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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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,..... Respondents,

v.

South Carolina Department of Social Services,..... Appellant.

AMENDED INITIAL REPLY BRIEF OF APPELLANT

ANDREW F. LINDEMANN
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Appellant

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I. The Court is urged not to address certain arguments on the Respondent BLH's breach of contract claim which were not raised to nor decided by the trial court.

As a threshold point, the Appellant South Carolina Department of Social Services ("DSS") calls to the Court's attention that the trial court did not grant the Respondent BLH summary judgment on her breach of contract claim. In fact, a review of BLH's motion for partial summary judgment filed April 14, 2024, demonstrates that BLH did not even move for summary judgment on her breach of contract claim. The motion expressly states:

> Plaintiffs move for Summary Judgment that (1) Plaintiffs are not collaterally estopped from pursuing the action; (2) Plaintiffs have standing to bring the action; (3) that the correct measure of damages is $20.00 per month as opposed to each adoptive child being required to show how he or she was harmed by the reduction in the subsidy payment; and (4) Plaintiffs are not required to exhaust their administrative remedies prior to instituting this action.

(Plaintiff's MSJ, p. 2).

Yet, BLH raises arguments in favor of her breach of contract action which were not only never raised in the trial court but also were not adjudicated by the trial court in the two orders issued. Specifically, BLH makes a novel argument unsupported by South Carolina law about "temporary obstacles" in contract law. Not surprisingly, BLH cites no authority from this state or any other jurisdiction recognizing this concept. However, the Court need not address it because, as indicated, the trial court did not grant summary judgment on BLH's breach of contract claim.

The same is also true with BLH's reliance on an implied covenant of good faith and fair dealing argument. That was not raised in the trial court. There is no mention of an implied

covenant of good faith and fair dealing in BLH's motion for summary judgment or during the June 4, 2024 motion hearing.

Frankly, it is unclear why BLH has attempted to interject new claims and issues into this appeal. Rather, this appeal should address the summary judgment granted as to DSS's exhaustion of administrative remedies defense as well as the trial court's rulings that BLH and the putative class members may pursue a breach of contract claim under a third-party beneficiary theory and that the measure of damages is the loss to the contracting parties rather than the specific loss to the third-party beneficiary. Those are the issues properly presented for appeal.

II. The trial court erred in granting the Respondent BLH's motion for partial summary judgment on the exhaustion of administrative remedies defense.

A. Appeal Rights are Mandatory

The Appellant DSS has appealed the trial court's grant of summary judgment on its exhaustion of administrative remedies defense. The trial court acknowledged that BLH presented two arguments as to that defense: (1) that it was discretionary or optional for the adoptive parents to pursue their appeal rights before filing suit, and (2) that the exhaustion of administrative remedies would be futile. In granting partial summary judgment and striking the exhaustion of administrative remedies defense, the trial court found that "the Plaintiffs have established that seeking an administrative remedy would have been a futile act." (Order I, p. 3).

However, the trial court also "agreed" with the "contention" that it was discretionary or optional for the adoptive parents to pursue their appeal rights before filing suit. (Order I, p. 4). The trial court further explained that "it can make this decision without reaching Plaintiffs' argument that the exhaustion of administrative remedies is permissive solely based on the word

'may,' which appears in the contract." (Order I, p. 4). The trial court then concluded "this argument is not determinative in the granting of this motion but is rather only instructive." (Order I, p. 4). In her response brief, BLH nonetheless argues once again that the pursuit of administrative remedies is optional or discretionary, and asks for an affirmance under Rule 220(c), SCRCP.

In its opening brief, DSS briefly addresses this issue given how it was presented by the trial court. To recap, the Supreme Court has already recognized in its earlier decision in this case that the Children's Code includes Section 20-7-1960 (currently codified as Section 63-9-1790) which provides: "A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations." S.C. Code Ann. § 20-7-1960 (Supp. 2002). *See, Hensley v. South Carolina Department of Social Services,* 429 S.C. 144, 838 S.E.2d 515 (2020). Additionally, the DSS regulations include a section captioned "Supplemental Benefits Appeals," which state:

> 1. The family has the 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 fair hearing 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. § 114-4380(G). Further, S.C. Reg. § 114-110 "allows an individual to contest an adverse action taken by [DSS] and to have his or her objections to the adverse action heard by an impartial hearing officer or committee." *See*, S.C. Reg. § 114-110. In fact, S.C. Reg. § 114-130, which describes the fair hearing process, also provides that "[t]he final decision rendered by the OAH is subject to administrative or judicial review as provided by law." S.C. Reg. § 114-130(M)(1).

In sum, those provisions describe the right to an administrative appeals process followed by judicial review to the Administrative Law Court and then to the appellate courts. There is no language in the statute or regulations that would suggest that the General Assembly intended for the appeal rights to be optional or that adoptive parents could file a lawsuit in the Circuit Court instead of first pursuing the available administrative remedies.

Nonetheless, BLH relies on language contained in the Adoption Subsidy Agreement stating that "Adoptive parent(s) 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." (R. __). BLH contends that the use of the term "may" makes the administrative appeals process created by statute optional, despite no language to that effect in the statute or regulations. Certainly, the language in the agreement does not override statutory law, and the language at issue explicitly references "the rules and procedures of the state's fair hearing and appeal process." (R. __). "It is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract." *Catawba Indian Tribe v. State of South Carolina*, 372 S.C. 519, 642 S.E.2d 751, 756 (2007). Moreover, it is well settled that statutory provisions that are applicable to a contract become part of that contract. If a contract provision contravenes an applicable statute, that provision is invalid, and the statute prevails. *Boyd v. State Farm Mut. Auto Ins. Co.*, 260 S.C. 316, 195 S.E.2d 706, 707 (1973). Thus, the provisions of the Adoption Subsidy Agreement must be read consistently with statutory law and the governing regulations.

Additionally, it is important to recognize that the use of term "may" does not always suggest that the provision is discretionary or optional. In the context of interpreting statutes, "South Carolina case law has recognized the term 'may' does not exclusively connote

discretionary conduct when construing it so would violate legislative intent." *Cricket Store 17, LLC v. City of Columbia Board of Zoning Appeals*, 428 S.C. 270, 834 S.E.2d 209, 212 (Ct. App. 2019). "When the question arises whether 'may' is to be interpreted as mandatory or permissive in a particular statute, legislative intent is controlling." *Id.* *See, Robertson v. State*, 276 S.C. 356, 278 S.E.2d 770 (1981) (the language "may be tried in magistrate's court" construed as mandatory); *T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994) (the language "may recover costs and attorneys' fees" construed as mandatory). Those cases involved the interpretation of statutes. However, in this instance, the use of the term "may" was used in a contract, and as indicated, it should not be construed inconsistently with the controlling statutory law and regulations.

As one additional point that is instructive, it is common for the term "may" to be used when addressing appeal rights because an aggrieved litigant is not required to appeal but "may" do so if it wishes to challenge the ruling below. That does not mean, however, that there is an alternative mechanism to an appeal. This is evident given that the Rule 201, SCACR, states that "[a]ppeal *may* be taken, as provided by law, from any final judgment, appealable order or decision." Rule 201, SCACR. (Emphasis added). The use of the term "may" in that context does not suggest that an appeal is optional and that there is an alternative mechanism to challenge the underlying decision. Thus, the use of the term "may" in the Adoption Subsidy Agreement should not be construed as meaning anything different from Rule 201's use of the term "may" in addressing appeal rights.

As DSS has previously argued, this Court's decision in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024), is controlling. Like the case at bar, *Robinson* is a class action lawsuit where the plaintiff and the

class members sought as monetary relief the payment of "all benefits denied as a result of [DEW's] policy of online applications." After addressing in detail the law governing the exhaustion of administrative remedies, this Court reversed and ruled that "the circuit court erred by finding Claimants were not required to exhaust their administrative remedies." 902 S.E.2d at 50. BLH suggests that *Robinson* is distinguishable because S.C. Code Ann. § 41-35-690 states that the process described by statute is the "sole and exclusive appeal procedure." However, the DSS statutes and regulations do not provide any other mechanism for an appeal nor create a private right of action to sue for money damages. The appeal rights as dictated by statute and the regulations should be deemed the only procedure for challenging a decision by DSS on the amount of an adoption subsidy.

As DSS also pointed out, it makes no sense for the General Assembly and DSS to create appeal rights, but then not to make the exhaustion of those rights mandatory before an aggrieved party can file a lawsuit. As this Court explained in *Robinson*, it is contrary to the public policy favoring judicial economy to suggest that administrative appeal rights are optional, and certainly if that were the intent, it should be spelled out with clarity in the statutes and regulations. In absence of such clear legislative intent, the general rules of exhaustion should apply, including that "[r]elief is not generally available to one who has not exhausted administrative remedies." *Robinson,* 902 S.E.2d at 47.

B. Exhaustion of Administrative Remedies is Not Futile

As DSS explained in its opening brief, the trial court erred in adopting BLH's argument that the decision in 2002 to cut the adoption subsidy amount by $20.00 was made by the DSS Director and thus it would be futile to challenge that decision. The trial court cited to the June

20, 2002 letter from then DSS Director Elizabeth G. Patterson, who, according to the trial court, "announced a unilateral and across-the-board reduction in the monthly subsidy rate of $20 per child." (Order I, p. 5). The trial court further observed:

> 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." 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."

(Order I, p. 5). Based thereon, the trial court concluded that "the letter from Director Patterson announced that this was a necessary action, and a decision made at the highest level of the agency." (Order I, p. 5). The trial court addressed no other evidence to support its futility ruling.

However, as DSS has explained, the trial court's analysis is in error because BLH and the putative class are *not challenging* the decision in 2002 to reduce the adoption subsidy by $20 per month. Instead, they contend that DSS breached its contract by failing to "readjust" or increase the subsidy in November 2004, when the foster care maintenance payments were increased. BLH does not dispute that on appeal. In her response brief, she concedes that "the $20 reduction in the maximum allowable adoption subsidy (based on the $20 cut in the foster payment) was justified, pursuant to federal law." *See*, Respondent's Brief, p. 8. This was also conceded at the motion hearing where BLH's counsel referred to the "2002 to 2004 time period which we've stipulated is not part of our damages calculation." (Tr. 67).

At the hearing, DSS argued that BLH, who had the burden of proving futility, presented no evidence that a request to DSS to increase the adoption subsidy *in 2004 or thereafter* would

have been futile. (Tr. 48-51). The only evidence discussed at the hearing by BLH's counsel was the Patterson letter from 2002, and that was also the only evidence filed in support of BLH's motion for summary judgment. (Plaintiff's MSJ). Moreover, no other evidence was cited in BLH's summary judgment memorandum. (R. ___). Certainly, the trial court did not consider any evidence from 2004 or thereafter because none is addressed in the court's order granting summary judgment on the exhaustion of administrative remedies defense. (Order I).

However, BLH obviously now recognizes that DSS's position is a correct one. The relevant time period is not 2002, but rather 2004 and thereafter. To try to fix that problem, BLH makes a number of "factual" representations for which there is no evidence submitted into the record for summary judgment. For instance, BLH claims that "[s]hould this administrative remedy be pursued, this DSS employee [a hearing officer] would be asked to confer relief that has been specifically and categorically removed from consideration by the employee's superior." *See*, Respondent's Brief, p. 20. There is no evidence of that in 2004 or thereafter, and none cited. Similarly, BLH argues that "a DSS-employed hearing officer would be asked to exercise his authority to overturn a political/discretionary decision made by the State Director." *See*, Respondent's Brief, p. 22. Again, there is no evidence of that in 2004 or thereafter, and none cited. It is pure supposition and conjecture, neither of which is admissible evidence on which to base the grant of summary judgment.

In contrast, the Adoption Subsidy Agreement expressly provides as follows: "Adjustments in monthly cash payments may be made with the concurrence of the adoptive parent(s) based upon changes in the needs of [the adopted child], in circumstances of the adoptive family, or *changes in the maximum allowable subsidy payment*." (R.___). (Emphasis added). Thus, the language in the Agreement actually allows for adjustments to be made in the

adoption subsidies where the amount in the allowable subsidy payment increases, which occurred in November 2004. That evidence should have defeated the futility argument.

In sum, the *only* actual evidence in the record on which BLH relies is the Patterson letter from 2002. That is also the *only* evidence on which the trial court relied in ruling as a matter of law that the exhaustion of administrative remedies would have been futile in 2004 or thereafter. There was no evidence presented to show that the pursuit of available administrative remedies would have been futile in 2004 or thereafter. In effect, the trial court relied on pure supposition and conjecture, but not evidence, and accordingly, it is clear that partial summary judgment was erroneously granted.

C. Notice of Adverse Action

Additionally, BLH raises another new issue in her response brief that was never argued to trial court nor decided by trial court. BLH argues that her adoptive parents were not provided notice of any adverse action. In addition to a preservation problem, that argument also fails because again there is no evidence presented that notice was not provided to BLH's adoptive parents. Obviously, the Hensleys learned of the reduction in the adoption subsidies at some point because there retained counsel and filed suit. They certainly could have pursued their administrative remedies at that point with the assistance of counsel. Moreover, as discussed above, the Hensleys could have made a request for an increase in their monthly adoption subsidy amount from November 2004 onward, and if that request had been denied, then they could have pursued their administrative remedies. In sum, the notice issue was not only not argued below, but it also clearly has no merit.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Social Services respectfully renews its request that the Court reverse the partial summary judgment granted by the trial court on the exhaustion of administrative remedies defense and further requests that the Court grant judgment to the Appellant on that defense. Alternatively, the Appellant also renews its request that the Court reverse the trial court's rulings on the third-party beneficiary and measure of damages issues.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

Counsel for Appellant South Carolina Department of Social Services

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

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant, does hereby certify that service of the **Amended Initial Reply Brief of Appellant** in the above-captioned matter was made upon all counsel of record by email only this the 30th day of May 2025, as follows:

T. Ryan Langley, Esquire
Matthew T. Foss, Esquire
Langley Law Firm
Email: ryan@thelangleylawfirm.com
Email: matt@thelangleylawfirm.com

James F. Thompson, Esquire
Thompson Dove Law Group, LLC
Email: jim@tdlawgroup.com

s/ Andrew F. Lindemann

LINDEMANN
Law Firm, P.A.

Telephone (803) 881-8920
Facsimile (803) 862-1181

5 Calendar Court, Suite 202 (29206)
Post Office Box 6923
Columbia, South Carolina 29260

ANDREW F. LINDEMANN*
Direct Dial: (803) 881-8921
Email: andrew@ldlawsc.com

*Also Admitted in North Carolina

RECEIVED
May 30 2025
SC Court of Appeals

May 30, 2025

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Kenneth and Angela Hensley, on behalf of their minor child BLH, and All Others Similarly Situated v. South Carolina Department of Social Services
Appellate Case Number: 2024-001598
Civil Action Number: 2013-CP-42-1569
Our File Number: 103.8851

Dear Ms. Kitchings:

Pursuant to Section (b)(2)the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), please find enclosed for filing the **Amended Initial Reply Brief of Appellant** with regard to the above referenced appeal. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jac
Enclosure

cc: T. Ryan Langley, Esquire *(w/ Enclosure, Via Email Only)*
Matthew T. Foss, Esquire *(w/ Enclosure, Via Email Only)*
James F. Thompson, Esquire *(w/ Enclosure, Via Email Only)*