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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

Supreme Court Case No. 2021-001290
Appellate Case No. 2018-001868
Opinion No. 2021-UP-273 (S.C. Ct. App. July 14, 2021)
Original Case No. 18-ALJ-07-0003-CC

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

v.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION TO REPLY

Petitioner, James W. Davenport, by and through his undersigned counsel, hereby files this Reply in Support of Petition for Writ of Certiorari. Although Petitioner's original submission did not include a quotation from Rule 242(b), SCACR, this Court is obviously aware of its own standard for granting a writ of certiorari. Petitioner suggests that a writ of certiorari is appropriate for both grounds (1) and (3) of Rule 242(b), SCACR: "there are novel questions of law" and "the decision of the Court of Appeals is inconsistent with a prior decision of the Supreme Court"–namely, this Court's decision in McDowell v. South Carolina Dep't of Soc. Servs., 304 S.C. 539, 405 S.E.2d 830 (1991), which recognized 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.

REPLY TO COUNTER-STATEMENT OF THE CASE

Respondent's Counter-Statement of the Case improperly includes a number of allegations that are directly contrary to the Administrative Law Judge's findings in the underlying contested case or that are not properly part of the Record on Appeal in this case. First of all, Respondent mischaracterizes the scope of its investigation into this matter. As the lead DHEC investigator testified at trial, there was no real "investigation" done here beyond receipt of an unsecured email from then-director of the Anderson County EMS Department, Scott Stoller, to then-DHEC Bureau Chief for EMS, Arnold Alier, with an unauthorized copy of body-worn camera footage of a patient care encounter. Contrary to Respondent's Return, DHEC's investigation did not include any review of Anderson County's investigation into Mr. Davenport (which actually found no grounds for disciplinary action or for suspending his paramedic credentials), nor did it include any effort to

obtain or review any of the patient's medical records beyond the ambulance run report. Furthermore, the so-called "interview" of Mr. Davenport was actually an ambush conducted under false pretenses in a clumsy effort to entrap him into signing a consent agreement to relinquish his paramedic certification.

Next, the findings and recommendation of the Investigative Review Committee are not in the Record on Appeal. The ALJ expressly excluded that document from evidence during the trial, and Respondent did not proffer that document as an exhibit for the record. Significantly, as noted in the original Petition, the IRC was not an independent body, but was led by Mr. Wronski, who was the architect of the plan to entrap Mr. Davenport during DHEC's interrogation about the body-cam video of the stabbing patient. DHEC's Medical Control Physician, Dr. Edgar DesChamps, also participated in the IRC proceedings, and he later testified as an expert witness on behalf of Respondent during the trial before the ALJ in the contested case.

Finally, the fact that Petitioner subsequently filed a federal lawsuit against various Defendants, including Respondent DHEC in United States District Court, is wholly irrelevant to this Petition for Certiorari. The federal district court is perfectly capable of preventing Petitioner from obtaining a double recovery for the attorney's fees awarded by the Administrative Law Court. Therefore, it is improper for Respondent to have mentioned the federal lawsuit, which is plainly not part of the Record on Appeal in this case. (Resp.'s Return, at 12, n. 6).

ARGUMENTS IN REPLY

Respondent's Return does little more than summarize the holding and flawed reasoning of the South Carolina Court of Appeals's decision in Town of Arcadia Lakes v. South Carolina Dep't of Health & Environmental Control, 433 S.C. 47, 855 S.E.2d 325 (Ct. App. 2021).

In support of its position, Respondent cites to an obscure footnote from this Court's opinion in Preservation Soc'y of Charleston v. South Carolina Dep't of Health & Environmental Control, 430 S.C. 200, 845 S.E.2d 481 (2020). The Preservation Society case pre-dated the Town of Arcadia Lakes case and was not cited by the S.C. Court of Appeals in the Town of Arcadia Lakes case. More importantly, the Preservation Society case has absolutely nothing to do with any of the issues raised here. At issue in the Preservation Society case was whether or not several citizens groups in Charleston had standing to challenge DHEC's issuance of a permit to build a large cruise-ship terminal adjacent to the historic peninsula of Downtown Charleston. Footnote 3 from the Preservation Society case, which is cited by Respondent, merely recognized that a contested case hearing before an ALJ is not a form of judicial (i.e., appellate) review, because the ALJ conducts a de novo trial of the case, without regard to what the agency's decision was.

If anything, footnote 3 from the Preservation Society case supports Petitioner's argument that under the holding of McDowell, in a contested case hearing before the ALJ, the state agency is functioning as a litigant, attempting to advance its position, rather than a decision-maker. Preservation Society, 430 S.C. at 214, n.3, 845 S.E.2d at 488, n.3 (" A contested case hearing in the ALC is distinguishable from judicial review. '[T]he ALC conducts a de novo hearing in contested cases, complete with the presentation of evidence and testimony. [T]he ALC is authorized to make a final determination—after a final agency decision and subject to judicial review—as to whether an administrative agency should have granted or denied a particular permit.' The ALC acts as the fact-finder and is not bound by an agency's factual findings or permitting decision." (quoting and citing Engaging & Guarding Laurens Cty.'s Env't ("EAGLE") v. S.C. Dep't of Health & Envtl. Control, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014)).

Whether or not a proceeding is a form of "judicial review" has nothing to do with whether that proceeding is a "civil action" under the State-Action Attorney's Fee Statute, S.C. Code Ann. § 15-77-300. Those two terms are not mutually exclusive. Obviously, the term "judicial review" can encompass both civil and criminal cases. The question here is not whether a contested case hearing before the Administrative Law Court constitutes a form of "judicial review"; the question is whether a contested case hearing before the ALC constitutes a "civil action." The Court of Appeals in both the Town of Arcadia Lakes case and below in this case got that question wrong.

It is odd that Respondent would reference footnote 1 of the McDowell opinion in asserting that the federal Equal Access to Justice Act ("EAJA") was "referenced by this Court in analyzing SAS [S.C. Code Ann. § 15-77-300." (Resp.'s Return, at 5). What this Court actually said in McDowell about the federal EAJA is that "[t]he language of § 15–77–300, however, does not track the EAJA beyond using the phrase 'substantially justified.'" McDowell, 304 S.C. at 542, n. 1, 405 S.E.2d at 832, n.1. In footnote 1 of the McDowell opinion, the Court was explaining why the federal case of Spencer v. National Labor Relations Bd., 712 F.2d 539 (D.C. Cir.1983), was not persuasive authority under the federal statute because the Spencer case pre-dated a critical amendment to the EAJA that materially changed the circumstances in which attorney's fees are available under the federal statute. As the McDowell court stated, "Spencer construed the Equal Access to Justice Act (EAJA) before its subsequent amendment requiring that both the agency's litigation position and its underlying action be substantially justified." McDowell, 304 S.C. at 542, n.1, 405 S.E.2d at 832, n. 1 (citing 28 U.S.C. § 2412(d)(2)(D)). In other words, this Court in McDowell expressly rejected the practice of relying on interpretations of the EAJA in construing the language of the South Carolina State-Action Statute.

Respondent's citation to the North Dakota statute is wholly unavailing. This Court is construing the language of the South Carolina statute, not another state's statute governing attorney's fee statute for unjustified state action.

Respondent next attempts to differentiate this case and the Court of Appeals's decision in Town of Arcadia Lakes from this Court's holding in McDowell by using a subtle slight-of-hand with respect to the language employed in the McDowell opinion. Respondent wrongly asserts that the McDowell Court "held SAS only applied to proceedings before the judiciary, not administrative decision-makers." (Resp.'s Return, at 6) (emphasis added). Respondent then argues that phrase "administrative decision-makers" includes judges of the Administrative Law Court in contested cases, not just the agencies themselves. The McDowell opinion made no such pronouncement. What McDowell focused on is not what forum the agency was in at the relevant time it was "pressing its claims in litigation," but rather the agency's role as a litigant rather than as a mere decision-maker. As this Court made very clear in the Preservation Society of Charleston case, the Administrative Law Court is not part of the agency's decision-making process. In fact, a contested case hearing is a de novo proceeding without regard to the agency's decision. To suggest that the Administrative Law Court is merely the final step in the agency's administrative process is simply wrong. A contested case hearing before the Administrative Law Court has all of the hallmarks of a "civil action," including the preponderance-of-the-evidence standard of proof and the nature of the remedies available in vindicating private rights. It matters not that Administrative Law Court is part of the executive branch of government, rather than the judicial branch of government. The statute does not use the phrase "a civil action before the judiciary," as Respondent now asserts. (Resp.'s Return, at 6) (emphasis added).

Petitioner has never argued that "attorney's fees pursuant to SAS would be available for hearings before administrative agencies, which are not criminal," as misrepresented by Respondent. (Resp.'s Return at 7). This is a fallacious straw-man argument. Petitioner conceded before the Administrative Law Court that any attorney's fees incurred by Petitioner in connection with the DHEC proceedings before the filing of the request for a contested case hearing are not recoverable under the holding of McDowell, because at that point in the administrative proceedings, DHEC was still acting as the decision-maker, not as a litigant.

The McDowell opinion did not turn on "administrative review" versus "judicial review" as incorrectly asserted by Respondent. At the time the McDowell decision was rendered, the Administrative Law Court did not exist, so review of a final agency decision under the APA was through the Circuit Court. The contested case hearing here was not the equivalent of the agency decision by DSS in McDowell, as argued by Respondent The appropriate analogy to the proceedings in McDowell is that the final agency decision by DHEC here was the equivalent of the agency decision by DSS on Ms. McDowell's application for food stamps. The contested case hearing before the ALC here was the equivalent of the hearing before the circuit court in McDowell, which is when this Court allowed the attorney's fee meter to start running under the statute. In both circumstances, the agency was acting as a litigant, not merely as an administrative decision-maker, and the next level of judicial review is an appeal to the South Carolina Court of Appeals.

Respondent complains about Petitioner's citation to "a definition of 'civil action' in a 30-year old dictionary, which pre-dates the creation of the ALC." (Resp.'s Return, at 7). The version of Black's Law Dictionary cited in Petitioner's original Petition for Certiorari is the Sixth Edition with a copyright date of 1990, which was the undersigned counsel's personal copy from his first year in

law school. Although that version obviously pre-dates the creation of the Administrative Law Courts in South Carolina, the 1990 edition was the most recent version of Black's Law Dictionary at the time the McDowell case was argued to, and decided by, this Court. More importantly, S.C. Code Ann. § 15-77-300 was originally passed in 1985, 1985 S.C. Act. No. 44, § 1; so a dictionary definition from 1990 would be much more germane in determining the plain meaning of the statute when it was passed, rather than a newer version of the dictionary. Interestingly, in the Preservation Society of Charleston case discussed previously, this Court referred to Black's Law Dictionary in determining the plain meaning of the phrase "affected person," as used in S.C. Code Ann. § 44-1-60(G), regarding who has standing to file a request for a contested case hearing before the Administrative Law Court. The Preservation Society Court quoted from both the 5th and 11th editions of Black's Law Dictionary from 1979 and 2019, respectively. 430 S.C. at 212, 845 S.E.2d at 487. In any event, the definition of "civil action" in the current version of Black's Law Dictionary is almost identical to that from the 1990 edition: "Civil Action--An action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." "Action," Black's Law Dictionary (11th ed. 2019) (available on Westlaw). There is nothing in the plain and ordinary meaning of the term "civil action" as used in S.C. Code Ann. § 15-77-300 that would exclude proceedings before the Administrative Law Courts.

The uses of the terms "civil action" or "civil proceedings" by the General Assembly in other statutes and by the South Carolina Supreme Court in its own rules are important in determining the plain and ordinary meaning of that phrase. These are not "sporadic and isolated references" or "obscure" references as Respondent argues (Resp.'s Br., at 9, 10); rather, provisions such as those cited in the Petition provide important examples of how both the legislature and the courts have

used the phrase "civil action" to include administrative proceedings beyond the final agency decision.

In any event, this Court need not look beyond the plain language Section 15-77-300 itself to conclude that the General Assembly intended to include administrative proceedings within the phrase "civil action." The express exception in S.C. Code Ann. § 15-77-300(C) reads as follows: " 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 relieve actions, child support actions, except as otherwise provided for herein, and child abuse and neglect action." S.C. Code Ann. § 15-77-300(C) (emphasis added). Importantly, disciplinary actions by state licensing boards are plainly administrative proceedings, yet such proceedings are expressly included within the broad category of "civil actions" under the statute.

There is no logical reason to treat agency-involved litigation before the Administrative Law Court differently than such litigation in the judicial branch of government. Individuals who are harmed by state-action in pressing a legal claim "without substantial justification" are subjected to the same type of harm by the state agencies in "pressing" their legal claims, regardless of whether such claims are litigated in the Administrative Law Courts or in Circuit Court. Chapter 77 of Title 15 of the South Carolina Code is entitled "Suits Involving State, State Agencies and Officials and United States." S.C. Code Ann. § 15-77-10 et seq. Article 5 of Chapter 77 is entitled "Attorney's Fees in State Initiated Actions." S.C. Code Ann. § 15-77-300 et seq. This portion of the S.C. Code is completely separate from the South Carolina Tort Claims Act, which is found in Chapter 78 of Title 15, and which was passed in 1986, a year after the State-Action Attorney's Fee Statute was passed. S.C. Code Ann. § 15-78-10 et seq.

Finally, Petitioner's discussion from his original Petition about the potential access-to-justice issues presented by the Court of Appeals's decision below and in Town of Arcadia Lakes is not meant to suggest that the Court should re-write Section 15-77-300. Instead, Petitioner is trying to illustrate the importance of this issue as grounds for this Court to grant the Writ of Certiorari here.

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 and to vindicate its prior holding from McDowell, which allows an award of attorney's fees in an administrative proceeding where the agency is no longer functioning as a decision-making body, but instead is pressing its claims in litigation.

Respectfully submitted,

December 16, 2021

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