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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Shirley C. Robinson, Administrative Law Judge

Supreme Court Case No. 2021-001290
Appellate Case No. 2018-001868 – Unpublished Op. No. 2021-UP-273
Case No. 18-ALJ-07-0003-CC

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

v.

James W. Davenport,Petitioner.

**RESPONDENT SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL CONTROL'S
RETURN TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals correctly hold that contested case hearings before the Administrative Law Court (“ALC”) are not “civil actions,” as that term is used in the State Action Statute (“SAS”)?)¹

COUNTERSTATEMENT OF THE CASE

Respondent South Carolina Department of Health and Environmental Control (“DHEC”) certifies and regulates emergency medical technicians, including paramedics, pursuant to the *Emergency Medical Services Act of South Carolina* (“the Act”), S.C. Code Ann. §§ 44-61-10 *et seq.*, and *Emergency Medical Services*, Regulation 61-7. Petitioner James Davenport is a certified paramedic, who was working for Iva Rescue Squad, an ambulance service in Anderson County.

DHEC received notice of a March 19, 2016 patient care encounter involving Petitioner and conducted an investigation. DHEC’s investigation included review of Anderson County’s investigation, the patient care report, body-cam footage, medical records, and an interview of Petitioner. DHEC determined Petitioner committed regulatory and statutory violations and proposed a consent order suspending his certification for two years. Petitioner rejected the proposal.

As a result, DHEC convened the Investigative Review Committee (“IRC”). The IRC is a professional peer review committee that is convened when the findings of an investigation may warrant suspension or revocation of a certification. *See* S.C. Code Ann. § 44-61-20(16).² After presentations from DHEC and Petitioner, the IRC recommended DHEC propose a consent order

¹ The Petition presents six questions; however, all six questions concern the larger question of whether contested cases before the ALC are “civil actions,” as that term is used in SAS. All six questions are briefly addressed in DHEC’s argument section of this Return.

² Section 44-61-20(16) was amended effective May 18, 2018, with passage of 2018 Act No. 248.

with different terms. DHEC adopted the recommendations. Petitioner rejected the IRC-recommended consent order.

On October 21, 2016, DHEC issued an administrative order revoking Petitioner's certificate based upon his failure to provide acceptable emergency medical treatment and misconduct. Petitioner filed a request for final review with the Board of Health and Environmental Control ("Board") on November 7, 2016. The Board mailed its decision to decline to conduct a final review conference on December 7, 2016. On January 6, 2017, Petitioner filed a request for contested case hearing with the ALC.

The merits hearing before the ALC was held on July 24-28, 2017. Approximately eight months later on March 20, 2018, the ALC issued its Merits Order, which vacated DHEC's administrative order finding, "there is insufficient evidence that [the Petitioner] committed misconduct, as defined by [the Act and Regulation], such that revocation of his South Carolina EMT certification is warranted." Instead, the ALC ordered Petitioner complete an ethics and leadership class. Petitioner then requested the ALC award attorney's fees pursuant to SAS, which states, in part:

In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

....
S.C. Code Ann. § 15-77-300(A). After briefing and a hearing, the ALC issued its Order Granting the Petition for Attorney's Fees on August 1, 2018. DHEC filed a Motion to Alter or Amend. On

September 20, 2018, the ALC issued its Order on DHEC's Motion to Alter or Amend ("Reconsideration Order"), which reduced the awarded fees.

DHEC filed its Notice of Appeal with the Court of Appeals on October 17, 2018, challenging the Order Awarding Attorney's Fees and the Reconsideration Order. Petitioner filed Notice of his Cross Appeal on October 22, 2018. On appeal, DHEC argued *inter alia* that the ALC erred in concluding the contested case was a civil action for purposes of qualifying for attorney's fees under SAS.³ On February 10, 2021, the Court of Appeals filed its opinion in *Town of Arcadia Lakes v. South Carolina Department of Health & Environmental Control*, 433 S.C. 47, 855 S.E.2d 325 (Ct. App. 2021) *reh'g denied* (Mar. 25, 2021), which held that a contested case before the ALC is not a "civil action," as that term is used in SAS. The Court of Appeals invited DHEC and Petitioner to file supplemental briefs in light of *Arcadia Lakes*. Both DHEC and Petitioner filed supplemental briefs and on May 4, 2021, the Court of Appeals heard oral argument. On July 14, 2021, the Court of Appeals filed an Unpublished Opinion adhering to *Arcadia Lakes* and finding the ALC erred in awarding attorney's fees to Petitioner. *S.C. Dep't of Health & Env't Control v. James W. Davenport*, Op. No. 2021-UP-273 (S.C. Ct. App. July 14, 2021). Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc with the Court of Appeals on July 27, 2021. On October 6, 2021, the Court of Appeals denied the Rehearing and rejected En Banc Consideration. Petitioner then filed a Petition for a Writ of Certiorari with the Court on November 5, 2021.

³ DHEC also argued even if the contested case was a "civil action," SAS was not applicable because DHEC's proceeding against Mr. Davenport was a "disciplinary action by a state licensing board." See S.C. Code Ann. § 15-77-300(C). Further, DHEC argued the ALC erred in finding DHEC acted without substantial justification in issuing its administrative order. See *id.* § 15-77-300(A)(1). Finally, DHEC argued the ALC erred in finding no special circumstances exist that make an award of fees unjust. See *id.* § 15-77-300(A)(2). Because the Court of Appeals found the contested case was not a "civil action," the opinion did not address the remaining DHEC arguments.

ARGUMENT

I. THIS CASE PRESENTS NO SPECIAL AND IMPORTANT REASONS THAT MERIT A WRIT OF CERTIORARI.

The Petition fails to present any valid reason for this Court to issue a writ of certiorari. Rule 242(b), SCACR, states, in part, “A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b) then identifies five factors this Court reviews when determining whether to grant a petition: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision of the Court of Appeals is inconsistent with a prior decision of the Supreme Court; (4) there are substantial constitutional issues; and (5) there is a federal question and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion. *S.C. Dep’t of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373, 373 (2020) (citing *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170, 170 (2008) and *In re Exhaustion of State Remedies in Criminal Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990)). Petitioner failed to identify any “special and important reasons” warranting exercise of this Court’s discretion.

This Court has admittedly not addressed the narrow issue of whether a contested case before the ALC is a “civil action” as used in SAS. However, this Court has recently held that administrative review before the ALC is distinguishable from judicial review before the judiciary. In *Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control*, 430 S.C. 200, 845 S.E.2d 481 (2020), *reh’g denied* (Aug. 7, 2020), this Court expressly held that a contested case before the ALC is “an administrative proceeding” and “distinguishable from judicial review.” 430 S.C. at 213 f.3 and 216. Further, the Court clarified that the

administrative process begins with DHEC’s review and “continues until the administrative process concludes with a contested case hearing [before the ALC]” *Id.* at 216. There is no sound basis for holding a proceeding before an administrative body is a civil action.

The lack of any Supreme Court decision addressing the narrow issue of whether an administrative proceeding before the ALC is a “civil action,” as used in SAS, is presumably because the plain meaning of SAS, the history and statutory framework of Title 15 of the S.C. Code of Laws, and a plethora of case law all support the holding that matters before statutorily-created administrative tribunals, including the ALC, are administrative proceedings, not civil actions. Indeed, despite the ALC being in existence for nearly 30 years and SAS being an available remedy during that timeframe, there is not a single decision from a South Carolina appellate court upholding an award of attorney’s fees for a contested case before the ALC.

Federal jurisprudence also supports the Court of Appeals’ holdings in *Arcadia Lakes* and *Davenport*. The Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1), is the federal analog to SAS and has been referenced by this Court in analyzing SAS. *See McDowell v. S.C. Dep’t of Soc. Svcs.*, 304 S.C. 539, 542 n.1, 405 S.E.2d 830, 832 n.1 (1991). Federal courts have held that the term “civil action” in EAJA does not encompass “administrative actions.” *See W. Watersheds Project v. U.S. Dep’t of the Interior*, 677 F.3d 922 (9th Cir. 2012). Further, other states’ equivalents to SAS distinguish between civil proceedings and administrative proceedings. *See, e.g.*, N.D. Cent. Code § 28-32-50(2) (“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”). Notably, the South Carolina Frivolous Civil Proceedings Act (“FCPA”), which is located with SAS in Title 15 of the S.C. Code of Laws, distinguishes between “civil actions” and

“administrative actions.” *See* S.C. Code Ann. § 15-36-10. There is also no statute authorizing the ALC, which is part of the executive branch, to award attorney’s fees pursuant to SAS. *Compare with* S.C. Code Ann. § 1-23-670 (authorizing the ALC to award sanctions authorized by FCPA).

Petitioner mistakenly contends the Court of Appeals’ holding is inconsistent to this Court’s holding in *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991). Pet. at 12-14. To the contrary and as explained below, the Court of Appeals’ decisions are perfectly consistent with *McDowell*, where this Court held SAS only applied to proceedings before the judiciary, not administrative decision-makers. 304 S.C. at 543. Petitioner’s argument fails to recognize that contested cases before the ALC, while removed from the agency that issued an initial decision, remain part of the administrative process, and are not a civil action before the judiciary.

Finally, Petitioner’s arguments must be reconciled with the competing and well-recognized judicial principles that waivers of sovereign immunity must be construed in favor of limiting liability and statutes authorizing attorney’s fees must be strictly construed. *See, e.g., Belton v. State*, 339 S.C. 71, 74, 529 S.E.2d 4, 5 (2000) (“A statute allowing attorneys fees is in derogation of the common law and must be strictly construed.”) and *Staubes v. City of Folly Beach*, 331 S.C. 192, 205, 500 S.E.2d 160, 167-168 (Ct. App. 1998) (holding the exceptions under the Tort Claims Act must be construed liberally in favor of limiting liability); *see also Ardestani v. Immigration and Naturalization Serv.*, 502 U.S. 129, 137 (1991) (stating “[t]he EAJA renders the United States liable for attorney’s fees for which it would not otherwise be liable, and thus amounts to partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United

States.” (citations omitted)). For these reasons and those mentioned below, there is no valid reason for the Court to issue a Writ.⁴

II. THE COURT OF APPEALS DID NOT ERR.

A. The Court of Appeals correctly applied the plain meaning of “civil action,” as used in SAS, to mean proceedings in judicial court, not administrative court.

In *Arcadia Lakes*, the Court of Appeals correctly held “[a] plain reading of the words ‘civil action’ does not encompass contested administrative cases; a civil action ‘is a proceeding in a judicial court, not an administrative court.’” 433 S.C. at 53. In contending the Court of Appeals erred, Petitioner cites to a definition of “civil action” in a 30-year old dictionary, which pre-dates the creation of the ALC. Pet. at 11. Petitioner then focuses on the second sentence of the definition, which broadly states, “In general, all types of actions other than criminal proceedings.” *Id.* Petitioner’s interpretation of SAS to mean anything that is not a criminal action is necessarily a civil action is far-reaching, inconsistent with the statutory scheme, and contrary to *McDowell* and *Preservation Society*. Under Petitioner’s reasoning, attorney’s fees pursuant to SAS would be available for hearings before administrative agencies, which are not criminal; however, this very issue was presented to this Court in *McDowell* and squarely rejected. *See McDowell*, 304 S.C. at 543 (1991).

As the Court of Appeals explained in *Arcadia Lakes*, its holding “is bolstered by the General Assembly’s demonstrated ability to specify when it wishes to include administrative cases in this sort of statute.” 433 S.C. at 53. The Court of Appeals went on to explain the amendments to the FCPA that distinguish between civil and administrative actions:

The original Frivolous Civil Proceedings Sanctions Act applied to “[a]ny person who [took] part in ... any civil proceeding.” S.C. Code Ann. § 15-36-10 (2005), *amended by* § 15-36-10 (Supp. 2020). The General Assembly rewrote the Sanctions

⁴ The Petition undeniably does not involve the following other criteria in Rule 242(b), SCACR: a dissent in the Court of Appeals decision; constitutional issues; or federal questions.

Act in 2005 and specified it applies to any “civil or administrative action.” § 15-36-10 (Supp. 2020). There was no similar revision to the State Action Statute when the General Assembly amended the statute in 2010. *See* Act No. 125, 2010 S.C. Acts 1104.

Id. at 53-54. The Court of Appeals also noted the General Assembly’s consideration of a bill that would have extended SAS to include “administrative proceedings” in addition to “civil actions”:

Indeed, the General Assembly previously considered, but did not pass, an amendment extending the State Action Statute to administrative proceedings and to agencies. H.R. 3383, 112th Leg., 1st Sess. (S.C. 1997). The sole purpose of this unenacted legislation would have been widening the State Action Statute to include administrative proceedings and proceedings involving agencies. This is not conclusive, but the fact that the General Assembly directly confronted this question and chose not to amend the statute supports our view that the statute does not already extend to administrative proceedings.

Id. at 54.

Petitioner also remarks of the standard of proof for contested cases at the ALC and the SCALC Rules discretionary incorporation of the SCRCF. *Pet.* at 11-12. While true, these facts are not of consequence to the meaning of “civil action.” It is well-recognized that the traditional standard of proof in both civil and administrative matters is a preponderance of evidence. *See, e.g., Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984). Moreover, discretionary incorporation of the SCRCF does not transform an administrative action into a civil action. The Court of Appeals correctly determined a contested case hearing before the ALC is not a “civil action.”

B. The Court of Appeals’ decision is consistent with this Court’s holding in *McDowell*, which was that prevailing parties are entitled to fees for judicial review of an agency decision, but not administrative review.

In *McDowell*, this Court held the hearing conducted before the Department of Social Services (“DSS”) was not subject to attorney’s fees pursuant to SAS because, at that point, the agency “was not ‘pressing its claim’ in litigation,” but, instead, “was merely functioning as an administrative decision maker.” 304 S.C. at 543. By contrast, this Court held that the appellant

was entitled to fees pursuant to SAS for judicial review of the agency decision by the circuit court. *Id.*

In this matter, the contested case hearing before the ALC is the equivalent of the hearing before DSS. Both DSS and the ALC are state agencies. *See* S.C. Code Ann. §§ 1-23-500 (creating the ALC) and 43-1-10 (creating DSS). Both administrative hearings are presided over by a hearing officer. *See* S.C. Code Ann. Regs. 114-130, S.C. Code Ann. § 1-23-600, and SCALC Rules, Part II. Both administrative hearings involve similar procedures. *See id.*

The Court of Appeals holding in *Arcadia Lakes* that “administrative cases do not become ‘civil actions’ until they leave the executive branch and enter the judicial branch for review” is entirely consistent with *McDowell* and this Court’s other decisions. 433 S.C. at 55. As noted above, this Court recently held in *Preservation Society* that the ALC’s contested case jurisdiction is but part of the “administrative process” and distinguishable from review by the judicial branch. 430 S.C. at 213 f.3 and 216. The Court of Appeals correctly applied the holding of *McDowell* and found the administrative hearing before the ALC, like the administrative hearing before DSS, is not subject to attorney’s fees pursuant to SAS.

C. The Court of Appeals properly considered the sporadic and isolated references of “civil action” and ALC in the S.C. Code of Laws and Court Rules.⁵

Citing to various provisions in the S.C. Code of Laws and Court Rules that utilize the terms “civil action” and ALC, Petitioner contends the Court of Appeals failed to reconcile these provisions to SAS. Pet. at 14-19. Importantly, Petitioner acknowledges these “key provisions” are “outside of the state-action attorneys’ fee statute.” *Id.* at 16. In fact, these “key provisions” are also not found in Title 15 of the S.C. Code of Laws, where the General Assembly chose to

⁵ Petitioner’s questions three and five both concern the Court of Appeals allegedly overlooking the General Assembly and Supreme Court’s usage of “civil action” or “civil proceedings” in relation to the ALC elsewhere in the S.C. Code of Laws and Court Rules. For this reason, the Department addresses both questions under part II.C of its Return.

place SAS. The probative evidence of the General Assembly’s intent with respect to “civil actions” is not the sporadic and isolated provisions cited by the Petitioner. Instead, the General Assembly’s intent is illustrated by reviewing FCPA and SAS, which clearly demonstrate SAS was not intended to apply to administrative proceedings.

“It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible to produce a single, harmonious result.” *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). Sanctions and attorney’s fees deal with the same subject matter – *i.e.*, post-proceeding relief. FCPA allows for sanctions in not only “civil actions,” but also “administrative actions.” *See* S.C. Code Ann. § 15-36-10(A). By contrast, SAS only allows for attorney’s fees in “civil actions.” *Id.* § 15-77-300(A). Moreover, in Section 1-23-670, the General Assembly unequivocally authorized the ALC to award sanctions in accordance with FCPA; however, there is no similar provision authorizing the ALC to award attorney’s fees in accordance with SAS. The obscure provisions cited by the Petitioner, which do not deal with the subject matter of SAS, are of minimal probative value in determining the General Assembly’s intent. Instead, the FCPA, which deals with the same subject matter as SAS, demonstrates that SAS is only intended to reach “civil actions,” which as the Court of Appeals held are “proceeding[s] in a judicial court, not an administrative court.” *Arcadia Lakes*, 433 S.C. at 53.

D. The Court of Appeals appropriately considered the § 300(C) exception for “civil actions relating to . . . disciplinary actions by state licensing boards”, which are subject to judicial review.

Section 15-77-300(C) of SAS states, “The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.” Petitioner asserts that if administrative

cases were not intended to be included as a “civil action,” then Section 15-77-300(C) would be unnecessary and superfluous. Pet. at 16-17.

Petitioner’s argument, however, fails to account for the fact that administrative cases can become civil actions after proceeding through various layers of administrative review. In addressing this contention in *Arcadia Lakes*, the Court of Appeals correctly recognized that:

Rate cases and licensing decisions have long been subject to the judicial branch’s review after the Public Service Commission or licensing board has completed its review. *See, e.g.*, S.C. Code Ann. § 58-5-340 (1976) (a former statute explaining a party could seek judicial review of Public Service Commission decisions by commencing “an action in the court of common pleas for Richland County”) (amended 2006); *Carroll v. Gaddy*, 295 S.C. 426, 428, 368 S.E.2d 909, 911 (1988) (noting the circuit court’s review of a licensing decision under the Administrative Procedures Act). The ALC’s addition to the “administrative” review process does not matter in a way that is relevant here. Under the reasoning in *McDowell*, *Foreclosure Specialists*, and the federal cases we have cited, administrative cases do not become “civil actions” until they leave the executive branch and enter the judicial branch for review.

433 S.C. at 55. Accordingly, the Court of Appeals did not disregard Section 15-77-300(C) in finding contested cases before the ALC are not “civil actions.”

E. The Court of Appeals correctly applied SAS to the facts of this case.

Petitioner attempts to distinguish the facts of *Arcadia Lakes* and the present case. Pet. at 19-20. While the Department disagrees with Petitioner’s portrayal of its investigation into and action against his certificate, there is but one undeniable, and material similarity between these two matters: both resulted in administrative proceedings before the ALC. Because SAS does not provide for attorney’s fees in administrative proceedings, the relief sought by the Petitioner is unavailable.

Petitioner then argues the Court of Appeal’s holding creates “substantial problems of access-to-justice and due process for . . . first responders.” Pet. at 20. “In South Carolina, the authority to award attorney’s fees can come only from a statute or . . . the language of a contract.

There is no common law right to recover attorney's fees." *Seabrook Island Prop. Owner's Ass'n v. Berger*, 365 S.C. 234, 238-39, 616 S.E.2d 431, 434 (Ct. App. 2005) (quoting *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001)). While the General Assembly, in SAS, has provided for attorney's fees in "civil actions" when certain criteria are met, it has not provided for attorney's fees in administrative proceedings before state agencies. To address the alleged access-to-justice issues, Petitioner's concerns are best addressed to the General Assembly, not this Court.⁶

CONCLUSION

There are no special and important reasons to grant a Writ of Certiorari. Petitioner essentially seeks reconsideration of a decision by the Court of Appeals that was correctly decided. Therefore, DHEC respectfully requests this Court deny the Petition.

Respectfully submitted,

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⁶ Notably, Petitioner has filed a civil action against Anderson County, DHEC, and various named employees of Anderson County and DHEC, which is currently pending in the United States District Court. *See* C/A No.: 6:18-cv-03178-TMC-JDA / 8:20-cv-03827-TMC-JDA. In his complaint, Petitioner alleges various causes of action including, but not limited to, malicious prosecution, abuse of process, due process violations, and defamation.