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SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE ADMINISTRATIVE LAW COURT  
John D. McLeod, Administrative Law Judge

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Appellate Case No. 2017-001554

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Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutton Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

Of Which Town of Arcadia Lakes is the Appellant/Respondent,

vs.

South Carolina Department of Health and Environmental Control, Respondent, and Roper Pond, LLC, Respondent/Appellant.

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**SUPPLEMENTAL MEMORANDUM**

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The Court has requested a supplemental memorandum on the question of whether the ALC has the power to award any fees under § 15-77-300 and, if not, the proper remedy in this case. The Town of Arcadia Lakes, having been compelled to pay significant fees under § 15-77-300, responds herein.

**I. The ALC has no Authority to Award Fees Under the State Action Statute:**

Based upon plain statutory language and South Carolina case law, the ALC could never be properly presented with the question of whether to award fees under the State Action Statute, and the ALC therefore lacks the power to award fees under that Statute.

A. The Plain Language of the State Action Statute Applies Only to Civil Actions.

In comparing the language of the State Action Statute to that of the Frivolous Civil

Proceedings Sanctions Act (“Frivolous Proceedings Act”), unequivocal differences reflect that consideration of State Action Statute fees is necessarily out of place in the ALC.

The Frivolous Proceedings Act, our state’s fee recovery statute of general applicability, contains the following direct excerpts:

(A)(1) A pleading filed **in a civil or administrative action** on behalf of a party who is represented by an attorney must be signed by at least one attorney of record who is an active member of the South Carolina Bar or who is admitted to practice in the courts of this State and must include the address and telephone number of the attorney signing the document.

(2) A document filed **in a civil or administrative action** by a party who is not represented by an attorney must be signed by the party and must include the address and telephone number of the party.

...

(4) An attorney or pro se litigant participating **in a civil or administrative action** or defense may be sanctioned for: . . .

S.C. Code § 15-36-10 (emphasis added). By direct comparison, the State Action Statute contains the following:

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

S.C. Code § 15-77-300 (emphasis added). The purpose of this highlighted variation, and, by proxy, the legislature’s intent, could not be more clear. The Frivolous Proceedings Act never fails to specify the application of its terms to *both civil and administrative actions*, and, in this light, the State Action Statute’s limitation to “*any civil action*” is obviously meaningful. Under the South Carolina Rules of Civil Procedure, a “civil action” can only be commenced by filing a summons and complaint with the clerk of court in the manner prescribed by the SCRCRCP Rule 3(a). Thus, an administrative action filed pursuant to § 1-23-600 is not a “civil action” as contemplated by the

State Action Statute. Fees are available in an administrative action like this one only if the standard of frivolity is met under § 15-36-10, but fees are not available in an administrative action based on the eased standard found within the State Action Statute.<sup>1</sup>

The ALC is an agency and an arm of the executive branch: “There is created the South Carolina Administrative Law Court, *which is an agency* and a court of record *within the executive branch* of the government of this State.” See S.C. Code § 1-23-500 (emphasis added). Moreover, the ALC is the final step of an administrative review process and is preceded only by other agency action. See, e.g., S.C. Code § 1-23-380 (“A party *who has exhausted all administrative remedies* available within the agency and who is aggrieved by a final decision in a contested case is entitled *to judicial review* pursuant to this article and Article 1.”). Because the State Action Statute is triggered only by a “civil action,” administrative actions arising under the statutory scheme of § 1-23-10, *et seq.* do not meet the requisite precondition for seeking an award. Consequently, the question of whether to award fees under the State Action Statute could not properly come before the ALC. In other words, the ALC should never be called upon to award State Action Statute fees for its own proceedings, nor for any appellate proceedings arising from an administrative action.

B. ALC’s Review of Appellate Court Proceedings:

In this case, the ALC awarded State Action Statute fees for all of the time committed to this case by Roper Pond’s attorneys, including for proceedings before this Court and the South Carolina

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<sup>1</sup>The Frivolous Proceedings Act authorizes fees and costs against any party, whether a governmental entity or not, on the basis of frivolous legal action. See § 15-36-10(A)(4). In contrast, the bar for fee recovery under the State Action Statute is much lower, in that a governmental entity only must have acted “without substantial justification.” In short, it is much easier to get fees under the State Action Statute, if that statute is applicable. The inclusion of “administrative action” only in the Frivolous Proceedings Act reflects the legislature’s determination that a party seeking fees in an administrative forum should not benefit from the State Action Statute’s low bar, but rather should have to meet the higher standard of frivolity in order to recover.

Supreme Court. As discussed above, the State Action Statute is only triggered by “civil actions.” Even though the appeal of this administrative action moved the matter from the executive to the judicial branch, this matter remained an administrative action arising under § 1-23-600. No “civil action” need be commenced in order to initiate an appeal of an administrative action, nor is an administrative action magically converted into a civil action upon appeal to the judicial branch. Because the ALC clearly lacks authority to undertake consideration of State Action Statute fees for its own administrative proceedings, it similarly cannot award such fees for an administrative appeal proceeding before the state appellate courts. Indeed, it simply does not compute logically or legally that an entity with jurisdiction as tightly constrained as the ALC would have authority to undertake an inquiry on remand from appeal that it could not have undertaken in the first place.

Relatedly, the ALC’s award of State Action Statute fees for appellate proceedings would have serious negative implications for the separation of powers between the branches of our state government. State Action Statute fees are authorized for civil actions arising within the judicial branch, and, in every other instance within our state’s jurisprudence, it has been a court within the judicial branch that has undertaken consideration of whether to award such fees. Having a statutorily-created administrative body attempting to sit in a position of review in relation to the judicial branch is troublesome and, in fact, the reverse of the balance of authority that is established by the Administrative Procedures Act. While the circuit courts may be authorized to evaluate State Action Statute fees for appellate proceedings, no legal basis exists to bestow an administrative agency with such authority. The ALC’s evaluation of the justification for arguments presented to the appeals courts in this case fundamentally exceeds the discrete authority granted to the ALC, as well as the plain language of the State Action Statute.

This Court’s relatively recent decision in Lawrence v. Brown, No. 2016-000479, 2018 WL 3058274 (S.C. Ct. App. June 20, 2018), is particularly instructive. In Lawrence, the plaintiff asked the family court to determine her eligibility for fee recovery on appellate proceedings in the case, but the family court refused. This Court affirmed, holding that “the family court **did not err by finding it lacked jurisdiction to determine whether Lawrence was entitled to appellate attorney’s fees** because the supreme court did not remand the issue of attorney’s fees to the family court.” Id. at \*2 (emphasis added). In reaching that holding, this Court acknowledged a string of precedential cases affirming the ability of the circuit courts to award statutory fees for appellate proceedings. Critically, however, this Court differentiated the broad authority of the circuit courts to engage in such inquiries from the more circumscribed role of family court.<sup>2</sup> Id.

The ALC, as an executive body with tightly constrained jurisdiction and authority, is even more limited in this regard than is the family court. “The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC’s powers.” Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’tl. Control, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013). “[R]egulatory bodies ... have only the authority granted them by the legislature.” Responsible Econ. Dev. v. S.C. Dep’t of Health & Env’tl. Control,

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<sup>2</sup>The Court’s exact ruling on this point was as follows:

We note Lawrence argues *Austin v. Stokes-Craven Holding Corp.*, *Muller v. Myrtle Beach Golf and Yacht Club*, and *Taylor v. Medenica* all state the award of appellate attorney’s fees pursuant to appellate court rules does not prevent a party from also seeking statutorily authorized attorney’s fees in circuit court, and thus, she should be allowed to seek appellate attorney’s fees in the family court. However, we find *Austin*, *Muller*, and *Taylor* are all legally distinguishable from this case because they were not decided in the family court. Thus, we find the family court correctly found it lacked jurisdiction to award Lawrence appellate attorney’s fees.

Id.

371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007). As is particularly relevant here, the legislature has not granted any authority to the ALC in relation to civil matters. See, e.g., Randolph R. Lowell, South Carolina Administrative Practice and Procedure, 152 (2d ed. 2008) (“The ALC has no authority to decide civil matters or to award monetary damages in cases.”). Instead, the General Assembly has authorized the ALC to preside over “contested case” proceedings, and this case was heard by the ALC as a contested case. See S.C.Code Ann § 1–23–600(A); S.C. Dep’t of Rev. v. Club Rio, 392 S.C. 636, 642, 709 S.E.2d 690, 694 (Ct.App.2011) (“The statutory scheme confers on the ALC subject matter jurisdiction over [DHEC’s] contested cases.”). A “contested case” is defined in the Administrative Procedures Act as “a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law ... to be determined by an agency or the Administrative Law Court after an opportunity for hearing.” S.C.Code Ann. § 1–23–505(3).

The plain language of the State Action Statute constraining awards to “any civil action” prevents the ALC from considering the State Action Statute whatsoever. Our appellate courts have repeatedly rebuked the ALC when its remedies stray into the territory of civil litigation. For example, this Court recently found error on the part of the ALC when its attempt to sanction a party amounted to a civil remedy. See Beltram v. S.C. Dep't of Revenue, No. 2017-000968, 2019 WL 5431833, at \*7 (S.C. Ct. App. Oct. 23, 2019) ([W]e find the ALC did err in sanctioning the Department by reducing Beltram’s tax liability.”) This Court’s opinion in S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc. is similarly informative. In that case, this Court examined the Consumer Credit Counseling Act, which provides the Department of Consumer Affairs with enforcement authority against unlicensed credit counseling. 390 S.C. 182, 186, 700 S.E.2d 468,

470 (Ct. App. 2010). Specifically, the Department is authorized to seek compliance with the Act through the ALC and is also authorized to seek a fee refund from unlicensed counselors through a “civil action.” Id. After analysis of the ALC’s circumscribed administrative authority, this Court determined that a separate action in civil court would be necessary for the Department to seek fee refunds, even when it was already pursuing enforcement in the ALC. Id. at 187, 700 S.E.2d at 470.

Obviously consideration of State Action Statute fees does not fall within the ALC’s primary jurisdiction to resolve contested cases. However, ALC judges do, of course, possess authority to issue orders and writs that are necessary “to give effect to” their primary jurisdiction. S.C. Code Ann. § 1–23–630(A). This authority certainly can include an award of sanctions when appropriate, as is reflected in Administrative Law Court Rule 72, which authorizes sanctions for frivolous proceedings.<sup>3</sup> Here, though, the State Action Statute fees flatly are not authorized for administrative contested cases. The law provides no source from which the ALC could derive authority to reach beyond its circumscribed jurisdiction in order to consider the justification for appellate proceedings in this case.

The ALC does have authority to award fees and sanctions for frivolous or dilatory filings, but clearly it was not intended to possess this authority in relation to the State Action Statute.

## **II. The Proper Remedy in this Case:**

As the ALC did not have statutory authority to award any fees under the State Action Statute, and as those fees have wrongfully been in the possession of Roper Pond for a period of years, the appropriate remedy in this case is for all State Action Statute fees to be returned to the

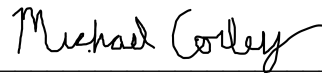
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<sup>3</sup>Here, Roper Pond conceded that the administrative proceedings were not “frivolous,” but rather that the administrative appeal was brought “solely for the purposes of delay.” It was upon that basis that the ALC awarded sanctions pursuant to ALC Rule 72.

Town of Arcadia Lakes, with interest.

The Town pursued every available measure to avoid paying fees to Roper Pond until such time as the Court had a chance to consider this appeal, but Roper Pond insisted upon immediate payment, and neither the ALC nor this Court would pause the Town's obligation. As a consequence, the Town has been without a significant portion of its total capital since 2017 and has had to adjust its operations accordingly. Pursuant to S.C. Code § 34-31-20, the Town is entitled to interest on these fees that have been in the possession of Roper Pond since November 2, 2017. Calculating at the current interest rate of 8.75%, compounded annually, Roper Pond owes the Town of Arcadia Lakes \$261,379.

Respectfully submitted,



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Amy E. Armstrong  
Michael Corley  
SOUTH CAROLINA ENVIRONMENTAL LAW  
PROJECT

Mailing address: Post Office Box 1380  
Pawleys Island, SC 29585  
Office address: 430 Highmarket Street  
Georgetown, SC 29440  
Telephone (843) 527-0078  
Email [amy@scelp.org](mailto:amy@scelp.org)

Terry E. Richardson, Jr.  
Richardson, Patrick, Westbrook & Brickman, LLC  
Mailing address: P.O. Box 1368  
Barnwell, SC 29812  
Email [trichardson@rpwb.com](mailto:trichardson@rpwb.com)

Georgetown, South Carolina

September 18, 2020