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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Opinion No. 2021-UP-273 (S.C. Ct. App. July 14, 2021)

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

v.

James W. Davenport,. . . . . Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned counsel for Petitioner hereby certifies that Petitioner timely filed the Petition for Rehearing, which was denied by the South Carolina Court of Appeals on October 6, 2021.

QUESTIONS PRESENTED

(1) Did the Court of Appeals misapply the plain meaning of the term "civil action" as used in the state-action attorneys' fee statute, S.C. Code Ann. § 15-77-300(A), which does not contain an express definition of the term "civil action," but merely uses that term to distinguish cases that are not of a criminal or quasi-criminal nature?

(2) Is the Court of Appeals decision below (as well as the opinion in Town of Arcadia Lakes v. South Carolina Dep't of Health and Environmental Control, Op. No. 5803, Adv. Sh., No. 5, at 53 (S.C. Ct. App. Feb. 2, 2021)) contrary to this 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, in administrative cases after the agency moves from functioning as a decision-maker to pressing its claims in litigation?

(3) Did the Court of Appeals overlook critical provisions of the South Carolina Rules of Appellate Procedure and the South Carolina Administrative Procedures Act that use the same term "civil action" specifically to include cases before the Administrative Law Courts?

(4) Did the Court of Appeals disregard the exception in S.C. Code Ann. § 15-77-300(C) for "civil actions relating to . . . disciplinary actions by state licensing boards," which are clearly administrative proceedings, yet are expressly described in the same statute as a sub-set of "civil actions"?

(5) Did the Court of Appeals overlook 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?

(6) Did the Court of Appeals fail to consider the important access-to-justice issues that would be faced by first-responders like Petitioner, for whom the state-action attorney's fee statute provides needed protection against potentially career-ending governmental action taken without substantial justification?

STATEMENT OF THE CASE

This is an appeal from an award of attorney's fees by the Administrative Law Court following a contested case hearing in which Respondent, South Carolina Department of Health and Environmental Control ("DHEC"), unsuccessfully attempted to revoke the paramedic certification of Petitioner, James W. Davenport ("Mr. Davenport"). The underlying contested case was tried before the Hon. Shirley C. Robinson, Administrative Law Court, from July 24-28, 2017, after extensive discovery that included numerous witness depositions, document requests, and third-party subpoenas. On March 20, 2018, Judge Robinson entered a Final Decision and Order vacating DHEC's Administrative Order that had revoked Mr. Davenport's paramedic certification. Judge Robinson found that "there is insufficient evidence that Respondent committed misconduct . . . such that revocation of his South Carolina EMT certification is warranted." (R. p. 11). DHEC did not appeal the underlying Order disposing of the contested case.

On March 21, 2018, the undersigned counsel for Mr. Davenport filed a Petition for Attorney's Fees and Court Costs, pursuant to Rule 54(d), SCRCP, and S.C. Code Ann. § 15-77-300(A). On April 5, 2018, DHEC filed a Memorandum in Opposition to the Petition for Attorney's Fees. On April 16, 2018, the undersigned counsel for Mr. Davenport filed a Reply Brief,

along with a Supplemental Affidavit of [Davenport's] Counsel, including additional time and expenses incurred since the filing of the fee petition, primarily the cost of obtaining a copy of the trial transcript, which was approximately $3,900.00. After briefs were submitted by both parties, Judge Robinson conducted an in-person hearing on the attorney's fee petition on June 13, 2018.

On June 22, 2018, DHEC attempted to file a Supplemental Memorandum of Law, which the undersigned counsel for Mr. Davenport objected to by letter of June 25, 2018, to Judge Robinson. (R. pp. 1728-29).

On August 1, 2018, Judge Robinson entered an Order Granting [Davenport's] Petition for Attorney's Fees in the amount of $91,120.00. Judge Robinson specifically found that "DHEC lacked reasonable grounds in law and fact to pursue revocation of [Davenport's] EMT Certification." (R. p. 78). The ALC declined to award fees for any post-trial matters and also declined to make an award of costs as requested under Rule 54(d), SCRCP. (Id.).

On August 8, 2018, DHEC filed a Motion to Alter or Amend (Reconsider) Order Granting Petition for Attorney's Fees. On August 27, 2018, Davenport filed a Memorandum of Law in Opposition to DHEC's Motion for Reconsideration of Attorney Fee Order. On September 20, 2018, Judge Robinson entered an Order on [DHEC's] Motion to Alter or Amend, affirming the award of attorney's fees under the statute, but reducing the amount of attorney's fees by $3,450.00 as allegedly unnecessary and unreasonable travel time. (R. p. 119).

Petitioner's counsel received notice of the entry of the Order on September 20, 2018. DHEC timely filed and served its Notice of Appeal on October 17, 2018, which the undersigned counsel for Petitioner received on October 22, 2018. Petitioner timely served and filed his Notice of Cross Appeal on October 22, 2018, pursuant to Rule 203(c), SCACR, within five (5) days of receipt of

Appellant's Notice of Appeal.

On March 24, 2021, the Court of Appeals invited the parties to file supplemental briefs regarding the applicability of its recent decision in Town of Arcadia Lakes v. South Carolina Department of Health & Environmental Control, Op. No. 5803 (S.C. Ct. App. Feb. 2, 2021). Both parties filed supplemental briefs on April 13, 2021.

The Court of Appeals heard oral argument in this case on May 4, 2021. Two of the three judges on the panel were also on the panel in the earlier Town of Arcadia Lakes case. The Court issued an unpublished, per curiam decision on July 14, 2021, concluding that the Town of Arcadia Lakes decision was controlling. South Carolina Department of Health & Environmental Control v. James W. Davenport, Op. No. 2021-UP-273 (S.C. Ct. App. July 14, 2021).

On July 27, 2021, Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On October 6, 2021, the Court of Appeals denied rehearing and declined en banc consideration.

Petitioner seeks a writ of certiorari to review that decision.

FACTS

DHEC did not appeal from Administrative Law Judge Robinson's Final Decision and Order in the contested case dated March 20, 2018. Accordingly, the underlying propriety of Mr. Davenport's care of the stabbing patient (and to the other two patients from the initial report) is not at issue in this appeal. The only factual findings of ALJ Robinson's that are at issue in this appeal are those she made specifically relating to the attorney's fee petition. Judge Robinson, who also presided over the trial of the underlying contested case, was clearly in the best position to weigh the record evidence and to determine the credibility of witnesses on the issues relevant to the fee

petition. As Judge Robinson specifically noted in her Order granting attorney's fees, "In evaluating DHEC's justification in pressing its claim, the Court has the benefit of considering the outcome of the contested case." (R. p. 75).

The underlying contested case seeking to revoke Mr. Davenport's paramedic certification was initiated after the Anderson County EMS Director, Scott Stoller, contacted his (Stoller's) former partner at the Greenville County EMS Department, Arnold Alier, then-DHEC's Director of the EMS Division, about three separate patient incidents involving Mr. Davenport's paramedic care. Stoller's first contact with Alier occurred late in the day, at 5:19 p.m. on Friday, March 25, 2016, after the Anderson County Medical Control Physician, Dr. Thomas Kickham, had reinstated Mr. Davenport's authority to continue working as a paramedic in Anderson County earlier that same day. (R. p. 1316, ll. 11-17). Significantly, Anderson County's review of the three incidents involving Mr. Davenport was not handled as part of the established QA/QI (quality assurance/quality improvement) procedures of the Anderson County EMS Department. Instead, Stoller hired another one of his close friends and former partners from the Greenville County EMS Department, Keith Eudy, to prepare a report critical of Mr. Davenport's care, unbeknownst to Dr. Kickham or Mr. Davenport. DHEC called Mr. Eudy as a witness during the trial, despite the fact that no one at DHEC ever communicated with Mr. Eudy during the investigation of Mr. Davenport. (R. p. 373, ll. 1-16).

During the contested case trial, Judge Robinson strictly limited Mr. Davenport's factual presentation about Stoller's ulterior motive in seeking to have Mr. Davenport's paramedic credentials revoked. Namely, Mr. Davenport had recently complained that Stoller had misappropriated funds and property of the Anderson County EMS Department for his personal use, among other allegations of serious mismanagement and malfeasance by Stoller within the

Department. Stoller's deposition testimony, which was offered into evidence when Stoller was unable to testify live at trial, confirmed that he was aware of Mr. Davenport's complaints about him at the time he (Stoller) first contacted DHEC about Mr. Davenport. (R. p. 1230, l. 6 to p. 1233, l. 25). During the trial, Judge Robinson strictly limited Mr. Davenport's introduction of evidence of the underlying retaliatory motivation of Stoller in attempting to discredit Mr. Davenport and terminate his employment with the Anderson County EMS Department.

Alier conceded at trial that the underlying complaint against Mr. Davenport was not handled in accordance with DHEC's regulations for initiating or accepting complaints against paramedics and EMTs. (R. p. 1332, l. 13 to p. 1333, l. 25). Alier actually admitted that his receipt of the body-worn camera video of one of the underlying incidents involving Mr. Davenport was likely a violation of the patient's HIPAA rights, when Stoller transmitted the video to Alier's unsecure, personal email address without any type of encryption. (R. p. 1308, l. 22 to 1315, l.16; p. 1340, ll. 4-18).

Alier opened an investigative file about Mr. Davenport and assigned the case to DHEC investigator Rich Naugler. Tellingly, DHEC did not even call Naugler as a witness in its case in chief. Mr. Davenport called Naugler as an adverse witness as part of the defense case. Naugler testified that he conducted literally no investigation into the matter, other than reviewing the body-worn camera video of the incident. According to Naugler, "My investigation came from the video. . . . That's all I needed." (R. p. 1264, l. 2, 5). Naugler conceded that he never attempted to speak to any critical witnesses to the incident or to obtain any documents or records relating to the incident. (R. pp. 1263-1268).

DHEC's Bureau Chief for the Bureau of EMS and Trauma, Rob Wronski, testified that after he and some other DHEC employees, including State Medical Control Director, Dr. Edgar

Deschamps, viewed the body-worn camera footage, they decided to call Mr. Davenport in for an investigatory interview under false pretenses. They misrepresented their involvement in reviewing the three cases as being part of a routine QA/QI review and told Mr. Davenport that they needed a statement from him to close out their file, because they already had a written statement from Mr. Davenport's partner on the self-inflicted stabbing call, and they thought that Anderson County handled the matter appropriately. (R. p. 1005, l. 25 to 1006, l. 3). They did not tell Mr. Davenport that he was the subject of an investigation, much less one that could lead to DHEC's revoking his paramedic credentials, or that he had a right to have counsel present at the meeting. (R. p. 1017, l.21 to p. 1018, l.3). Wronski testified that he and his investigator at DHEC, Naugler, devised a "strategy" going into the meeting with Mr. Davenport to obtain an "ultimate objective"–apparently to intimidate Mr. Davenport into signing a consent order voluntarily surrendering his paramedic credentials. At the beginning of the interview, they deliberately asked Mr. Davenport gentle, open questions "to put [him] at ease and establish a little bit of rapport with him." (R. p. 1009, l.19 to p. 1010, l.4). As the interview went on, they began to ask Mr. Davenport pointed and leading questions about the stabbing patient incident to which they already knew the answer based on their prior review of the body-worn camera video. (R. p. 1016, ll. 7-24). As the interview appeared to be wrapping up, they sprang the video footage of the incident on Mr. Davenport and began to ask him very hostile, cross-examination-type questions. Wronski said that his investigative technique of ambushing Mr. Davenport was not part of any training through DHEC, but probably came from "watching too much TV." (R. p. 1023, l.23 to p. 1024, l.5). Wronski also misled Mr. Davenport into believing that DHEC investigators had spoken with the patient and that the patient allegedly complained about how Mr. Davenport regularly treated him. In reality, DHEC never spoke to the

patient or to the patient's family as part of the investigation. (R. p. 1022, l.17 to p. 1023, l.22).

The Investigative Review Committee ("IRC") meeting that considered Mr. Davenport's case in June 2016 was not an independent, unbiased reviewing body. The IRC was led by Wronski and was chaired by Dr. Deschamps, DHEC's State Medical Director, who also served as one of DHEC's expert witnesses at trial. Dr. Deschamps was one of the original DHEC officials or employees who reviewed the video of the stabbing patient encounter shortly after it was sent by Stoller to Alier. At trial, the ALJ properly sustained an objection when DHEC attempted to introduce into evidence the recommendations of the IRC. (R. p. 814, l.1 to p. 815, l.17). DHEC did not challenge that ruling, nor did DHEC attempt to proffer such evidence for the record on appeal.

Most of DHEC's case at trial was spent attempting to establish that Mr. Davenport's care of the stabbing patient allegedly violated various protocols of the Anderson County EMS Department and affiliated rescue squads within Anderson County operating under Dr. Kickham's Medical Control. DHEC repeatedly attempted to create a false equivalency between violation of a protocol and violation of a physician order. One of the categories of "misconduct" for paramedics and EMTs is disregarding a physician's order. S.C. Code Ann. § 44-61-80(F)(6). DHEC's own expert witnesses, Dean Douglas, testified at length on cross examination that the terms "protocols" and "physician's orders" are very different things. (R. p. 718, l.4 to p. 725, l.11). Even Dr. Deschamps testified as follows: "So sometimes I think we make too much of is this a protocol or is this an order. There are times when it's very clear, give them medicine, give x amount of medicine. That's clearly a standing order. But if you say take the stretcher to the bedside, that's an order but it falls within the protocol. So it's kind of wishy washy." (R. p. 826, l.24 to p. 827, l.7). Dr. Deschamps conceded on cross examination that one of the goals of educating paramedics is to teach them not to "blindly

follow the protocols," but to recognize when they should step outside of the protocols based on their own training and experience. He also agreed that paramedics cannot step outside of the requirement of following physician orders. (R. p. 861, l.18 to p. 862, l.1).

Among the primary criticisms leveled at Mr. Davenport was his failure to place the stabbing patient on oxygen, to start an IV on the patient, and to place the patient on a cardiac monitor. (R. p. 386, l. 21 to p. 387, l.5). This was the essence of Mr. Eudy's written review that was done outside of the Anderson County EMS QA/QI process. (R. p. 377, ll. 7-11). Mr. Eudy acknowledge that he is a "close friend" to Stoller and was Stoller's partner on occasion when they both worked at Greenville County EMS years earlier. (R. p. 360, ll. 5-12). Dr. Kickham also testified that "any major trauma patient should have IV, oxygen, cardiac monitor." (R. p. 447, ll.19-20). Dr. Deschamps echoed that same phrase that he learned during his training as a paramedic in the 1970s. (R. p. 807, ll. 6-8). DHEC's investigator, Naugler, testified that he was also familiar with the old paramedics' mantra, "O2, IV, monitor," although he corrected Davenport's counsel that he learned it as "IV, O2, monitor." (R. p. 1241, ll. 6-9). DHEC's own expert witness, Dean Douglas, testified that the mantra "O2-IV monitor for paramedics" has been "outdated for a while." (R. p. 680, ll.14-19; p. 717, ll. 14-18). Mr. Douglas actually testified that, in his opinion, the stabbing patient did not need to be placed on a heart monitor, (R. p. 737, ll. 19-25), nor did the patient require supplemental oxygen. (R. p. 741, l.24 to p. 742, l.1). Similarly, Mr. Davenport's expert witness, Leo Deason, testified that the phrase "O2, IV, monitor" has been obsolete since at least 2010 in the training of paramedics. (R. p. 1128, l.23 to p. 1129, l.3).

Mr. Davenport, who has been a certified paramedic since 1995 and received extensive medical training as a Special Forces Medic in the mid-2000s, quickly determined that the stabbing

patient was stable and did not need supplemental oxygen, did not need an IV started, and did not need be connected to a heart monitor. Only BLS-level treatment was provided to the patient, which Mr. Davenport's EMT-Basic partner was perfectly capable of handling (and, in fact, did handle without incident throughout the ambulance trip to the emergency department at the hospital). Mr. Davenport carefully explained his thought processes in assessing the patient, treating the patient, stabilizing the impaled knife, and getting the patient to the ambulance as safely as possible. (R. p. 1415, l.4 to p. 1446, l.11). Mr. Deason convincingly testified that Mr. Davenport's treatment of the stabbing patient and the manner in which the patient was moved out of the house to the ambulance were appropriate. (R. p. 1152, ll. 17-21; p. 1154, l.23 to p. 1155, l.3; p. 1166, ll.19-25; and p. 1168, ll. 17-22).

Throughout the course of DHEC's processing and consideration of this matter, DHEC made several overtures to Mr. Davenport to enter into a consent order; however, all proposals would have required Mr. Davenport to completely relinquish his paramedic (and even EMT-level) credentials for at least one year. Mr. Davenport was steadfast and confident in his position that he rendered appropriate medical care to all three patients at issue in Stoller's initial communication to Alier at DHEC, although Mr. Davenport readily acknowledged that his language towards the stabbing patient was somewhat rude and terse. (R. p. 323, ll. 4-6; p.1450, ll. 6-14). By way of explanation and not excuse for his actions, Mr. Davenport explained at trial that he was at the tail end of working a 36-hour shift, that he was in significant pain from his amputation, and that he was still grieving the loss of his good friend and fellow paramedic, who had committed suicide less than six weeks earlier–all mitigating factors that no one at DHEC ever attempted to ascertain or consider. (R. p. 1414, ll. 8-12; p. 1415, ll. 18-24; p. 1419, ll. 3-5; p. 1430, l.22 to p. 1431, l.1). Instead, DHEC persistently tried

to entrap and intimidate Mr. Davenport into giving up his certification as a nationally registered paramedic. Unfortunately for DHEC, they tried to ambush the wrong Green Beret.

ARGUMENTS

1. THE COURT OF APPEALS MISAPPLIED THE PLAIN MEANING OF THE TERM "CIVIL ACTION" AS USED IN THE STATE-ACTION ATTORNEYS' FEE STATUTE, S.C. CODE ANN. § 15-77-300(A), WHICH DOES NOT CONTAIN AN EXPRESS DEFINITION OF THE TERM "CIVIL ACTION," BUT USES THAT TERM MERELY TO DISTINGUISH CASES THAT ARE NOT OF A CRIMINAL OR QUASI-CRIMINAL NATURE.

The underlying, unpublished order of the Court of Appeals, which relied entirely on the 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.

The term "civil action" is not defined by S.C. Code Ann. § 15-77-300; accordingly, as ALJ Robinson aptly noted, the Court should "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 the term "civil action" as follows: "An action brought to enforce, redress, or protect private rights. In general, all types of actions other than criminal proceedings." Black's Law Dictionary at 245 (6th ed. 1990). Contrary to the Court's analysis in the Town of Arcadia Lakes case, the plain meaning of the term "civil action" merely distinguishes legal actions that are not of a criminal nature.

The underlying contested case before the Administrative Law Court is clearly a "civil action," not a criminal or quasi-criminal action. The standard of proof in a contested case before the ALC is generally the civil standard, i.e., by a preponderance of the evidence, not the criminal standard of beyond a reasonable doubt. S.C. Code Ann. § 1-23-600(A)(5). Rule 68 of the South Carolina

Administrative Law Court Rules actually incorporates the South Carolina Rules of Civil Procedure (not Criminal Procedure) to contested cases, to the extent that questions are not specifically addressed by the ALC Rules. SCALC Rule 68. Rule 1 of the South Carolina Rules of Civil Procedure similarly provides, "These rules govern the procedure in all South Carolina courts in all suits of a civil nature . . . ." Rule 1, SCRCP (emphasis added); see also Rule 81, SCRCP ("These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state . . . ."). Furthermore, Rule 2 of the South Carolina Rules of Civil Procedure provides, "There shall be one form of action to be known as 'civil action.'" Rule 2, SCRCP. This provision reflects the modern practice of merging actions at law with suits in equity and is not intended to exclude cases in the Administrative Law Courts. There can be no doubt that a contested case before the ALC is a "civil action" for purposes of S.C. Code Ann. § 15-77-300(A).

2. THE COURT OF APPEALS DECISION BELOW (AS WELL AS THE OPINION IN TOWN OF ARCADIA LAKES V. SOUTH CAROLINA DEP'T OF HEALTH AND ENVIRONMENTAL CONTROL, OP. NO. 5803, ADV. SH., NO. 5, AT 53 (S.C. CT. APP. FEB. 2, 2021)) IS CONTRARY TO THIS 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, IN ADMINISTRATIVE CASES AFTER THE AGENCY MOVES FROM FUNCTIONING AS A DECISION-MAKER TO PRESSING ITS CLAIMS IN LITIGATION.

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), fully supports the ALC's award of attorney's fees to Mr. Davenport in this matter. 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.[1] In McDowell, the Supreme Court held that judicial review of an agency decision fell within the term "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 refused to award 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. However, attorney's fees were allowed once the matter left the agency level and proceeded to litigation.

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 properly awarded attorney's fees after the matter left the agency.

The Court of Appeals decision in Town of Arcadia Lake, which purports 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.,

[1]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.

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. This Court should reverse the Court of Appeals' holding in this case and should overrule the Town of Arcadia Lakes case as inconsistent with McDowell.

3. THE COURT OF APPEALS OVERLOOKED CRITICAL PROVISIONS OF THE SOUTH CAROLINA RULES OF APPELLATE PROCEDURE AND THE SOUTH CAROLINA ADMINISTRATIVE PROCEDURES ACT THAT USE THE SAME TERM "CIVIL ACTION" SPECIFICALLY TO INCLUDE CASES BEFORE THE ADMINISTRATIVE LAW COURTS.

The South Carolina Supreme Court clearly views the term "civil action" to include 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). Sub-section (b)(11) to Rule 241, SCACR, specifically lists "Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5)[2]"

[2]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

as an exception to the general 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, which is part of the Administrative Procedures Act, 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 ALC 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).

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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.

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).

The Court of Appeals below and in the Town of Arcadia Lakes case failed to reconcile these important uses of the term "civil action" by the South Carolina Supreme Court and the General Assembly in key provisions outside of the state-action attorneys' fee statute. As such, this Court should grant certiorari to correct his material oversight.

4. THE COURT OF APPEALS 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 CLEARLY ADMINISTRATIVE PROCEEDINGS, YET ARE EXPRESSLY DESCRIBED IN THE SAME STATUTE AS A SUB-SET OF "CIVIL ACTIONS."

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 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. Under Section 40-1-160 of the South Carolina Code, any "person aggrieved by a final action of a [professional or occupational licensing] board may appeal the decision to the Administrative Law Court in accordance with the rules of the Administrative Law Court." S.C. Code Ann. § 40-1-160. The

exception in Section 15-77-300(C) would be wholly superfluous if actions in the ALC were not considered "civil actions" for purposes of Section 15-77-300(A) in the first place.

Administrative Law Judge Robinson was absolutely correct in her rejection of DHEC's arguments: "I find minimal difficulty in concluding that the underlying proceeding meets the customary definition of civil action." (R. p. 73) (emphasis added).

5. THE COURT OF APPEALS 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.

In the Town of Arcadia Lakes opinion, the Court of Appeals glossed over several key statutory provisions from Title 40 of the South Carolina Code, which contains various statutes regulating professions and occupations. What the Court of Appeals dismissively described as a "small constellation of statutes" that use the phrase "civil action" in the context of the Administrative Law Court (Town of Arcadia Lakes, 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.

Section 40-1-210 of the South Carolina Code, which is actually titled "Civil proceedings before Administrative Law Court," allows the Department of Labor, Licensing & Regulation ("LLR") 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 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 merely 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. Petitioner 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.

6. THE COURT OF APPEALS FAILED TO CONSIDER THE IMPORTANT ACCESS-TO-JUSTICE ISSUES THAT WOULD BE FACED BY FIRST-RESPONDERS LIKE PETITIONER, FOR WHOM THE STATE-ACTION ATTORNEY'S FEE STATUTE PROVIDES NEEDED PROTECTION AGAINST POTENTIALLY CAREER-ENDING GOVERNMENTAL ACTION TAKEN WITHOUT SUBSTANTIAL JUSTIFICATION.

Finally, 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, Petitioner 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 both employed at Greenville County EMS years earlier. Petitioner 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 ultimately upheld by the ALJ, and the attorney's fee award was imposed against the Town of Arcadia Lakes, not against DHEC. The ALJ determined that the Town's action in challenging the agency action was without substantial justification, not the underlying agency decision itself.

Paramedics and EMTs are not governed by Title 40. Instead, they are covered by the Emergency Medical Services Act of South Carolina, S.C. Code Ann. § 44-61-10 et seq., which is administered by DHEC, not by LLR. If the General Assembly had intended for DHEC matters to be included within the exception to Section 15-77-300(C), it would have done so expressly. See Vernon, 244 S.C. at 157, 135 S.E.2d at 844 ("Where there is an express exception in a statute, all other exceptions which are not expressly set forth are excluded."). Mr. Davenport did not receive any type of hearing before the final agency action was taken by DHEC's staff members revoking his paramedic certification. The DHEC Board actually refused Mr. Davenport's request for a final hearing before that body, allowing the staff decision to become the final agency decision. Thus, Mr. Davenport's only opportunity for a hearing came at the contested case trial before the Administrative Law Court, pursuant to S.C. Code Ann. § 1-23-320. If paramedics like Mr. Davenport were not able to recover attorney's fees for defending against DHEC's actions against their professional credentials without substantial justification, many paramedics could be easily bullied into surrendering their livelihoods, with no prospect of being able to mount a successful legal defense through counsel. Thus, the narrow reading of S.C. Code Ann. § 15-770300(A) by the Court of Appeals below would cause substantial problems of access-to-justice and due process for such first responders.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court grant the petition for a writ of certiorari to review this important matter of statutory interpretation.

Respectfully submitted,

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