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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.

RETURN TO RESPONDENTS' PETITION FOR REHEARING

On August 12, 2026, the South Carolina Court of Appeals issued an unpublished decision in favor of the Appellant South Carolina Department of Social Services ("DSS") thereby reversing the partial summary judgment granted by the trial court on DSS's exhaustion of administrative remedies defense. The Respondents Kenneth and Angela Hensley, on behalf of the minor child BLH ("BLH") subsequently filed a petition for rehearing.

A review of the arguments asserted in BLH's petition for rehearing demonstrates that this unanimous Court did not overlook or misapprehend any of the issues asserted by the parties in briefing or at oral argument on the exhaustion of administrative remedies defense. The

unpublished opinion correctly and distinctly sets forth the applicable South Carolina law on exhaustion of administrative remedies, properly examined the applicable provisions of the South Carolina Adoption Supplemental Benefits Act, the relevant regulations, and the language of the Adoption Subsidy Agreement, and determined that BLH's parents were required to exhaust available administrative remedies prior to commencing this breach of contract action in circuit court. In sum, this Court ruled:

> Here, BLH's breach of contract claim arises out of their allegations that DSS violated the Act by reducing the statutorily prescribed subsidy amount. The Act provides an administrative remedy for BLH to contest the Subsidy reduction which BLH was required to pursue. Therefore, the trial court erred as a matter of law in finding BLH was not required to exhaust administrative remedies.

(Slip Op. at 8). The arguments offered by BLH for rehearing were previously rejected by this Court, and correctly so. Respectfully, there is no basis that warrants a rehearing.

I. The Court correctly determined that BLH's parents had appeal rights which were not optional or discretionary.

The Court correctly analyzed the applicable statutes and regulations to determine that the Hensleys (BLH's adoptive parents) had appeal rights which were not optional or discretionary. In other words, contrary to their continued insistence, BLH was not granted the option of filing an action against DSS in circuit court and forgoing the available administrative remedies.

The record establishes that BLH's parents did not pursue their appeal rights. *See*, Plaintiff's Responses to First Set of Interrogatories, dated September 8, 2020, #14 ("The Plaintiff BLH's parents did not elect to appeal to DSS because they were unsure of the process and believed that legal representation would be more expensive than the hoped for result"). (R. 101). Nonetheless, the trial court granted summary judgment to BLH finding that "the Plaintiffs have

established that seeking an administrative remedy would have been a futile act." (R. 14). 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. (R. 15).

In its earlier decision in this litigation, the Supreme Court set forth a roadmap for the trial court to follow in addressing various issues on remand, including the exhaustion of administrative remedies defense. *See*, *Hensley v. South Carolina Department of Social Services*, 429 S.C. 144, 838 S.E.2d 510 (2020). As the Supreme Court recognized, 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). Additionally, the DSS regulations include a section captioned "Supplemental Benefits Appeals," which states:

> 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. As this Court correctly determined, 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, in its petition for rehearing, BLH continues to rely strictly 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. 96). 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*. Not surprisingly, BLH has still not identified any case law or other authority directing that the language in the agreement overrides the applicable statutory law, particularly where, as here, the contractual language at issue explicitly references "the rules and procedures of the state's fair hearing and appeal process." (R. 96). "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 – which is precisely what this Court has done.

BLH only cites the case of *Edge v. State Farm Ins. Co.*, 345 S.C. 136, 546 S.E.2d 647 (2001), where the Supreme Court interpreted the use of the term "may appeal" in an insurance regulation as not requiring an aggrieved insured to file an appeal. *Edge*, however, is inapposite to the scenario here. There is no statute or regulation governing the payment of adoption subsidies that includes the term "may appeal" or any language that could be construed as optional. Again, it is the statutes and regulations that control, not the language in the Adoption Subsidy Agreement which is nonetheless required to be read in accordance with statutes and regulations.

Of course, contrary to the discussion in *Edge*, it is important to also 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 very 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 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.

Obviously, what is critical is the legislative intent. This Court recognized that very point. After reviewing the applicable statute and regulations, this Court writes: "We do not construe this language as permissive, as it sets forth the process for an appeal." (Slip Op. at 7). That is a correct reading of the law and application of the legislative intent. The "may appeal" language in the Adoption Subsidy Agreement does not change that legislative intent.[1]

BLH is also critical that the Court relied on its decision in *Robinson v. South Carolina Department of Employment and Workforce*, 443 S.C. 63, 902 S.E.2d 41 (Ct. App. 2024) (certiorari denied November 14, 2024), and did not find it distinguishable. However, like the case at bar, *Robinson* is a class action lawsuit where the plaintiff and the class members sought

[1] BLH also makes a new argument that the DSS regulations cited by the Court address only how a fair hearing is conducted rather than whether the process is mandatory. The regulations cited above and in the Court's decision, however, address the appeal rights and not the procedure to be followed once those rights are exercised. Indeed, these are the same regulations identified by the Supreme Court. Moreover, BLH is precluded from raising a new argument for the first time on rehearing. *See*, *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322, 322 (2001) ("[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time"); *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) (issue raised for first time in petition for rehearing not preserved for review).

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. As this Court ruled, the appeal rights as dictated by statute and the regulations are the only process for challenging a decision by DSS on the amount of an adoption subsidy.

Finally, it bears repeating that 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.

II. The Court did not treat the Supreme Court's earlier decision as dispositive of the exhaustion of administrative remedies issue.

The Respondent BLH argues that this Court "misapprehended" the Supreme Court's earlier decision in *Hensley v. South Carolina Department of Social Services*, 429 S.C. 144, 838

S.E.2d 510 (2020). That is not the case. A reading of this Court's opinion does not even remotely imply or suggest that the Supreme Court has already decided the exhaustion of administrative remedies issue. Instead, the Supreme Court identified the issues for the circuit court to address on remand, which included an exhaustion of administrative remedies defense. The Supreme Court decision, as DSS has framed it, provided a roadmap, but it was not dispositive on any issues raised after remand. This Court demonstrated that it was well aware of the limits of the Supreme Court's decision and made its own independent determination that BLH's parents were required to exhaust the available administrative remedies. Any argument to the contrary lacks merit.

III. The Court correctly determined that "the record is devoid of evidence that shows it would have been futile for BLH to pursue administrative remedies in 2004."

As an additional issue, BLH challenges this Court's determination that "the record is devoid of evidence that shows it would have been futile for BLH to pursue administrative remedies in 2004." (Slip Op. at 6). As the Court correctly points out, "[t]he only evidence in the record concerning BLH's failure to pursue administrative remedies is their statement they 'did not elect to appeal to DSS because they were unsure of the process and believed that legal representation would be more expensive than the hoped for result.'" (Slip Op. at 6).

As DSS explained in its briefing, 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 only 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." (R. 16). 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."

(R. 16). 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." (R. 16). Importantly, 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 conceded 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." (R. 319).

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. (R. 300-303). 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. (R. 165). Moreover, no other evidence was cited in BLH's summary judgment memorandum. (R. 144-159). 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. (R. 12-18).

However, BLH continues to try to "fix" the errors made in the presentation of evidence in the trial court by making a number of "factual" representations for which there is no evidence submitted into the record for summary judgment. BLH took that approach in its Respondents' Brief and continues to do so in its petition for rehearing. 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, Petition for Rehearing, p. 9. Yet, 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 the petition, BLH now argues what adoptive parents would have "believed" or "thought" or "assumed." BLH goes so far as to suggest that "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." *See*, Petition, p. 8. Again, that is pure supposition and conjecture. There is no evidence to support such musings. If adoptive parents did believe or assume such things, that should have been placed into evidence by affidavit or deposition testimony. Notably, BLH, who had the burden of proof on the futility exception, presented no testimony from BLH's parents nor any other adoptive parents. As this Court so aptly noted,

"[t]he only evidence in the record concerning BLH's failure to pursue administrative remedies is their statement they 'did not elect to appeal to DSS because they were unsure of the process and believed that legal representation would be more expensive than the hoped for result.'" (Slip Op. at 6). That evidence came from BLH's interrogatory responses, which was submitted by DSS and not BLH. Bottom line is that BLH did not present any evidence to support its futility argument, and they cannot raise supposition and conjecture on appeal to fill that void. This Court was entirely correct in its ruling that "the record is devoid of evidence that shows it would have been futile for BLH to pursue administrative remedies in 2004." (Slip Op. at 6). No rehearing is warranted.

IV. The Court correctly determined that the "notice" issue was raised for the first time on appeal and is not preserved for appellate review.

Finally, BLH once again argues that DSS did not give them notice of the foster care benefit increase in 2004 so they could have known to appeal DSS's failure to increase the adoption subsidy. The Court correctly concluded that "this argument was not raised to the trial court and is not preserved for our review." (Slip Op. at 7).

Yet, in addition to the preservation problem as found by this Court, that argument also fails because again there is no evidence presented as to what notice was provided or not provided to BLH's adoptive parents. Obviously, the Hensleys learned of the reduction in the adoption subsidies at some point because they retained counsel and filed suit. They certainly could have pursued their administrative remedies at that point with the assistance of counsel. Moreover, as discussed in earlier briefing, 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. Accordingly, the notice issue was not only not argued below, but it also clearly has no merit.[2]

In sum, the Court correctly reversed the summary judgment entered in the court below and ruled that BLH was required to exhaust administrative remedies. The Appellant, therefore, respectfully requests that this Court deny the Respondents' petition for rehearing.

Respectfully submitted,

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September 29, 2026

[2] The Appellant DSS submits that the Respondent BLH has provided no basis that warrants a rehearing by this Court. Nonetheless, if the Court does choose to rehear the exhaustion of administrative remedies defense, the Court is respectfully reminded that it will also need to address DSS's argument that the trial court erred in finding BLH may pursue a breach of contract claim under a third-party beneficiary theory. This Court did not find it necessary to reach that issue. (Slip Op. at 4, n.1).

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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 **Return to Respondents' Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 29th day of September 2026, as follows:

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