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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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,

South Carolina Department of Health and Environmental Control and
Roper Pond, LLC . . . . . Respondents,

Of Which Town of Arcadia Lakes is . . . . . Appellant-Respondent,

v.

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

and

Roper Pond, LLC is . . . . . .Respondent-Appellant.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT-APPELLANT ROPER POND, LLC

Pursuant to the Order issued August 19, 2020, Respondent/Appellant Roper Pond, LLC ("Roper Pond") respectfully submits this Supplemental Memorandum summarizing the legal authority for the South Carolina Administrative Law Court's ("ALC") award of fees and costs under S.C. CODE ANN. § 15-77-300.

I. A CONTESTED CASE HEARING BEFORE THE ALC IS A "CIVIL ACTION" WITHIN THE MEANING OF THE STATE ACTION STATUTE.

S.C. CODE ANN. § 15-77-300 (the "State Action Statute") allows a prevailing party to recover reasonable attorney's fees against the State or a political subdivision of the State in "any civil action." The Town has argued that a contested case hearing before the ALC is not a "civil action" for purposes of the State Action Statute. This argument is contrary to the plain meaning of the statute. Since the term "civil action" is not defined in the State Action Statute or elsewhere in controlling law, courts must "interpret the term in accord with its usual and customary meaning." *State v. Hudson,* 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). Black's Law Dictionary defines 'civil action' as '[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation.'" BLACK'S LAW DICTIONARY (11th ed. 2019). ALC proceedings are noncriminal in nature, and pursuant to the South Carolina Administrative Procedures Act ("APA"), a 'contested case' is defined 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 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." S.C. CODE ANN. § 1-23-505(3). It would be contrary to plain-reading principles to dispute that a contested case hearing falls within the usual and customary meaning of a "civil action."

Additionally, Section 15-77-300(C) of the State Action Statute expressly excludes specific actions 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 (C). In addition to the inclusion of licensing matters within the

definition of "contested case" under the APA, S.C. CODE ANN. § 40-1-160 expressly provides that an appeal from the disciplinary decision of a state licensing board is filed in the Administrative Law Court. S.C. CODE ANN. § 40-1-160. 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."). Moreover, the specific exclusion of "civil actions relating to the establishment of public utility rates" supports the position that contested case hearings are civil actions within the meaning of the State Action Statute. While public utility rate cases are heard before the Public Service Commission ("PSC") rather than the ALC, the PSC bears striking similarities to the ALC in several pertinent respects. The PSC is an executive branch body, whose adjudicating members are subject to the Code of Judicial Conduct and hold hearings under the APA. See S.C. CODE ANN. § 58-3-30. Critically, these PSC hearings are expressly recognized by the State Action Statute as "civil actions" in Section 15-77-300(C). Clearly, the Town's attempt to distinguish between hearings before executive agencies and courts of the judicial branch is defeated by a clear reading of the statute standing alone.

Additionally, the remedial nature of the State Action Statute requires a broad reading of the term "civil actions" to effectuate the purpose of the Statute. Courts should consider "not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (citation omitted). Remedial statutes are to be construed liberally in order to effectuate their purpose. *See Spencer v. Barnwell County Hosp.*,

314 S.C. 405, 408, 444 S.E.2d 538, 540 (Ct. App. 1994) ("In considering a remedial act designed to protect a class of persons or the public at large, the courts liberally construe the act to carry out its purposes."). There is no doubt that the State Action Statute is a remedial statute. A statute is remedial "when it creates new remedies for existing rights or enlarges rights of persons under disability." *Wiesart v. Stewart*, 379 S.C. 300, 303, 665 S.E.2d 187, 188 (Ct. App. 2008). The State Action Statute unquestionably creates a remedy for recovery of attorney's fees and costs under a standard unique to the Statute and against a class of parties unique to the Statute. The purpose of the Statute is to provide a remedy for private citizens who have incurred legal costs in proceedings in which a State agency or political subdivision of the State pursues unjust claims. As discussed more fully below, a contested case before the ALC for a matter challenging DHEC action is a *de novo* hearing conducted pursuant to the South Carolina Rules of Civil Procedures and the South Carolina Rules of Evidence as adopted by the South Carolina Rules of Procedure for the Administrative Law Court ("SCRPALC"). In this case, the parties engaged in extensive written discovery and numerous depositions in preparation for the three-day evidentiary hearing before the ALC. To interpret the definition of "civil actions" under State Action Statute to exclude contested cases before the ALC would be a denial of any meaningful remedy for private parties who incur substantial legal fees and costs in an action for which the ALC conducts de *novo* hearings and would thus thwart the legislative purpose of the State Action Statute in discouraging unjust claims by governmental entities.

II. THE ADMINISTRATIVE LAW COURT HAS THE STATUTORY AUTHORITY TO AWARD FEES UNDER THE STATE ACTION STATUTE.

The ALC was created as both an executive agency and a court of record. S.C. CODE ANN. § 1-23-500. Administrative law judges are subject to the Code of Judicial Conduct and have the "same power at chambers or in open hearing as do circuit court judges and to issue those

remedial writs as are necessary to give effect to its jurisdiction." S.C. CODE ANN. §§ 1-23-560, 1-23-630(A). The ALC conducts contested case hearings in all material respects as a state circuit court hearing a matter at common pleas. The South Carolina Rules of Civil Procedure are incorporated into the operation of the ALC to resolve circumstances unaddressed in the South Carolina Administrative Law Court Rules pursuant to Rule 68, SCRPALC. Additionally, specific provisions of the South Carolina Rules of Civil Procedure are adopted throughout the ALC Rules. *See* SCRPALC Rules 3, 5, 16, 21, 22, 29, and 54. Contested case hearings are subject to the same South Carolina Rules of Evidence as trials in circuit court, and except where specifically provided otherwise by statute, the ALC employs the same "preponderance of the evidence" standard of proof as is utilized in common pleas matters. S.C. CODE ANN. § 1-23-600(a). Finally, the ALC's exercise of power to impose attorney's fees under the State Action Statute is consistent with the express power of the ALC to impose sanctions consistent with SCRPALC Rule 72.

The Town's attempts to argue that *McDowell v. S.C. Department of Social Services,* 304 S.C. 539, 405 S.E.2d 830 (Ct. App. 1991) controls the question of whether the ALC has the necessary power to wield the State Action Statute are without merit. First, the ALC correctly noted that the *McDowell* decision was issued prior to the creation of the ALC. (June 14, 2017 Order, p. 10, R. p. 10). Second, the 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. Department of Social Services,* 296 S.C. 89, 91 370 S.E.2d 878, 879 (Ct. App. 1987). These hearings are held before an impartial DSS employee or panel of employees, in contrast with the elected judges of the ALC. *See* S.C. CODE ANN. REGS. § 114-100(J). In the context of the present case, the Fair Hearing Committee proceeding would be equivalent to a

request for final agency review before the DHEC Board. 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 is 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 ALC correctly ruled below, once an agency has rendered its final decision, and the matter is placed before the ALC, the agency is "pressing its claim" within the meaning of *McDowell* and the State Action Statute. (June 14, 2017 Order, p. 9, R. p. 9).

Additionally, and significantly, in *McDowell*, the Supreme Court found that the agency was not "pressing its claim" in the context of the internal hearing, but was operating as an administrative decision-maker. *McDowell,* 304 S.C. at 543, 304 S.E.2d at 833.[1] As such, the Town's reliance on *McDowell* is inapplicable to the instant case. There is simply no basis for an argument that the Town is acting as an "administrative decision-maker" in bringing this action. The Town had no involvement in the DHEC decision at issue in this case. The DHEC decision authorized activities on property which was outside of the Town's municipal limits. As the ALC correctly held, the Town lacked substantial justification in bringing this action. The State Action Statute was enacted to discourage such unjust and unfair action by governmental entities. Accordingly, Roper Pond is entitled to the remedy provided by the State Action Statute and the ALC's award for the legal fees and costs incurred in defending the DHEC decision before the

[1] Despite the Town's reliance on the federal district decision *Just v. Spartanburg Community College*, 2013 WL 3833063 for its position, the *Just* decision is consistent with ALC's decision below insomuch as the proceeding at issue in *Just* was before the State Ethics Commission, which was operating as the administrative decision-maker. As the ALC noted, "[t]here was no 'agency decision' prior to the actions of the State Ethics Commission." (June 14, 2017 Order, p. 9, R. p. 9).

ALC should be upheld.

III. PUBLIC POLICY CONSIDERATIONS DICTATE THAT THE STATE ACTION STATUTE APPLY TO CONTESTED CASE HEARINGS BEFORE THE ALC.

As discussed above, the State Action Statute is a remedial statute which should be interpreted broadly to effectuate its purpose. These purpose of the Statute is clear on its face. The Statute authorizes the award of attorney's fees where a State agency or political subdivision of the State acts "without substantial justification in pressing its claim" in the absence of either special circumstances which would make an award unjust or a valid statutory or constitutional mandate. S.C. CODE ANN. § 15-77-300(A). It is self-evident that allowing the State or a political subdivision of the State to pursue such unjustified litigation at the (often tremendous) expense of private citizens is the type of conduct intended to be discouraged by the State Action Statute. The Town's position that proceedings at the ALC are categorically excluded from the application of the State Action Statute would effectively nullify the law for broad swathes of State actions. The ALC is the exclusive jurisdiction for challenging numerous decisions of executive branch agencies (i.e., political subdivisions of the state). S.C. CODE ANN. § 1-23-600. The ALC is the trial venue for all contested cases hearings. *Id.* For these cases, the ALC is where written discovery is conducted and depositions are taken. SCRPALC Rule 21. The ALC is where motions practice is conducted. SCRPALC Rule 19. The ALC is where testimony is elicited, exhibits are offered, and a record is created. SCRPALC Rules 29, 30. The ALC is, in short, where the attorney's fees are incurred in the practice of challenging or defending oneself against State actions. As such, if a party is forced to litigate in the ALC to determine legal rights, duties, or privileges because a governmental entity presses a claim without substantial justification, that party should be entitled to attorney's fees and costs incurred in that litigation.

The Town attempts to draw distinction between judicial review of an ALC decision and

the contested case hearing itself as if the substantive claim being pressed at the ALC is magically converted from what they term an "administrative proceeding" to a "civil action" by the act of appeal. This distinction is unsupported by law and defies the public policy considerations that seek to protect innocent parties from the burdens of unfair litigation with government entities. The underlying facts in the record of this matter provide a prime illustration of why this is the case. The initial request for contested case was filed on February 16, 2009, and the case was finally dismissed as moot by the South Carolina Supreme Court on April 9, 2015. (June 14, 2017 Order, p. 5, R. p. 5). Counsel for Roper Pond spent 397.4 hours of time preparing and trying the case over the 14-month period from inception of the litigation to the filing of the Notice of Appeal to the Court of Appeals on April 20, 2010. *Id.* Counsel spent an additional 304.7 hours over the next five years preparing and arguing the matter before the Court of Appeals and Supreme Court. (June 14, 2017 Order, p. 6, R. p. 6). In total, legal fees associated with the defense of this matter amounted to $195,068 in that period, after adjusting for discounts on fees by Roper Pond's attorneys. (June 14, 2017 Order, p. 8, R. p. 8).

While the efforts and resources expended on appeal alone are considerable, it would not serve the policy goals of the State Action Statute to limit an award of attorney's fees to only the appellate process and leave a party unjustifiably drawn into a contested case without a remedy for the larger bill for the trial-level work without a clear expression of statutory intent to do so. Far from demonstrating such intent, the State Action Statute expressly recognizes some categories of "administrative proceedings" (relating to public utility rates, disciplinary actions by state licensing boards, etc.) as "civil actions" that are excluded from the statute. The State Action Statute and public policy do not view these types of cases as mutually exclusive. The Court should therefore uphold the ALC's award of attorney's fees and costs incurred by Roper

Pond in this matter.

IV. CONCLUSION

For the reasons stated herein, Roper Pond respectfully requests that the Court uphold the ALC's award of attorney's fees and costs pursuant to S.C. Code Ann. § 15-77-300.

Respectfully submitted,

September 18, 2020

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

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

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

PROOF OF SERVICE

I certify that I have served **Supplemental Memorandum of Respondent/Appellant Roper Pond, LLC** on counsel of record for South Carolina Environmental Law Project and the South Carolina Department of Health and Environmental Control by depositing a copy of it in the United States Mail, postage prepaid, on September 18, 2020, addressed to:

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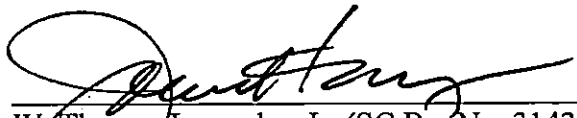

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September 18, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Town of Arcadia Lakes, et al. v. South Carolina Department of Health and Environmental Control and Roper Pond, LLC*
Docket No. 09-ALC-07-0069-CC
Appellate Case No. 2017-001554

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Supplemental Memorandum of Respondent/Appellant Roper Pond, LLC in the above-referenced matter. Please return a clocked copy to us in the enclosed envelope.

We appreciate your assistance in this matter.

Best regards,

Joan W. Hartley

cc: Stephen P. Hightower, Esquire
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TO

The Honorable Jenny Abbott Kitchings
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