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Jul 27 2021

SC Court of Appeals

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.

RESPONDENT-APPELLANT’S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Pursuant to Rule 221(a), SCACR, Respondent-Appellant, James W. Davenport, by and through his undersigned counsel, hereby files this Petition for Rehearing of the Court’s per curiam decision of July 14, 2021, in the above-captioned case. With all due respect, the Court’s 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), that a contested case before the Administrative Law Court is not a “civil action” for purposes of the state-action attorney’s fee statute, S.C. Code Ann. § 15-77-300(A), which is the sole basis for its decision in this case, was wrongly decided. In the instant case, the Court overlooked or misapprehended the following points of law:

- (1) The Court misapplied the plain meaning of the term “civil action,” which is not

defined in S.C. Code Ann. § 15-77-300(A), but which merely distinguishes cases that are not of a criminal or quasi-criminal nature;

(2) The Court’s decision is contrary to the South Carolina Supreme Court’s holding in McDowell v. South Carolina Dep’t of Soc. Servs., 304 S.C. 539, 405 S.E.2d 830 (1991), that attorneys’ fees are properly allowable under S.C. Code Ann. § 15-77-300, for administrative cases after the agency moves from functioning as a decision-maker to pressing its claims in litigation;

(3) The Court overlooked critical provisions of the South Carolina Rules of Appellate Procedure and the Administrative Procedures Act that use the same term “civil action” specifically to include cases before the Administrative Law Courts, see Rule 241, SCACR (entitled “Stay and Supersedeas in Civil Actions”), S.C. Code Ann. §§ 1-23-390, -610(A)(1), and -650(B)(1);

(4) The Court disregarded the exception in S.C. Code Ann. § 15-77-300(C) for “civil actions relating to . . . disciplinary actions by state licensing boards,” which are administrative proceedings, yet are expressly described in the same statute as types of “civil actions”; the Court’s overly narrow reading of Section 15-77-300 would render this exception completely superfluous;

(5) The Court also overlooked the General Assembly’s express use of the terms “civil proceedings” and “civil action” before the Administrative Law Court in various portions of Title 40 of the South Carolina Code; and

(6) The Court’s decision would create serious problems with access to justice for first-responders like Respondent-Appellant, for whom the state-action attorney’s fee statute provides needed protection against potentially career-ending governmental action taken without substantial justification.

Respondent-Appellant hereby incorporates by reference the briefs and supplemental brief he

previously filed in this case.

For all of the foregoing reasons, the Court should re-hear this matter, should reinstate the attorney's fee award of the Administrative Law Court, and should address Respondent-Appellant's cross appeal regarding additional fees and costs.

In addition, because this case involves a question of exceptional importance and because two of the three members of the panel who heard this case were also on the panel that decided the Town of Arcadia Lake case, Respondent-Appellant suggests that the matter should be reheard en banc pursuant to Rule 219, SCACR.

July 27, 2021

s/ David E. Rothstein
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PROOF OF SERVICE

I certify that I have served Respondent-Appellant’s Petition for Rehearing for upon Appellant-Respondent, South Carolina Department of Health and Environmental Control, by email and by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2021, addressed to its attorneys of record, Ashley C. Biggers and Vito M. Wicevic, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201.

July 27, 2021

s/ David E. Rothstein
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VIA EMAIL (ctappfilings@sccourts.org)
AND U.S. MAIL

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: South Carolina Department of Health and Environmental Control v. Davenport,
Appellate Case No. 2018-001868

Dear Ms. Kitchings:

I represent Respondent-Appellant, James Davenport, in the above-referenced appeal. Enclosed please find Respondent-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc. Please file the original and return a clocked-in copy to me via the court's email portal. I am also enclosing a check for \$50.00 for the filing fee with the original, mailed copy of this letter.

As indicated on the attached Proof of Service for this document, I am hereby serving a copy of the Petition for Rehearing on Counsel for Appellant-Respondent.

Thank you in advance for your attention to this matter. If you have any questions or need anything else, please do not hesitate to call me or email me.

Sincerely yours,

David E. Rothstein

Enclosures

cc: Ashley C. Biggers, Esq. (Both via email only)
Vito M. Wicevic, Esq.