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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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 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.

RESPONSE TO PETITION FOR REHEARING

Roper Pond's petition for rehearing continues its relentless and meritless pursuit of 126% of the Town of Arcadia Lakes' yearly revenue resulting from a non-frivolous case that was ultimately dismissed as moot by the Supreme Court after Roper Pond plowed forward with its project in the face of the appeal. It bears repeating from prior briefing, but **no appellate court has ever upheld an Administrative Law Court (ALC) award of attorneys' fees under the State Action Statute for administrative or appellate proceedings**. Just the contrary, this Court soundly ruled that the State Action Statute does not apply to administrative appeals, thus the ALC erred in awarding attorneys' fees, costs, and sanctions against the Town. Roper Pond requests that this Court revisit its decision, using nearly identical arguments previously presented to this Court, while never providing any points of law or misapprehensions that warrant a departure from the

Opinion which is supported by the plain language of the State Action Statute.

I. The Opinion Rests Squarely on the Plain Language of the Statute

Roper Pond devotes most of its efforts to arguing that a proposed amendment is not indicative of legislative intent in enacting a statute (Petition, pp. 1-4); however, it wrongly suggests that this Court's ruling rested on that principle. Instead, this Court's decision rests soundly on a plain reading of the statute and the meaning of a "civil action." The discussion of a proposed legislative amendment does nothing to diminish such holding, as this Court noted that the proposed amendment's failure simply "supports our view" that the statute does not apply to ALC proceedings. But even without such "support" the plain language controls.

Indeed, rather than relying on the proposed amendment for its holding, this Court undertook a careful analysis of the language contained in § 15-77-300 and held that the ALC cannot award fees or costs because a contested case proceeding is not a "civil action." This Court also affirmed a long-standing recognition that the ALC is an administrative body arising under the executive branch, and not a court of law arising under the judicial branch. S.C. Code § 1-23-500; *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 45, 766 S.E.2d 707, 724 (2014) (noting the ALC is "the final decision maker for contested regulatory litigation within executive branch agencies"); *Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000) (noting the ALC is part of the executive); *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011) (same). No similarities or overlap in procedure between the ALC and circuit courts elevate the ALC to the judicial branch (or an administrative proceeding to a civil action), as suggested by Roper Pond (Petition, p. 4), such decision being entirely within the legislature's purview.

Notably, Roper Pond does not refute this Court's analysis with respect to the differing standards between the Frivolous Proceedings Act and the State Action Statute. The FPA 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. Fees are available in an administrative action 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 which allows recovery only if the governmental entity 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.[1]

Similarly, with respect to *South Carolina Department of Consumer Affairs v. Foreclosure Specialists*, this Court hardly rested its opinion on that case, which did not involve the State Action Statute. Instead, this Court cited to that case for support that the ALC does not have authority to grant relief in a "civil action." The *Foreclosure Specialists* case even identified the distinction between the legislature granting the ALC jurisdiction over enforcement matters versus granting the circuit court jurisdiction over monetary awards. As Roper Pond recognizes, the Code precluded monetary relief in the ALC, which is because the Code directs that such an award must be brought by way of a "civil action" – the same reason why the ALC lacked jurisdiction to award monetary

[1]Roper Pond conceded that the Town's appeal is not frivolous.

relief in the form of attorneys fees here. In addition, the *Foreclosure* case underscores the constraints the legislature has placed on the ALC. This Court noted that a "civil action" could not be brought in the ALC. *S.C. Dep't of Consumer Affs. v. Foreclosure Specialists, Inc*., 390 S.C. 182, 185, 700 S.E.2d 468, 469 (Ct. App. 2010) ("We conclude the Department has no statutory authority to bring a civil action in the ALC"). Thus, even if the Court's statement is only "dicta," as argued by Roper Pond, it is certainly logical and instructive on whether the ALC has jurisdiction to grant relief that is authorized only in "civil actions" pursuant to the State Action Statute.

II. The ALC's Lack of Authority to Award Fees Under the State Action Statute Precludes its Ability to Award of Fees on Appeal

As this Court found, the ALC is without jurisdiction to award fees under the State Action Statute. Because the ALC 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. Even though an appeal of an administrative action to an appeals court moves the matter from the executive to the judicial branch, the matter remains an administrative action arising under § 1-23-600. No "civil action" need be commenced in order to initiate an appeal of an administrative action.

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. 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.[2] *Id.*

The ALC, as an executive body with tightly constrained jurisdiction and authority, is even more limited in this regard than 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 & Envtl. Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013). As is particularly relevant here, the legislature has not granted any authority to the ALC in relation to civil matters. *See, e.g.*, Randolf 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). The narrow, administrative nature of the ALC's authority to resolve contested cases has been repeatedly emphasized by our appellate

[2]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.

courts.

It simply does not compute logically or legally that an entity with jurisdiction as tightly constrained as the ALC would have authority to undertake a fee inquiry following an appeal that it could not have undertaken in the first place. 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.

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 civil proceedings 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 within the judicial branch fundamentally exceeds the discrete authority granted to the ALC, and the plain language of the State Action Statute.

A review of appellate case law does not reveal a single occasion where our state's courts have considered a state action statute award for appellate work arising from the ALC. *McDowell*, which Roper Pond cites, is of limited utility in assessing whether the ALC can award fees for appellate court proceedings. *McDowell* was decided in 1991. At that time, no Administrative Law Court (nor its precursor the Administrative Law Judge Division) existed and appeals from the agency review process went to circuit court. *See id.* at 541, 405 S.E.2d at 832. The ALC was eventually

established; however, in 2006 Act 387 drastically revamped the agency decision-making process such that administrative appeals go from the ALC directly to the Court of Appeals, eliminating the circuit court cause of action. Whereas *McDowell* involved an action in the court of common pleas, the legislature repealed the common pleas cause of action so that no civil action – or anything even close to a civil action – exists under the present statutory scheme. What the legislature gives, it may take away. *Milwaukee Police Ass'n v. City of Milwaukee*, 383 Wis. 2d 247, 272, 914 N.W.2d 597, 609 (WI S.Ct. 2018); *Daly v. River Oaks Place Council of Co-Owners*, 59 S.W.3d 416, 423 (Tex. App. 2001); *State v. Mizell*, 938 So. 2d 712, 717 (La. App. 1 Cir. 2006) ("It is almost universally recognized that if a statute giving a special remedy is repealed, without a saving clause in favor of pending suits, all suits must stop where the repeal finds them").

Finally, the language of Section 15-17-300(C) contains a specific exemption from the assessment of attorneys' fees for *civil actions* relating to certain explicit types of actions. Notably, several of the specific topics listed in subsection C also contain a potential administrative component to them. *See* S.C. Code Ann. 58-5-270; 58-5-320 (permitting challenge to utility rates and reconsideration by the public service commission); S.C. Code Ann. 40-1-90 (providing licensing boards the authority to hold disciplinary action proceedings, including accepting testimony and examination of documents); S.C. Code Ann. 63-7-1410 (providing for an administrative appeal of child abuse and neglect determinations). The assessment of attorneys' fees for these administrative challenges would not be permitted under the State Action Statute because they are not "civil actions;" additionally, no attorneys' fees could be assessed for any separate, civil action relating to any of those specific topics because of the express exemption of subsection C. The existence of administrative components to many of the topics listed in subsection C and the plain language of referring to only civil actions further demonstrates the intended distinction

between civil and administrative actions—not only is the assessment of attorneys' fees excluded from *all* administrative actions but also from *civil actions* relating to these specific topics. This conclusion is supported by *Father v. South Carolina Department of Social Services*: after DSS indicated a case of abuse and neglect against Father, he requested an internal appeal of the determination. 345 S.C. 57, 62, 545 S.E.2d 523, 526 (Ct. App. 2001). When that was unsuccessful, Father filed an action in family court seeking an order finding the case to be unfounded and for attorneys' fees. *Id.* at 63, 545 S.E.2d at 526. The Court of Appeals confirmed the State Action Statute prohibited the recovery of attorneys' fees because it was a child abuse and neglect action but agreed that the Frivolous Proceedings Act was a potential avenue for fees. *Id.* at 66, 545 S.E.2d at 528. Though it is unclear from the opinion whether Father sought attorneys' fees for the administrative appeal in addition to the action in family court, it is clear that any award of attorneys' fees for either would be through the FPA, not the State Action Statute because of its limitation to civil actions and its express exclusion of child abuse and neglect actions. *Id.*

III. Even if the ALC Had Authority to Award Fees Under the State Action Statute for Appellate Proceedings, Roper Pond Would Not Be Entitled to Them

Even if this Court determines that the ALC has authority to award fees under the State Action Statute for the administrative and/or appellate proceedings, which the Town asserts it does not based on the law above, that does not end the inquiry as swiftly as Roper Pond proposes. Instead, this Court must review the ALC's determinations for errors of law. Specifically, the Town asserts that the ALC erred in concluding (1) that Roper Pond is the prevailing party; (2) that the Town was not substantially justified; (3) that the Town's affidavits in support of its substantial justification should be stricken; (4) that even if an award were appropriate, the Town as one of 17 appellants should not be responsible for 100% of the fees; and (5) that Roper Pond's bare-bones

time sheets complied with the State Action Statute. Each of these issues were briefed before this Court, and the Town will only briefly address them here.

A. Roper Pond is Not a Prevailing Party

In order to conclude that Roper Pond is entitled to recover fees, this Court must first determine whether Roper Pond was the prevailing party. (See Town's Brief, pp. 20-24). The Supreme Court has held that a prevailing party is a party who successfully prosecutes the action by prevailing on the main issue and "in whose favor the decision or verdict is rendered and judgment entered." *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990). Where, as here, the Supreme Court initially granted certioriari but later determined that the case was 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 Pond's construction activities under the State-wide general permit)," it cannot be said that a verdict or judgment has been rendered "in favor of" Roper Pond.[3] In fact the court denied Roper Pond's motion for fees and costs on appeal pursuant to SCACR 222. (R. p. 120).

South Carolina's appellate courts have ruled on the impact of a dismissal on mootness grounds under a Section 15-77-300 cause of action in only two cases. In both of those cases the courts held that a party cannot claim prevailing party status if the ultimate disposition of a case is a mootness dismissal.

In *Douan v. Charleston County Council*, the Supreme Court affirmed the denial of

[3]The Court ruled that "As to Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues, counsel for Respondent South Carolina Department of Health and Environmental Control (DHEC) assured this Court at oral argument that DHEC has the ongoing ability to receive and investigate postconstruction complaints." (R. p. 125, note 2). On this passage, the Supreme Court was attentive to and solicitous of the Town's concerns.

attorney's fees under the State Action Statute to the Plaintiff whose challenge to the county's sales and use tax referendum was rendered moot by the Supreme Court's decision voiding election results because they were not the "prevailing party." 373 S.C. 384, 386-87, 645 S.E.2d 241, 242-43 (2007). In *City of Charleston v. Masi*, the City of Charleston asked the Court to declare that the residents of the Town of James Island be prohibited from voting in elections for the James Island Public Service District ("District"). 362 S.C. 505, 507-08, 609 S.E.2d 301, 303 (2005). When the Court, in another case, declared that the Town was a nullity because it had been created by unconstitutional legislation, the *Masi* court dismissed the case as moot because it could no longer grant the relief sought. *Id.* The District sought to recover fees under the State Action Statute, asserting itself as the prevailing party. *Id.* at 510, 609 S.E.2d at 304.The Supreme Court rejected the petition on the basis that because the case was dismissed as moot, there can be no prevailing party.[4] *Id.*

B. The Town was Substantially Justified in Pressing its Claims

Next the court must consider whether the Town was substantially justified in pressing its claims. The Town extensively briefed this issue in its Opening Brief, pp. 8-13, and asserts that it was substantially justified. The ALC erred in striking evidence in support of the Town's justification. (Brief, pp. 14-17). This Court has previously recognized 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. *See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 358 S.C.

4 The Court also noted that the District could not be the prevailing party because the circuit court did not find for either party, instead declining to address the issues raised by the District; however, mootness was the predominant reason for prevailing party determination.

647, 651–52, 595 S.E.2d 890, 892 (Ct. App. 2004).

C. Roper Pond's Time Sheets Fail to Comply With the Statute

Even if the state action statute does apply, the statute contains the unequivocal requirement that fees "shall only be paid upon presentation of an itemized accounting of the attorney's fees." S.C. Code § 15-77-330. Roper Pond simply submitted and resubmitted a list of time quantities (basically a column of numbers) without any identification or description of the associated tasks. Roper Pond's timesheets do not have sufficient information to determine whether that time was spent on the appeal, on the overlapping proceedings before the ALC seeking fees, or some other work unrelated to the appeal (a point the Town made in its briefing both on deficiency in reporting, pp. 18-20 and the "fees on fees", pp. 38-40). This Court simply does not have the information upon which to determine which of the ~$92,000 in fees is attributable to the appellate work.

CONCLUSION

Roper Pond points to no points overlooked or misapprehended by the Court that would warrant a departure from its plain language interpretation of the State Action Statute and the Town requests that the rehearing be denied.

Respectfully submitted,

s/ Amy E. Armstrong

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