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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge

Lower Court Case No. 2013-CP-06-00059
Appellate Case No. 2019-000599

Lorena Robinson, Elaine Nix, Archie Patterson,
and Tami Bollerman, ... Plaintiffs,

Of Whom Archie Patterson and Tami Bollerman are the Respondents,

v.

South Carolina Department of Employment and
Workforce .... Appellant.

FINAL REPLY BRIEF OF APPELLANT SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE

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Argument

Appellant South Carolina Department of Employment and Workforce (DEW) writes this reply only to clarify several matters raised by Respondents Archie Patterson and Tami Bollerman in their brief. When Respondents filed this case in early 2013 and claimed regulations were needed for DEW to require online work searches, they were unaware that the General Assembly had already enacted legislation—effective July 1, 2012—authorizing DEW to do just that. Although Respondents' theory of the case was therefore undercut before the case was filed, they nevertheless seek adoption of "the absurd result that, before an agency may enforce a statute, it would have to enact a regulation explaining its interpretation and application of the statute in detail and its intention of enforcing it." Sloan v. S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 475, 636 S.E.2d 598, 610 (2006), overruled on other grounds, Joseph v. S.C. Dep't of Lab., Licensing & Regul., 417 S.C. 436, 790 S.E.2d 763 (2016). Even if Respondents were properly before the Court, which they are not, no such superfluous regulation is needed.

For the reasons that follow, as well as those set forth in DEW's opening brief, the Court should reverse and remand with instructions to dismiss the amended complaint because (1) DEW was not required to promulgate regulations to enforce the online work search requirement, (2) Respondents failed to exhaust their exclusive statutory remedies for obtaining unemployment benefits, and (3) Respondents failed to meet the prerequisites for class certification. In the alternative, the Court should reverse and remand with instructions for the circuit court to administer the class on a claims-made basis.

I. DEW was not required to promulgate regulations when a budget proviso specified the agency's responsibilities.

"An appropriation act, though generally in duration temporary, has equal force and effect as a permanent statute for the time being." State ex rel. McLeod v. Mills, 256 S.C. 21, 27, 180,

S.E.2d 638, 641 (1971). As part of the General Assembly's "duty and authority to appropriate money as necessary for the operation of the agencies of government," it "has the right to specify the conditions under which the appropriated monies shall be spent." Edwards v. State, 383 S.C. 82, 90, 678 S.E.2d 412, 416 (2009). State "agencies are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid." Id. at 91, 678 S.E.2d at 417. After all, an agency "is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991).

During four fiscal years, the General Assembly mandated that DEW "shall" spend "[t]hirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers . . . on enforcement of Section 41-35-110(3)" by "requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified." Act No. 288, 2012 S.C. Acts 448, § 67.7; see also Act No. 101, 2013 S.C. Acts 475–76, § 83.6; Act No. 286, 2014 S.C. Acts 503, § 83.6; Act No. 91, 2015 S.C. Acts 484–85, § 83.5.

The proviso expressed the General Assembly's intent that claimants' work search activities include an online component to verify compliance. To give this verification method teeth, the General Assembly told DEW it "shall" enforce it. Proviso 67.7—as well as its successor provisos—expressly incorporated the requirements for demonstrating entitlement to unemployment compensation benefits set forth in subsection 41-35-110(3). That statute requires claimants to show they are able to work, available for work, and actively seeking work, and the proviso merely provided additional details on how claimants are to comply with, and DEW is to enforce, the "actively seeking work" requirement. S.C. Code Ann. § 41-35-110(3).

Nor was this a one-time thing—the General Assembly included the proviso in the State budget for four straight years. See Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992) (citing with approval Grove City College v. Bell, 465 U.S. 555 (1984), in which the U.S. Supreme Court recognized that reenactment of a statute with knowledge of the administrative interpretation thereof is a strong indication of legislative approval of that interpretation). Respondents, however, contend DEW was required to promulgate regulations to enforce this unambiguous proviso, pointing to several general statutes. Yet it is well-settled that a specific statute will prevail over one of general application. See Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468–69 (2010) (quoting Spectre, LLC v. S.C. Dep't of Health & Env't Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010)).

Viewed through this lens, Respondents' effort to invoke general statutes about rulemaking and DEW's agency authority to trump what the General Assembly's proviso—which "has equal force and effect as a permanent statute for the time being," Mills, 256 S.C. at 27, 180 S.E.2d at 641—says about the specific requirements for showing entitlement to unemployment benefits is unavailing. Likewise, Respondents' repeated assertion that the proviso was nothing more than a funding mechanism is not only perplexing, but it is also just plain wrong. Cf. Edwards, 383 S.C. at 90, 678 S.E.2d at 416 (recognizing the unremarkable proposition that the General Assembly "has the right to specify the conditions under which the appropriated monies shall be spent").

Pivoting from their chief argument, Respondents now seek to argue DEW did not appeal two "findings" in the circuit court's order. Not so. DEW spent two pages of its brief discussing why it was improper for the circuit court to make a passing reference to some purported article I, section 22 violation that was neither pled nor litigated. See App. Br. at 40–41. And even if section 41-35-670 was not specifically cited, DEW's entire argument is that no new procedures were

required, and Respondents continue to ignore that a specific statute prevails over the more general ones they seek to invoke.[1] In any event, section 41-35-670 has nothing to do with this case because the statute, by its terms, only applies when DEW has issued a determination to pay benefits and that determination is subject to challenge by an employer seeking reconsideration, an appeal, or judicial review. See S.C. Code Ann. § 41-35-670 (providing that "benefits must be paid pursuant to a determination . . . regardless of the pendency of the period to . . . file an appeal . . . with respect to it"). Here, it is undisputed that (1) DEW's determination on the work search issue was to not pay benefits; and (2) Respondents did not seek reconsideration, file appeals, or attempt to invoke judicial review before initiating this action. See Resp. Br. at 4. The scenario contemplated in section 41-35-670 simply does not apply.

In making this argument, Respondents conflate the determination they received regarding their separation from employment—which was favorable to them and subject to an employer's

[1] "Of course, a party is not required to use the exact name of a legal doctrine . . . to preserve [an] issue." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). If the issue is "sufficiently clear to bring into focus the precise nature of the alleged error," an "appellate court may nevertheless consider the issue" when "it is reasonably clear from an appellant's arguments." Id. After all, courts are "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." Id. at 470, 719 S.E.2d at 644. Our supreme court has cautioned that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). And it is "good practice . . . to reach the merits of an issue when error preservation is doubtful." Id. at 330, 730 S.E.2d at 285. In any event, to the extent Respondents implicitly argue DEW is somehow bound by these "findings," it is well settled that the law-of-the-case doctrine does not apply to dicta. See White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 123 n.1, 609 S.E.2d 811, 814 n.1 (Ct. App. 2005); Weil v. Weil, 299 S.C. 89, 90, 382 S.E.2d 471, 474 (Ct. App. 1989). As DEW pointed out below, the two "findings" Respondents champion were not necessary to the circuit court's decision on whether DEW was required to promulgate regulations to enforce the online work search requirement. See (R. pp. 230–31). The Court should therefore simply find this is "the product of a labyrinthine factual and legal landscape rather than view it as a finding necessary to the [circuit court's] decision." White's Mill Colony, Inc., 363 S.C. at 123 n.1, 609 S.E.2d at 814 n.1. If DEW were required to line-item each sentence in the circuit court's order, the parties and the Court would be here all day. But the preservation requirement is for issues, not a footnote a party snuck into a proposed order ruling on a different question. See (R. p. 8 n.4). Thus, while Respondents wish to tag DEW with these "findings," their effort is futile and elevates form over substance.

appeal—with the later determination that they were not actively seeking work, which was unfavorable to them and not subject to an employer's appeal. By way of background, when an employee is separated from employment, DEW determines whether they were separated due to no fault of their own. If so, the individual may file weekly claims for benefits, demonstrating each week that he or she meets all eligibility conditions under the law. There is no authority—not in section 41-35-670 or anywhere else—that says when DEW initially finds a claimant was separated due to no fault of his own, the agency cannot implement determinations on separate issues that bear on a claimant's weekly eligibility for benefits, such as being able to work, available for work, and actively seeking work. See S.C. Code Ann. § 41-35-110(1)–(6).

This case is not about article I, section 22 of the South Carolina Constitution, and section 41-35-670 of the South Carolina Code has no bearing on the circuit court's order certifying a class.[2] But the Court need not take DEW's word for it. Respondents removed all doubt on the subject by repeatedly defining "the legal issue in this case" as "whether [DEW] was required to promulgate regulations prior to implementing its online work search requirement." Resp. Br. at p. 18; see also id. at 7–8 ("The issue of whether the department was required to promulgate regulations to establish procedures for its online work search requirement will be determinative of all class claims."); id. at 24–25 ("The determinative issue therefore was whether the department was required to promulgate regulations for the new policy."); id. at 31 (defining "the legal issue" as "whether the department was required to promulgate regulations before implementing the online work search requirement"). That is what the parties litigated in circuit court.

To further illustrate the point, if these "findings" were so important to the class certification decision, then why did the circuit court omit them from the class notice under the heading of "What

[2] Notably, neither authority appears in Respondents' amended complaint. See (R. pp. 141–50).

is this Lawsuit about?" See (R. p. 15). And why are these procedural issues not mentioned anywhere in the class definition that explains "Who is in the class"? (R. p. 16 (emphasis omitted)). The Court, of course, cannot uphold class certification on an issue that was not pled, litigated, or included in the class notice. Cf. Tilley v. Pacesetter Corp., 355 S.C. 361, 380, 585 S.E.2d 292, 302 (2003) (holding "that allowing the [plaintiffs] to modify the class definition they chose at this late date would be unfair" and refusing to do so). Here, as in Tilley, "[t]he definition espoused by the [Respondents] in their original and amended complaints was adopted by the courts and used by the parties as the working definition of the class." 355 S.C. at 381, 585 S.E.2d at 302. Limiting the class "was the result of a strategy choice, and . . . [it] is one that [Respondents] have to live with since a decision on the merits was made." Id. Respondents are simply trying to move the goalposts on appeal.

Even if the Court were to bite on section 41-35-670, Respondents' interpretation is incorrect as a matter of law.[3] Here, DEW noticed a claimant did not do the online work search for a week, sent a letter asking the claimant to report to the office, and initiated a factfinding procedure to determine what happened for that week only. After the factfinding process concluded, which included asking the claimant to come into the office, DEW issued a decision. If it was in the claimant's favor, benefits were not stopped. And an employer is not an interested party in a weekly

[3] Section 41-35-670 was enacted to comply with U.S. Supreme Court precedent. See Cal. Dep't of Hum. Res. Dev. v. Java, 402 U.S. 121 (1971). In Java, the plaintiffs challenged a California statute that stopped benefit payments pending the outcome of an employer appeal of an initial determination regarding whether a claimant is eligible to apply for unemployment benefits. Under this initial process, a claimant files for benefits and the department issues a decision finding him eligible; the employer appeals on the separation issue concerning whether the individual quit, was fired for cause, etc.; and it takes the department, for example, four weeks to decide the employer's appeal. The issue in Java was whether California could stop benefit payments during the four weeks the employer's appeal was pending, even though the agency's initial decision found the claimant eligible on the separation issue. The U.S. Supreme Court said no. Accordingly, the South Carolina General Assembly enacted a statute—consistent with precedent—to protect claimants when their employer appeals a favorable decision they received.

determination of able, available, and actively seeking work. So there would never be a pending employer appeal from DEW's determination on that issue.[4] Simply put, section 41-35-670 is inapplicable because Respondents never received a favorable determination finding them eligible for the week in question after which DEW stopped payment for that week. Stopping benefits during the factfinding process did not violate section 41-35-670 because no determination was in place finding them eligible for that week under the able, available, actively seeking work issue.

As Kevin Cummings noted in his affidavit, "When a claimant fails to perform at least one online job search in a given week, the claimant is denied benefits using the same procedures that apply whenever a claimant fails to show that he or she is able to work and available for work. No new procedures were necessary in order to enforce the online job search requirement." (R. p. 521). The circuit court thus erred because DEW did not need to implement a new procedure of any kind—whether through regulations or otherwise—to enforce the General Assembly's new method for verifying job searches. And this method complied with due process because Respondents received notice and an opportunity to be heard, the verification was conducted "by a mode of procedure prescribed by the General Assembly," and it was subject "to judicial review." S.C. CONST. art. I, § 22.[5]

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[4] In addition to complying with South Carolina law, DEW's process was right in line with the U.S. Department of Labor's guidance on the subject. See U.S. DEP'T OF LABOR, EMP'T & TRAINING ADMIN., UNEMPLOYMENT INSURANCE PROGRAM LETTER 04-01, at 2 (Oct. 27, 2000) ("Eligibility for UC is determined on a week-by-week basis. During a continued claim series, a claimant must certify as to continuing eligibility each week. If information provided by the claimant or others establishes eligibility, the State agency manifests its determination of eligibility for that week by issuing compensation to the claimant. When a question concerning continued eligibility for benefits for a given week arises, the State agency conducts an investigation of the facts and makes a determination of eligibility or ineligibility. While such a determination is pending, the State agency need not issue payment for the week in question until it issues a determination regarding eligibility, provided the determination is timely." (emphasis added)).

[5] Regardless, our supreme court has long recognized that no constitutional right has been denied until the plaintiff has exhausted administrative remedies. See Moore v. Sumter Cty. Council, 300 S.C. 270, 272–73, 387 S.E.2d 455, 457 (1990). As noted below, Respondents failed to do so here.

Facing the absence of any legal authorities supporting their position, Respondents are left with relying upon a Legislative Audit Council (LAC) report and self-selected portions of DEW employees' depositions to cobble together a factual argument as to why they believe DEW is incorrect. But neither informs the legal inquiry of whether the unambiguous statutes and provisos in question mean what they say. See Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.").

Respondents put a lot of stock in the 2014 LAC report. See LEGIS. AUDIT COUNCIL, A MANAGEMENT REVIEW OF THE DEPARTMENT OF EMPLOYMENT AND WORKFORCE 1 (May 2014), https://lac.sc.gov/sites/default/files/Documents/Legislative%20Audit%20Council/Reports/A-K/DEW_2014.pdf. Notably, however, the section of the report addressing the online work search requirement does not mention the proviso. The whole purpose behind the LAC's recommendation to promulgate a regulation was to "provide the public and the General Assembly an opportunity to comment on the policy." Id. at 35. But the General Assembly—in setting public policy—already had commented on the situation, directing DEW to enforce the online work search requirement. Cf. Weaver v. Recreation Dist., 431 S.C. 357, 364, 848 S.E.2d 760, 763 (2020) ("There can be no question that the General Assembly is a body of duly elected, direct representatives of the people of South Carolina."). In any event, the LAC's opinion is not controlling. See Marbury v. Madison, 5 U.S. 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is."); cf. generally S.C. Pub. Interest Found. v. Greenville Cty., 401 S.C. 377, 383 n.3, 737 S.E.2d 502, 505 n.3 (Ct. App. 2013) (noting that "Attorney General opinions are persuasive but not binding authority").

Next, Respondents try to point to Laura Robinson's testimony on what the force of the proviso was. For starters, she was a 30(b)(6) witness, not an expert. Cf. United States v. Ancient Coin Collectors Guild, 899 F.3d 295, 324 (4th Cir. 2018) (asserting the prevailing view that seeking "the government's legal positions . . . is generally beyond the scope of a proper [Rule] 30(b)(6) deposition"). And even if she were an expert, Robinson would not be able to opine on questions of law. See Carter v. Bryant, 429 S.C. 298, 313, 838 S.E.2d 523, 531 (Ct. App. 2020); State v. Commander, 396 S.C. 254, 264, 721 S.E.2d 413, 418 (2011); Dawkins v. Fields, 354 S.C. 58, 66–67, 580 S.E.2d 433, 437 (2003). That is for this Court to decide. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court."). Further, Respondents mischaracterize her testimony.

In short, Respondents' red herrings do not add to the analysis. The question here is whether an unambiguous proviso required DEW to enforce the online work search requirement without the need to superfluously promulgate regulations.[6] And the answer is yes.

II. Respondents failed to exhaust the exclusive administrative remedies provided by statute.

In their brief, Respondents admit that the "[c]lass representatives did not file an appeal," Resp. Br. at 4, from DEW's decision to deny benefits for failure to comply with the online work search requirement. But they fail to appreciate that is fatal to their lawsuit. See S.C. Code Ann. § 41-35-660 (providing a claimant "may file an appeal from an initial determination, redetermination, or subsequent determination not later than ten days after the determination was mailed to his last known address"); S.C. Code Ann. § 41-35-740 ("A decision of the department, in the absence of an appeal from it as provided in this article, becomes final ten days after the date

[6] Even if the Court were to accept Respondents' argument that the online work search requirement was a policy, no "binding norm" was created because DEW "remain[ed] free to consider the individual facts in the various cases" as evidenced by the fact that 214 out of 1,300 appeals were successful. Joseph, 417 S.C. at 454, 790 S.E.2d at 772. That kind of success rate on appeal necessarily shows DEW had discretion.

of notification or mailing of it, and judicial review is permitted only after a party claiming to be aggrieved by it has exhausted his administrative remedies as provided by Chapters 27 through 41 of this title.").

While Rule 57, SCRCP, "governs declaratory judgment actions, and expressly provides: '[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate,' a court should not exercise such power lightly." Smith v. S.C. Ret. Sys., 336 S.C. 505, 527, 520 S.E.2d 339, 351 (Ct. App. 1999). After all, "it is well settled a court ordinarily will refuse to grant a declaratory judgment where a special statutory remedy has been provided." Id. As this Court has recognized, "'[g]ratuitous interference' in the administrative process should be avoided." Id. (quoting Williams Furniture Corp. v. S. Coatings & Chem. Co., 216 S.C. 1, 7–8, 56 S.E.2d 576, 579 (1949)).

"Declaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances" because "[r]elief is not generally available to one who has not exhausted administrative remedies." Garris v. Governing Bd. of S.C. Reins. Facility, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995). "In general, judicial review is appropriate only when appeal is from a final agency order." Smith, 336 S.C. at 528, 520 S.E.2d at 351. The statutory requirements affording an administrative remedy and requiring exhaustion before seeking judicial review mandate that an administrative agency has "the exclusive right to decide those issues subject only to an appeal for judicial review of [its] decisions." Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 313, 408 S.E.2d 230, 232 (1991). Dismissal is therefore proper when plaintiffs bypass their administrative remedies "by means of an action for declaratory judgment." Pullman Co. v. Pub. Serv. Comm'n, 234 S.C. 365, 368–69, 108 S.E.2d 571, 572 (1959).

"A trial judge must have a sound basis for excusing the failure to exhaust administrative relief." Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 209, 442 S.E.2d 582, 583 (1994). Here, the circuit court did not have a sound basis for allowing Respondents to bypass the administrative appellate process. The circuit court excused exhaustion on two grounds: (1) the statutory procedures are not exclusive and (2) pursuing them would have been futile because DEW purportedly lacked authority to address whether it was required to promulgate regulations. Both are without merit. DEW will nevertheless address each in turn.

First, Respondents' claim that the statutory administrative remedies were not exclusive does not and cannot hold water. For over a century, our supreme court has recognized "[t]he general rule is that, where a new right is created by a statute, which also prescribes the remedy or method of enforcing the right, the method prescribed by the statute is exclusive." Bethea v. Allen, 101 S.C. 350, ___, 85 S.E. 903, 905 (1915); see also Daniel v. Conestee Mills, 183 S.C. 337, ___, 191 S.E. 76, 79 (1937) ("Where a statute creates a new right and prescribes the remedy of enforcing it, the statutory remedy is exclusive."). And the court has "held that a statutory remedy to enforce a new right or liability created by the same statute is exclusive unless the statute clearly shows a contrary intention." State ex rel. Hutchinson, 182 S.C. 369, ___, 189 S.E. 475, 477 (1937).

One never had a common law right to unemployment benefits and, thus, no common law remedy existed. Indeed, unemployment benefits did not exist at all until they were statutorily created as a response to the Great Depression in 1936. Faile v. S.C. Emp. Sec. Comm'n, 267 S.C. 536, 542, 230 S.E.2d 219, 222 (1976); see also Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 587–88 (1937) (detailing the statutory origins of the unemployment insurance system); N.Y. Tel. Co. v. N.Y. State Dep't of Lab., 440 U.S. 519, 536 (1979) ("Title IX of the Social Security Act of 1935 established the participatory federal unemployment compensation scheme.").

Because unemployment benefits are a creature of statute, a claimant can only obtain those benefits by applying for them with DEW under the statutory scheme. See S.C. Code Ann. § 41-35-10 ("All benefits shall be paid through employment offices, in accordance with such regulations as the department may prescribe."); S.C. Code Ann. Regs. § 47-21 (explaining an individual may file a request with DEW to determine whether they are an insured worker and that "[s]uch request shall be filed at the Department office"). And if DEW denies a request for benefits, the sole and exclusive procedure for challenging the denial is to appeal pursuant to the statutory scheme. See S.C. Code Ann. § 41-35-690.

Respondents, however, contend that broader language used in the different statutory scheme governing workers' compensation justifies their decision to jettison the statutory process for obtaining unemployment benefits. Not so. They are comparing apples to oranges. And the difference in the language used in sections 41-35-690 and 42-1-540 is understandable given the origins of the respective systems. The General Assembly created the workers' compensation statutory system to replace common law remedies that were available prior to enactment of the South Carolina Workers' Compensation Act (the Act).[7] Unlike with unemployment benefits, employees could bring civil actions against their employers alleging on-the-job injuries under a common law negligence theory. To balance the competing interests between employers and employees, the General Assembly created the Act to supplant and replace the common law remedies that were previously available and fashion a no-fault system.

Given that the Act was replacing existing rights and remedies, the General Assembly properly included the phrase "all other rights and remedies" when expressing its intent to replace the common law system. See S.C. Code Ann. § 42-1-540. Indeed, section 42-1-540 needed to be

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[7] S.C. Code Ann. §§ 42-1-10 through -19-50 (2015 & Supp. 2020).

broad and expansive to clearly evince the General Assembly's intent to abrogate the common law. See Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003) ("Workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights."); id. at 115, 580 S.E.2d at 107 ("Workers' compensation statutes abrogate traditional common law approaches to compensate workers injured on the job. With rare exceptions, workers' compensation displaces tort law with a no-fault system for on-the-job injuries.").

Thus, the origins and goals of the workers' compensation system were and are different from the origins and goals of the unemployment insurance system. Those differences easily explain why the General Assembly used different language in sections 41-35-690 and 42-1-540. Because the only method for applying for and obtaining unemployment benefits is by requesting them from DEW, a statute limiting a challenge of DEW's determination to the statutory appeals procedure necessarily forecloses any other possible remedy. In other words, section 41-35-690 did not need to state the appeals procedure was the only "remedy" because there is no other remedy or method for obtaining UI benefits. And there never has been.

Second, Respondents failed as a matter of law to demonstrate futility. "A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act." Brown v. James, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010). "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" Law v. S.C. Dep't of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (quoting Thetford Properties IV Ltd. P'ship v. U.S. Dep't of Hous. and Urban Dev., 907 F.2d 445, 450 (4th Cir. 1990)).

At the outset, in trying to skirt their exhaustion problem, Respondents overlook that the entire purpose of this suit is to obtain unemployment benefits that were denied. That is not an issue lurking in the shadows—it is front and center on appeal. To suggest that the entire case is about promulgating regulations, therefore, does not paint an accurate picture. Respondents want money. Whether they were entitled to that money during the benefit periods in question is reserved to DEW as the factfinder designated by the General Assembly.

In any event, Respondents' futility argument is twofold. They contend DEW had already taken a hard and fast position on the online work search requirement, and besides, the question regarding DEW's authority could not be addressed in the administrative setting. To shore up their futility argument, Respondents repeatedly state that, out of the 61,900 claimants who were denied benefits in the program's initial months, only 214 appeals were successful. Resp. Br. at 4, 31. And from those numbers they extrapolate a mere 0.35% success rate. As Mark Twain reportedly once quipped, "Facts are stubborn things, but statistics are more pliable." S. Alan Medlin, 42 REAL PROP. PROB. & TR. J. 717, 725 n.35 (2008) (quoting THE QUOTATIONS PAGE, http://www.quotationspage.com/quote/27556.html (last visited Nov. 2, 2007)). Respondents' statistic is misleading because it implies that all 61,900 claimants filed appeals. But that was not the case. Rather, only around 1,300 claimants appealed adverse decisions. (R. p. 482). Thus, the success rate for appeals was over 16%, which is a far cry from less than half a percent. Indeed, that reversal rate is probably right on par with that of our appellate courts. It may even be a little better. In any case, it hardly translates into a finding that the online work search requirement was being blindly enforced without discretion such that losing was an absolute certainty.[8] Cf. Law, 368 S.C. at 438, 629 S.E.2d at 650.

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[8] Further, DEW is unaware of any exception to the exhaustion requirement under which a claimant can jettison the administrative process simply due to frustration. Cf. Floyd v. S.C. Emp. Sec. Comm'n, 281

What is more, Romi Robinson's testimony simply cannot bear the weight Respondents place on it. As with Laura Robinson, the purpose for which Respondents offer her testimony is beyond the scope of a 30(b)(6) deposition, she is not a legal expert, and her purported legal conclusions are simply irrelevant. E.g., Ancient Coin Collectors Guild, 899 F.3d at 324; Carter, 429 S.C. at 313, 838 S.E.2d at 531; Commander, 396 S.C. at 264, 721 S.E.2d at 418; Dawkins, 354 S.C. at 66–67, 580 S.E.2d at 437. Here, the Court must determine whether the statutes gave DEW, the Appellate Panel, and the ALC authority to rule on the issue of whether DEW was required to promulgate regulations to enforce the online work requirement. Cf. Catawba Indian Tribe of S.C., 372 S.C. at 524, 642 S.E.2d at 753.

A plain and unambiguous reading of the relevant authorities reveals that, notwithstanding Romi Robinson's speculative testimony about the authority of her tribunal and others,[9] this issue was squarely within the authority of DEW, the Appellate Panel, and the ALC to address. See S.C. Code Ann. § 41-35-680 (providing that "an appeal tribunal, after affording the parties reasonable opportunity for a fair hearing, after notice of not less than seven days, must make findings and conclusions"); S.C. Code Ann. Regs. § 47-51(C)(1) & (E)(1)(a) (authorizing hearing officers to

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S.C. 483, 487, 316 S.E.2d 143, 146 (1984) (finding a statute "is not rendered invalid because individuals find it difficult to meet the necessary qualifications"); Moore, 300 S.C. at 273, 387 S.E.2d at 457 (rejecting argument that exhausting administrative remedies "would be too time-consuming and tiresome" and holding "[a] party is not excused from seeking administrative relief because he feels that he will encounter delay by the agency in acting on his requests"). Nor is DEW aware of an exception to the exhaustion requirement that allows a claimant—after an adverse decision—to forego an appeal and simply argue the agency did not ask for the documents she needed to meet her burden of proof. To be sure, Bollerman's testimony is awfully self-serving. If Bollerman had this form, then she would have presented it to the claims adjudicator to demonstrate her entitlement to unemployment benefits for the week in question. As a named plaintiff and class representative, she should still have it too. Which leads to a logical follow-up question: Where is it? Because Bollerman does not have it, she is not entitled to unemployment benefits.

[9] Irrespective of whether Romi Robinson could testify about her own tribunal, she certainly could not testify with any authority as to what the Appellate Panel—which is independent from the agency, elected by the General Assembly every four years, and subject to the Code of Judicial Conduct—would consider on appeal and how that body might rule. See S.C. Code Ann. §§ 41-29-300(B)(2) & (F)(1).

"consider all issues affecting the claimant's right to benefits" and mandating that "[a]ll issues relevant to the appeal shall be considered and passed upon"); S.C. Code Ann. § 41-29-300(A) (creating the Appellate Panel with the "sole purpose" being "to hear and decide appeals from decisions of the department's divisions"); S.C. Code Ann. § 1-23-380(5)(a)–(c) (allowing a party to challenge agency action on the grounds that it is "in violation of constitutional or statutory provisions" or "in excess of the statutory authority of the agency" or "made upon unlawful procedure").

If unhappy with the ruling, Respondents always could have come to this Court. See S.C. Code Ann. § 41-35-750 ("An appeal may be taken from the decision of the administrative law court pursuant to the South Carolina Appellate Court Rules and Section 1-23-610."). To that end, Respondents' argument that requiring exhaustion would allow DEW to escape judicial and legislative oversight is puzzling. The General Assembly required DEW to implement the online work search requirement and set forth the process by which DEW must administer appeals. Further, the General Assembly continued to enact the same budget proviso for three successive budget cycles. As part of the exclusive administrative process created by the General Assembly, the agency's decisions are subject to judicial review. Respondents just want to skip three rungs on the appellate ladder and obtain judicial review now. Respectfully, that is not how it works. DEW, as well as each appellate forum provided by statute, plainly had the authority to pass on the issue in question. And so Respondents' futility argument necessarily fails as a matter of law.

Last, our supreme court's discussion of exhaustion in the context of a tax assessment case is instructive:

> The court cannot substitute its judgment, or that of a jury, for the judgment of the tax assessor duly appointed for the purpose of making an appraisal and valuation of property for tax purposes. A remedy is not given by the aforesaid sections to an aggrieved

> taxpayer by reason only of an excessive assessment or overvaluation of his property. If we should hold that the cited sections of the Code were applicable to the factual situation here revealed, such a procedure would render the whole basis of taxation most unstable and set at naught the orderly procedure by which any taxpayer, who may feel aggrieved by the valuation placed upon his property by the tax assessor, may have such reviewed by the Richland County Board of Assessment Appeals and, thereafter, by the South Carolina Tax Commission. The respondents here had available to them an adequate administrative remedy to determine the question of fact as to whether there had been an overvaluation of their property for the purpose of the taxation thereof. Having failed to follow the administrative remedy created by the statute for the correction of errors in the valuation of their property, they are precluded from resorting to the courts for relief.

Meredith v. Elliott, 247 S.C. 335, 346–47, 147 S.E.2d 244, 249 (1966). So too here.

Because Respondents were required to exhaust their exclusive administrative remedies and admittedly failed to do so, the circuit court erred as a matter of law in declining to dismiss the amended complaint. The Court should therefore reverse and remand.

III. The circuit court abused its discretion in finding Respondents met the prerequisites for class certification and, in the alternative, by relieving class members of their statutory burden of proving they are entitled to unemployment benefits.

As the Fourth Circuit has recognized, the adequacy-of-representation element often merges with the elements of commonality and typicality. E.g., Deiter v. Microsoft Corp., 436 F.3d 461, 466 (4th Cir. 2006). That rings especially true here because the class representatives' specific situations only highlight how inappropriate this case is for class treatment. Indeed, Respondents' claims are not typical of the class, and their unique circumstances do not present common factual questions on which the circuit court could issue class relief with the broad stroke of a pen. As a result, Respondents are not adequate representatives.

Respondents continue to assert, and the circuit court inexplicably found, that all class members have already certified they were entitled to unemployment benefits. Notably, despite

repeatedly making this assertion, Respondents point to no evidence in the record supporting it aside from conclusory findings in the circuit court's orders. Just because Respondents say it does not make it so. As explained in Part I, supra, a claimant is only eligible for unemployment benefits in any given week when DEW finds they meet all eligibility requirements under state law. Whether a claimant was separated due to no fault of his own and whether he performed one job search online is not dispositive of the individual's entitlement to unemployment benefits.

Against this backdrop, the circuit court erred in simply assuming everyone was eligible when four out of the six named plaintiffs had to drop out of the lawsuit because the exact opposite was true. Footnote 15 of Respondents' brief only proves the point. Respondents admit those initially named plaintiffs' claims were not typical, and they were not adequate representatives. They had years to identify the folks most suitable to serve as named plaintiffs and class representatives in this lawsuit. If those carefully selected plaintiffs were not even entitled to unemployment benefits for a host of reasons, then what does that say for the rest of the class?

Here, "the variation in claims strikes at the heart of the" dispositive issue in this case. Deiter, 436 F.3d at 467. As our supreme court has confirmed, "[t]he very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action." O'Quinn v. Beach Assocs., 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978). But that is what is required under state law. See S.C. Code Ann. § 41-35-110(3); Hyman v. S.C. Emp. Sec. Comm'n, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). This Court has recognized that "[w]hether a claimant is available and actively seeking work is an issue of fact to be determined by the administrative agency in accordance with the facts and circumstances of each case." Wellington v. S.C. Emp. Sec. Comm'n, 281 S.C. 115, 117, 314 S.E.2d 37, 39 (Ct. App. 1984). Yet under Respondents' and the circuit court's reasoning, DEW must turn a blind eye and accept

as gospel that nearly 62,000 claimants were automatically entitled to benefits. And it must do so even though a supermajority of the named plaintiffs to this lawsuit were not entitled to unemployment benefits on grounds other than their failure to comply with the online work search requirement. Respectfully, that is a bridge too far.

Turning to the adequacy-of-representation requirement,[10] in particular, Respondents are trying to redefine the strikezone. According to Respondents, the class representatives are adequate because they do not have a conflict of interest with—and are not antagonistic to—the rest of the class. Respondents, however, omit the crucial part of the test on which DEW based its objection to their adequacy—that they have not suffered the "same injury." Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co., 356 S.C. 644, 664, 591 S.E.2d 611, 622 (2004) (asserting that "a class representative 'must be part of the class and possess the same interest and suffer the same injury as the class members'" (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997)). Indeed, Respondents do not even try to wrestle with this argument. They just dismiss it as putative class members merely having "inconsequential differences." Resp. Br. at 28. But if those differences were so inconsequential, then it seems odd that named plaintiffs would continue dropping like flies before a decision on the merits was rendered. The truth is DEW has shown those differences matter a great deal.

As DEW explained in its opening brief, Patterson and Bollerman's situations are entirely different from each other and the rest of the class. Patterson left money on the table because he was annoyed with the appeals process, and Bollerman failed to present her Form UCB-303 when she was given the opportunity to prove entitlement to unemployment benefits. In other words,

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[10] Respondents are indeed correct that DEW does not challenge the adequacy of class counsel. The undersigned have great respect for opposing counsel and do not question their abilities. Here, the objection is limited solely to the adequacy of the class representatives.

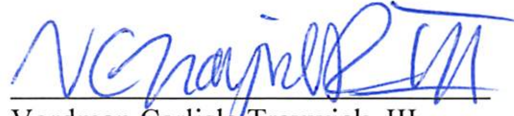
Patterson and Bollerman are not entitled to unemployment benefits for reasons independent of the online work search requirement. Thus, they have not suffered the same injury as the class. See Hosp. Mgmt. Assocs., Inc., 356 S.C. at 664, 591 S.E.2d at 622 (quoting Amchem Prods., Inc., 521 U.S. at 625–26)). Accordingly, they lack standing to bring this challenge, their claims are not common or typical, and they are not adequate representatives of the class.

For these reasons, the circuit court abused its discretion in finding commonality, typicality, and adequate representation to certify the class. In the same vein, even if the circuit court were correct in certifying a class, it erred as a matter of law by relieving class members of the statutory requirement of individually proving they are able to work, available for work, and actively seeking work prior to receiving an award of unemployment benefits for the period in question. See S.C. Code Ann. § 41-35-110(3); Hyman, 234 S.C. at 373, 108 S.E.2d at 556; Wellington, 281 S.C. at 117, 314 S.E.2d at 39. Because the circuit court's class certification rulings were controlled by an error of law and are not supported by the evidence, the Court should reverse and remand with instructions to decertify the class or, in the alternative, order it to proceed on a claims-made basis.

CONCLUSION

In sum, the Court should reverse and remand with instructions to dismiss the amended complaint. Respondents failed to exhaust the exclusive administrative remedies available to them before running to the courts. On the merits, Respondents' legal position is simply untenable, and the circuit court abused its discretion in certifying a class. Even if class certification were appropriate, the circuit court erred as a matter of law in absolving putative class members of their statutory burden of proving they are able to work, available for work, and actively seeking work. The Court should therefore reverse and remand with instructions for the circuit court to administer the class on a claims-made basis.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge

Lower Court Case No. 2013-CP-06-00059
Appellate Case No. 2019-000599

Lorena Robinson, Elaine Nix, Archie Patterson,
and Tami Bollerman, ... Plaintiffs,

Of Whom Archie Patterson and Tami Bollerman are the Respondents,

v.

South Carolina Department of Employment and
Workforce .... Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant South Carolina Department of Employment and Workforce certify that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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