

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

RECEIVED

Sep 18 2020

SC Court of Appeals

Appellate Case No. 2017-001554

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 the
Appellant/Respondent,

v.

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

**MEMORANDUM IN OPPOSITION TO
AN AWARD OF FEES BY THE ALC
PURSUANT TO S.C. CODE §15-77-300**

The South Carolina Department of Health and Environmental Control (“SCDHEC”) submits the arguments below in response to the Order of the Court filed on August 19, 2020, inviting the parties to submit a memorandum of law on whether the Administrative Law Court (“ALC”) “has the power to award any fees under S.C. Code Ann. § 15-77-300, and if not, the proper remedy in this case.” As more fully set forth below, the ALC lacks the power to award fees under S.C. Code Ann. § 15-77-300 because the ALC is an executive agency empowered to adjudicate administrative proceedings. Contested cases before the ALC are not civil actions. The award of fees under Section 15-77-300 is limited to civil actions, which are proceedings before the

judiciary. The appropriate remedy is to reverse the ALC's award of attorneys' fees under Section 15-77-300.¹

ARGUMENT

I. THE ALC DOES NOT HAVE THE POWER TO AWARD FEES UNDER S.C. CODE ANN. § 15-77-300 BECAUSE THE EXPRESS LANGUAGE OF THE STATUTE LIMITS ITS APPLICABILITY TO CIVIL ACTIONS BEFORE THE STATE'S JUDICIAL COURTS.

It is well established that

[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

Senate by and through Letterman v. McMaster, 425 S. C 315, 322, 821 S.E.2d 908, 911 (2018) quoting, *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Further, “[t]he canon of construction “*expressio unius est exclusio alterius*” or “*inclusio unius est exclusio alterius*” holds that “to express or include one thing implies the exclusion of another, or of the alternative.” *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 quoting Black's Law Dictionary 602 (7th ed. 1999).

Taken together, these rules of construction provide that the language used by the Legislature is paramount and that if the language is clear, unambiguous, and conveys a definite meaning, a court must apply the statute as written and cannot impose an interpretation contrary to that contained in the statute. In order to answer the question posed by the Court, it is necessary to review the language contained in Section 15-77-300, the Administrative Procedures Act (“APA”), and any other relevant statute. In addition to the rules of construction, it is also necessary to

¹ In a pending appeal before the Court, SCDHEC similarly takes the position that a contested case is an administrative action, not a civil action, and therefore, the ALC cannot award attorneys' fees pursuant to Section 15-77-300. See *S.C. Dep't of Health & Envtl. Control v. Davenport*, Appellate Case No. 2018-001868.

consider that waivers of sovereign immunity should be liberally construed in favor of limiting liability of the government. *See, e.g., Staubes v. City of Folly Beach*, 331 S.C. 192, 205, 500 S.E.2d 160, 167-168 (Ct. App. 1998) (holding that the exceptions under the S.C. Tort Claims Act must be construed liberally in favor of limiting liability of the State and its political subdivisions) and *Levernier Constr., Inc. v. United States*, 947 F.2d 497, 502 (Fed. Cir. 1991) (stating, “Because the [Equal Access to Justice Act] as a waiver of sovereign immunity is to be strictly construed, ‘civil action’ should be given . . . its ordinary (and most restrictive) meaning to include only judicial proceedings.”).

By its express terms, Section 15-77-300 is limited to “civil actions” brought by the State. Section 15-77-300 provides that:

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: (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) the court finds that there are no special circumstances that would make the award of attorney’s fees unjust. The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

S.C. Code Ann. Section 15-77-300(A) (Emphasis added). This limitation constitutes a jurisdictional limit to the courts that are authorized to impose fees under it. Specifically, it limits courts authorized to impose fees to those that are capable of adjudicating civil actions. Although a definition for “civil action” is not provided for in Section 15-77-300, Title 15 of the S.C. Code of Laws demonstrates that “civil actions” only consist of proceedings before the judiciary and the ALC is not a court of the judicial branch. *See* S.C. CONST. art. V (establishing and explaining the Judicial Department in South Carolina) and S.C. Code Ann. § 14-1-70 (“The following are courts

of justice in this State: (1) the court for trial of impeachments; (2) the Supreme Court; (3) the court of appeals; (4) the circuit courts, to wit: (a) a court of common pleas and (b) a court of general sessions; (5) probate courts; (6) the family courts; (7) magistrates' courts; and (8) municipal courts.”). Thus, the language of Section 15-77-300 limits the imposition of fees to civil actions.

As opposed to being a member of the judiciary, the ALC is an executive agency created and prescribed by the APA for the express purpose of providing a forum for the adjudication of **administrative matters**.² *Amisub of South Carolina, Inc. v. S.C. Dep’t of Health and Envlt. Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013). As a creature of statute, the ALC’s powers are limited to those granted by the General Assembly. *S.C. Dep’t of Consumer Affairs v. Foreclosure Specialists*, 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010) (observing the ALC does not have the authority to exceed its statutorily granted powers). The ALC is authorized under the APA to hear and adjudicate administrative matters in contested case hearings. S.C. Code Ann. § 1-23-500 (“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.”), S.C. Code Ann. § 1-23-505(1) (“Administrative law judge” means a judge of the South Carolina Administrative Law Court created pursuant to Section 1-23-500.”), S.C. Code Ann. § 1-23-505(2) (“Agency” means a state agency, department, board, or commission whose action is the subject of a contested case hearing . . . heard by an administrative law judge”) and S.C. Code Ann. § 1-23-505(3) (“Contested case” means a proceeding . . . in which the legal rights, duties, or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.”). When the ALC presides over a contested case hearing, it sits as the fact finder and its determination

² The relevant provisions of the APA are found in Article 5 of Chapter 23, *State Agency Rule Making and Adjudication of Contested Cases*.

constitutes the final administrative determination of the matter. *See A.O. Smith Corporation v. S.C. Dep't of Health and Env't. Control*, 428 S.C. 189, 199, 833 S.E.2nd 457 (Ct. App. 2019), *see also*, S.C. Code Ann. §§ 1-23-600(G). The final decision of the ALC is subject to judicial review by the Court of Appeals by the filing of a notice of appeal in accord with the SCRCP. S.C. Code Ann. §§ 1-23-600(I) and 610.

Recently, the Supreme Court recognized the critical distinction between the ALC's statutory administrative review in contested cases and the circuit courts' judicial review of civil actions. *See Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't. Control*, 430 S.C. 200, 214-15, 845 S.E.2d 481, 488-89 (2020), *reh'g denied* (Aug. 7, 2020). In *Preservation Society*, the Supreme Court addressed the standing of petitioners' who challenged issuance of a DHEC environmental permit by filing contested cases with the ALC. *Id.*, 430 S.C. at 208-19. The Supreme Court found it was an error to apply constitutional standing, which applies to judicial review of civil actions in circuit court, to the administrative review of contested cases before the ALC. *Id.*, 430 S.C. at 214-15. Likewise, in this case, it is erroneous to allow the ALC to award attorney's fees pursuant to Section 15-77-300 in administrative proceedings, when such fees are limited to "civil actions" before the judiciary.

II. THE ALC'S INABILITY TO IMPOSE FEES UNDER SECTION 15-77-300 IS SUPPORTED BY THE SOUTH CAROLINA FRIVOLOUS CIVIL PROCEEDINGS ACT AND ADMINISTRATIVE PROCEDURES ACT.

Although fees imposed under Section 15-77-300 are jurisdictionally limited to "civil actions," Title 15 does provide for sanctions in "administrative actions," which include contested cases. The *South Carolina Frivolous Civil Proceedings Act* ("SCFPA"), S.C. Code Ann. §§ 15-36-10 *et seq.*, provides that, "[a]n attorney or pro se litigant participating in a *civil or administrative action* or defense may be sanctioned" for: filing frivolous pleadings, motions, or document or

making frivolous arguments. S.C. Code Ann. § 15-36-10(A)(4) (Emphasis added). The SCFPA applies to “[a] pleading filed in a civil or *administrative action*” or “[a] document filed in a civil or *administrative action*.” *Id.* § 15-36-10(A)(2) and (3) (Emphasis added). Accordingly, the language of the statute distinguishes between “administration actions,” such as contested cases, and “civil actions.” The Legislature has given effect to this distinction by the fact that the APA explicitly provides the ALC with authority to impose sanctions in accordance with the SCFPA. In pertinent part, the APA provides:

. . . . If the presiding administrative law judge determines at the conclusion of the proceeding that the case was frivolous or taken solely for the purpose of delay, the judge may impose sanctions as the circumstances of the case and discouragement of like conduct in the future may require, including sanctions authorized in the Frivolous Proceedings Act, Chapter 36, Title 15, and as otherwise prescribed by law.

S.C. Code Ann. § 1-23-670. This language limits the imposition of sanctions by the ALC under the SCFPA to the rare situation that it finds that the evidence before it establishes that a party willfully pursued objectively frivolous claims or finds the evidence establishes that the contested case hearing was brought merely to delay the prevailing party’s actions. *Id.*

In contrast, there is no similar provision within the APA authorizing the ALC authority to award attorney’s fees pursuant to Section 15-77-300. Under that statute, the court must find that “the agency acted without substantial justification in pressing its claim against the party; and (2) the court finds that there are no special circumstances that would make the award of attorney’s fees unjust.” S.C. Code Ann. § 15-77-300. Thus, the statutory language shows that the Legislature intended to limit the ALC’s ability to issue fee sanctions to those rare egregious cases covered under the SCFPA and not those under Section 15-77-300. Therefore, the ALC has no power to impose fees pursuant to the provisions of Section 15-77-300.

CONCLUSION

For the reasons set forth herein, SCDHEC respectfully requests the Court to find that the ALC lacks the power to impose fees pursuant to S.C. Code Ann. § 15-77-300.

Respectfully submitted,

/s/ Stephen P. Hightower

Stephen P. Hightower, Esquire (SC Bar No.: 72265)

South Carolina Department of Health and

Environmental Control

2600 Bull Street

Columbia, SC 29078

P: (803) 898-3350

F: (803) 898-3367

Email: hightosp@dhec.sc.gov

Attorney for Respondent SCDHEC

September 18, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Sep 18 2020

SC Court of Appeals

Appellate Case No. 2017-001554

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 the
Appellant/Respondent,

v.

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

CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, Paralegal with the South Carolina Department of Health and Environmental Control, hereby certify that I have this 17th day of September, 2020, served the foregoing *South Carolina Department of Health and Environmental Control's Memorandum in Opposition to an Award of Fees by the ALC Pursuant to S.C. Code §15-77-300* upon all counsel of record by emailing a copy of the same to the address indicated below:

Amy E. Armstrong, Esquire
SC Environmental Law Project
Post Office Box 1380
Pawleys Island, South Carolina 29585
Email: amy@scelp.org

Joan W. Hartley, Esquire
W. Thomas Lavender, Jr., Esquire
Nexen Pruet, LLC
Post Office Drawer 2426
Columbia, South Carolina 29202-2426
Email: jhartley@nexsenpruet.com
tlavender@nexsenpruet.com

Terry E. Richardson, Jr., Esquire
Richardson, Patrick, Westbrook & Brickman
Post Office Box 1368
Barnwell, South Carolina 29812
Email: trichardson@rpwb.com

Michael G. Corley, Esquire
SC Environmental Law Project
Post Office Box 5761
Greenville, South Carolina 29606
Email: michael@scelp.com

/s/ Sandra R. Wessinger
Sandra R. Wessinger

September 18, 2020
Columbia, South Carolina

Re: Town of Acadia Lakes et al vs. SCDHEC and Roper Pond, LLC; Appellate Case No. 2017-001554

Wessinger, Sandra <WESSINSR@dhec.sc.gov>

Fri 9/18/2020 3:01 PM

To: amy@scelp.org <amy@scelp.org>; jhartley@nexsenpruet.com <jhartley@nexsenpruet.com>; tlavender@nexsenpruet.com <tlavender@nexsenpruet.com>; trichardson@rpwb.com <trichardson@rpwb.com>; michael@scelp.org <michael@scelp.org>
Cc: Hightower, Stephen <HIGHTOSP@dhec.sc.gov>; Martinez, Sara <martinsv@dhec.sc.gov>

📎 2 attachments (276 KB)

Arcadia Costs Memo for filing.pdf; Acadia Lakes Certificate of Service.pdf;

Counsel,

Attached please find SCDHEC's *Memorandum in Opposition to an Award of Fees by the ALC Pursuant to S.C. Code §15-77-300*, which is being filed today with the South Carolina Court of Appeals.

Thank you,

Sandra R. Wessinger

Paralegal to Stephen P. Hightower

Sandra R. Wessinger

Paralegal for Environmental Quality Control
Office of General Counsel
S.C. Dept. of Health & Environmental Control
Office: (803) 898-3350
Fax: (803) 898-3367
Email: wessinsr@dhec.sc.gov
Connect: www.scdhec.gov [Facebook](#) [Twitter](#)



RECEIVED

Sep 18 2020

SC Court of Appeals

PRIVACY NOTICE: The information contained in this message and all attachments transmitted with it may contain legally privileged and/or confidential information intended solely for the use of the individual or entity to whom it is addressed. Access to this information by any other individual is unauthorized and may be unlawful. If the reader of this message is not the intended recipient, you are hereby notified that any reading, dissemination, distribution, copying, or other use of this message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately and delete the information without retaining any copies.