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
Case No. 18-ALJ-07-0003-CC

South Carolina Department of Health and Environmental Control, Appellant/Respondent,

v.

James W. Davenport, Respondent/Appellant.

REPLY BRIEF OF APPELLANT/RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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The South Carolina Department of Health and Environmental Control ("DHEC") submits the arguments below in response to the Respondent brief of James W. Davenport. Mr. Davenport fails to refute the various legal errors that affect the Administrative Law Court's ("ALC") award under S.C. Code Ann. § 15-77-300. Accordingly, the award must be reversed.

I. THIS WAS NOT A CIVIL ACTION.

Contested cases are "administrative actions" that are conducted before administrative agencies of the executive branch. *See, e.g.*, S.C. Code Ann. § 1-23-500 ("There is created the [ALC], which is an agency . . . within the executive branch of government of this State."). "Civil actions" are conducted before courts of the judicial branch. *See* S.C. CONST. art. V (establishing and explaining the Judicial Department in South Carolina) and S.C. Code Ann. § 14-1-70 (designating the several courts of the State). Relying on a dictionary definition, Mr. Davenport broadly contends that because this was not a criminal proceeding, it was a "civil action." (Davenport Initial Resp't Br., pp. 10-11). The more relevant distinction is between "civil actions" and "administrative actions." Mr. Davenport's argument and the ALC's holding that a contested case is a "civil action" ignore the statutory scheme behind § 15-77-300.

Section 15-77-300 is within Title 15 of the S.C. Code of Laws entitled, "Civil Remedies and Procedures." While § 15-77-300 does not include any definitions, Title 15 demonstrates that "civil actions" only consist of proceedings before the judiciary. In prescribing the time for commencement of civil actions, § 15-3-20 provides:

> (A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.

> (B) A civil action is commenced when the summons and complaint[1] are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

Section 15-77-50 describes the jurisdiction and venue of actions affecting State agencies as "[t]he circuit courts of this State." Nowhere within Title 15 is there mention of contested cases or the ALC. Additionally, with exception of describing the Court of Appeal's jurisdiction, Title 14 entitled, "Courts," does not reference contested cases or the ALC.

However, Title 15 mentions "administrative actions," which include contested cases. The *South Carolina Frivolous Civil Proceedings Act* ("SCFPA"), S.C. Code Ann. §§ 15-36-10 *et seq.*, explains that, "[a]n attorney or pro se litigant participating in a *civil or administrative action* or defense may be sanctioned" for: filing frivolous pleadings, motions, or document or making frivolous arguments. S.C. Code Ann. § 15-36-10(A)(4) (Emphasis added). The SCFPA applies to "[a] pleading filed in a civil or *administrative action*" or "[a] document filed in a civil or *administrative action*." *Id.* § 15-36-10(A)(2) and –(3) (Emphasis added). Accordingly, there is a distinction between "administration actions," such as contested cases, and "civil actions." This distinction is made clearer by the fact that Title 1 of the S.C. Code of Laws, which is entitled "Administration of the Government" and creates the ALC, explicitly provides the ALC with authority to impose sanctions in accordance with the SCFPA. Section 1-23-670 states:

> . . . . If the presiding administrative law judge determines at the conclusion of the proceeding that the case was frivolous or taken solely for the purpose of delay, the judge may impose sanctions as the circumstances of the case and discouragement of like conduct in the future may require, including sanctions authorized in the Frivolous Proceedings Act, Chapter 36, Title 15, and as otherwise prescribed by law.

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[1] While the Supreme Court in *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 405 S.E.2d 830 (1991), rejected DSS's argument that a case was not "civil action" because it was not commenced by service of a summons and complaint, the awarded attorney's fees in that matter concerned the "civil action" for judicial review before the circuit court, not the "administrative action" before the Fair Hearing Committee.

In contrast, there is no similar provision within Title 1 providing the ALC authority to award attorney's fees pursuant to § 15-77-300.

Federal and other state laws are supportive of the distinction between "civil actions" and "administrative actions." *The Equal Access to Justice Act* ("EAJA") has provisions in separate titles of the U.S. Code distinguishing between awards of attorney's fees in "civil actions" before courts and awards of attorney's fees in "adversary adjudications" before administrative agencies. In Title 28 of the U.S. Code, entitled "Judiciary and Judicial Procedure," a court may award reasonable fees to the prevailing party in "any civil action." *See* 28 U.S.C. § 2412(b); *see also Levernier Constr., Inc. v. United States*, 947 F.2d 497 (Fed Cir. 1991) (holding "civil action," as used in the EAJA, should be given its ordinary meaning to include only judicial proceedings and not to encompass administrative actions). In Title 5, entitled "Government Organization and Employees," an agency shall award to a prevailing party in "an adversary adjudication." *See* 5 U.S.C. § 504(a)(1). Other states' equivalents to § 15-77-300 also distinguish between civil proceedings and administrative proceedings. *See, e.g.*, N.D. Cent. Code § 28-32-50(2) (stating "This section [regarding award of reasonable attorney's fees and costs] applies to an administrative or civil judicial proceeding brought by a party not an administrative agency against an administrative agency for judicial review of a final agency order . . . .").

Mr. Davenport cites SCALC Rule 68 as support for this matter being a "civil action." (Davenport Initial Resp't Br., p. 11). SCALC Rule 68 states, "The South Carolina Rules of Civil Procedure . . . in contested cases . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." The discretionary incorporation of the SCRCP does not transform "administrative actions" into "civil actions." Moreover, "[t]he traditional standard [of proof] in a civil or administrative proceeding is proof by

a preponderance of the evidence." *Bender v. Clark*, 744 F.2d 1424, 1429 (10th Cir. 1984). These arguments are meritless.

Finally, Mr. Davenport contends the § 15-77-300(C) exception for "disciplinary actions by state licensing boards" demonstrates that matters before the ALC are "civil actions." (Davenport Initial Resp't Br., p. 13). Mr. Davenport remarks that the exception "would be completely unnecessary if actions in the [ALC] were not considered 'civil actions' for purposes of Section 15-77-300(A)." (*Id.*). First, this argument fails to acknowledge that the list of exceptions in that subsection is preceded by the following: "The provisions of this section do not apply to *civil actions* relating to . . . ." S.C. Code Ann. § 15-77-300(C) (Emphasis added). Again, this was a contested case, which is an "administrative action." Moreover, the Department of Labor Licensing and Regulation ("LLR") hearings before the ALC referred to by Mr. Davenport are not contested cases. Accordingly, the § 15-77-300(C) exception concerning "disciplinary action by state licensing boards" is not relevant to the issue of whether a DHEC contested case is a "civil action."

In conclusion, Mr. Davenport argues for a broad, far-reaching interpretation of "civil action," which will greatly expand the intended reach of § 15-77-300 and expose the state and its political subdivisions to significant liability. This goes against the well-recognized principle that waivers of sovereign immunity should be liberally construed in favor of limiting liability of the government. *See, e.g., Staubes v. City of Folly Beach*, 331 S.C. 192, 205, 500 S.E.2d 160, 167-168 (Ct. App. 1998) (holding that the exceptions under the *S.C. Tort Claims Act* must be construed liberally in favor of limiting liability of the State and its political subdivisions) and *Levernier Constr., Inc.*, 947 F.2d at 502 (stating, "Because the EAJA as a waiver of sovereign immunity is to be strictly construed, 'civil action' should be given . . . its ordinary (and most restrictive) meaning to include only judicial proceedings."). A more restrictive interpretation of "civil action"

is appropriate, such that the intended liability of § 15-77-300 is not expanded beyond what was explicitly consented to by the General Assembly. This matter was an "administrative action," not a "civil action."

II. THIS WAS A DISCIPLINARY ACTION BY A STATE LICENSING BOARD.

If the Court finds that a contested case is a "civil action" and is subject to attorney's fees, then this matter naturally fits within the § 15-77-300(C) exception concerning "disciplinary actions by state licensing boards." Mr. Davenport argues for an unreasonably narrow interpretation of this exception that ignores the plain, usual, and customary meaning of the terms at issue.

In arguing the § 15-77-300(C) exception only applies to the various Professional and Occupational Licensing ("POL") Boards established under LLR, Mr. Davenport recites the various terms used in Title 40 of the S.C. Code of Laws. (Davenport Initial Resp't Br., pp. 14-15). This, however, ignores that the General Assembly declined to limit the "disciplinary action for state licensing boards" to the POL Boards. Section 15-77-300(C) does not reference the POL Boards. If the intent was for the exception to only apply to actions by the POL Boards, the General Assembly would have explicitly provided so. Instead, the General Assembly used open-ended, broad language. Glaringly absent from Mr. Davenport's brief is any argument in response to the plain, ordinary meanings of "state licensing board" and "disciplinary action." DHEC is a group of individuals mandated by law to administer a program regarding privileges to practice emergency medical services – *i.e.*, DHEC is a "state licensing board." This action concerned an administrative sanction based upon statutory or regulatory violations – *i.e.*, this is a "disciplinary action."

Mr. Davenport diverts attention to the hearing testimony of Robert Wronski, the Chief of DHEC's Bureau of EMS. (Davenport Initial Resp't Br., pp. 15-17). Mr. Wronski's testimony included an explanation of various terms as used in the context of the *Emergency Medical Services Act of South Carolina* ("the EMS Act"), S.C. Code Ann. §§ 44-61-10 *et seq.*, and *Emergency*

Medical Services ("the EMS Regulation"), Regulation 61-7, not in the context of § 15-77-300. As explained in DHEC's Appellant brief, the EMS Act and Regulation utilize specific terms to distinguish between the various types of privileges issued by DHEC in the EMS industry. (DHEC Br., pp. 11-12). Mr. Wronski was not announcing DHEC's position on the applicability of the § 15-77-300(C) exception. More importantly, whether DHEC's action against Mr. Davenport is a "disciplinary action by a state licensing board" is a matter of law for determination by this Court. (*See* R. p. 1092, lines 12-14).

While recognizing DHEC's functions in the context of EMTs and the POL Boards' functions are analogous, Mr. Davenport suggests DHEC lobby the General Assembly for legislative change of § 15-77-300(C). (Davenport Initial Resp't Br., p. 17). Legislative change is unnecessary. The principles of statutory construction support this matter being a "disciplinary action by a state licensing board." In addition to the above discussion of the plain ordinary meaning of this exception, Mr. Davenport's suggested reading leads to an absurd result where agencies exercising the same general functions are treated differently. *See Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[A] court must reject a statute's interpretation leading to absurd results not intended by the Legislature."). The policy behind the exception of not hindering actions against professionals by regulatory bodies is advanced by holding DHEC fits into the exception. Furthermore, a liberal construction of "disciplinary action by a state licensing board" in favor of limiting the liability of DHEC is appropriate and in line with jurisprudence concerning waivers of sovereign immunity. *See Staubes*, 331 S.C. 192 (1998), and *Levernier Constr., Inc.*, 947 F.2d 497 (Fed. Cir. 1991). The ALC's holding and Mr. Davenport's arguments, which rely upon implication and negative inferences, ignore the plain meaning of the terms at issue, and result

in absurdities, should be rejected. For these reasons, DHEC's action was a "disciplinary action by a state licensing board."

III. DHEC WAS SUBSTANTIALLY JUSTIFIED.

DHEC's action, which included reasonable legal interpretations and reasonable evidentiary support, was substantially justified. Mr. Davenport asserts that the ALC carefully and deliberately considered the grounds for DHEC's action and properly applied the "substantial justification" prong of § 15-77-300. (Davenport Initial Resp't Br., pp. 18-19). This is incorrect. As explained in DHEC's Appellant brief, the ALC's cursory review of the alleged misconducts and violations misstates the record and misapplies the "substantial justification" analysis. (DHEC Br., pp. 14-27).

At the outset, Mr. Davenport fails to include any argument regarding the clarity (or lack thereof) of the law at issue in this matter. For example, there is no argument by Mr. Davenport or finding by the ALC that the statutes and regulations in question were unambiguous. *Cf. Layman v. State*, 376 S.C. 434, 630 S.E2d 265 (2008) (finding the State acted without substantial justification when the State breached an unambiguous contract with certain TERI participants) and *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (finding a county acted without substantial justification in violating an unambiguous statute). Additionally, there is no argument by Mr. Davenport or finding by the ALC that there is binding precedent on issues in this matter. *Cf. McDowell*, 304 S.C. 539 (1990) (finding the Department of Social Services acted without substantial justification when there was settled precedent contrary to its position). This is not a situation wherein DHEC's position was in direct contradiction of explicit and unambiguous law. *See, e.g., Impresa Construzioni Geom. Domenico Garufi v. United States*, 100 Fed. Cl. 750, 763 (2011) (holding the United States was not substantially justified as a result of its failure to comply

with regulations before awarding a contract). The ALC failed to inquire into the substance of the governing law[2], which substantially supports the reasonableness of DHEC's action.

Further, litigating cases of first impression is generally justifiable. *See Cody v. Caterisano*, 631 F.3d 136, 142 (4th Cir. 2011); *see also* 32 Am Jur 2d Federal Courts § 260. Pointing to one sentence in an ALC order in another EMS case, *S.C. Dep't of Health & Evntl. Control v. Platt*, Docket No. 06-ALJ-07-0477-CC (Final Order and Decision, July 20, 2007), Mr. Davenport contends this matter is not a case of first impression. (Davenport Initial Resp't Br., p. 21). A "case of first impression" is recognized as "[a] case without precedent" or "an action raising an issue of law that has not been raised before in the jurisdiction in which the action arises." *The Woulters Kluwer Bouvier Law Dictionary Desk Edition*, "case of first impression." First, another ALC decision is not precedent. "Stare decisis requires courts to follow the decisions of higher courts, but *does not bind courts to follow decisions of equal or inferior courts*." *Schiffner v. Motorola, Inc.*, 697 N.E.2d 868, 871 (Ill. App. Ct. 1998) (Emphasis added). More importantly, the facts and legal issues in the *Platt*[3] matter, which involved a paramedic's failure to exercise the requisite degree of supervision over EMTs at a motor vehicle accident that resulted in entrapment of several occupants and the associated creation of a substantial possibility of death or serious physical harm, differ significantly from this matter. This was indeed a case of first impression.

While correctly noting that "substantial justification" means "justified to a degree that could satisfy a reasonable person," the ALC applied a heightened standard beyond that of reasonableness. (R. p. 75). As recognized in the context of the EAJA, the "substantial justification

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[2] For example, the ALC disagreed with DHEC's interpretations and conclusions regarding Mr. Davenport's disregard of appropriate physician orders. *See* S.C. Code Ann. § 44-61-80(F)(6) and 3 S.C. Code Ann. Regs. 61-7 § 1100(B)(6). However, the ALC failed to provide any analysis or conclusion to the meaning of "order," which was disputed throughout the hearing.

[3] Although the ALC in *Platt* determined revocation, which like this matter was recommended by the Investigative Review Committee ("IRC") and adopted by DHEC, was not warranted, it did impose a 15-month suspension that was upheld on appeal. *See S.C. Dep't of Health & Envtl. Control v. Platt*, No. 2009-UP-160 (Ct. App. 2009).

standard is a lesser standard than the substantial evidence standard used to review administrative determinations." *Brouwers v. Bowen*, 823 F.2d 273, 275 (8th Cir. 1987). "That phrase does not mean a large or considerable evidence, but such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S. Ct. 2541, 2550 (1988). Mr. Davenport fails to advance any credible arguments about DHEC's action lacking evidentiary support. He does not and cannot argue that the record lacks any evidence supporting the alleged violations. The five-day hearing resulted in an abundance of evidence, including but not limited to, a body-cam video documenting the March 19, 2016 patient encounter and lay and expert testimony, that support the alleged violations. (DHEC Br., pp. 17-27). Mr. Davenport does, however, discount the fact that this matter proceeded through several administrative filters prior to reaching the ALC, which he alleges were lacking independence. (Davenport Initial Resp't Br., pp. 5-7 and 19). The record is devoid of any type of demonstrated bias by DHEC staff or IRC members. In investigating this matter, Mr. Wronski's "strategy" and "ultimate objective" was not to have Mr. Davenport relinquish his paramedic certification. Mr. Wronski testified that the "strategy" and "objective" were "to try to get answers to our questions, find out how the [EMT] feels about whatever allegations have been brought forth" and "to get as much of the truth as [DHEC] can." (R. pp. 936-937). Further, to argue DHEC failed to consider mitigating factors in this matter is disingenuous. DHEC's counsel attempted to question Mr. Wronski regarding the application of the enforcement factors in the EMS Regulation, but Mr. Davenport's counsel objected and the ALC deemed an explanation of such factors unnecessary. (R. pp. 969-970). While there is significant discussion by Mr. Davenport of how DHEC allegedly mishandled its investigation, Mr. Davenport fails to assert how the relevant facts – *i.e.*, Mr.

Davenport's conduct, actions, and inactions during the March 19, 2016 call – did not reasonably support the violations alleged by DHEC.

Section 15-77-300(A) states, "The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate . . ." Per the EMS Act, DHEC is responsible for administering the EMS Program, which includes the certification of EMTs. *See* S.C. Code Ann. § 44-61-30(A) and –(B)(4). DHEC complied with the processes prescribed by the EMS Act and Regulation, including convening of the IRC. *See id.* § 44-61-20(16). As a result, the ALC should have, but failed to recognize and apply the presumption that DHEC's action was substantially justified. Absent from the ALC's Orders is any reference or application of this burden. Mr. Davenport responds by alleging DHEC failed to conduct its investigation in accordance with the EMS Act and Regulation. (Davenport Initial Resp't Br., pp. 5 and 20). Again, Mr. Davenport fails to cite any statutory or regulatory provisions DHEC violated and evidentiary support for such alleged violations. Contrary to Mr. Davenport's arguments, the ALC did not find DHEC violated any law.

Finally, Mr. Davenport fails to provide any meaningful response to the untenable position of the ALC in denying Mr. Davenport's motion for directed verdict, but finding DHEC acted without substantial justification in this disciplinary matter. (Davenport Initial Resp't Br., p. 18-19). In the context of the EAJA, the Seventh Circuit held there is a presumption that a government case strong enough to survive a motion to dismiss and a motion for summary judgment is substantially justified, as will support a denial of an award of attorney's fees to the prevailing party. *U.S. v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010); *see also* 32 Am Jur 2d Federal Courts 258. This presumption should be even stronger if a case proceeds to a hearing, the government presents its case, and a motion for directed verdict is denied without argument from

the government. The ALC's conclusions are at logical odds and constitute an abuse of discretion. While the ALC disagreed with its findings[4], DHEC had substantial justification in its action against Mr. Davenport.[5]

IV. SPECIAL CIRCUMSTANCES EXIST.

The ALC's nominal one-paragraph consideration of whether "special circumstances [exist] that would make the award of attorney's fees unjust" is in error. (R. p. 78). Contrary to Mr. Davenport's arguments, the ALC did confuse and misapply the "special circumstances" prong of § 15-77-300. The correct inquiry is not whether DHEC had substantial justification. Even if "substantial justification" is lacking, the "special circumstances" exception insures the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. *The Taylor Group, Inc. v. Johnson*, 919 F.Supp. 1545 (M.D. Ala. 1996). Additionally, the exception allows denial of award where equitable considerations dictate that an award should not be made. *Id.*

DHEC's action, which stemmed from the statutorily-established IRC's recommendation, was made in good faith and was a credible application of the law. Exercising its lawful police powers in accordance with the EMS Act and Regulation, DHEC pursued this administrative action with aims of protecting the health and welfare of South Carolinians. As noted, this was a "case of first impression," and accordingly, novel issues were at dispute. Moreover, equitable considerations ("unclean hands"), which include Mr. Davenport's undisputed verbal abuse of a

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[4] Mr. Davenports cites caselaw concerning the "law of the case" doctrine and argues by not appealing the ALC's Merits Order, the ALC's findings of fact and conclusions of law in the Merits Order cannot be challenged. (Davenport Initial Resp't Br., p. 2). DHEC is not challenging the Merits Order. DHEC is challenging the Order Awarding Attorney's Fees and the Reconsideration Order. The "law of the case" doctrine, which holds that a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal but should have been, or raised on appeal but expressly rejected by the appellate court, is not applicable to this matter. *See Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009).

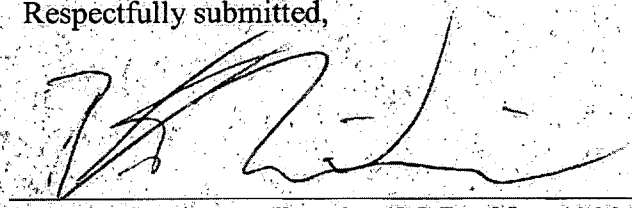
[5] The ALC did, however, agree with DHEC's contention that Mr. Davenport's "extremely inappropriate language when speaking to the patient" was in violation of Anderson County's patient abuse policy. (R. p. 11).

patient, dictate that an award would be unjust. Taxpayers should not bear these expenses. If fees are ultimately awarded, there will no doubt be a chilling effect on not only DHEC exercising its police powers, but also other similarly situated agencies. The award of attorney's fees pursuant to § 15-77-300 for an administrative proceeding involving DHEC's licensure action against an EMT for statutory and regulatory violations that involved credible and good faith applications of the law would be unlike any other case in South Carolina. Special circumstances exist in this matter.

CONCLUSION

For these reasons, DHEC respectfully requests the Court reverse the ALC's orders awarding attorney's fees against DHEC and that the Court order the immediate return of such sum to DHEC, with interest.

Respectfully submitted,



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Certificate of Counsel

The undersigned does hereby certify that this Final Reply Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Rita D. DeCarlis, legal assistant with the South Carolina Department of Health and Environmental Control, hereby certify that I have on this **1st day of April 2019**, served a copy of the **Reply Brief of Appellant/Respondent South Carolina Department of Health and Environmental Control** upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid and addressed as follows:

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