

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED

Aug 27 2026

SC Court of Appeals

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.

RESPONDENTS' PETITION FOR HEARING

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August 27, 2026

Attorneys for Respondents

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Respondents Kenneth and Angela Hensley, on behalf of their minor child BLH and All Others Similarly Situated, by and through their attorney, James Fletcher Thompson, respectfully present this Petition for Rehearing from this court's decision in *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Situated, Respondents v. South Carolina Department of Social Services, Appellant*, Appellate Case No. 2024-001598, unpublished opinion No. 2026-UP-408, filed August 12, 2026. In reversing the lower court's order, this court overlooked or misapprehended the following points:

ARGUMENTS

- I. **In holding that BLH was required to exhaust administrative remedies, this court misapprehended or overlooked the factual and legal dissimilarities between *Robinson v. S.C. Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024) and the case at bar; the court's decision is inconsistent with Supreme Court precedent of *Edge v. State Farm Insurance Company*, 345 S.C. 136, 546 S.E.2d 647 (2001).**

This court cited *Robinson v. S.C. Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024) eight times and relied heavily upon it throughout the opinion. *Edge* was never cited nor discussed. *Robinson* is legally and factually dissimilar to the present case; *Edge* is virtually on all fours. A brief review of the Adoption Subsidy Agreement, the applicable statute, and DSS regulations demonstrates how the case at bar differs from *Robinson* and how this court misapprehended precedent.

The Adoption Subsidy Agreement states that "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." (R. p. 96) (emphasis added). The plain, ordinary and everyday meaning of the bolded language is permissive and not mandatory; the Agreement offers a mechanism for redress but does not purport to be an exclusive or compulsory mechanism.

Similarly, the Act presents adoptive parents with a mechanism for redress but does not purport to be exclusive or compulsory. Section 63-9-1790 states, “A decision concerning supplemental benefits by the department which the adoptive parents consider adverse to the child is reviewable according to department regulations.”

These “department regulations” from DSS regulations on this subject are equally permissive, and not mandatory: “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.” *See* S.C. Reg. Section 114-4380(G).

DSS invited this court to follow *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (C. App. 2024) (see Appellant’s brief, page 15, asserting that *Robinson* is controlling). This court accepted that invitation, and in so doing, this court misapprehended or overlooked stark differences between the applicable regulation in *Robinson* compared to the applicable agreement, act and regulation in the instant case.

In *Robinson*, the claimants were “statutorily required to exhaust their administrative remedies;” this was the “sole and exclusive” method for challenging determinations regarding unemployment benefits.” *Robinson*, 902 S.E.2d at 47. The 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 could hardly be more distinct. Yet, this court treated it as a distinction without a difference. This is a misapprehension of the law because a statute that makes passing reference to administrative remedies (BLH) must not be held equivalent to a statute that explicitly demands pursuit of administrative remedies (*Robinson*). *See Stinney v. Sumter School Dist. 17*, 391 S.C. 547, 550, n. 1, 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).

Consider the similar language between the case at bar and *Edge v. State Farm Insurance Company*, 345 S.C. 136, 546 S.E.2d 647 (2001). The regulation at issue in *Edge* stated:

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.*

Id. at 139 (citing South Carolina Reg. 69-13.1(IV) (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.” *Id.* (citing *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.**

Id. (citing *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); and *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980) (same)) (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*, 345 S.C. at 140 (footnote omitted).

This court incorrectly interpreted two entirely different statutory/regulatory frameworks to require the same legal outcome, seemingly on the sole basis that both contemplate administrative remedies. The *Robinson* framework (which involves the South Carolina Department of Employment and Workforce appeals) differs significantly from the framework set out for adoptive parents, and the two should not 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, this court treats them the same.

BLH invited this court (in our brief and during oral argument) to consider *Edge*. This court declined to do so. BLH asks for this court to do so now. Where a strikingly similar regulatory framework was evaluated by the Supreme Court, and where the court concluded that pursuit of administrative remedies was permissive and not mandatory, we submit that *Edge* is the controlling law; not *Robinson*.

II. The Court cited regulations for how a fair hearing should be conducted as support for whether the fair hearing process is mandatory.

In support of its ruling that neither the Agreement nor the statute authorizing administrative remedies are permissive (but instead are mandatory), this court cites regulations directing the process by which the DSS’s fair hearing appeal process must be conducted. (Opinion, page 7). This court notes that “this regulatory language is not permissive.” (Opinion, p. 7-8). BLH agrees — once the regulatory process is triggered, there is a mandatory process that must be followed. However, this regulatory process was never in fact triggered under the facts of this case.

BLH respectfully submits that this court misapprehended these regulations and places undue reliance on regulations without applicability to the issue before the court. The mandatory nature of these cited regulations (setting forth how the fair hearing process is conducted) are only relevant if the fair hearing process was triggered in the first place. In other words, this court cites regulations that are not relevant, because these regulations direct the process by which a fair hearing shall be conducted, and do not address whether an aggrieved party, like BLH, shall be forced to pursue an administrative remedy.

III. This Court misapprehended the South Carolina Supreme Court ruling in *Hensley v. South Carolina Department of Social Services*.

This court repeatedly and, we respectfully submit, incorrectly, cited *Hensley v. South Carolina Department of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020) as having previously passed judgment — either directly or impliedly — as to whether BLH was required to exhaust administrative remedies. (*See Opinion*, pp. 5-6, 8). The Supreme Court did no such thing.

On pages 5–6 of its opinion, this court describes the Supreme Court’s reference to DSS’s contention that an administrative appeals process is required; the Supreme Court’s reference to the South Carolina Adoption Supplemental Benefits Act; the Supreme Court’s reference to the annual renewing of the Agreement; and that the “parents may appeal DSS’s decision to reduce, change or terminate any adoption subsidy.” These excerpts from the Supreme Court decision give no voice to the issue of whether administrative remedies are required, yet this court concluded otherwise. The Supreme Court was careful to leave no false impression: “the [exhaustion of administrative remedies] question is not before this Court at this time.” *Hensley*, 429 S.C. at 154, 838 S.E.2d at 515. And yet this court seems to have overlooked that admonition and cites *Hensley* for a holding the court does not make, on an issue it does not reach.

Again, at page 8 in its opinion, this court assigns meaning to *Hensley* that the text of that decision does not support. The Supreme Court was, once again, referencing DSS's contention that exhaustion of administrative remedies was required; the Supreme Court passed no judgment on the issue. Again, this court implies otherwise. Instead, 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 Supreme 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. Had the Supreme Court reached a conclusion that the pursuit of an administrative remedy was required then this paragraph would be meaningless. BLH respectfully submits that this court assigned to the Supreme Court decision in *Hensley* a meaning that the Supreme Court itself disavowed.

IV. This court held that the “record is devoid of evidence that shows it would have been futile for BLH to pursue administrative remedies in 2004.” (Opinion, page 6). This court misapprehended or overlooked the BLH legal position and the facts supporting that position.

The following finding of the trial court is undisputed: the 2002 cuts to the foster care and adoption subsidies were “not an individualized decision based on the specific needs of the adopting family or the special needs of the child. Instead of the decision was an overall financially driven agency decision.” (Order dated August 29, 2024 Granting Plaintiffs’ Motion for Partial Summary Judgment and Denying Defendant’s Motion for Summary Judgment, p. 5) (hereinafter Order I).

The 2002 letter from Director Elizabeth 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 to all foster parents and adoptive parents that there was insufficient money to pay them, and the \$20 per-month per-child cut was a necessary action — a decision made at the highest level of the agency.

In 2004, when the foster parent benefit was readjusted and the adoptive parent subsidy was not, adoptive parents were given no notice of this disparate treatment. The only information they continued to have was the Patterson 2002 letter – a letter that assured adoptive parents that, when the money was available, the subsidy would be increased. Ms. Patterson states, “I hope that this reduction in foster care board and adoption subsidy payments will be temporary and the rates can be increased when the budget crisis has eased.” This court cites this statement as evidence that an appeal would not have been futile and that the DSS position was not a “hard and fast position.” (Opinion, page 6).

This court misapprehends the significance of this portion of the Patterson letter, as it cuts the other way. When the highest-ranking official announces to adoptive parents that there is insufficient money to pay the \$20 and that she hopes it will be restored when the budget crisis is eased, a reasonable adoptive parent would take Ms. Patterson at her word and assume that if the

subsidies have not been reinstated, the money is not available. An appeal would not hasten the end of a budget crisis or conjure up money that adoptive parents had been assured did not exist.

Keep in mind, adoptive parents could not expect an individualized assessment of their family needs, but instead would assume that any individual family will be treated the same as all others — it would not be until all the money was available for all families that any one family would see an increase. Therefore, the Patterson assurance that the cuts were “temporary and the rates can be increased when the Budget crisis has eased” is a reason why a reasonable adoptive parent would not appeal and would instead await the arrival of brighter times.

Even if any adoptive family learned through grapevine about the foster care rate being readjusted (perhaps through conversations with foster parents or they were themselves foster parents in addition to being adoptive parents), that news would reinforce the futility of an appeal. After all, Ms. Patterson assured them that adopted parents “are among the agency’s most valuable resources,” and assured them that an increase would come when possible. The only reasonable inference for adoptive parents who learned that the foster care rate had been readjusted when the adoption rate was not is that the agency, once again, with “much thought and consternation” had made the decision to ask “families to make this financial sacrifice” — an across-the-board sacrifice where an individualized appeal would be futile. The suggestion that an individual adoptive family should have marshalled the resources to undertake the necessary time away from the arduous task of raising adopted and/or foster children to pursue an appeal over a \$20 per month cut strains credulity. However, that is precisely what this court seems to demand in hindsight. BLH submits that our state stands on superior moral ground to such a position adverse to its most vulnerable special needs citizens and urges rehearing.

Further support for the BLH futility 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. 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 — a reasonable adoptive parent would assume that it was a vain or futile act to ask an employee to overrule a policy/financial decision from the boss. *See Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010) (recognizing an 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”).

The “fair hearing” regulations envision hearings “[t]o ensure uniform application of social services regulations and policies throughout the state.” S.C. Reg. § 114-120(C). In the administrative procedure urged by DSS (and held by this court), 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. It is anathema to this regulation (designed to promote uniform application of social services regulations and policies) to require an individual family to seek preferential treatment over other families who are similarly situated.

V. The notice requirements necessary to trigger the administrative review process were not followed by DSS. This court misapprehended or overlooked that this legal issue is properly before the court.

In 1999, the Hensleys 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. As explained in our original filing, 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.

If adoptive parents were required to pursue administrative remedies, as DSS and this court maintain, 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 Hensleys 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). There is no evidence in this record that any notice was given of this adverse action by DSS. And there is no evidence because it never occurred. Seeking to have it both ways, DSS makes the absurd assertion that "there is no evidence presented that notice was **not** provided," as if Respondents could possibly prove the negative.

(Amended Initial Reply Brief of Appellant, p. 9) (emphasis added). 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, addressed to both foster *and* adoptive parents, 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 parents were ignored. Not only did the adoption subsidy cut never get restored, adoptive parents were never informed of this disparate treatment.

This court noted at footnote 2 that DSS had no obligation to inform adoptive parents of rate changes of foster parents. Agreed. But this decision had consequences because it was only the initial rate reduction to the foster parents that ever legally justified the reduction in contractually-guaranteed adoption subsidy to begin with. DSS's decision not to inform adoptive parents of the foster parent rate change, therefore, did not trigger administrative remedies. The Hensleys 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 in the maximum allowable subsidy payment) no longer existed. DSS cannot have it both ways where they are forgiven for not notifying adoptive parents of the foster care rate change but expect adoptive parents to somehow know of this adverse action and pursue an administrative appeal.

This court did not reach this issue, holding instead that the issue was not preserved for review. (Opinion, footnote 2). BLH respectfully submits that the notice provisions of the DSS fair hearing procedure, and their applicability to these facts, is properly before the court. Rule 208(b)(2) of the South Carolina Appellate Court Rules allows BLH to raise this issue on appeal even though it was not necessary to be raised in order to prevail in the circuit court. Respondent's brief may contain argument asking the court to affirm for any ground appearing on the record as

provided by Rule 220(c). Having prevailed at the circuit court on the futility argument, BLH had no need to add a separate and independent basis upon which it could prevail, *i.e.*, DSS's failure to provide notice of the 2004 adverse action. Now, with this court holding that the circuit court erred in the futility issue, the notice issue is now squarely presented for review — as a matter of law.

The trial court correctly noted that the parties had stipulated to relevant facts and agreed that the circuit court's decision on the exhaustion of administrative remedies is appropriate for summary judgment. (Order I, p. 2). The Standard of Review section of the order (page 4) notes that issues of statutory construction (such as the statutes and regulations requiring notice in order for the administrative procedures to be triggered) should be decided as a matter of law. "Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Buonaiuto v. Town of Hilton Head Island*, 440 S.C. 144, 150, 889 S.E.2d 625, 628–29 (Ct. App. 2023) (*quoting Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)). "Furthermore, '[q]uestions of statutory interpretation are questions of law, which [this court is] free to decide without any deference to the court below.'" *Buonaiuto*, 440 S.C. at 151, 889 S.E.2d at 629 (alterations in original) (*quoting CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)).

BLH respectfully submits that this court misapprehended or overlooked this dispositive issue — that DSS never gave adoptive parents the requisite notice to trigger administrative procedures — and BLH appropriately submitted this issue to this court for review.

VI. This court overlooked an opportunity to address all substantive defenses raised by DSS.

This court did not reach DSS's argument that the trial court erred in finding BLH may pursue a breach of contract claim under a third-party beneficiary theory. *See* Opinion, footnote 1. BLH respectfully requests this court to address this issue on its merits, as it is the sole remaining

defense alleged by DSS to this class action. If, following this appeal, the Supreme Court issues a writ of certiorari to review a final decision of the Court of Appeals, BLH wants to ensure all substantive issues are properly before the Supreme Court. After 13 years of litigation on behalf of these approximately 1600 adoptive families, we respectfully request this court's final review, and we rely on our previous briefing in support of our position.

CONCLUSION

For the reasons stated, this Court should grant this Petition for Rehearing, withdraw its prior opinion, and issue a new opinion addressing the points raised. The Court should further affirm the lower court's order and remand the matter for further proceedings consistent with that ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served Respondents' Petition for
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August 27, 2026

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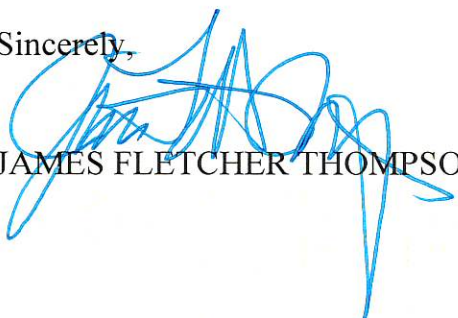
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RE: Kenneth and Angela Hensley, on behalf of their minor child
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Appellate Case No. 2024-001598

Dear Ms. Kitchings:

Please find enclosed a check in the amount of \$50 for the Petition
for Rehearing filed electronically today.

Sincerely,


JAMES FLETCHER THOMPSON

/am
Enclosure

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