THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2018-001868

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

v.

James W. Davenport, ... Respondent-Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLANT

Pursuant to this Court's invitation of March 24, 2021, Respondent-Appellant, James W. Davenport, by and through his undersigned counsel, hereby submits this Supplemental Brief of Respondent-Appellant to address the Court's recent decision in Town of Arcadia Lakes v. South Carolina Dep't of Health and Environmental Control, Op. No. 5803, Shearouse Adv. Sh., No. 5, at 53 (S.C. Ct. App. Feb. 2, 2021). With all due respect, the Court's holding in Town of Arcadia Lakes that a contested case before the Administrative Law Court is not a "civil action" for purposes of S.C. Code Ann. § 15-77-300(A) was wrongly decided.

Respondent-Appellant addressed the issue of whether the term "civil action" in S.C. Code Ann. § 15-77-300 can include proceedings before the Administrative Law Court at length in Argument 1 of the Brief of Respondent-Appellant on Primary Appeal, which arguments are hereby incorporated by reference. Contrary to the Court's analysis in the Town of Arcadia Lakes case, the

plain meaning of the term "civil action," which is not specifically defined in the statute itself, merely distinguishes legal actions that are not of a criminal nature. See Blacks Law Dictionary, at 245 (6th ed. 1990) (defining "civil action" as "Action brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings.").

The South Carolina Supreme Court clearly views the term "civil action" as including proceedings before the administrative law court. Rule 241, SCACR, which is entitled "Stay and Supersedeas in Civil Actions" plainly applies to matters before administrative tribunals. Rule 241(a), SCACR provides, "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." Rule 241(a), SCACR (emphasis added). Section 241(b)(11) specifically lists "Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5)[1]" as an exception to the general

[1]The references in Rule 241(b), SCACR, to Sections 1-23-380(A)(2) and 1-23-600(G)(5) are no longer accurate. Section 1-23-380 was re-written in 2006 to provide for appeals to the S.C. Court of Appeals instead of to the circuit court, and again in 2008 to remove subsections (A) and (B). Section 57 of the 2006 Act provides, in relevant part, "No pending or vested right, civil action, special proceeding, or appeal of a final agency administrative decision exists under the former law as of the effective date of this act, except for [exceptions to not apply] . . . and petitions for judicial review that are pending before the circuit court." 2006 S.C. Act No. 287, sec. 57 (emphasis added). Thus, the General Assembly clearly used the term "civil action" to refer to matters under the Administrative Procedures Act, S.C. Code Ann. § 1-23-310 et seq. and before the Administrative Law Court in a contested case, S.C. Code Ann. § 1-23-600 et seq.

rule that the service of a notice of appeal in a civil case stays the effect of the order from which the appeal is taken. Rule 241(b), SCACR.

Section 1-23-390 of the South Carolina Code of Laws also supports the conclusion that administrative proceedings are, in fact, civil cases: "An aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Court Rules as in other civil cases." S.C. Code Ann. § 1-23-390 (emphasis added). The legislature's choice of the word "other" to modify the phrase "civil case" indicates that proceedings before the Administrative Law Court are a sub-set of civil cases; otherwise, the word "other" simply could have been left off. Similarly, S.C Code Ann. § 1-23-610(A)(1) specifies that appeals from a final decision of an administrative law judge are governed by the South Carolina Appellate Court Rules in civil cases," as opposed to criminal cases. S.C. Code Ann. § 1-23-610(A)(1) (emphasis added). Moreover, S.C. Code Ann. § 1-23-650(B)(1) requires the rules governing practice before the ALC to be "consistent with the rules of procedure governing civil actions in courts of common pleas." S.C. Code Ann. § 1-23-650(B)(1).

Perhaps the most significant indication that the General Assembly intended for the term "civil action" to include contested cases before the administrative law court is found in the exception set forth in S.C. Code Ann. §15-77-300(C): "The provisions of this section do not apply to civil actions relating to . . . disciplinary actions by state licensing boards." Significantly, the General Assembly amended Section 15-77-300 in 2010, after jurisdiction for all contested cases had been placed in the Administrative Law Court and appeals for all such cases were transferred to the SC Court of Appeals

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Section 1-23-600 was amended in 2008 to add a new subsection (G) and to move the former subsection (G) to new subsection (H). 2008 S.C. Act No. 334, sec. 7. Thus, the reference in Rule 241(b)(11), SCACR, to S.C. Code Ann. § 1-23-600(G)(5) clearly means § 1-23-600(H)(5).

rather than to circuit courts. 2010 S.C. Act No. 125. Disciplinary actions by state licensing boards are clearly administrative matters; yet, Section 15-77-300(C) expressly includes them among the class of "any civil action brought by the State" described by Section 15-77-300(A). In other words, if the General Assembly did not mean to include administrative cases within the phrase "civil action," the exception in subsection (C) would be completely unnecessary.

What the Town of Arcadia Lakes opinion dismisses as a "small constellation of statutes" that use the phrase "civil action" in the context of the Administrative Law Court (Slip Op., at 7), is actually critical to an understanding of S.C. Code Ann. § 15-77-300 and the exceptions in subsection (C), particularly with respect to disciplinary actions by licensing boards. The title of S.C. Code Ann. § 40-1-210 is particularly revealing: "Civil proceedings before Administrative Law Court." This statute specifically allows the Department of Labor, Licensing and Regulation to "institute a civil action through the Administrative Law Court, in the name of the State, for injunctive relief against a person violating this article, a regulation promulgated under this article, or an order of the board." S.C. Code Ann. § 40-1-210 (emphasis added). The term "board" refers to the body that has "the responsibility for licensing or otherwise regulating an occupation or profession" under the umbrella of LLR. S.C. Code Ann. § 40-1-20(3). The fact that the General Assembly used the same term "civil action" in both S.C. Code Ann. § 15-77-300 and in S.C. Code Ann. § 40-1-210 reveals that the General Assembly knows that the term "civil actions" can include proceedings before the ALC and is not limited to matters brought in a judicial forum. Indeed the remainder of Title 40 of the South Carolina Code addresses the specific professions and occupations regulated under the auspices of LLR, from Accountants to Veterinarians. The Town of Arcadia Lakes opinion completely overlooks the obvious interplay between S.C. Code Ann. § 15-77-300 and the narrow exception in

subsection (C), which immunizes the LLR and the various boards and commissions from liability for attorney's fees for professional licensing or disciplinary matter in which the state does not prevail.

The South Carolina Supreme Court's decision in McDowell v. South Carolina Dep't of Soc. Servs., 304 S.C. 539, 405 S.E.2d 830 (1991), supports the ALC's award of attorney's fees to Mr. Davenport in this matter, although it was cited by the Court of Appeals in Town of Arcadia Lakes. The McDowell case involved judicial review under the Administrative Procedures Act ("APA") of an agency decision denying appellant's application for food stamps. Under the old version of the South Carolina APA, judicial review of a final agency decision was through the circuit court, not through the court of appeals.[2] In McDowell, the Supreme Court held that judicial review of an agency decision fell within a "civil action" under the attorney fee statute, S.C. Code Ann. § 15-77-300, even though the matter in the circuit court was not commenced by the filing of a summons and complaint. The McDowell court denied attorney's fees incurred by appellant while the matter was still within DSS because "at this point the agency was not 'pressing its claim' in litigation against appellant but was merely functioning as an administrative decision-maker." 304 S.C. at 543, 405 S.E.2d at 833.

Here, DHEC was not acting as an administrative decision-maker during the ALC proceeding, but rather was "pressing its claim" against Respondent within the meaning of S.C. Code Ann. § 15-77-300. Applying the holding of the Supreme Court in McDowell, the ALC specifically denied Respondent's award of attorney's fees while the matter was still at the agency level, but did award

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[2]As noted previously, the APA was amended in 2006 to provide for judicial review through the Court of Appeals, not through the circuit court. S.C. Code Ann. § 1-23-380.

fees after the matter left the agency. The Court of Appeals decision in Town of Arcadia Lake purporting to distinguish between administrative proceedings and civil proceedings is inconsistent with the Supreme Court's holding in McDowell that the determinative point is once the administrative matter leaves the agency itself and the agency is no longer functioning as a decision-maker, but rather acts as a litigant. The Town of Arcadia Lakes opinion's pronouncement that "administrative cases do not become 'civil actions' until they leave the executive branch and enter the judicial branch for review," (Slip Op., at 7), missed the point of McDowell. The critical question is not when does the case leave the executive branch of government; rather, the critical question is when does the agency go from being a decision-maker to a litigant pressing its position.

The Town of Arcadia Lakes case also cites to the Court of Appeals case of South Carolina Dep't of Consumer Affairs v. Foreclosure Specialist, Inc., 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010). At issue in the Foreclosure Specialist case was whether the Administrative Law Court had authority under the South Carolina Consumer Protection Code to award monetary damages for violations of the Consumer Credit Counseling Act. The Consumer Protection Code specifically limited the ALC's powers: "Under subsection 37-6-108(F), 'the administrative law judge may not award damage[s] . . . to affected customers in these hearings.'" 390 S.C. at 186, 700 S.E.2d at 470 (quoting former S.C. Code Ann. § 37-6-108(F)). There is no such express limitation on the ALC's authority to award attorney's fees under S.C. Code Ann. § 15-77-300. In fact, as the Foreclosure Specialist court recognized, S.C. Code Ann. § 1-23-630(A) specifically provides that "an administrative law judge 'has the same power at chambers or in open hearings as do circuit court judges and to issue those remedial writs as are necessary to give effect to its jurisdiction.'" Id. (quoting S.C. Code Ann. § 1-23-630(A)).

The Town of Arcadia Lakes decision also relies on a federal appeals case from the Ninth Circuit Court of Appeals interpreting the Equal Access to Justice Act ("EAJA"), Western Watersheds Project v. United States Dep't of the Interior, 677 F.3d 922 (9th Cir. 2012). Importantly, as the South Carolina Supreme Court recognized in the McDowell case, "[t]he language of [S.C. Code Ann.] § 15-77-300 . . . does not track the EAJA beyond using the phrase 'substantially justified.'" McDowell, 304 S.C. at 542, n.1, 405 S.E.2d at 832, n.1. Accordingly, federal precedent under the EAJA is not particularly helpful in applying and interpreting S.C. Code Ann. § 15-77-300.

The fact that the General Assembly did not amend S.C. Code Ann. § 15-77-300 in 2010 to add "or administrative action" as it did when it amended the South Carolina Frivolous Civil Proceedings Sanctions Act in 2005 does not support the Court of Appeals's decision in Town of Arcadia Lakes. In fact, a strong argument could be made that, in amending S.C. Code Ann. § 15-36-10, the legislature was clarifying that the term "civil proceedings" as contained in the title of that statute was always intended to include administrative matters. Likewise, the fact that the General Assembly rejected a proposed bill in 1997 that would have expressly added the phrase "administrative proceedings" to Section 15-77-300(A) is not evidence of legislative intent when the original statute was actually passed. In light of the South Carolina Supreme Court's holding in McDowell from 1991, there was no question that cases under the APA could be considered civil actions for purposes of the attorney's fee provision in S.C. Code Ann. § 15-77-300. The particular bill from 1997 was proposed approximately six years after the Supreme Court's holding in McDowell that attorney's fees are available for administrative matters after the administrative decision-making function of the agency is concluded. Respondent suggests that the General Assembly's inaction in refusing to tinker with the statute's language further is actually strong

evidence that the legislature was endorsing the previous judicial interpretation of the statute as correct.

In addition, the underlying facts and procedural history of the instant case are much different than those presented in the Town of Arcadia Lakes case. Thus, the two cases are easily distinguishable. Here, Respondent requested a contested case hearing before the ALC after the DHEC board adopted the staff decision without even holding a hearing. There was substantial evidence that DHEC's action was improperly influenced by the personal friendship between the former Anderson County EMS Director, Scott Stoller, and DHEC's former Director of the EMS Division, Arnold Alier, who were previously partners when they were employed at Greenville County EMS years earlier. Respondent alleged that the action against his paramedic credentials was motivated by unlawful retaliation against him for raising serious misconduct and financial self-dealing within the Anderson County EMS Department by Mr. Stoller. The ALJ's attorney's fee award was directly against DHEC, the agency responsible for the contested action in question that was deemed to have acted without substantial justification.

By contrast, the Town of Arcadia Lakes case involved a contested case filed by a town challenging the administrative action of DHEC in issuing an environmental permit to a developer. The agency's action was upheld by the ALJ, and the attorney's fee award was imposed against the Town of Arcadia Lakes, not DHEC. The ALJ determined that the Town's action in challenging the agency action was without substantial justification, not the underlying agency decision.

Finally, if the Court agrees that the Town of Arcadia Lakes case is binding precedent and would be dispositive of Respondent's right to receive an award of attorney's fees under S.C. Code Ann. § 15-77-300, Respondent would request that the Court remand the case back to the ALC for

a determination of whether sanctions under Rule 72 of the South Carolina ALC Rules or the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 are warranted.

For all of the foregoing reasons and for the reasons stated in Respondent's previous briefs, Respondent requests that this Court overrule the holding of Town of Arcadia Lakes v. South Carolina Dep't of Health & Environmental Control, Op. No. 5803 (S.C. Ct. App. Feb. 10, 2021), or limit the scope of that case to the facts presented there, and affirm the ALC's award of attorney's fees in this case.. In the alternative, Respondent requests that the Court remand the case back to the ALC for determination of sanctions under Rule 57, SCALC Rules, and/or S.C. Code Ann. § 15-36-10.

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