Court, the Town contends there is no judgment in favor of Roper because the Supreme Court "did not affirm the lower court opinions." (Town's Brief, pp. 21-22). The Town appears to argue that this Court may award fees and costs under Section 15-77-300 only if its ruling is affirmed on appeal. The State Action Statute imposes no such requirement. The ALC cited to numerous appellate cases in which the award of fees and costs under the State Action Statute is made following a ruling/judgment by the trial court. *See, e.g.*, *Brown v. City of N. Charleston*, 314 S.C. 298, 442 S.E.2d 633 (Ct. App. 1994) (affirming the trial court order granting summary judgment to plaintiffs and reversing the trial court's denial of attorney fees under Section 15-77-300); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006) (affirming trial court's order granting summary judgment to plaintiff and awarding attorney fees under Section 15-77-300). There is simply no basis for the Town's argument that Roper Pond is not a prevailing party because the Supreme Court did not affirm the Court of Appeals decision upholding this Court's ruling.

The Town further argues that "the Supreme Court's decision to dismiss the case as moot does not evidence an intent to affirm the Court of Appeal's decision." (Town's Brief, p. 25). Contrary to the Town's argument, the ALC did not interpret the Supreme Court dismissal as affirming the lower courts' rulings. However, the Town is attempting to interpret the Supreme Court's Order as an "implicit reversal" of the Court of Appeals decision. The ALC correctly held that "[t]he Town improperly interprets the Supreme Court's decision to grant its writ of certiorari as a statement on the merits of the claims at issue." (March 15, 2017 Order, p. 30, R. p. 54). Moreover, the ALC cited to numerous

cases in which the Supreme Court vacated a lower courts' rulings in an order dismissing an appeal as moot or requiring this Court to depublish its opinion in the case when dismissing a writ of certiorari as improvidently granted. (March 15, 2017 Order, pp. 19-20, R. pp. 43-44).[2] The ALC properly found that the effect of the Supreme Court's dismissal of the appeal is limited to dismissal of the action before the Supreme Court. The Supreme Court's order does not reverse or vacate the January 21, 2010 ALC Order or this Court's decision affirming that Order.

The Town further argues that the Supreme Court's finding of mootness precludes an award of fees and costs under Section 15-77-300. Specifically, the Town contends that "a party cannot claim prevailing party status if the ultimate disposition of a case is a mootness dismissal." (Town's Brief, p. 23). In support of this argument, the Town cites the Supreme Court holdings in *City of Charleston v. Masi*, 362 S.C. 505, 609 S.E.2d 301 (2005), and *Douan v. Charleston County Council*, 373 S.C. 384, 645 S.E.2d 241 (2007), The ALC correctly held that these cases do not affect Roper Pond's status as a prevailing party because "the mootness determination in those cases were made <u>prior to the trial court's decision</u> on the merits of the case. (March 15, 2017 Order, p. 20, R. p. 44) (emphasis in original). In *Masi*, the Supreme Court held that the trial court properly declined to award attorney's fees under the State Action Statute where the <u>trial court</u> found the action to be mooted by the Supreme Court's decision in another matter and therefore never issued a decision on the merits in the case. 373 S.C. at 387, 645 S.E.2d at

[2] Citing *Friends of McLeod, Inc. v. City of Charleston*, 384 S.C. 438, 682 S.E.2d 488 (2009) (dismissing appeal as moot and vacating the Court of Appeals opinion in the matter); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 627 S.E.2d 749 (Ct. App. 2005) (finding that decision in separate tort action rendered insurance coverage litigation moot and vacating the trial court's order); *Rivera v. Newton*, 413 S.C. 26, 773 S.E.2d 913 (2015) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect); *Horton v. City of Columbia*, 413 S.C. 25, 773 S.E.2d 912 (2015) (same); *Keeter v. Alpine Towers Int'l, Inc.*, 410 S.C. 445, 766 S.E.2d 375 (2014) (same).

243. Similarly, in *Douan*, the Supreme Court issued a decision in a related case which rendered the action moot before the trial court issued a decision on the merits of the case. 373 S.C. at 387, 645 S.E.2d at 243. The trial courts in *Masi* and *Douan* never ruled on the merits of these cases. Such is not the case here. As discussed above, the ALC made a ruling on the merits in this case and that ruling was affirmed by this Court.

C. The Town is not shielded from an award of attorneys' fees and costs under the State Action Statute because private entities join in the challenge to the DHEC decision to grant Roper Pond coverage under the General Permit.

The Town argues that the State Action Statute does not apply in this case because the Town "is not the 'cause in fact' of legal action being initiated or continued" where the Town was only one of the seventeen Petitioners in this action. (Town's Brief, p. 5). The Town fails to cite to any authority for this "cause in fact" standard. Additionally, the Town erroneously characterized the Town's involvement in this case as "the Town's incidental status as a named co-party." (Town's Brief, p. 7). The fact that there were private parties who joined in this action has no bearing on the Town's potential liability for attorneys' fees and costs under the State Action Statute. Under the Town's argument, a governmental entity could bring an action without substantial justification, but circumvent the applicability of the State Action Statute merely by bringing an action in concert with a private entity. In enacting the State Action Statute, the General Assembly clearly intended to hold state agencies and political subdivisions of the state to a higher standard than private litigants. The Town cannot avoid the "without substantial justification" standard applied to all other political subdivisions and agencies of the state by arguing that the private co-parties are not subject to this standard.

The Town acknowledges that the South Carolina appellate court have not directly

ruled on the applicability of the State Action Statute for actions jointly pursued by public and private entities. However, in support of its argument, the Town cites to *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), in which the South Carolina Retirement System argued that the agency was not subject to the State Action Statute because the State itself was named as a co-defendant in the action. (Town's Brief, p. 6). The Town acknowledges that the Supreme Court rejected this argument, but asserts that the argument advanced by the South Carolina Retirement System is still valid because the Court's rejection of the argument "was based on the artificial nature of a distinction between State and state agency." (Town's brief, pp. 6-7). Contrary to the Town's arguments, the *Layman* rationale supports Roper Pond's position that the Town cannot avoid potential liability under the State Action Statute merely because it brought this action with other parties. The *Layman* Court explained:

> In our view, separating the liability of the State and the Retirement System is **simply an attempt by these parties to bar any potential for a fee award**, and this Court refuses to compartmentalize the actions of the State and the Retirement System in this manner. Instead, we believe the overriding principle of the state action statute is that as a state agency, the Retirement System is obligated to carry out the instructions of the State. Furthermore, as a governing body, the State is ultimately responsible for the actions of its agencies. That the statute plainly recognizes this principle is exhibited by the language purporting to apply to cases in which a party is "contesting state action." S.C. CODE ANN. § 15-77-300. For this reason, we find the attempt to parse the actions of the State and the Retirement System unpersuasive, and therefore hold that either the State or the Retirement System may be liable for attorneys' fees under the statute.

Layman, 376 S.C. at 446, 658 S.E.2d at 326 (emphasis added). In the same manner, the Town cannot attempt to avoid the operation of the State Action Statute by arguing that other parties who are not subject to the Statute are co-parties. Moreover, this rationale is even more compelling in this case. In *Layman*, the South Carolina Retirement System was a defendant in a case contesting state action. In this case, the Town chose to bring an

action challenging DHEC's decision. Additionally, and significantly, the decision at issue in this case is for a project that is not even within the municipal limits of the Town. The Town cannot take such action without being held to the standard applied to every other political subdivision of the state who avails itself of the legal system.

D. The ALC properly granted Roper Pond's motion to strike the affidavits offered by the Town.

The Town argues that the ALC improperly granted Roper Pond's motions to strike the affidavits of Eugene C. McCall, Jr. ("McCall Affidavit"), D. Cravens Ravenel ("Ravenel Affidavit"), and John P. Freeman ("Freeman Affidavit") which were offered as "the Town's evidence on the question of whether a reasonable factual and legal basis existed for the Town's participation in the case." (Town's Brief, p. 14). "A motion to strike is likewise within the trial court's discretion and will not be reversed absent an abuse of discretion." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 143, 697 S.E.2d 644, 653 (Ct. App. 2010) (citing *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993)). The qualification of an expert witness and the admissibility of his opinions are matters resting largely within the trial judge's discretion. *Daves v. Cleary*, 355 S.C. 216, 584 S.E.2d 423 (2004). The determination on whether to qualify a witness as an expert and admit the expert's testimony is left to the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). Rule 702, which governs the admissibility of expert testimony, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

S.C.R. Evid. 702. (Emphasis added). "In general, expert testimony on issues of law is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (citations omitted) (emphasis in original). The ALC correctly found that the opinions offered the affidavits filed by the Town were improper legal conclusion on matters which were within the parameters of the ALC's ordinary knowledge and would not assist the ALC as the trier of fact.

The Town argues that the ALC improperly relied on *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), in ruling that Professor Freeman's affidavit was inadmissible. (Town's Brief, p. 14). This argument is without merit as the Supreme Court holding in *Dawkins* is directly on point. In *Dawkins*, the trial court refused to consider Professor Freeman's expert affidavit offered in opposition to defendants' motion for summary judgment. In upholding the trial court's refusal to consider the affidavit, the Supreme Court found that "Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment." *Id.* at 65, 580 S.E.2d at 437 (citation omitted). The holding in *Dawkins* provides as follows:

> Rule 702, SCRE, provides that "[i]f . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." While it is true that "an opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," Rule 704, SCRE, Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment. *See O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106-07,

249 S.E.2d 734, 739-40 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court).

In general, expert testimony **on issues of law** is inadmissible. *See generally* Note, *Expert Legal Testimony,* 97 Harv. L. Rev. 797, 797 (1984); *see also Askanase v. Fatjo,* 130 F.3d 657, 673 (5th Cir.1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "[s]uch testimony is a legal opinion and inadmissible."); *United States v. Sinclair,* 74 F.3d 753, 758 n. 1 (7th Cir.1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

Recently, this Court decided the issue of whether expert testimony from a criminal defense attorney on whether trial counsel was deficient could be admitted at a post-conviction relief (PCR) hearing. *Green v. State,* 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002). Green argued that Rule 702 required the PCR judge to admit the expert opinion testimony. We disagreed, and stated the following:

> The expert offered no factual evidence. He proffered his opinion, assuming certain facts, [that] trial counsel's actions fell below acceptable legal standards of competence. **The testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence.** Such "testimony" falls outside of Rule 702, SCRE.

Id. (emphasis added).

Green is instructive to the instant case. Here, Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual information,[FN4] the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise. *See Green, supra; O'Quinn, supra.*

> FN4. For instance, Professor Freeman offered his opinion that based on the value of the south side tract, Seaside's stock value per share was approximately $800, and therefore, selling the stock for $100 per share was

improper.

Dawkins v. Fields, 354 S.C. 58, 65-67, 580 S.E.2d 433, 437 (2003) (emphasis in original). The Supreme Court held the trial court properly refused to consider Professor Freeman's affidavit because "the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied" *Id.* at 66-67, 580 S.E.2d at 437 (footnote omitted).

In the Freeman Affidavit, Professor Freeman offered his opinions on whether the Town's claim in this matter were substantially justified and whether the case warrants sanctions as a frivolous proceeding under the reasonable attorney standard. (Freeman Aff., p. 9, R. p. 884). The ALC's determination on whether the Town acted without substantial justification under S.C. CODE ANN. § 15-77-300 involves the application of the facts in this case to the significant body of case law interpreting "without substantial justification" under S.C. CODE ANN. § 15-77-300. Mr. Freeman has no "scientific, technical, or other specialized knowledge" to assist the Court in understanding those facts or determining a fact in issue. As in *Dawkins*, "Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court." *Id.* at 66, 580 S.E.2d at 437. Professor Freeman merely sought to stand in the shoes of the ALC in applying the facts to the applicable law.

The Town's argues that the Freeman Affidavit is admissible because Professor Freeman's affidavit was admitted in the other cases: *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008); *Hatfield v. Van Epps*, 358 S.C. 185, 594 S.E.2d 526 (Ct. App. 2008); *Tuten v. Joel*, 410 S.C. 104, 763 S.E.2d 54 (Ct. App. 2014). However, in these cases, Professor Freeman offer opinions in areas of the law in which he was deemed to have some expertise. In *Vortex* the Supreme Court found

that the trial properly admitted Professor Freeman's expert testimony because Professor Freeman's experience in the substantive body of law—corporate law—qualified him to opine on self-dealing by a corporation's former officer. *Id.* at 208, 662 S.E.2d at 450. In *Hatfield*, Professor Freeman was qualified as an expert in "lawyer's duties and legal malpractice, based largely on his academic and other professional involvement in matters of legal ethics." *Hatfield*, 358 S.C. at 197-98, 594 S.E.2d at 533. Similarly, in *Tuten,* the opposing party stipulated that Professor Freeman was qualified as an expert in "professional duties in handling litigation for clients" and "duties owed by lawyers when withdrawing from representation." *Tuten*, 410 S.C. at 111, 763 S.E.2d at 58. In this case, Professor Freeman has no experience--much less expertise--in the substantive body of law. Professor Freeman has no specialized knowledge on the underlying factual determinations or the law applicable to the underlying case. The ALC therefore properly granted Roper Pond's motion to strike the Freeman Affidavit.

As with Professor Freeman, Mr. Ravenel offers no specialized knowledge of expertise to assist the ALC as the trier of fact on Roper Pond's petition for attorneys' fees and sanctions. Mr. Ravenel merely reviewed the filings in the record before this Court and the appellate courts and opined as follows: "Based on my review of the relevant documents, in my professional opinion, the Town presented a colorable, adequate, reasonable and proper factual and legal basis for their request for a contested case hearing seeking review of DHEC's authorization to Roper Pond, LLC." (Ravenel Affidavit, ¶ 8, R. p. 910). As with Professor Freeman's opinions, Mr. Ravenel simply offered his opinion on the ultimate legal determination to be made by the ALC. The ALC therefore properly granted Roper Pond's motion to strike the Ravenel Affidavit.

While Mr. McCall is an environmental attorney and a professional engineer, the ALC properly excluded the McCall Affidavit because the Mr. McCall also offered impermissible legal conclusions under the *Dawkins* holding and presented opinions which were irrelevant to the matters before the ALC. Mr. McCall opined that "[b]ased upon the history, facts and law in this case, I have concluded, as an attorney and an engineer, that there was a reasonable basis for pursuing this litigation." (McCall Affidavit, ¶ 13, R. p. 896). Mr. McCall further opined that "Petitioners' claims were well founded and not frivolous." (McCall Affidavit, ¶ 14, R. p. 897). Again, these opinions were opinions on the ultimate legal questions before this ALC and impermissible pursuant to the *Dawkins* holding.

Although Mr. McCall testified that prior to the filing of this contested case, he provided counsel for Petitioners with his professional engineering opinion regarding "appropriate controls" necessary to prevent sedimentation and water quality degradation, he failed to identify the "appropriate controls" to be implemented. (McCall Affidavit, ¶ 8, R. p. 894). Moreover, Mr. Mc Call did not opine that the controls in the storm water pollution prevention plan ("SWPPP") approved by the Department were deficient. Mr. McCall merely opined that based on his review prior to the Petitioners' filing of the contested case, "[s]ignificant sediment deposition would most probably occur in Roper Pond during and after construction unless appropriate controls were implemented, proper care was taken during construction, and proper maintenance was conducted after construction." (McCall Affidavit, ¶ 8(a), R. p. 894). Moreover, even if Mr. McCall had provided an opinion regarding the deficiency of control measures in the SWPPP, the ALC and this Court found that Petitioners failed to offer any evidence that the SWPPP

approved by the Department was technically deficient. (January 21, 2010 Order, pp. 21-22, R. pp. 188-189); *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control,* 404 S.C. 515, 531, 745 S.E.2d 385, 393 (Ct. App. 2013). Additionally, Petitioners offered no expert to opine on the sufficiency of the SWPPP at the contested case hearing. Petitioners' only expert witness offered in this matter testified that he had not reviewed the SWPPP prepared on behalf of Roper Pond. (Hrg. Tr., p. 201, l. 12 – p. 202, l. 7, R. pp. 982-983). When Mr. McCall was unable to provide the testimony at the hearing on the merits in this case because of a potential conflict, Petitioners failed to engage another professional engineer to provide expert testimony regarding the sufficiency of the SWPPP. Accordingly, the ALC properly found that "Mr. McCall's testimony regarding the 'appropriate controls' is irrelevant to this Court's determination on whether the Town acted without substantial justification or brought the contested case solely for the purpose of delay." (January 25, 2016 Order, p. 13, R. p. 115).

E. <u>**The State Action Statute applies to fees incurred in a contested case before the ALC.**</u>

The Town argues that the ALC improperly held that Roper Pond is entitled to attorneys' fees and costs incurred in the contested case before the ALC. Attorneys' fees and costs incurred in an action originating in the Administrative Law Court are subject to an award under the State Action Statute. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 358 S.C. 647, 651-52, 595 S.E.2d 890, 892 (Ct. App. 2004) (reviewing an award of attorneys' fees pursuant to S.C. CODE ANN. § 15-77-300 for fees associated with appeal originating in the Administrative Law Court). Indeed, Section 15-77-300(C) of the State Action Statute expressly excludes certain actions, but not all actions, which are within the jurisdiction of the Administrative Law Court.

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

S.C. CODE ANN. § 15-77-300(A), (C). Pursuant to S.C. CODE ANN. § 1-23-310(3), a contested case under the jurisdiction of the ALC includes proceeding related to "ratemaking, price fixing, and licensing." S.C. CODE ANN. § 1-23-310(3). Similarly, S.C. CODE ANN. § 40-1-160 provides that an appeal from the decision of a state licensing board is filed in the Administrative Law Court. S.C. CODE ANN. § 40-1-160. Additionally, post-conviction relief actions are brought under the provisions for contested cases contained in the Administrative Procedures Act. *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). Since the State Action Statute excludes some, but not all, of the actions under the jurisdiction of the ALC, it is clear that those actions, which are not expressly excluded, are subject to the State Action Statute. *Stewart v. Richland Memorial Hosp.*, 350 S.C. 589, 594, 567 S.E.2d 510, 513 (Ct. App. 2002) (citation omitted) ("The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded."). As such, the ALC correctly found that attorneys' fees and costs incurred by Roper Pond in the contested case before the ALC is subject to the State Action Statute.

The Town contends that the ALC improperly distinguished the *McDowell* decision in finding that Roper Pond is entitled to an award of attorneys' fees for the contested case. (Town's Brief, p. 37). The ALC correctly notes that the *McDowell* decision was issued prior to the creation of the ALC. (June 14, 2017 Order, p. 10, R. p. 10). The ALC's reliance on *McDowell* supports the award of attorneys' fees under the State Action Statute for proceedings before the ALC. Specifically, the administrative

proceeding at issue in the *McDowell* case was a hearing before the Fair Hearing Committee of the South Carolina Department of Social Services. *McDowell v. S.C. Dep't of Soc. Servs.*, 296 S.C. 89, 91, 370 S.E.2d 878, 879 (Ct. App. 1987). The Fair Hearing proceedings at the Department of Social Services is a "proceeding before an impartial Department employee or committee of employees." S.C. CODE ANN. REGS. § 114-100(J). For DHEC actions, the final review conference before the DHEC Board would be comparable to the Fair Hearings Committee. S.C. CODE ANN. § 1-44-60(E), (F). "[A] final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair." S.C. CODE ANN. § 1-44-60(F). "After the final review conference, the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented." S.C. CODE ANN. § 1-44-60(F)(2). After the final agency decision issued, the party may file a request for a contested case hearing to the ALC. S.C. CODE ANN. § 1-44-60(G).

As the Town noted, the *McDowell* decision pre-dated the creation of the ALC. The ALC is established with administrative judges and is a "court of record within the executive branch of the government." S.C. CODE ANN. § 1-23-500. The administrative law judges are elected by the General Assembly for a term of five years and are bound by the Code of Judicial Conduct. S.C. CODE ANN. §§ 1-23-510 and -560. Accordingly, the *McDowell* decision does not support the Town's argument that proceedings before the ALC are not subject to the State Action Statute. The Town also cites to *Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010), but this case does not support the Town's position that a contested case before the

ALC is not subject to the State Action Statute. In *Transportation Ins. Co. & Flagstar Corp.*, the Court was considering the commencement of a "civil action" in the context of the statute of limitations—not the award of attorneys' fees. *Id.* at 432, 699 S.E.2d at 692. As such, the Town has failed to cite relevant authority to dispute the ALC's award of attorneys' fees and costs incurred by Roper Pond in the contested case before the ALC.

F. **Roper Pond presented sufficient documentation on the fees and costs incurred in defending this action.**

The Town argues that Roper Pond failed to provide sufficient detail to describe the attorney time in support of its petition for attorneys' fees and costs under the State Action Statute. "The specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion or an error of law." *Hueble v. S.C. Dep't of Nat. Res.*, 416 S.C. 220, 232, 785 S.E.2d 461, 467 (2016) (citing *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)); *see also Baron Data Sys. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 296 (1989) ("Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence."). Section 15-77-300(B) establishes the following factors to be applied in making this determination:

> (1) the nature, extent, and difficulty of the case;
> (2) the time devoted;
> (3) the professional standing of counsel;
> (4) the beneficial results obtained; and
> (5) the customary legal fees for similar services.

S.C. CODE ANN. § 15-77-300(B). This provision of the State Action Statute further provides that the Court "must make specific written findings regarding each factor listed

above in making the award of attorney's fees." *Id.* The ALC issued a detailed order which made written findings on each of the factors. (June 14, 2017 Order, pp. 4-12, R. pp. 4-12).

The Town argues that counsel for Roper Pond must provide detailed time entries describing each task performed by counsel for Roper Pond in this matter. Roper Pond submitted a detailed time entry summary which provide the daily hours worked by each attorney in this matter. The ALC found that such detail was sufficient under the State Action Statute. In support of this finding, the ALC cited to the Supreme Court holding in *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016), which involved an award of attorneys' fees pursuant to the UTPA. In *Maybank,* the Supreme Court held that such detailed time entries were <u>not</u> required for the court to determine the amount of attorneys' fees to be awarded under the statute. 416 S.C. at 580, 787 S.E.2d at 518. The defendants in *Maybank* argued that detailed time entries were needed to determine which time was devoted to the UTPA because the UTPA claim was the only claim of eleven for which the plaintiff was entitled to attorneys' fees. The Supreme Court held that the trial court's 20 percent reduction in the award of attorneys' fees sufficiently accounted for the time expended on other claims since "all of Maybank's claims shared the same common facts and required combined efforts throughout the litigation process." *Id.* The ALC properly found that there was no basis for the reduction in the award of attorneys' fees this case because the Roper Pond is entitled to an award of attorneys' fees as to all claims pressed by the Town and Roper Pond prevailed on all of those claims. Moreover, the ALC noted that counsel for Roper Pond had already discounted its bills in this matter by

approximately ten percent. (Affidavit of Joan W. Hartley dated July 16, 2015, R. pp. 739-761).

The Town further argues that Roper Pond is not entitled to an award of attorneys' fees for all of the attorneys' fees incurred in this matter because the Town was only one of 17 petitioners in this case. The ALC properly rejected this argument based on the *Layman* holding:

> The Supreme Court addressed this argument in the *Layman* case. In *Laymen*, the defendants argued that the award of attorneys' fees should be reduced because the plaintiffs offered an affidavit with "the hours spent on the litigation of the case (designated on the chart below as 'Total Hours Expended'), with no distinction between the time associated with the TERI participants' claims giving rise to the instant case, and time associated with the Working Retirees' claims, which were remanded." The Supreme Court rejected this argument:
>
> > Although the record indicates that Working Retirees constituted roughly one-third of the class of plaintiffs in *Layman*, we do not find it necessary to adjust the total hours expended by this proportion in order to arrive at a reasonable fee in this case. Not only were the same legal theories advanced on behalf of both the TERI participants and the Working Retirees, making their claims virtually indistinguishable, but more importantly, guiding jurisprudence explicitly holds that "a party need not be successful as to all issues in order to be found to be a prevailing party" for purposes of awarding attorneys' fees under the state action statute.[8] *Heath*, 302 S.C. at 182, 394 S.E.2d at 711. Only in an abundance of caution, however, do we reduce the number of total hours expended by three percent (3%), rounded down to the nearest tenth, in order to account for any time devoted solely to the Working Retirees' claims, thereby arriving at what we view as a "reasonable" number of hours expended on the TERI participants' claims (appearing as "Net Hours Expended" in the chart below). *See Edmonds*, 658 F.Supp. at 1135 n. 18, 1147 n. 44 (performing a lodestar analysis and adjusting the time devoted to litigating the underlying case by two to three percent in order to account for the fact that "some hours may not be properly compensable").

> *Layman*, 376 S.C. at 459–60, 658 S.E.2d at 333–34 (footnote omitted). While the Supreme Court adjusted the actual time expended by the attorneys in that class action by 3%, this adjustment was made "[o]nly in an abundance of caution" because the claims of a group within the class had been remanded. *Layman*, 376 S.C. at 359-60, 658 S.E.2d at 333-34. However, no such adjustment is warranted in this case because all of the petitioners advanced the identical claims. There was no factual or legal distinction between the claims of the Town and those of the other petitioners.
>
> Additionally, even if an adjustment were warranted, it would not be necessary because counsel for Roper Pond discounted its bills in this matter by approximately ten percent. According to the detail of time expended by Nexsen Pruet attorneys on this matter, the value of the time actually expended on this matter totals $217,048.50. (Affidavit of Joan W. Hartley dated July 16, 2015). However, Nexsen Pruet billed Roper Pond a total of $195,068 in attorneys' fees from February 11, 2009 through March 18, 2015. Nexsen Pruet thus provided Roper Pond with a reduction of $21,980.50 on the billing in this matter. Therefore, the value of actual time expended in this litigation has already been adjusted by approximately ten percent. Given that adjustment, Roper Pond is entitled to the total time actually billed by Nexsen Pruet in this matter.

(June 14, 2017 Order, pp. 7-8, R. pp. 7-8). The ALC properly found that Roper Pond is entitled to attorneys' fees and costs incurred in defending this action.

II. THE ALC CORRECTLY IMPOSED SANCTIONS ON THE TOWN BASED ON ITS FINDING THAT THE TOWN BROUGHT THIS ACTION SOLELY FOR THE PURPOSE OF DELAY.

The evidence on the record before the ALC support the imposition of sanctions on the Town. Rule 72, SCRPALC, provides as follows:

> If the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous <u>or</u> taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Rule 72, SCRPALC (emphasis added). Roper Pond filed the November 30, 2015 Third Amended Petition for Fees for the purpose of withdrawing its claims for sanctions against the individual Petitioners and limiting the request for sanctions to those based on a determination that the contested case was "taken solely for purposes of delay."

(November 30, 2015 Third Amended Petition for Fees, p. 3, R. p. 812). "The imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) (citation omitted). "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). The ALC made detailed findings of fact based on the evidence on the record at the ALC in support of its conclusion that the Town brought this action solely for the purpose of delay. The findings and references to evidentiary support for this conclusion are summarized as follows:

1) The Town was involved in communications with DHEC and other governmental representatives with the stated purpose of stopping or delaying the Proposed Project. (Hartley Aff., Exs. 5, 10, 11, 12, R. pp. 299-301, 315-320).

2) The Town's Mayor contacted politicians and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. (Hartley Aff., Exs. 3 and 4, R. p. 294-298).

3) Prior to DHEC decision at issue in this case, professionals reviewed the SWPPP on behalf of the Town, but intentionally withheld information on alleged deficiencies from DHEC and Roper Pond. (Hartley Aff., Exs. 5, 6, 7, 8, 14, R. p. 299-312, 325-326).

4) The Town's 30(b)(6) deponent could not identify a factual basis for challenging the sufficiency of the SWPPP approved by DHEC even though the deponent, the Town's Mayor held a master's degree in engineering, had reviewed the SWPPP, and testified that he would be competent to prepare and seal such the design drawings for the SWPPP. (Town Dep., p. 14, ll. 4-10, R. p. 1119; p. 24, ll. 16-22, R. p. 1129; p. 22, l. 19 – 23, l. 11, R. p. 1127-1128; p. 25, ll. 17-23, R. pp. 1130; p. 32, ll. 11-16, R. p. 1137).

5) The Town's 30(b)(6) deponent expressed a number of reasons for opposing the Proposed Project—none of which related to the DHEC decision at issue in the case. The deponent testified as to a number of concerns including a decrease in property values, inconsistency with character of neighborhood, transient nature of

renters, light intrusion from Proposed Project, and traffic concerns. (Town Dep., p. 112, l. 5 -113, l. 17, R. pp. 1217-1218).

6) The Town council adopted a resolution to the Richland County Planning Commission regarding development plans submitted to the County for the Proposed Project. The Resolution advised the Commission of the Town's belief that the proposed development as multifamily high density apartments was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ." (Town Dep., Ex. 6, R. pp. 1281-1282).

7) The Town's 30(b)(6) deponent testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property and the opposition to the development began upon learning that the property would be developed as an apartment project. (Town Dep., p. 83, l. 21 – p. 86, l. 10, R. pp. 1188-1191; p. 112, l. 5 -113, l. 17, R. pp. 1217-1218).

Accordingly, the ALC provided detailed findings based on the evidence in the record to support its determination that the Town brought this action solely for the purpose of delay.

The Town argues that the evidence on the record in support of the imposition of sanctions is not sufficient to bind the Town because the Mayor is only one vote on the town council. (Town's Brief, pp. 46-51). However, this argument disregards the fact that the Town designated the Mayor as its sole deponent for the Town's 30(b)(6) deposition. As such, the ALC properly relied on evidence of the Mayor's statements in the record. Moreover, as noted above, the evidence also includes a resolution passed by the council in opposition to the Proposed Project.

The Town argues that the imposition of sanctions by the ALC is inappropriate without a determination that the Town's claims were frivolous. (Town's Brief, p. 61). However, Rule 72 does not require demonstration that the contested case was frivolous.

The Rule clearly states that the ALC may impose sanctions when "a contested case, appeal, motion, or defense is frivolous <u>or</u> taken solely for purposes of delay." Rule 72, SCRPALC (emphasis added). There is no basis for arguing that a frivolous action warrants a greater sanction that an action taken solely for purposes of delay. In either case, the party on which the sanctions are imposed has availed itself on the court for an improper purpose and sanctions are thus warranted. In this case, the ALC found that the Town's actions involved "an egregious use of lawful statutes to the harm of the owner and the unnecessary expenditure of the time of the Court." (June 14, 2017 Order, p. 15, R. p. 15). The ALC thus properly imposed a sanction of $200,000 against the Town.

III. THE ALC PROPERLY IMPOSED SANCTIONS IN ADDITION TO THE AWARD OF ATTORNEYS' FEES AND COSTS UNDER THE STATE ACTION STATUTE.

The Town argues that the sanctions are fees on fees and thus improper. As a preliminary matter, the ALC did not award sanctions to Roper Pond and therefore the Town cannot characterize the sanctions as fees. Additionally, Rule 72 clearly provides "the judge may impose such sanctions as the circumstances of the case and <u>discouragement of like conduct in the future may require</u>." Rule 72, SCRPALC (emphasis added). Roper Pond offered financial documents and council minutes demonstrating that the Town has accumulated unrestricted net assets in excess of $1 million. (Exhibits 1 and 2, Affidavit of Joan W. Hartley dated April 3, 2017, R. App. pp. 20-51). The ALC therefore correctly determined the amount of sanctions based on the substantial unrestricted reserves held by the Town. Moreover, the evidence on the record demonstrates that the only service which the Town provides its citizen is municipal solid waste collection and disposal at no charge. (June 14, 2017 Order, p. 14, R. p. 14). In 2016, the Town had revenues of $320,046 and expended only $128,562 on the waste

collection and disposal services. (June 14, 2017 Order, pp. 14-15, R. pp. 14-15). Moreover, the imposition of sanctions would not directly impact the citizens of the Town because all of the Town revenue is derived from sales tax, insurance tax, brokers, tax, telecommunications tax, local business license tax, South Carolina Local Government Fund, and utility franchise fees. The Town imposes no tax assessment on its citizens, thus its citizens would not directly fund the payment of the judgment. (June 14, 2017 Order, p. 14, R. p. 14).

Additionally, the imposition of sanctions is not fees on fees because Roper Pond requested sanctions to address the costs incurred by Roper Pond during the pendency of the contested case. As discussed more fully in Appellant's Initial Brief of Respondent/Appellant Roper Pond, LLC, Roper Pond requested sanctions against the Town to be based, in part, on the costs incurred by Roper Pond as a result of the delay in construction of the Proposed Project. The South Carolina Supreme Court has held 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. 590, 596, 713 S.E.2d 624, 627 (2011) (affirming an award of sanctions which included lost income of plaintiff doctor caused by improper second removal to federal court). In *Bon Secours*, the trial court imposed sanctions under Rule 11 for a second removal of the case by defendant hospital on the morning on which a jury trial of the case was scheduled to begin. The trial court found that the "second removal was based upon the same grounds as the first removal, was without merit, and was interposed solely for delay." *Id.* at 595, 713 S.E.2d at 627. The trial court ordered sanctions totaling $68,000, including $53,685.65 for the plaintiff doctor for lost income,

trial costs and fees, and attorneys' fees. *Id.* at 596, 713 S.E.2d at 627. The Supreme Court upheld this portion of the sanctions awarded to the plaintiff doctor under Rule 11, SCRCP. *Id.* at 600, 713 S.E.2d at 629-30.

The *Bon Secours* Court set forth the following factors for determining the appropriate sanctions under Rule 11, SCRCP:

> A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing. *See Runyon*, 322 S.C. at 19, 471 S.E.2d at 162. The sanctions may include: an order to pay the reasonable costs and attorneys' fees incurred by the party defending against the action brought in bad faith; a reasonable fine to be paid to the court; a reasonable monetary penalty to the party defending the action brought in bad faith; or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future action in bad faith. *Id.*

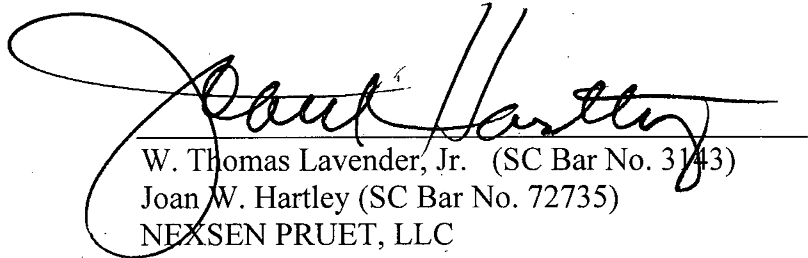
Bon Secours, 393 S.C. at 597-98, 713 S.E.2d at 628 (citing *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)). Although deterrence of similar future action was a factor in determining the appropriate sanctions, the *Bon Secours* Court clearly held that the costs to the opposing party also was a consideration, and in fact, upheld sanctions to that opposing party for lost income incurred a result of the Rule 11 violation. Accordingly, costs incurred in addition to attorneys' fees is a proper consideration in determining the nature of sanctions to be imposed.

CONCLUSION

For the reasons stated herein, the Court should affirm the ALC's award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 and the imposition of sanctions pursuant to Rule 72, SCRPALC.

Respectfully submitted,

June 7, 2018



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THE 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

Case No. 09-ALJ-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,

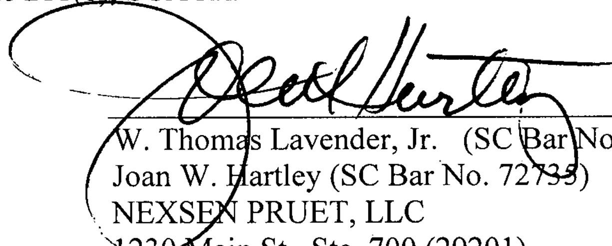
and

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

CERTIFICATION OF COUNSEL

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

June 7, 2018



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