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,

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.

PETITION FOR REHEARING

W. Thomas Lavender, Jr. (SC Bar No. 3143)
Joan Wash Hartley (SC Bar No. 72735)
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Attorneys for Respondent-Appellant Roper Pond, LLC

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent-Appellant Roper Pond, LLC ("Roper Pond") respectfully petitions this Court for a rehearing of Opinion No. 5803 issued February 10, 2021 ("Opinion"). The basis for this petition is that the Opinion overlooks and misapprehends key points of law. Specifically, the Court interpretation of "civil action" in S.C. CODE ANN. § 15-77-300 (the "State Action Statute") improperly considers a 1997 proposed amendment of the State Action Statute to ascertain legislative intent that an action originating in the Administrative Law Court ("ALC") is not a "civil action." Additionally, the Court improperly cited to *South Carolina Department of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010), in support of its holding that the ALC cannot award attorney's fees under the State Action Statute. Finally, even if the State Action Statute is interpreted to exclude attorneys' fees incurred during a contested case before the ALC, Roper Pond is entitled to attorneys' fees and costs incurred for judicial review of the ALC decision to this Court and the Supreme Court.

I. THE COURT INCORRECTLY CONSIDERED A 1997 PROPOSED AMENDMENT TO THE STATE ACTION STATUTE IN NARROWLY INTERPRETING "CIVIL ACTION" WITHIN THE MEANING OF THE STATUTE.

The State Action Statute was enacted by the General Assembly in 1985. 1985 S.C. Acts 80 (Act No. 44). In the Opinion, the Court cites to a 1997 proposed amendment of the State Action Statute "extending the State Action Statute to administrative proceedings and to agency." Opinion, p. 6. However, there is no basis for Court's presumption that this proposed amendment was intended to extend that statutory authority for an award of attorneys' fees to administrative proceedings. As discussed below, the proposed amendment very likely could have merely been a clarification that

the term "civil action" in the State Action Statute was originally enacted to include administrative proceedings.

A proposed amendment to a statute after the enactment of that statute is not indicative of the intent of the legislature which originally enacted the statute. In *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534 (9th Cir. 1985), Nevada's attorney general argued that the state legislature did not intend that an open meeting law allowed for an attorney-client exception. Specifically, he argued that the state legislature's rejection proposed amendments to the open meeting law to recognize an explicit exemption for meetings between a public agency and its counsel gave rise to the inference that "the legislature did not intend to permit such an exception." *Id.* at 538. The Ninth Circuit Court of Appeals rejected the attorney general's argument, stating:

> [C]aution must be exercised in using the rejection by a legislature of proposed amendments as an aid in interpreting measures actually adopted. In particular, care must be taken to distinguish unsuccessful attempts to amend proposed legislation during the process of enactment from unsuccessful attempts to amend a measure passed by a previous legislative session. Whatever aid the former may furnish in ascertaining intent, "[a]ction on a proposed amendment is not a significant aid to interpretation of an act that was passed years before."

Id. (quoting *Sutherland Stat. Const.* §48.18 (4th Ed.)). Similarly, in *U.S. v. Capital Blue Cross*, 992 F.2d 1270 (3d Cir. 1993), the Third Circuit Court of Appeals held that a subsequent proposed amendment of a federal statute governing veterans benefits was not properly considered in determining the meaning of a term within that statute. The Court rejected an argument that the subsequent amendment was indicative of Congress' intent to exclude Medicare supplemental policies in the term "health plan contract":

> Blue Cross also contends that recent failed attempts to amend section 1729 show that the statute excludes Medicare supplemental policies. In 1990, Senator Cranston introduced Senate Bill 2455. The Bill, which contained a provision that would have expressly included Medicare

> supplemental policies within the definition of the term "health plan contract," was never enacted. S. 2455, 101st Cong., 2d Sess. § 5 (1990). In 1991, Senator Cranston introduced another unsuccessful Bill, Senate Bill 1271, containing a similar amendment. S. 1271, 102d Cong., 1st Sess. § 2(b) (1991). Blue Cross argues that Congress' failure to amend section 1729 implies that the proposed amendments are contrary to current law.
>
> As a general rule, Congress' rejection of a proposed amendment is not a significant aid in interpreting a statute passed years earlier. 2A N. Singer, *Sutherland on Statutory Construction* § 48.18 (5th ed. 1992). This case illustrates why. **Blue Cross assumes that the proposed amendments would have expanded the reach of section 1729 to include Medicare supplemental policies. An at least equally likely assumption is that Congress originally intended to include medigap policies within the broad definition of the term "health plan contract," but controversy over the scope of the definition caused Congress to consider amending the statute to clarify its intent.** *See Blue Cross and Blue Shield of Maryland*, 989 F.2d at 727–728. Accordingly, the failed amendments do not support the inference that Congress intended section 1729 as written to exclude Medicare supplemental policies.

992 F.2d 1270, 1276–77 (3d Cir. 1993) (citing *United States v. Blue Cross and Blue Shield of Maryland*, 989 F.2d 718, 723–725 (4th Cir.1993)) (emphasis added). As the Third Circuit noted, a proposed amendment years after the original enactment cannot be interpreted to mean that the original term excluded the proposed additional language. It may have indicated that the subsequent legislature identified a need to clarify that such term already included the proposed additional language. Accordingly, a proposed amendment of the State Action Statute to add "administrative proceedings" to the express language of the Statute does not indicate that the South Carolina General Assembly was attempting to extend the Statute to administrative proceedings. As the Third Circuit held, it is "at least equally likely" to assume that the State Action Statute was originally enacted to be applicable to administrative proceedings. Accordingly, the Court improperly considered the 1997 proposed amendment to the State Action Statute in ruling

that an action originating in the ALC is not a civil action.

Instead, the Court should have looked to the South Carolina Administrative Procedures Act, S.C. CODE ANN. § 1-23-10 et seq. ("APA"). 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). Accordingly, the ALC is court of record and a contested case before the ALC is a "civil matter" under the State Action Statute.

II. THE COURT IMPROPERLY CITED TO THE *SOUTH CAROLINA DEPPARTMENT OF CONSUMER AFFAIRS* CASE FOR THE HOLDING THAT THE ALC CANNOT AWARD ATTORNEYS' FEES UNDER THE STATE ACTION STATUTE.

The Opinion cites dicta from *South Carolina Department of Consumer Affairs v. Foreclosure Specialists, Inc.*, for the proposition that "the ALC did not have the

'authority to decide civil matters or to award monetary damages in cases.'" Opinion, p. 6 (citing *S.C. Dept. of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 186-87, 700 S.E.2d 468, 470 (S.C. App. 2010) (quoting Randolf R. Lowell, *South Carolina Administrative Practice and Procedure*, 152 (2d ed. 2008)). The *South Carolina Department of Consumer Affairs* case did not require this Court to make a determination of the ALC's authority to award the monetary relief sought. The *South Carolina Department of Consumer Affairs* case was clearly a jurisdictional decision. The South Carolina Consumer Protection Code, the statute at issue in that case, provided that the monetary relief sought must be brought in a civil action in circuit court:

> The Code provides that the Administrator of the Department may file a petition before the ALC to seek enforcement of administrative orders issued pursuant to section 37-7-119, or otherwise to seek compliance with the Act. *See* S.C. CODE ANN. § 37-6-108(A), (C) (Supp.2009). The ALC has exclusive jurisdiction over such an action for enforcement. *Id.* § 108(B). In addition to these administrative powers, the Code provides that the Administrator may bring a "civil action against . . . a person subject to this title to recover actual damages sustained and excess charges paid by one or more consumers." *Id.* § 113(A).

Id. at 184, 700 S.E.2d at 469. The Court further noted that the Code expressly provided that "[u]nder subsection 37-6-108(F), 'the administrative law judge may not award damage[s] . . . to affected customers in these hearings.'" *Id.* at 186, 700 S.E.2d at 469 (citing S.C. CODE ANN. § 37-6-108(F) (Supp.2009)." This subsection of the Code unambiguously precludes the ALC from granting the type of monetary relief requested. As such, the following quotation in *South Carolina Department of Consumer Affairs* is merely dicta from a secondary source: "The ALC has no authority to decide civil matters or to award monetary damages in cases." *Id.* at 187, 700 S.E.2d at 470 (quoting Randolf R. Lowell, *South Carolina Administrative Practice and Procedure*, 152 (2d ed. 2008)). This quotation therefore should not be relied on to interpret the authority of the ALC to

award attorneys' fees under the State Action Statute.

III. EVEN IF THE STATE ACTION STATUTE IS INTERPRETED TO EXCLUDE ATTORNEYS' FEES INCURRED IN A CONTESTED CASE BEFORE THE ALC, ROPER POND IS ENTITLED TO ATTORNEYS' FEES AND COSTS INCURRED FOR JUDICIAL REVIEW OF THE ALC DECISION.

A ruling that the ALC did not have authority to award attorneys' fees incurred to litigate the contested case at the ALC does not preclude the award of attorneys' fees for the judicial review of the ALC decision in this Court and the Supreme Court. Citing to the Supreme Court decision in *McDowell v. South Carolina Department of Social Services*, the Court noted that the Supreme Court has held that a prevailing party in an administrative case "was entitled fees and costs under the State Action Statute; however, that holding only applied to judicial review of the agency's decision, and it did not apply while the contested case remained an 'administrative' case." Opinion, p. 6 (citing *McDowell v. S.C. Dept. of Soc. Services*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991)). In 2006, the General Assembly amended the APA to provide that judicial review of a final decision of the ALC is filed in this Court. Accordingly, Roper Pond is entitled to the award of attorneys' fees for the judicial review of the ALC decision in this Court and the Supreme Court. Roper Pond's petition for attorneys' fees provides documentation for $92,337 in attorneys' fees incurred by Roper Pond for the judicial review of the ALC decision by this Court and the Supreme Court. (*See* Affidavit of Joan W. Hartley, R. pp. 821-843, attached to Respondent Roper Pond, LLC's Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALC, pp. 810-843). Therefore, even if this Court finds that Roper Pond is not entitled to an award of attorneys' fees incurred during the contested case before the ALC, Roper Pond is entitled to an award of $92,337 in attorneys' fees incurred during the contested case at the ALC.

IV. CONCLUSION

For the reasons stated herein, Roper Pond respectfully requests that the Court grant its Petition for Rehearing and affirm the ALC's award of attorneys' fees in the amount of $205,283.84 pursuant to S.C. Code Ann. § 15-77-300, or in the alternative, affirm the ALC's award of attorneys' fees in the amount of $92,337 for fees incurred during the judicial review of the ALC decision in this Court and the Supreme Court pusurant to pursuant to S.C. Code Ann. § 15-77-300 and *McDowell v. S.C. Dept. of Soc. Services*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991).

Respectfully submitted,

February 25, 2021

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PROOF OF SERVICE

I certify that I have served **Petition for Rehearing** on counsel of record for South Carolina Environmental Law Project and the South Carolina Department of Health and Environmental Control by emailing a copy of the same to the address indicated below:

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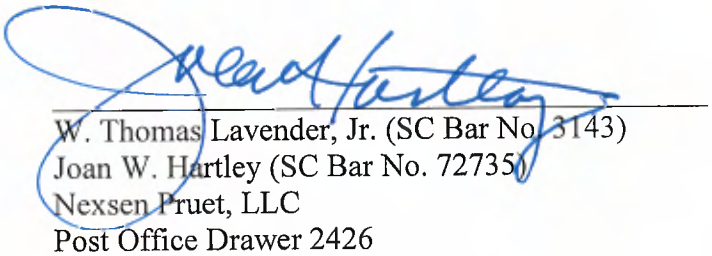

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