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## Remedies

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## REMEDIES

### I. STANDARD OF REVIEW FOR AWARD OF ATTORNEY FEES UNDER SECTION 15-77-300 ESTABLISHED

In *Heath v. County of Aiken (Heath II)*<sup>1</sup> the South Carolina Supreme Court awarded the Sheriff of Aiken County attorney fees pursuant to section 15-77-300 of the South Carolina Code.<sup>2</sup> The court's opinion establishes the standard of review for attorney fees cases under section 15-77-300.

*Heath II* reached the supreme court after a trial on remand pursuant to the court's order in *Heath v. County of Aiken (Heath I)*.<sup>3</sup> In *Heath I* the Sheriff of Aiken County brought an action to determine the appropriate location and control of the county's emergency calls system. The parties reached a settlement on most issues, but the case proceeded to trial on issues relating to the control of the sheriff's deputies. The trial court resolved these issues in favor of the county council, but ordered the council to pay Sheriff Heath's attorney fees pursuant to section 15-77-300. On appeal the supreme court disposed of the issues relating to the deputies, remanded the attorney fees portion of the case, and ordered the trial court to make factual findings to support its award of attorney fees under section 15-77-300.<sup>4</sup> On remand the circuit court made the factual findings and awarded Sheriff Heath \$12,500 in attorney fees. The council appealed.<sup>5</sup>

Because the applicability of section 15-77-300 was settled in *Heath*

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1. 394 S.E.2d 709 (S.C. 1990).

2. S.C. CODE ANN. § 15-77-300 (Law. Co-op. Supp. 1990). Section 15-77-300 provides:

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.

*Id.*

3. 295 S.C. 416, 368 S.E.2d 904 (1988).

4. *Heath II*, 394 S.E.2d at 710.

5. *Id.* at 711.

*I*, the *Heath II* court refused to examine the issue again.<sup>6</sup> The court noted, however, that the standard of review for attorney fees cases under section 15-77-300 was an issue of first impression in South Carolina. The *Heath II* court therefore relied on the United States Supreme Court's treatment of the Equal Access to Justice Act (EAJA),<sup>7</sup> which is similar to section 15-77-300, in *Pierce v. Underwood*.<sup>8</sup> *Pierce* involved a claim for attorney fees under the EAJA. The *Pierce* Court held that appellate courts should employ an "abuse of discretion" standard for reviewing an award of attorney fees.<sup>9</sup> The *Heath II* court adopted the *Pierce* Court's standard of review and found that the trial court had not abused its discretion in awarding attorney fees to Sheriff Heath under section 15-77-300.<sup>10</sup>

The *Heath II* court next applied the three elements established in *Heath I* for determining whether a party is entitled to attorney fees under section 15-77-300. The three prerequisites are: "[F]irst, the contesting party must be the "prevailing party;" second, the court must find "that the agency acted without substantial justification in pressing its claim against the party;" and third, the court must find "that there are no special circumstances that would make an award of attorney's fees unjust."'<sup>11</sup> The *Heath II* court agreed with the trial court that Sheriff Heath was the prevailing party for purposes of section 15-77-300. Sheriff Heath prevailed on all issues except one, which the court determined was a minor issue.<sup>12</sup> The court noted the definition of a prevailing party established in *Buza v. Columbia Lumber Co.*,<sup>13</sup> which requires that the party prevail only "on the main issue, even though not to the extent of the original contention."<sup>14</sup>

The court next examined whether Sheriff Heath met the second prerequisite. The court declined to upset the trial court's factual finding that the council had acted without substantial justification in pressing its claim.<sup>15</sup> *Pierce* held that the "substantially justified" requirement does not mean that the government must show it was " 'justified to a high degree', but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable per-

6. *Id.*

7. 28 U.S.C. § 2412(d) (1988).

8. 487 U.S. 552 (1988).

9. *Id.* at 561.

10. *Heath II*, 394 S.E.2d at 711.

11. *Id.* (quoting *Heath I*, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988) (quoting S.C. CODE ANN. § 15-77-300 (Law. Co-op. Supp. 1990))).

12. *Id.*

13. 395 P.2d 511 (Alaska 1964).

14. *Id.* at 514 (footnote omitted).

15. *Heath II*, 394 S.E.2d at 712.

son."<sup>16</sup> The *Heath II* court determined the issue of substantial justification by reviewing the terms of the settlement agreement and by considering the outcome of the issue that was litigated. The court noted that "[t]he fact of a settlement alone does not automatically dispose of the issue of substantial justification, although it can be considered a relevant factor."<sup>17</sup> Because all of the facts concerning the settlement were not in the record, the court was unwilling to hold that the trial court abused its discretion in holding that the council had acted without substantial justification.<sup>18</sup> On the issue of the litigated outcome as evidence of justification, the court did find, however, that "the statute construed in *Heath I* was unambiguous and . . . the Council's claims were without merit."<sup>19</sup> Finally, the court found that no special circumstances existed that would make an award of attorney fees to Sheriff Heath unjust.<sup>20</sup> The court stated that "[c]learly this litigation enured to the benefit of the citizens of Aiken County," and it would therefore be unjust not to award attorney fees.<sup>21</sup>

The result reached by the court is consistent with the language of the statute. The litigation benefitted all of the citizens of Aiken County by clarifying the relationship between the sheriff and the county council. Further, the lower court found that the council had acted without substantial justification. Finally, Sheriff Heath had retained private counsel and would be personally liable for the fee if he lost.<sup>22</sup>

The concept of awarding attorney fees to plaintiffs that successfully challenge the state is neither new nor exclusively governed by statute. Under the "private attorney general doctrine" courts award attorney fees to individuals that pursue litigation which benefits the public. The private attorney general doctrine generally requires that (1) the litigation benefit a large number of people and not be motivated by the litigant's self-interest,<sup>23</sup> and (2) private enforcement is appropriate or that it would be unfair not to award attorney fees to the litigant.<sup>24</sup>

16. *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

17. *Id.*

18. *Id.*

19. *Id.* The *Heath I* court construed section 4-9-30(7) of the South Carolina Code, S.C. CODE ANN. § 4-9-30(7) (Law. Co-op. Supp. 1990).

20. *Heath II*, 394 S.E.2d at 712.

21. *Id.*

22. Brief of Appellant at 8.

23. See *Austin v. Board of Retirement*, 209 Cal. App. 3d 1528, 258 Cal. Rptr. 106 (1989) (denying award of attorney fees because no significant public benefit accrued from litigation, which was motivated by litigant's own pecuniary interests); *Hellar v. Cenarusa*, 106 Idaho 571, 682 P.2d 524 (1984) (awarding attorney fees to litigant that successfully challenged the Idaho Legislature's voting apportionment scheme because societal importance of the litigation benefitted all Idaho citizens).

24. See *Hellar*, 106 Idaho at 578, 682 P.2d at 531 (requiring litigant to show the

Statutes like section 15-77-300 codify the private attorney general doctrine, discourage governmental authorities from harassing private individuals with unwarranted litigation,<sup>25</sup> and encourage private litigants to compel governmental authorities to perform their required duties.<sup>26</sup> Decisions like *Heath II* help achieve the statute's intended effect.

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necessity for private enforcement).

25. See *Pierce v. Underwood*, 487 U.S. 552, 575 (1988) (Brennan, J., concurring) ("Concerned that the Government, with its vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation, Congress enacted the EAJA . . .").

26. See *Nelson v. Public Employees Ins. Bd.*, 300 S.E.2d 86, 92 (W. Va. 1982) ("Citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed non-discretionary duties. When, however, resort to such action is necessary to cure willful disregard of law, the government ought to bear the reasonable expense incurred by the citizen in maintaining the action.").