RECEIVED
Apr 04 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2024-001598
Case No. 2013-CP-42-1569

Kenneth and Angela Hensley, on behalf of their minor child BLH, and All Others Similarly Situated, Respondent,

v.

South Carolina Department of Social Services, Appellant.

AMENDED INITIAL BRIEF OF RESPONDENTS

HODGE LAW FIRM
Charles J. Hodge, SC Bar #2537
Post Office Box 2765
Spartanburg, SC 29304
chodge@hodgelawfirm.com

LANGLEY LAW FIRM
T. Ryan Langley, SC Bar #76558
Matthew Thomas Foss, SC Bar #104390
229 Magnolia Street
Spartanburg, SC 29302
ryan@thelangleylawfirm.com

THOMPSON DOVE LAW GROUP, LLC
James Fletcher Thompson, SC Bar #13082
Post Office Box 1853
Spartanburg, SC 29304
Jim@TDLawGroup.com

Attorneys for Respondents

April 3, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Federal

South Carolina

Other Jurisdictions

STATUTES

Federal

South Carolina

REGULATIONS

RULES

OTHER

STATEMENT OF THE CASE

This class action involves an across-the-board, $20 per month cut of adoption subsidies to over sixteen hundred (1,600) South Carolina families and the adopted children beneficiaries. The stated purpose of the contract specifying these monthly payments is to benefit the adopted children of South Carolina, such as BLH. (*See* p. 1 of Adoption Subsidy Agreement).

This cut was implemented by the South Carolina Department of Social Services (DSS) in 2002 to both the adoption subsidy and to foster care payments. As will be described more fully in this brief, this cut in foster payments necessitated a commensurate reduction in the adoption subsidy. On November 30, 2004, the foster payment was reinstated by that $20. The adoption subsidy has not been reinstated. Beginning with the December 2004 adoption subsidy payment, BLH and the members of the certified class allege DSS's failure to pay the face value of the contract constitutes a breach of contract for which there is no defense and that the adopted children are entitled to recovery.

Initially brought in state court and removed by DSS to federal court, this case was filed in 2011 as a 42 U.S.C. Section 1983 action against the DSS Directors individually: Elizabeth Patterson, Kim Aydlette, Kathleen Hayes, and Lillian Koller. The plaintiffs were listed as "Kenneth and Angela Hensley, as adoptive parents of BLH (dob 02-20-97)." (Case No. 2011-CP-42-3992) (Federal Case No. after removal - 7:11-cv-02827-GRA). The individual defendants moved to dismiss on the basis of the statute of limitations; the plaintiffs corrected the caption and amended the complaint to clarify that the true party in interest was the child BLH. Once the class certification was sought, again the caption was modified to reflect the class nature of the suit. At that time it was changed to "BLH (dob

2/20/97) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated." The individual defendants filed a motion for summary judgment based on qualified immunity, including various exhibits. BLH filed a cross motion for summary judgment also with exhibits. Included in the exhibits were documents reflecting the cut of benefits and affidavits from both sides. After a hearing on August 9, 2012, United States Federal District Court Judge G. Ross Anderson certified the class under FRCP 23 and denied the individual defendants' motion for summary judgment by order dated August 17, 2012. The individual defendants filed an appeal to the United States Court of Appeals for the Fourth Circuit.

On April 1, 2013, BLH filed a breach of contract claim against the South Carolina Department of Social Services, which was not a defendant in the federal case. The claims were based on state law only and were filed prior to any adjudication on the federal claims. It is this state court contract claim that is presently before this Court.

BLH moved before the Fourth Circuit to dismiss the Contracts Clause cause of action without prejudice. The motion was granted on May 29, 2013 by agreement on the record at the oral argument. The remaining issue before the Fourth Circuit was only the claim under 42 U.S.C. § 673 (a)(3) of the Federal Adoption Assistance and Child Welfare Act (The Act). DSS claimed qualified immunity shields government officials performing discretionary functions from suits for civil damages under Section 1983. On July 3, 2013, the Fourth Circuit issued an order in favor of BLH's argument that Section 673 (a)(3) of the Act gave rise to a privately enforceable federal right. However, the court granted the individual defendant's qualified immunity on the basis of a limited federal exception in 673(a)(3).

Discovery then ensued on the state court contract claim. On April 7, 2014, BLH submitted its memorandum in support of the motion for class certification with exhibits. DSS submitted its memorandum in opposition to motion for class certification and a memorandum in support of summary judgment. On April 8, 2014, Judge Gibbons issued a Form 4 Order granting the motion for class certification and denying the motion for summary judgment.

On April 28, 2014, DSS filed a 59(e) Motion requesting a formal order. The Court issued a formal order on May 29, 2014. A revised Order was filed September 16, 2014. On September 26, 2014, DSS filed yet another Rule 59(e) motion. On October 16, 2014, DSS also filed a Notice of Appeal. On February 27, 2015 the circuit court held another hearing on DSS's most-recent 59(e) Motion. On April 30, 2015, Judge Gibbons issued the formal order, again granting the motion for class certification.

The Court of Appeals reversed the class certification, ruling that DSS's alleged affirmative defenses negate the benefits of a class action. *BLH v. South Carolina Department of Social Serv*., 423 S.C. 422, 814 S.E.2d 638 (Ct. App. 2018).

After the Court of Appeals denied a petition for rehearing, BLH filed a petition for writ of certiorari which was granted by the Supreme Court of South Carolina. The Supreme Court ultimately found that "under the circumstances of the case that the class certification order is not immediately appealable." *Hensley v South Carolina Department of Social Services*, 429 S.C. 144, 154, 838 S.E.2d 510, 515 (2020). The Supreme Court thereupon vacated the Court of Appeals' decision and dismissed the appeal.

In its order, the Supreme Court offered a preview of unresolved issues, two of which are before this court in this appeal: (1) the exhaustion of administrative remedies

and (2) the proper method of calculating damages under the contract. As to administrative remedies, the court noted the following:

> If the requirement to exhaust administrative remedies does not apply in this case, then the court would have to go through no individualized process. If the requirement does apply, however, the circuit court may have to conduct individual trials or hearings…..[T]he question is not before this Court at this time. The answer to the question will nevertheless affect whether this case is appropriate for class treatment. *Hensley*, 429 S.C. at 154, 838 S.E.2d at 515.

As to the damages issue, the Supreme Court summarized as follows:

> DSS raises the additional question of whether the calculation of damages requires significant individual treatment, or—as the Hensleys contend—the damages can be calculated by simple formula. All of these questions relate directly to whether the circuit court will ultimately permit this lawsuit to be maintained as a class action. *Id.*

Following remand, the parties completed discovery. Next, the parties filed cross motions for summary judgment on a number of issues, including DSS's exhaustion of administrative remedies defense. A hearing was held before Circuit Court Judge J. Mark Hayes, II on June 5, 2024. On July 9, 2024, Judge Hayes issued a Form Order granting BLH's motion for partial summary judgment as to the exhaustion of administrative remedies defense. On August 29, 2024, Judge Hayes issued a formal Order [Order I] granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motion for Summary Judgment. On that same date, he also issued an Order Denying Defendant's Motion to Decertify the Class and [Order II] Ordering Plaintiffs to Provide Notice to All Class Members.

With those orders, Judge Hayes granted partial summary judgment as to DSS's exhaustion of administrative remedies defense in BLH's favor, finding that exhaustion was futile. He also ruled that BLH had established a prima facie case for a third-party

beneficiary breach of contract, and in so doing, rejected DSS's defense alleging damages required individual calculation.

In his order, Judge Hayes also confirmed that the class definition is as follows: "[A]ll children, less than 19 years of age on the date the filing of the first state court Complaint (September 16, 2011); whose adoptive parents entered into assistance subsidy agreements with the South Carolina Department of Social Services, executed on or before June 20, 2002, and who have had at least five (5) months of lost benefits due to the cut in the assistance agreement after the date the foster care payments were reinstated in 2004." (Order II, p. 5).

The Appellant DSS then timely filed the current appeal to this Court.

STANDARD OF REVIEW

The parties stipulated to the relevant facts and agreed that this Court's decision on the exhaustion of administrative remedies issue is appropriate for summary judgment. Rule 56(c) of the *South Carolina Rules of Civil Procedure* states a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank v. Best Capital Corp.,* 341 S.C. 372, 534 S.E.2d 688 (2000). *Catawba Indian Nation v. State,* 407 S.C. 526, 535–36, 756 S.E.2d 900, 905–06 (2014).

"Whether administrative remedies must be exhausted is a matter within the [circuit court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse thereof." See *Holman v. S.C. Education Lottery Commission*. 441 S.C. 18, 29, 891 S.E.2d 701 (2023) (citing *Hyde v. S.C. Dep't of Mental Health,* 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994). "An abuse of discretion occurs where the [circuit court] was controlled by an error of law or where [the circuit court's] order is based on factual conclusions that are without evidentiary support." *Stanton v. Town of Pawleys Island,* 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (quoting *Coleman v. Dunlap,* 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992))

ARGUMENTS

(A) Overview of Argument.

i. The Adoption Subsidy Contract and its Interconnectedness with the Foster Payment.

In April 1997, BLH, a minor child, was placed in temporary foster care with Angela and Kenneth Hensley. Beginning in 1998, DSS approved monthly foster care maintenance payments of $675 to Mr. and Mrs. Hensley for the care of BLH. These payments included a "Difficulty of Care Rate" upward adjustment due to BLH's unique special needs. In early 1999, Mr. and Mrs. Hensley applied for a court order declaring them BLH's adoptive parents. (*See Hensley v. Koller*, 722 F.3d 177, 180 (4th Cir. 2013)).

In preparing their adoption application, Mr. and Mrs. Hensley sought to convert the foster care maintenance payment into an adoption assistance subsidy. On March 22, 1999, DSS and Mr. and Mrs. Hensley entered into a contract entitled Adoption Subsidy Agreement under which DSS agreed to furnish the Hensley's with monthly adoption assistance payments of $675. Two months later, a state court issued an order declaring Mr. and Mrs. Hensley the adoptive parents of BLH. Mr. and Mrs. Hensley continued to receive the $675 adoption subsidy monthly for three years. (*See Hensley v. Koller*, 722 F.3d 177, 180 (4th Cir. 2013)).

The South Carolina Department of Social Services provides adoption assistance subsidies and foster care maintenance payments pursuant to federal funding authorized by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 et seq. (2006) ("the Act"). The Act sets forth specific requirements governing foster care maintenance payments, *id.* § 672, and adoption assistance payments, *id.* § 673. With respect to the latter, a state with an approved plan "shall enter into adoption assistance agreements ... with the

adoptive parents of children with special needs." *Id*. § 673(a)(1)(A). The Act further provides:

> The amount of the [adoption assistance] payments ... shall be determined through agreement between the adoptive parents and the State ..., which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents ..., depending upon changes in such circumstances. <u>However, in no case may the amount of the adoption assistance payment ... exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home</u>.

Id. § 673(a)(3) (emphasis added). The Adoption Subsidy Agreement between DSS and adoptive parents, referenced in § 673, establishes the payment rate for an adoptive child.[1]

But in June 2002, then-DSS Director Elizabeth G. Patterson announced that as a result of "South Carolina's budget crisis," DSS would reduce by $20 all monthly foster care maintenance payments and adoption assistance subsidies, beginning that July. Pursuant to this across-the-board reduction, BLH's adoption subsidy decreased to $655.

For the next 29 months, the $20 reduction in the maximum allowable adoption subsidy (based on the $20 cut in the foster payment) was justified, pursuant to federal law (the Adoption Assistance and Child Welfare Act of 1980 § 673(a)(3)), and the terms of the contract ("adjustments in the monthly cash payments may be made" based upon "changes in the maximum allowable subsidy payment") (*see* Adoption Subsidy Agreement § I(B)). Said another way, adoptive parents had no basis to complain about the $20 subsidy reduction because their subsidy reduction matched the foster care reduction.

[1] The above discussion of the Adoption Assistance and Child Welfare Act was taken from *Hensley v. Kohler*, 722 7.3d 177, 179-80 (4th Cir. 2013).

ii. DSS's Breach of Contract.

On November 30, 2004, the symmetry between the foster payment and the adoption subsidy ended (*See* DSS answers to interrogatories # 35, August 22, 2022). DSS rescinded the $20 reduction to foster payments. DSS has never rescinded the 2002 $20 reduction to adoption subsidies; thus, for BLH, the latter remained $655. *See Hensley v. Koller*, 722 F.3d 177, 180 (4th Cir. 2013).

From the time the $20 per month foster payment was reinstated, the legal justification for the previous reduction in the adoption benefits ended. As reflected in the class definition, it is from this 2004 date forward for which the plaintiffs seek redress.

DSS's duty to provide adoptive families with the subsidy it contracted to pay was not permanently discharged by a temporary obstacle. *Temporary* impossibility does not completely discharge contractual duty. "[W]here the impossibility is only temporary, the promisor's duty is suspended only while the impossibility persists." § 77:102. Temporary impracticability, generally, 30 Williston on Contracts § 77:102 (4th ed.) Contractual duty is not fully discharged "unless performance after the cessation of the impracticability or frustration would be materially more burdensome had there been no impracticability or frustration." Restatement (Second) of Contracts § 269 (1981).

DSS's duty to provide the contracted-for adoption subsidy was never discharged. Although the specific amount that DSS agreed to pay adoptive families varied from one adoption to another, all contracts between DSS and adoptive parents set out a specific amount that DSS would pay to adoptive parents as an adoption subsidy. From June 2002 to October 2004, when the foster care subsidy was temporarily lowered, DSS lowered the adoption subsidy to remain in compliance with federal law requiring that the adoption

subsidy not exceed the foster care subsidy. In October 2004, when the foster care subsidy increased again, the federal obstacle preventing DSS's compliance with the contract was no longer in place, thus reviving DSS's duty to pay the agreed-upon subsidy amount.

Contract law supports the adoptive families in this case, both to discourage the blatant disregard of contractual obligations and to uphold South Carolina's duty of good faith and fair dealing.

First, this court should require DSS to honor their contractual agreement because South Carolina courts recognize the significance of enforcing contracts. *See Ex parte Rosenfeld*, 51 S.E.2d 88, 90-91 (S.C. 1948) (quoting *Crosswell v. Connecticut Indemnity Ass'n.*, 51 S.C. 103, 28 S.E. 200, 205 (S.C. 1948) ("A sound public policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals.") As the trial court noted, this is especially true when the breach is of an adhesion contract drafted by DSS designed to meet the needs of special needs children. (Order II, p. 4).

Contract law requires that *temporary* obstacles are treated in just that way: *temporary*. This is doubly true when a party to the contract (DSS) themselves voluntarily and unilaterally erected the very obstacle (cutting foster subsidies) that they now cite as justification for the breach. A temporary obstacle should not give promisors a free pass to permanently abandon their contractual obligations. *See, e.g.*, *Long Signature Homes, Inc. v. Fairfield Woods, Inc.*, 445 S.E.2d 489, 492 (Va. 1994) (holding that a contract to sell building lots, made temporarily impracticable by the unavailability of sewer connections, was still in effect because the possibility remained that the County could "build new facilities or expand existing ones").

Second, South Carolina's implied covenant of good faith and fair dealing should apply to prevent DSS from shirking its contractual duties. "There exists in every contract an implied covenant of good faith and fair dealing." *Hall v. UBS Fin. Servs. Inc.*, 866 S.E.2d 337, 342 (S.C. 2021). It "implies an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made." *Columbia E. Assocs. v. Bi-Lo, Inc.*, 386 S.E.2d 259, 262 (S.C. Ct. App. 1989). South Carolina courts treat the implied covenant of good faith as a "term of the contract at issue." *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 597 S.E.2d 881, 884 (S.C. Ct. App. 2004) (citing *Boddie-Noell Props., Inc. v. 42 Magnolia P'ship*, 574 S.E.2d 726, 730 (S.C. 2002)). While the duty of good faith does not create additional duties for parties to a contract, it "govern[s] the manner in which parties to a contract enforce their existing contractual rights and carry out their existing contractual duties." *Rd., LLC v. Beaufort Cnty.*, 902 S.E.2d 366, 372 (S.C. 2024).

In summary, in its contracts with adoptive families, DSS agreed to pay specific adoption subsidies in specific, agreed-upon amounts for the care of adopted children. In June 2002, DSS voluntarily reduced foster subsidy amounts as a cost-saving measure; and per federal law, adoption subsidies had to be reduced accordingly. In October 2004, DSS increased foster subsidies. With the obstacle of federal law requiring adoption subsidies to remain below foster subsidies no longer in its way, DSS was legally able—and contractually obligated—to resume paying adoptive parents their contractually agreed-upon subsidy amount. Even so, DSS did not increase the adoption subsidy or notify adoptive parents of this important change to adoptive parents' legal position. In October 2004, when DSS was once again legally able to honor its contractual obligations, reason

and justice dictate that it in fact would provide the contractually agreed-upon adoption subsidy amount. However, DSS simply chose not to; instead, it ignored the contracted-for subsidy amount and paid adoptive parents a lower subsidy. Why? No legitimate substantive reason has emerged over the last 13 plus years of litigation. Rather, DSS has deployed a whirlwind of procedural objections and defenses to avoid responsibility and frustrate the administration of justice for 1,600 of our state's most needy.

The events that occurred between 2002 and 2004 evince a breach of the terms of the contract and a further violation of the implied duty of good faith and fair dealing. DSS must not be allowed to unilaterally conjure a temporary defense through its own decision to lower foster care subsidies for a limited period and convert it into a permanent shirking of its contractual duties to adoptive parents.

iii. DSS's Defenses

DSS asserts that after the November 2024 increase in foster payments, each adoptive parent should have filed an administrative appeal through DSS's fair hearing process and cites to S.C. Reg. 114-100 et seq. BLH counters that the pursuit of administrative remedies is discretionary and not statutorily or contractually required under the facts of this case. Further, BLH asserts, and the trial court found, that pursuit of these administrative remedies would be futile. Finally, BLH asserts that the pursuit of administrative remedies should not be required because after the cut in the foster payment was rescinded in November 2004 (and those funds were restored for foster parents) the contractual obligations to the adoptive parents were ignored. Not only did the adoption subsidy cut never get restored, adoptive parents were never even informed of this disparate treatment. As such, BLH and the adoptive parents for the class were never put on notice

that the legal justification for reduction of the adoption benefits (change in the maximum allowable subsidy payment) no longer existed. Hence, the triggering event for the DSS "fair hearing" process (notice to adoptive parents) has yet to occur.

BLH asserts that the proper calculation of damages for breach of this contract is the contractual payment that was reduced in the amount of $20 per month by DSS to families who were adopting. DSS disagrees, asserting that to recover damages in this action, plaintiffs "would need to prove with particularity how the reduction in the subsidy amount by $20 a month would have individually affected the child in a negative manner." (Order II, p. 3). The trial court summarized the DSS position that plaintiffs "must show something individualized that was lost such as a dance lesson, a happy meal from McDonald's" or "a hearing aid battery or a replacement catheter." (Order II p. 4). The trial court disagreed with DSS, and instead concluded that the "claim before this court is contractual and limited to $20 a month per family for the applicable period in the class definition." (order. II p. 4). The trial court further concluded that "the child has a right to enforce the contract because the language of the agreement (an adhesion contract drafted by defendant DSS) was "to aid the adoptive parents in providing proper care for this child." (Order II p. 4)

(B) Exhaustion of Administrative Remedies is Not Required.

BLH asserts that there is no requirement to pursue administrative remedies when both the contractual and statutory language is discretionary, and not mandatory. The trial court agreed with this contention. (Order I p. 4). The court did not, however, rely on this argument, finding that the non-mandatory language was "not determinative in the granting of this motion, but is rather only instructive." (Order I p. 4). The court relied primarily on on a finding that the pursuit of administrative remedies would have been futile .

BLH respectfully requests this court to affirm the trial court grant of summary judgment as to administrative remedies for the following reasons: The language of the contract, statute, and regulation are all non-mandatory and not statutorily required; pursuit of administrative remedies was futile; and, the notice provisions of the "Fair Hearing" process were never met by DSS and as such, pursuit of administrative remedies was not triggered. (*See* Rule 208(b)(2), SCACR) (Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)).

i. Pursuit of Administrative Remedies is Discretionary and is Not Statutorily the Sole or Exclusive Procedure.

The contract (Adoption Subsidy Agreement) provides notice to the adoptive parents of their appeal rights as follows: "Adopted parents **may** appeal DSS's decision to reduce, change, or terminate any adoption subsidy in accordance with the rules and procedures of the state's fair hearing and appeal process." (p. 3) (emphasis added). As the bolded language makes clear, the Adoption Subsidy Agreement does not mandate adoptive parents to pursue this administrative remedy.

Similarly, the statute regarding redress for subsidy reductions is not mandatory. Rather, like the Adoption Subsidy Agreement, it offers a mechanism for redress but does not purport to be an exclusive or compulsory mechanism. The statute below implies to adoptive parents that pursuit of the administrative remedy is optional or discretionary.

> **SECTION 63-9-1790.** Review of decisions.
> A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child **is reviewable** according to department regulations. (emphasis added)

The DSS regulations on this subject are equally permissive, and not mandatory:

1. The family **has a right** to appeal any decision made by the department on supplemental benefits, both before and after finalization of the adoption, according to the Department's approved appeal process.

2. The family **will be informed of its right to a judicial review** in accordance with the Administrative Procedures Act. (See S. C. Reg. Section 114–4380(G)) (emphasis added).

BLH contention is supported by a comparison to the statute addressed in the recent decision of *Robinson v. South Carolina Department of Employment and Workforce*, 902 S.E.2d 41 (S.C. Ct. App. 2024). In *Robinson*, this court held that the claimants were "statutorily required to exhaust their administrative remedies" and this was the "sole and exclusive" method for challenging determinations regarding unemployment benefits." *Robinson*, 902 S.E.2d at 47 (emphasis added). The Code section offered only one method of appeal:

> **SC Code § 41-35-690 (2022)**
> The procedure provided in this chapter for appeals from a determination or redetermination to the appeal tribunal and for appeals from the tribunal, first to the Department of Employment and Workforce Appellate Panel, as established by Section 41-29-300, and afterward to the administrative law court, pursuant to Section 41-29-300(C)(1), is the **sole and exclusive appeal procedure**. *Id* at 48. (emphasis added)

There is a stark contrast between the "sole and exclusive appeal procedure" language from *Robinson* and the discretionary procedure stated in the Adoption Subsidy Agreement, section 63-9-1790, and the DSS regulations. Having a mere right to an appeal is a far cry from a mandate for a sole and exclusive mechanism for appeal. *See Stinney v. Sumter School Dist*., 17, 707 S.E.2d 397 (2011) ("the doctrine of exhaustion of administrative remedies only applies when a litigant invokes the original jurisdiction of the circuit court to adjudicate a claim, based upon a statutory violation for which the legislature has provided at administrative remedy."). (emphasis added) A fatal flaw in the DSS

argument is that no statutory violation is alleged in the facts of this case. See *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (use of word "may" signifies permission and generally means the action spoken of is optional or discretionary); *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980).

Consider the case of *Edge v. State Farm Insurance Company,* 345 S.C. 136, 139-40, 546 S.E.2d 647, (2021). A similar regulation as in the instant case made administrative remedies available, but in no way required administrative remedies to be the exclusive remedy of insured:

> South Carolina Reg. 69-13.1(IV):
>
> A. Any insured aggrieved by an insurer's application of the Plan or assignment of points *may appeal to the Chief Insurance Commissioner* for a review thereof. Unless otherwise ordered by the Commissioner, investigation and review of an appeal under this Section shall be conducted informally and without a hearing.
>
> . . .
>
> C. Any decision of the Commissioner will be made in writing, and a copy thereof will be mailed to the insured and the insurer. *Any such decision may be appealed by either party in accordance with South Carolina Code Section 38-3-210 (1976) as amended*. (emphasis in *Edge* opinion).

The *Edge* court explained that "[t]he words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation. *Byerly v. Connor*, 307 S.C. 441, 415 S.E.2d 796 (1992)." The *Edge* court reasoned that:

> Pursuant to the plain and ordinary meaning of the regulation, an aggrieved party **may** appeal to the Commissioner; however, nothing prevents the aggrieved party from bypassing an administrative hearing before the Commissioner and bringing an action in the circuit court as Edge did in this matter. **By using the word "may" instead of "shall," the regulation allows, but does not require, an aggrieved party to appeal to the Commissioner.** See *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (use of word "may" signifies permission and generally means the

> action spoken of is optional or discretionary); *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980)] (emphasis added).

The *Edge* court concluded, "[t]here is nothing in the regulation to indicate an intent on the part of the regulation's promulgator, that is, the Department of Insurance, to force an aggrieved party to pursue an administrative remedy." *Edge v. State Farm Insurance Company*, 345 S.C. 136, 139-40, 546 S.E.2d 647, (2021) (footnotes omitted)

DSS asks this court to interpret two very different statutes to mean the same thing solely on the basis that both statutes contemplate administrative remedies. These are distinct concepts, however, that cannot be conflated. On the one hand, we have a statute that states that a decision "is reviewable" according to department regulations, and that regulation states that "[t]he family has a right to appeal…." *See* § 63-9-1790 and S.C. Reg. § 114-4380(G). On the other hand is a statute that states administrative review "is the sole and exclusive appeal procedure." *see* S.C. Code § 41-35-690. Despite the permissive nature of the former and the mandatory nature of the latter, DSS nonetheless claims that the *Robinson* case is controlling. (Appellant brief, p. 15). DSS invites this court to reach a confusing and intellectually dubious holding that this drastically differing statutory language is of no moment.

The law of statutory construction, of course, requires the Court reject DSS argument. Indeed every word in every provision must be given effect insofar as it is possible under the law. None should be ignored, and none should needlessly be given interpretation that causes it to duplicate another provision or have no consequence. Antonin Scalia & Bryan A. Gardner, Reading Law (2012) at 174. DSS urges dissimilar language to be interpreted as a duplicate of the other, thereby giving no effect to the unique and permissive statute and regulation written for adoptive parents.

Both statutes govern the pursuit of administrative remedies. Statutes dealing with the same subject matter are to be interpreted together, as though they were one law. *Id*. at 252. Statutes cannot be read intelligently "if the eye is closed to considerations evidenced in affiliated statutes." *Id*. (quoting Justice Felix Frankfurter). DSS asks this court to close its eyes to the permissive nature of the statute, regulation, and adoption subsidy agreement, and instead, to reject the claims of aggrieved adoptive parents because they did not pursue an exclusive path against the department for which the parents had no statutory mandate. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). What the General Assembly says in the text of the statute is the best evidence of its intent, and this Court is bound to give effect to the legislature's expressed intent that pursuit of an administrative remedy is not required under these circumstances. *Id*.

ii. Pursuit of Administrative Remedies Would be Futile.

On June 20, 2002, the adoptive parents of the children in this class action received a letter from Elizabeth G. Patterson, then State Director of the Department of Social Services. The letter described foster and adoptive parents as "among the agencies most valuable resources" and offered Ms. Patterson's "most heartfelt thanks for nurturing and caring for the children of South Carolina." The lavish praise was a trojan horse, unfortunately, for the bad news that came shortly thereafter: a unilateral and across-the-board reduction in the contracted for monthly subsidy rate in the amount of $20 per child.

This decision did not come from a DSS county director. The decision was not made by an area director or the director of economic services. The decision was not made by the

chief financial officer or the director of human resources. The decision to cut the monthly subsidy came from the State Director.

The letter from Ms. Patterson stated that the department "**has made every effort** to avoid taking any action that affects critical services to children and families. However, **it is now necessary** to take additional measures in order to stay within the department budget." (emphasis added). Ms. Patterson continued: "Please be assured that **this action has not been taken without much thought and consternation. I would not be asking families to make this financial sacrifice if I did not feel it was necessary in order to continue to provide essential, protective service and assistance to as many children as possible.**" (emphasis added). In short, the letter from Director Patterson announced that this was a necessary action, and a decision made at the highest level of the agency.

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). Given the finality expressed in this decision by the department's highest-ranking officer, it would have been futile for an adoptive family to ask for review and expect there would have been a different result. The trial court so held. (See Order I, pp. 5-6).

The trial court further held that "to the degree this decision is discretionary the Court holds that the facts presented did not require the exhaustion of those administrative remedies because the plaintiff has established the issue of futility." (Order I pp. 4-5). "Whether administrative remedies must be exhausted is a matter within the [circuit court]'s sound discretion and [its] decision will not be disturbed on appeal absent an abuse

thereof." *Robinson*, 902 S.E.2d at 47, citing *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. 209, 217, 893 S.E2d 342, 346 (Ct. App 2023). It was proper for the trial judge to exercise that discretion in favor of special needs children:

> This Court takes judicial notice that a special needs child has financial and other needs that are more significant [than] non-special needs children and that adoption of special needs children presents more challenges to DSS to find a pool of prospective adopting parents. These payments were negotiated between the adopting parents and DSS at the time the contract was executed and included a sum deemed necessary to meet the child's needs. The overall nature of the claim being an institutional/agency decision to reduce the contractually obligated payment in the amount of $20 per month per family for care of special needs children meets the objective behind class action litigation. (Order I, p. ___)

Further support for the BLH position is found in the nature of the "fair hearing" that DSS urges the adoptive parents should have pursued. This proceeding would have been conducted before a "department employee or committee of employees" of the Defendant DSS. *See* S.C. Reg. Section 114-100(J). Should this administrative remedy be pursued, this DSS employee would be asked to confer relief that has been specifically and categorically removed from consideration by that employee's superior. It strains credulity to suggest that any employee would act in contravention of Director Patterson's June 20, 2002 unqualified conclusion that the decision had been made.

Based on the foregoing, the trial court was correct in finding that this $20 monthly payment "was not an individualized decision based on the specific needs of the adopting family or the special needs of the child. Instead, the decision was an overall financially driven agency decision." (Order p. 5.) Individualized decisions, unique to the child or the caregiver, invite further investigation and presentation of evidence; therefore, pursuit of administrative remedies under those circumstances may not be futile, as the hearing officer may conduct a proceeding where evidence is presented, witnesses are called, and "pertinent

information bearing on the issue has been introduced and examined." S.C. Reg. § 114-30(E). No such individualized decision was reached for any member of the class in the case at bar; this supports not only the futility of an administrative remedy but the propriety of class treatment and certification.

As the trial court held, "where the highest placed person within an organization has announced a decision, and that decision is an across-the-board decision and is not unique or fact specific to the denied recipient, a reasonable person would consider an appeal to be vain or futile." (Order pp. 5–6.) The "fair hearing" regulations further envision hearings "[t]o ensure *uniform application* of social services regulations and policies throughout the state." S.C. Reg. § 114-120(C) (emphasis added). In the administrative procedure urged by DSS, adoptive parents would not be contesting the *uniformity* of the $20 per month per child cut in benefits. Rather, adoptive parents would be objecting to the cut to their individual adoption benefits, albeit uniformly applied to others. As such, pursuing such an administrative remedy is an exercise in futility.

Similarly, the Supreme Court of South Carolina has found that it would be futile to require a parent to exhaust administrative remedies when a school board of trustees has already acted adversely to the parent. In *Storm M.H., v. Charleston County Board of Trustees*, 400 S.C. 478, 735 S.E.2d 492 (2012), a parent from Berkeley County sought to enroll her child in a magnet school in Charleston County. When the Board of Trustees decided that only Charleston County residents were eligible for enrollment, the parent did not pursue available administrative remedies, but instead filed an action in the circuit court. The Supreme Court held that "we find it would have been futile for Parent to exhaust her administrative remedies as the Board's decision was certainly to be unfavorable." *Id.* at

487. There, like here, when the highest placed and most powerful person or entity has already spoken, it is futile for a parent to assume the outcome of an administrative procedure would be different.

In this appeal, DSS claims adoptive parents should be required to exhaust administrative remedies, even if the hearing officer has been divested of that authority (to restore the $20 per month subsidy) by his ultimate supervisor. This contention strains credulity and is contrary to South Carolina law. "A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Robinson*, 902 S.E.2d at 48*, citing Charleston Trident Home Builders, Inc. v. Town Council of Somerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006); id. (holding the plaintiffs were not required to exhaust administrative remedies when it challenged the validity of an ordinance itself).

Said another way, adoptive parents would be asking a hearing officer who is employed by DSS to overturn a political decision made by the state director, not to address a legal issue or factual question. Our Supreme Court has determined the requirement of exhaustion of administrative remedies was excused when the Commissioner was without the authority to conduct an "investigation into purely political activities of the insurance companies and their agents." *See Robinson*, 902 S.E.2d at 49, *citing Ex Parte Allstate*, 248 S.C. at 567-68, 151 S.E.2d at 855. Similarly, a DSS-employed hearing officer would be asked to exercise his authority to overturn a political/discretionary decision made by the State Director. Again, it is reasonable for any adoptive family to assume that pursuing such an administrative remedy would be an exercise in futility.

In their brief to this court, DSS describes a "critical distinction between the 2002 and 2004 dates …" when assessing the futility issue. (Appellant brief, p 11). It would be foolhardy to assume that any administrative appeal—whether it be in 2002 or 2004—would have produced a different result. Importantly, neither the Hensleys nor other adoptive parents were ever even informed of any change in the department's hard and fast position taken in the June 20, 2002 letter. They continued to rely on Director Patterson's assurance "that this action has not been taken without much thought and consternation." And even after the foster care rate was reinstated, no notice of this fact was given to adoptive parents. To this very date and throughout this litigation, DSS has defended leaving adoption subsidies at the reduced rate, even after the foster payment rate was reinstated. An administrative appeal would have, therefore, been futile in 2002, 2004, or today.

iii. The Notice Requirements Necessary to Trigger the Administrative Review Process were Not Followed by DSS.

As we have discussed, in 1999, the Hensley's entered into a contract, entitled Adoption Subsidy Agreement under which DSS agreed to furnish the Hensleys with monthly adoption assistant payments of $675. In June 2002, then DSS Director Elizabeth Patterson announced an across-the-board reduction for all foster parents and adoptive parents. Therefore, BLH's subsidy decreased to $655. For 29 months, the reduction in the maximum allowable adoption subsidy payment was justified, pursuant to federal law and the terms of the contract.

On November 30, 2004, when the foster care subsidy payment was reinstated by DSS to $20 per month, the legal justification for the previous reduction in the adoption

benefits ended. As reflected in the class definition, it is from this 2004 date forward for which the plaintiffs seek redress. [2]

If adoptive parents were required to pursue administrative remedies, as DSS asserts, that pursuit would have been triggered in November 2004. And so, to follow DSS's legal logic, it is then, November 2004, that adoptive parents should have followed the state's fair hearing appeal process found in the DSS regulations, S.C. Reg. § 114-100 *et seq.*

The regulations define an "adverse action" from which redress can be sought. The definition of adverse action includes circumstances when the department "decreases benefits [,] which the person was previously determined eligible to receive." 114-100(A)(2). The Hensley's agree that an adverse action occurred when, after November 30, 2004, DSS continued to pay the adoption subsidy at a $20 reduction without the previous justification (that the foster care rate required it).

Next, the fair hearing procedure requires a person who believes that they have been harmed by an adverse action of DSS to request a hearing "within thirty (30) days of receiving notification of adverse action." 114-130(B)(1) (emphasis added). But how would DSS suggest that these parents were placed on notice of this purported obligation to pursue these administrative remedies?

At no time since November 30, 2004 have adoptive parents been informed that the foster care subsidy cut has been rescinded. Director Patterson's June 20, 2002 letter is the last that adoptive parents have heard on the matter. After the foster care subsidy cut was rescinded in November 2004 and those funds were restored for foster parents, adoptive

[2] For detailed treatment of DSS's duty to reinstate the subsidy to the amount it contracted to pay, see Argument A(ii).

parents were ignored — not only did the adoption subsidy cut never get restored, adoptive parents were never informed of this disparate treatment. As such, the Hensley's and the adoptive parents for the putative class members were never put on notice that the legal justification for reduction of the adoption benefits (change the maximum allowable subsidy payment) no longer existed. As such, the Hensleys should not be required to pursue administrative remedies prior to filing suit in the circuit court.

(C) BLH and the Class Members are Direct Intended Third Party Beneficiaries and have Standing to Enforce the Terms of the Contract.

DSS also appealed the trial court's denial of summary judgment on the issue of standing for BLH and the class members to bring a contractual claim as a third-party beneficiary. Specifically, the trial court's Order states:

> This case is about a contractual $20 monthly payment that was not paid by DSS to families who were adopting---through DSS--- a special needs child. The $20 monthly payments were to be paid through DSS for the child's benefit based needs. As this Court understands a "special needs" child is one who has a medical condition, physical condition, mental condition, or combination of thereof, that causes the child to have needs beyond those typical needs that may be considered customary for a child. The American With Disabilities Act may have a better definition for these children. The parties are welcomed to challenge this Court on the following conclusion, but this Court takes judicial notice that the needs of special needs child are financially more significant that non-special needs children AND that adoption of special needs children presents more challenges to the DSS to find a pool of prospective adopting parents.

(Form 4 Order by Judge J. Mark Hayes, II filed July 9, 2024, Pg., 3).

This finding was based on the plain language of the contract, which states: the $20.00 payment is for "facilitating the legal adoption of BLH . . . and to aid the adoptive parents in providing proper care for this child." (*See* p. 1 of Adoption Subsidy Agreement). In yet another stretch to the bounds of reason, DSS contends that this language does not

confer upon BLH standing to litigate because her parents, Kenneth and Angela Hensley, were the contracting parties. This ignores the patent intention of the Defendant, which elected on its own volition in the drafting of this adhesion contract to explicitly name BLH as the direct intended third-party beneficiary.

When "a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Windsor Green Owners Ass'n v. Allied Signal, Inc*., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004); *see also* 30 S.C. Jur. Contracts § 68 (citing *Svenningsen v. Knight*, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985); *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*., 384 F.3d 157 (4th Cir. 2004) (finding that under South Carolina law, when a contract is made for the benefit of a third person, that person may enforce the terms of the contract if the contracting parties intended to create direct benefit to such third person); *Fabian v. Lindsay*, 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014) (finding that a beneficiary of a trust had standing to bring a legal malpractice claim as a third party beneficiary to the estate because the very nature of an estate document "is, inherently, on third-party beneficiaries.")

The contract at issue in the case at bar is similar to that in *Fabian* because it is inherently for a third-party beneficiary and states on its face that it is for the benefit of BLH. This language confers standing upon BLH and the class members and they therefore stand in the shoes of the named contracting party for enforcement of the terms of the contract. This only makes logical sense under the facts of this case because every adopted child leaving DSS custody is a minor and the only party with which the agreement can be executed is the adult adoptive parent. DSS argument that Respondents must demonstrate

evidence of a specific loss to the third-party beneficiaries is without merit because it seeks to add an additional element of proof of individual damages. The law does not require this but rather puts the third-party beneficiary in the position to "enforce the terms of the contract." There is no requirement DSS can point to in any case stating that the third party beneficiary must identify specific damages other than the contracted for benefit owed to the beneficiary. This is a contract dispute not a tort claim. In a breach of contract claim the measure of damage is the contracted for benefit of the bargain under the agreement. As the trial court correctly found, the beneficiaries are entitled to enforce the term of the contract for the specific amount of subsidy agreed upon because the amount was negotiated and agreed upon solely for the benefit of the disabled child.

Respondent has met the threshold requirement by demonstrating the existence of a contract, its breach, and damages. *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC,* 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015)(citing elements for a breach of contract). In this case, the contract at issue would not even exist but for the purpose of conveying a benefit to the child. Accordingly, the child has the right to enforce that contract because the contract's stated purpose was "to aid the adoptive parents in providing proper care for this child." (See Adoption Subsidy Agreement, p. 1).

CONCLUSION

The Respondents request this court affirm the orders of the trial court and to remand for proceedings consistent with those orders.

HODGE LAW FIRM
Charles J. Hodge, SC Bar #2537
Post Office Box 2765
Spartanburg, SC 29304
chodge@hodgelawfirm.com

LANGLEY LAW FIRM
T. Ryan Langley, SC Bar #76558
Matthew Thomas Foss, SC Bar #104390
229 Magnolia Street
Spartanburg, SC 29302
ryan@thelangleylawfirm.com

THOMPSON DOVE LAW GROUP, LLC
James Fletcher Thompson, SC Bar #13082
Post Office Box 1853
Spartanburg, SC 29304
Jim@TDLawGroup.com

Attorneys for Respondents

April 3, 2025