

PM - 1-14-2011
POS - 1-7-2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-10-7404

Jeffrey D. Allen, individually,
as guardian for Jane Doe, a
minor, and as representative of
other similarly situated State
of South Carolina employees,

Appellant,

v.

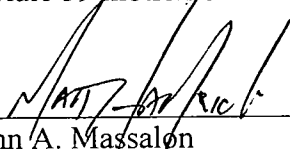
South Carolina Budget and
Control Board Employee
Insurance Program and Blue
Cross and Blue Shield of
South Carolina,

Respondent.

RECEIVED
JAN 18 2011
SC Court of Appeals

NOTICE OF APPEAL

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees, appeals the orders of the Honorable Paul M. Burch dated October 12, 2010 and November 23, 2010, respectively. The November 23, 2010 order was a denial of Appellant's motion to alter, amend, or reconsider the October 12, 2010 order, pursuant to Rule 59, SCRP. Appellant received written notice of entry of the November 23, 2010 order denying Appellant's Rule 59 motion on December 8, 2010.


John A. Massalon
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, SC 29402
(843) 727-1144

-and-

Terry E. Richardson, Jr.
Matthew D. Hamrick
Richardson, Patrick, Westbrook &

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(843) 727-6500
ATTORNEYS FOR APPELLANT

Other counsel of record:

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-and-

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(803) 734-2375
ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

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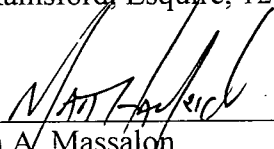
South Carolina Budget and
Control Board Employee
Insurance Program and Blue
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Respondent.

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on South Carolina Budget and Control Board Employee Insurance Program, and Blue Cross and Blue Shield of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on January 7, 2011, addressed to their attorneys of record, Theodore D. Willard, Jr., Esquire, 1002 Calhoun Street, Post Office Box 11886, Columbia, SC 29211; and Kelly H. Rainsford, Esquire, 1201 Main Street, Ste. 300, Columbia, SC 29211.


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ATTORNEYS FOR APPELLANT



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

January 14, 2011

Hon. Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JAN 18 2011
SC Court of Appeals

Re: *Jeffrey Allen v. SC Budget Control Board Employee
Insurance Program, et al., case no.: 2009-CP-10-7404*

James C. Bradley
Michael J. Brickman
Elizabeth Middleton Burke
J. David Butler
Aaron R. Dias
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Nina H. Fields
Thomas P. Gressette, Jr.
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Of Counsel:
Daniel O. Myers
Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz

Dear Ms. Gee:

Enclosed for filing in the above-referenced case please find the following:

- 1) The original and one copy of the Notice of Appeal;
- 2) The original and one copy of the Proof of Service of Notice of Appeal;
- 3) Two copies each of the October 12, 2010 order and the November 23, 2010 order being challenged on appeal; and
- 4) Our firm's check for \$100 for the filing fee.

Please file these and return copies, stamped filed, to me in the enclosed self-addressed, stamped envelope. I have copied opposing counsel.

Thank you.

Sincerely,

Matthew D. Hamrick

Enclosures

cc: Theodore D. Willard, Jr., Esq. (w/ enclosures)
Kelly H. Rainsford, Esq. (w/enclosures)

) IN THE COURT OF COMMON PLEAS

) OF THE NINTH JUDICIAL CIRCUIT

) C/A No.: 2009-CP-10-7404

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

FILED
2010 NOV 29 PM 1:50
JULIE J. KRISTROB
CLERK OF COURT
BY _____
and reexamining my

)
)
)
)
)


Honorable Paul M. Burch
Judge, Fourth Judicial Circuit

Pageland, South Carolina
November 23, 2010

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



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76



MASSALON, JOHN A
PO BOX 859
CHARLESTON SC 29402-0859

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

- ORDER - ORDER DENYING PLNTFF'S MOTION TO RECONSIDER

THIS JUDGMENT WAS ENTERED ON THE 29TH DAY OF NOVEMBER, 2010 AND A COPY MAILED
FIRST-CLASS THIS 4TH DAY OF DECEMBER, 2010 TO ALL COUNSEL OF RECORD AND/OR
ALL PERSONS ENTITLED TO RECEIVE NOTICE.
YOU MAY VIEW AND DOWNLOAD THIS DOCUMENT AT WWW3.CHARLESTONCOUNTY.ORG

MASSALON, JOHN A
PO BOX 859
CHARLESTON SC 29402-0859

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Wills & Massalon

2009-CP-10-007404
ALLEN, JEFFREY D ETAL
VS.
SOUTH CAROLINA BUDGET AND CONT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Jeffrey D. Allen, individually, as guardian)
for Jane Doe, a minor, and as representative)
of other similarly situated State of South)
Carolina employees,)

Civil Action No.: 2009-CP-10-7404

Plaintiffs,)

ORDER

v.)

South Carolina Budget and Control Board)
Employee Insurance Program and Blue)
Cross and Blue Shield of South Carolina,)

Defendants.)

RECEIVED
JAN 18 2011
SC Court of Appeals

This matter is before the Court on Defendants South Carolina Budget and Control Board Employee Insurance Program's ("EIP") and Blue Cross Blue Shield of South Carolina's ("BCBSSC") Motion for a Protective Order pursuant to South Carolina Rule of Civil Procedure 26 (c) and Motion for Summary Judgment pursuant to South Carolina Rule of Civil Procedure 56 and Plaintiff's Motion to Stay Defendants' Motion for Summary Judgment and Plaintiff's Motion to Compel responses to Plaintiff's discovery. On August 26, 2010, this Court heard arguments on the above motions. For the reasons stated below, based on the arguments of counsel, the written submissions, evidence, and affidavits submitted to the Court, this Court finds Defendants' Motion for a Protective Order and Motion for Summary Judgment should be granted, and Plaintiff's Motion to Stay Defendants' Motion for Summary Judgment and Plaintiff's Motion to Compel are denied.

I. BACKGROUND

The Group Health Benefits Plan of the Employees of the State of South Carolina, the

Public School Districts, and Participating Entities ("State Health Plan") is a self-funded, non-federal governmental health plan, which is administered by the South Carolina Budget and Control Board Employee Insurance Program ("EIP"). (Affidavit of Robin Tester, ¶ 3). BCBSSC is the third-party claims administrator for the State Health Plan. BCBSSC is not an insurer of the State Health Plan. (Affidavit of Robin Tester, ¶ 4).

Plaintiff, an employee of a South Carolina School District, brings this purported class action against the State Health Plan and BCBSSC, alleging S.C. Code Ann. § 38-71-46 mandates coverage under the State Health Plan for diabetes outpatient self-management training and education. Plaintiff alleges causes of action for declaratory judgment to interpret the terms of the State Health Plan, disgorgement of benefits under the State Health Plan, reformation of the State Health Plan and for injunctive relief. Plaintiff's Complaint alleges:

5. This is an action for declaratory judgment arising from Defendants' unlawful issuance and administration of the State of South Carolina EIP Standard Plan, a plan of health benefits and insurance offered to all current and retired state employees, including public school district employees, for violation of a SC Code Section 38-71-46, for disgorgement of revenues received as a result of the unlawful issuance and administration, and for declaration to determine the value of unlawfully withheld benefits.

11. As the named Plaintiff is an employee of a South Carolina school district, has been enrolled in the EIP Standard Plan, has enrolled his dependent child in said plan who was diagnosed with Diabetes at the age of two years old, and has made multiple claims for his dependent child with a value of approximately One Thousand & 00/100 US Dollars (\$1000.00) for diabetes outpatient self-management training and education which were denied by Defendant BCBSSC as administrator to the EIP, his claim, right and privileges are typical of the proposed class.

19. Plaintiff seeks, individually and as legal guardian for Jane Doe, and on behalf of all class members, a declaration of the rights of the parties hereto: that Defendants are required to issue and administer all health benefit plans offered

through the EIP in compliance with the express mandate of South Carolina Code Section 38-71-46.

20. Plaintiff seeks an Order of the Court reforming the terms of the health benefit plan provided to all class members effective January 1, 2000 to provide the mandated diabetes coverage.

21. Plaintiff seeks an Order of the Court requiring the Defendants to disgorge monies received as a result of unlawful denials of the mandatory diabetes coverage, and to pay them to members of the putative class the present value of said unlawfully withheld revenues.

24. The Defendants should be enjoined from the wrongful takings as described above and from further denial of claims for the diabetes outpatient self-management training and education.

Defendants moved for summary judgment on the following grounds: (1) the administrative remedies under S.C. Code Ann. § 1-11-710 (C) are Plaintiff's exclusive remedy, subject only to appeal to the South Carolina Administrative Law Court pursuant to S.C. Code Ann. § 1-23-600 (D); and (2) S.C. Code Ann. § 38-71-46 does not apply to the State Health Plan. Defendants further moved for a protective order staying Plaintiff's discovery pending a determination of Defendants' Motion for Summary Judgment. Plaintiff moved to stay Defendants' Motion for Summary Judgment and to compel responses to Plaintiff's discovery.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The purpose of summary judgment is to

“expedite the disposition of cases which do not require the services of a fact finder.” Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

III. DISCUSSION

A. Defendants’ Motion For Summary Judgment And Plaintiff’s Motion To Stay Summary Judgment

The Court finds that the administrative remedies under S.C. Code Ann. § 1-11-710 (C) are Plaintiff’s exclusive remedy, subject only to appellate review to the South Carolina Administrative Law Court (“ALC”) pursuant to S.C. Code Ann. § 1-23-600 (D). A participant and/or beneficiary challenging an award of benefits under the State Health Plan is limited to the remedies set forth in S.C. Code Ann. § 1-11-710(C), which provides as follows:

Notwithstanding Sections 1-23-310 and 1-23-320 or any other provision of law, claims for benefits under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board, which shall constitute the exclusive remedy for these claims, subject only to appellate review consistent with standards provided in Section 1-23-380.

Id. (Emphasis added).

Pursuant to the allegations of Plaintiff’s Complaint, Plaintiff is requesting the Court interpret the terms of the State Health Plan to include the coverage set out in S.C. Code Ann. § 38-71-46. Plaintiff further alleges he is entitled to disgorge benefits from the plan for unlawful denials of coverage and for injunctive relief enjoining “further denial of claims for diabetes out-patient self-management training and education.” (Complaint ¶24). The interpretation of the

State Health Plan and the resolution of claims for benefits under the Plan are exactly the types of remedies contemplated by § 1-11-710(C).¹

It is undisputed that prior to filing the current action, and while the current action was pending, Plaintiff continued to avail himself of his administrative remedies under § 1-11-710(C). On September 30, 2009, Plaintiff made a first level appeal to the BCBSSC Appeals Committee regarding the denial of his claim for benefits under the State Health Plan, making the exact same argument he makes here concerning the application of S.C. Code Ann. § 38-71-46 to the State Health Plan. (Affidavit of Robin E. Tester ¶7, Exhibit A). By including this issue as part of his administrative appeal, Plaintiff recognized EIP had the authority to rule on the application of S.C. Code Ann. § 38-71-46 to the State Health Plan.

On April 2, 2010, the BCBSSC Appeals Committee informed Plaintiff in a letter that it was upholding the denial of Plaintiff's claim because the requested services were specifically excluded under the terms of the State Health Plan. BCBSSC also stated S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. (Affidavit of Robin Tester ¶8, Exhibit B). This letter further gave Plaintiff 90 days from April 2, 2010, to appeal this decision to the EIP Health Appeals Committee.

On June 30, 2010, Plaintiff appealed the denial of his claim to the EIP Health Appeals Committee. (Exhibit A to Defendants' Memorandum). As can be seen from the contents of this

¹ Paragraph 1.3 of the State Health Plan states:

1.3 Applicable Law

This Plan is established and will be maintained with the intention of meeting the requirements of all applicable federal and state laws. Any provision of this Plan, which is in conflict with the law of any governmental body or agency that has jurisdiction over this Plan, shall be interpreted to conform to the minimum requirements of such laws.

(Affidavit of Robin E. Tester, Exhibit C, p.1) (emphasis added).

letter, Plaintiff appealed the issue of the applicability of S.C. Code Ann. § 38-71-46 to the State Health Plan to the EIP Health Appeals Committee.

By letter dated August 24, 2010, the EIP Health Appeals Committee wrote Plaintiff that it was denying his claim for benefits and noted S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. This letter also informed Plaintiff that his next level of appeal was to the South Carolina Administrative Law Court. (Exhibit A to Defendants' Memorandum).

Appeals involving claims under the State Health Plan are under the exclusive jurisdiction of the ALC.² Pursuant to S.C. Code Ann. § 1-11-710(C), the exclusive remedy available to Plaintiff is the administrative review process provided by the Plan, "subject only to appellate judicial review consistent with the standards provided in Section 1-23-380." S.C. Code Ann. § 1-23-380 provides: "a party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article [the Administrative Procedures Act]." Additionally, S.C. Code Ann. § 1-23-600 (D) states: "[a]n administrative law judge also shall preside over all appeals from final decisions of contested cases pursuant to the Administrative Procedures Act...or another law..."

Plaintiff's argument that it was futile for Plaintiff to exhaust his administrative remedies, and that the letter of August 24, 2010 was evidence of this futility, is misplaced. Undeniably, Plaintiff purposely availed himself of the administrative remedies under the State Health Plan and fully exhausted the internal appeals process. Therefore, any futility argument was waived and/or mooted. Simply put, Plaintiff still has a viable remedy by appealing the denial of his claim to the ALC, which has exclusive jurisdiction over such actions.

The Court further finds Plaintiff's argument that summary judgment was premature

² Prior to July 1, 2006, appeals from EIP went directly to the Circuit Court. After July 1, 2006, pursuant to 2006 S.C. Acts 387, appeals from EIP go directly to the Administrative Law Court.

because discovery had not been completed also fails. The undisputed facts establish Plaintiff purposely availed himself of the State Health Plan's administrative remedies. Therefore, the Court was left to decide the purely legal issue of whether Plaintiff's exclusive remedy was an appeal to the ALC. The issue of interpretation of a statute is a question of law for the Court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). While Plaintiff's counsel did submit a Rule 56 (f) affidavit, that affidavit failed to identify any evidence Plaintiff expected to discover that would be relevant to the issue of whether the administrative remedies under S.C. Code Ann. § 1-11-710 (C) were Plaintiff's exclusive remedy, subject only to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600 (D). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

Plaintiff further argues that the issue of whether the administrative remedies under S.C. Code Ann. § 1-11-710 (C) were Plaintiff's exclusive remedy, subject only to appellate review to the ALC under S.C. Code Ann. § 1-23-600 (D), is a novel question of law that should not be decided at summary judgment. However, as the South Carolina Supreme Court held in Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996), where the dispute is not regarding the underlying facts but the interpretation of the law, and the development of the record will not aid in the resolution of the issues, it is proper to decide even novel questions of law on demurrer. See also Brown v. Howe, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999) (even novel questions of law can be decided at the motion to dismiss stage where development of the record will not aid resolution of the issues). In the present case, the underlying facts are not in dispute and further development of the record will not aid the resolution of the issue of whether the administrative remedies under S.C. Code Ann. § 1-11-710 (C) were Plaintiff's exclusive remedy, subject only

to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600 (D). Therefore, summary judgment is not premature.

Plaintiff also argues that based on Drummond v. State of South Carolina, 378 S.C. 362, 662 S.E.2d 587 (2008), the ALC cannot rule on whether or not S.C. Code Ann. § 38-71-46 applies to the State Health Plan. However, Drummond stands for the proposition that the ALC cannot rule on the validity of a statute because the ALC is a part of the executive branch. The ALC is charged with following the law “as written.” Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000) (“ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation.” (emphasis added)). Plaintiff argues that the final EIP Health Appeals Committee decision dated August 24, 2010, was a “regulation,” the validity of which cannot be challenged by the ALC. However, the August 24, 2010, decision was not a regulation, but merely a decision by the EIP Health Appeals Committee, which was precisely the type of decision the ALC is authorized to hear in its appellate capacity. In the current case, no one was challenging the validity of S.C. Code Ann. § 38-71-46; rather, the challenge was whether S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. Therefore, the rule set forth in Drummond has no application to the present case.

The undisputed evidence establishes Plaintiff exhausted his administrative remedies under the State Health Plan. Pursuant to § 1-11-710(C) and S.C. Code Ann. § 1-23-600 (D) Plaintiff’s exclusive remedy now is to appeal to the ALC. Accordingly, this Court finds Plaintiff’s Motion To Stay Defendants’ Motion For Summary Judgment is denied, Defendants’ Motion for Summary Judgment is granted, and Plaintiff’s Complaint should be dismissed with

prejudice as a matter of law.³

B. Defendants' Motion For Protective Order and Plaintiff's Motion To Compel

The Court Further finds Defendants were entitled to a protective order staying Plaintiff's discovery pending a determination of Defendants' Motion for Summary Judgment and denying Plaintiff's Motion to Compel. Pursuant to SCRCP 26 (c), a party may move for a protective order "for good cause shown ... to protect a party or person from annoyance...oppression, or undue burden by expense, including one or more of the following: (1) that discovery not be had; (2) that the discovery may be had only on specified terms and conditions...." The Court may control the timing and sequence of discovery pursuant to SCRCP 26 (d).

An order under Rule 26(c) to stay discovery pending determination of a dispositive motion is an appropriate exercise of a court's discretion. See Thigpen v. United States, 800 F.2d 393, 396-97 (4th Cir. 1986) ("Nor did the court err by granting the government's motion under Fed.R.Civ.P. 26(c) to stay discovery pending disposition of the 12(b) (1) motion.... Trial courts ... are given wide discretion to control this discovery process...."), overruled on other grounds, Sheridan v. United States, 487 U.S. 392, 108 S.Ct. 2449, 101 L. Ed. 2d 352 (1988); Tilley v. United States, 270 F. Supp. 2d 731, 734 (M.D.N.C. 2003), affirmed, 85 Fed. Appx. 333 (4th Cir. 2004), cert denied, 543 U.S. 819, 125 S.Ct. 64, 160 L. Ed. 2d 27 (2004); Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C.1988); Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1, 3 (D.D.C. 2001).

A stay of discovery until the determination of a dispositive motion is appropriate when (1) the issue raised is strictly one of law, (2) the motion, if successful, would be dispositive of the entire action, (3) the issue is one that cannot be cured by amending the pleadings, and (4) there is

³ Because this Court finds Plaintiff's exclusive remedy is an appeal to the ALC, this Court need not address Defendants' second ground for summary judgment, whether S.C. Code Ann. § 38-71-46 applies to the State Health Plan.

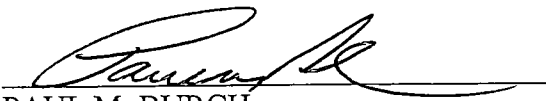
no showing of any prejudice if the Court were to stay discovery. United States v. County of Nassau, 188 F.R.D. 187 (E.D.N.Y. 1999).

In the present case, the issues raised by Defendants' Motion for Summary Judgment are dispositive legal issues. As was previously discussed, the development of the record will not aid in the resolution of the issue of whether the Plaintiff's administrative remedies under S.C. Code Ann. § 1-11-710 (C) are Plaintiff's exclusive remedy, subject only to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600 (D). Additionally, the dispositive issues involved cannot be cured by Plaintiff amending his pleadings. Also, staying discovery will not prejudice Plaintiff in that Plaintiff will be saved from wasting time on voluminous, burdensome, and costly discovery only to find out at a later stage in the litigation that his exclusive statutory remedy is an administrative appeal to the ALC. Therefore, the Court finds Defendants' Motion for a Protective Order should be granted and Plaintiff's Motion To Compel should be denied.

IV. CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's Motion To Stay Defendants' Motion For Summary Judgment and Plaintiff's Motion To Compel, and grants Defendants' Motion for a Protective Order and Defendants' Motion for Summary Judgment. Accordingly, Plaintiff's Complaint is dismissed with prejudice.

IT IS SO ORDERED.


PAUL M. BURCH
PRESIDING JUDGE

~~September~~ 10/10th, 2010
Charleston, South Carolina



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

January 14, 2011

Deborah Garrison
Post Office Box 901
Johns Island, SC 29457

Re: *Request for hearing transcript; Jeffrey Allen v. SC Budget Control Board
Employee Insurance Program, et al., case no.: 2009-CP-10-7404*

Dear Ms. Garrison:

On March 4, 2010 a motion hearing was held before the Honorable Markley Dennis in the Charleston County Court of Common Pleas in the above-referenced case. My records indicate that you were the court reporter at the hearing. I request that you provide me with a transcript of the hearing. I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

If you have any questions or need any further information from me, please do not hesitate to contact me. Thank you.

Sincerely,

Matthew D. Hamrick

cc: Theodore D. Willard, Jr., Esq.
Kelly H. Rainsford, Esq.
S.C. Court Administration
Clerk, S.C. Court of Appeals

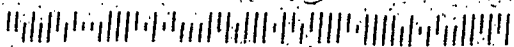
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RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

P.O. BOX 1007, 1017 CHUCK DAWLEY BLVD., MT. PLEASANT, SC 29464



jem

Hon. Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

January 14, 2011

RECEIVED

JAN 18 2011

SC Court of Appeals

H. Eugene Buckner
P.O. Box 1462
Conway, SC 29528-1462

Re: Request for hearing transcript; Jeffrey Allen v. SC Budget Control Board
Employee Insurance Program, et al., case no.: 2009-CP-10-7404

Dear Mr. Buckner:

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If you have any questions or need any further information from me, please do not hesitate to contact me. Thank you.

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cc: Theodore D. Willard, Jr., Esq.
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Thomas D. Rogers
A. Hoyt Rowell, III
Brady R. Thomas
T. Christopher Tuck
James L. Ward, Jr.
Edward J. Westbrook
Kenneth J. Wilson
Robert S. Wood

Of Counsel:
Daniel O. Myers
Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

January 14, 2011

Deborah Garrison
Post Office Box 901
Johns Island, SC 29457

Re: *Request for hearing transcript; Jeffrey Allen v. SC Budget Control Board
Employee Insurance Program, et al., case no.: 2009-CP-10-7404*

Dear Ms. Garrison:

On March 4, 2010 a motion hearing was held before the Honorable Markley Dennis in the Charleston County Court of Common Pleas in the above-referenced case. My records indicate that you were the court reporter at the hearing. I request that you provide me with a transcript of the hearing. I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

If you have any questions or need any further information from me, please do not hesitate to contact me. Thank you.

Sincerely,

Matthew D. Hamrick

cc: Theodore D. Willard, Jr., Esq.
Kelly H. Rainsford, Esq.
S.C. Court Administration
Clerk, S.C. Court of Appeals

RECEIVED

JAN 18 2011

SC Court of Appeals

James C. Bradley
Michael J. Brickman
Elizabeth Middleton Burke
J. David Butler
Aaron R. Dias
Jerry Hudson Evans
Nina H. Fields
Thomas P. Gressette, Jr.
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Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 25, 2011

John A. Massalon, Esquire
Wills & Massalon, LLC
134 Meeting St, Ste. 100
Charleston, SC 29401

Terry E. Richardson, Jr., Esquire
Matthew D. Hamrick, Esquire
1017 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464

Re: Allen, Jeffrey v. SCBCB
Case #2011183026

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/jt

cc: Kelly Hunter Rainsford, Esquire
Theodore DuBose Willard, Jr, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
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January 25, 2011

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134 Meeting St, Ste. 100
Charleston, SC 29401

Terry E. Richardson, Jr., Esquire
Matthew D. Hamrick, Esquire
1017 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464

Re: Allen, Jeffrey v. SCBCB
Case #2011183026

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the

transcript) with the Court reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,

V. Claire Allen, Deputy

Tanya A. Gee
CLERK

TAG/jt

cc: Kelly Hunter Rainsford, Esquire
Theodore DuBose Willard, Jr, Esquire

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,¹ documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:²

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

¹ See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

February 9, 2011

Deborah A. Garrison
PO Box 901
Johns Island, SC 29457

RECEIVED

FEB 11 2011

SC Court of Appeals

Re: *Allen vs. S.C. Budget and Control Board, et al.*
Common Pleas case no.: 2009-CP-10-7404
Ct. of Appeals case no.: 2011183026

James C. Bradley
Michael J. Brickman
Elizabeth Middleton Burke
J. David Butler
Aaron R. Dias
Jerry Hudson Evans
Nina H. Fields
Thomas P. Gressette, Jr.
H. Blair Hahn
Daniel S. Haltiwanger
Matthew D. Hamrick
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Gregory A. Lofstead
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T. Christopher Tuck
James L. Ward, Jr.
Edward J. Westbrook
Kenneth J. Wilson
Robert S. Wood

Of Counsel:
Daniel O. Myers
Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz

Dear Ms. Garrison

In response to your January 26, 2011 invoice, I am enclosing our firm's check in the amount of \$84.25 for the transcript. I am also providing a copy of this letter and your January 26, 2011 invoice to all counsel of record, the clerk of the Court of Appeals, and the S.C. Office of Court Administration in accordance with the SCACR.

Thank you.

Sincerely,

Matthew D. Hamrick, Esq.

Enclosures

cc: Theodore D. Willard, Jr., Esq.
Kelly H. Rainsford, Esq.
John A. Massalon, Esq.
Christy F. Allen, Esq.
S.C. Court of Appeals
S.C. Court Administration



State of South Carolina
The Circuit Court of the Ninth Judicial Circuit

Deborah A. Garrison
Circuit Court Reporter

January 26, 2011

P O Box 901
Johns Island, SC 29457
dgarrison@sccourts.org

Matthew D. Hamrick
RICHARDSON PATRICK WESTBROOK
P O Box 1007
Mount Pleasant, SC 29465

IN RE: Jeffrey Allen v. SC Budget & Control Board
Hearing of March 4, 2010
Before The Honorable R. Markley Dennis, Jr.

Transcript	\$	81.25
Postage & Handling		3.00
TOTAL	\$	84.25

Check to be made Payable to: Deborah Garrison

Federal ID No.: 57-0897678

DUE ON RECEIPT - PLEASE MAIL CHECK TODAY

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FEB 11 2011
SC Court of Appeals



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

February 25, 2011

Hon. Tanya Gee, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *Allen vs. S.C. Budget and Control Board, et al.*
Common Pleas case no.: 2009-CP-10-7404
Ct. of Appeals case no.: 2011183026

Dear Ms. Gee:

This is to respectfully request a thirty-day extension of time for Appellant to file his Initial Brief and Designation of Matter to be Included in the Record on Appeal. These are currently due March 17, 2011. Therefore, a thirty-day extension would make these due April 16, 2011. The reason for this request is that Appellant's undersigned counsel has intervening deadlines in other cases, has a March 16, 2011 pre-trial conference in a federal court case to prepare for, has a March 17, 2011 motion hearing in a federal court case to prepare for, and has a federal court trial scheduled to begin April 18, 2011.

Thank you for your consideration of this request. I have copied opposing counsel, and I have enclosed a Proof of Service and my firm's \$25 check for the filing fee.

Sincerely,

Matthew D. Hamrick

Enclosures

cc: Theodore D. Willard, Jr., Esq.
Kelly H. Rainsford, Esq.

118973 25
RECEIVED
FEB 28 2011
SC Court of Appeals

James C. Bradley
Michael J. Brickman
Elizabeth Middleton Burke
J. David Butler
Aaron R. Dias
Jerry Hudson Evans
Nina H. Fields
Thomas P. Gressette, Jr.
H. Blair Hahn
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Robert S. Wood

Of Counsel:
Daniel O. Myers
Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404

S.C. Court of Appeals Case Tracking No. 2011183026

Jeffrey D. Allen, individually,
as guardian for Jane Doe, a
minor, and as representative of
other similarly situated State
of South Carolina employees,

Appellant,

v.

South Carolina Budget and
Control Board Employee
Insurance Program and Blue
Cross and Blue Shield of
South Carolina,

Respondent.

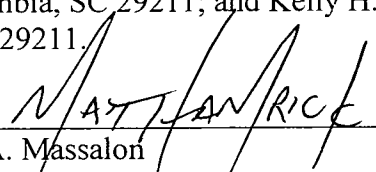
PROOF OF SERVICE

I certify that I have served the Appellant's Request for Extension of Time to File Initial Brief and Designation of Matter to be Included in Record on Appeal upon South Carolina Budget and Control Board Employee Insurance Program, and Blue Cross and Blue Shield of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on February 24, 2011, addressed to their attorneys of record, Theodore D. Willard, Jr., Esquire, 1002 Calhoun Street, Post Office Box 11886, Columbia, SC 29211; and Kelly H. Rainsford, Esquire, 1201 Main Street, Ste. 300, Columbia, SC 29211.

RECEIVED

FEB 28 2011

SC Court of Appeals


John A. Massalon
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, SC 29402
(843) 727-1144

-and-

Terry E. Richardson, Jr.
Matthew D. Hamrick
Richardson, Patrick, Westbrook &
Brickman, LLC
1017 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464
(843) 727-6500
ATTORNEYS FOR APPELLANT

RECEIVED

FEB 28 2011

SC Court of Appeals



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

March 10, 2011

BY FACSIMILE AND U.S. MAIL TO:

Ms. Elizabeth Carter
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Allen vs. S.C. Budget and Control Board, et al.*
Common Pleas Case No.: 2009-CP-10-7404
Ct. of Appeals Case No.: 2011183026

RECEIVED
MAR 11 2011
SC Court of Appeals

James C. Bradley
Michael J. Brickman
Elizabeth Middleton Burke
J. David Butler
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Of Counsel:
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Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
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David L. Suggs (MN & NY only)
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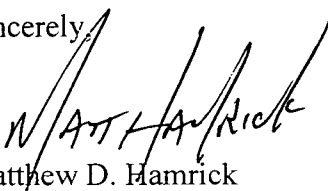
Dear Ms. Carter:

As you requested, this is to supplement my request for an extension to file appellant's initial brief and designation of matter to be included in the record on appeal in the above-referenced case. I have enclosed the two court reporter's invoices, as well as the first page of each of the two transcripts from the trial court hearings in this matter. As you will see, we received the final transcript on February 15, 2011.

Also, two of the reasons I previously gave for the request have changed. My previously-scheduled March 16, 2011 federal court pre-trial hearing and federal court trial previously set to begin April 18, 2011 have been postponed to August 11, 2011 and September 19, 2011, respectively. However, I do still have intervening deadlines in other cases and a March 17 federal court motion hearing.

Thank you for your consideration of this request. I have copied opposing counsel, and I have enclosed a Proof of Service. I have also copied South Carolina Court Administration.

Sincerely,


Matthew D. Hamrick

cc: Theodore D. Willard, Jr., Esq.
Kelly H. Rainsford, Esq.
S.C. Court Administration

***H. Eugene Buckner, CVR
OFFICIAL COURT REPORTER AT LARGE
15 JUDICIAL DISTRICT, STATE OF SOUTH CAROLINA***

P.O. Box 1462
Conway, SC 29528-1462

Phone: 843-655-7474
Email: info@verbate-a-rite.com

Invoice

Invoice #: ORG-JAvBCB-82610
Invoice Date: February 14, 2011
Proceedings of: Jeffrey Allen v S. C. Budget and Control Board – Judge Burch
Location: Charleston County Common Pleas – 8/26/10

Bill To:

Matthew D. Hamrick, Esquire
Richardson Patrick Westbrook & Brickman, LLC
P.O. Box 1007
Mount Pleasant, SC 29465

(843) 727-6568

Original (normal): (3.25 per page per Rule 607) # of Pages 39 126.75
SHIPPING AND HANDLING: 5.00

TOTAL: \$131.75

Less Deposit of \$167.50, leaving a refund due of: \$35.75

PLEASE NOTE:

An **E-Check** in your favor in the amount of **\$35.75** is being processed by Carolina First Bank and you should receive the refund check within 10 business days.

Thank you for your order.

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MAR 11 2011
SC Court of Appeals

received
2-15-11 JH

received
2-15-11 (MH)

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
IN THE COURT OF COMMON PLEAS

JEFFREY ALLEN,
PLAINTIFF,

-vs-

THE S C BUDGET AND CONTROL BOARD,
ET AL,
DEFENDANTS.

Original

2009-CP-10-7404

JUDICIAL (NONJURY) PROCEEDINGS HELD BEFORE

THE HONORABLE PAUL BURCH;

COMMENCING AT THE HOUR OF 12:04 PM, ON THE 26TH DAY OF
AUGUST, 2010, AT THE CHARLESTON COUNTY COURTHOUSE, 15TH
JUDICIAL DISTRICT, CIRCUIT COURT, CHARLESTON, SOUTH
CAROLINA.

REPORTED BY: H. EUGENE BUCKNER, CVR

ORIGINAL

H. Eugene Buckner
Official Court Reporter at Large
15th Judicial Circuit
PO Box 1462, Conway, SC 29528-1462



State of South Carolina
The Circuit Court of the Ninth Judicial Circuit

Deborah A. Garrison
Circuit Court Reporter

January 26, 2011

P O Box 901
Johns Island, SC 29457
dgarrison@sccourts.org

Matthew D. Hamrick
RICHARDSON PATRICK WESTBROOK
P O Box 1007
Mount Pleasant, SC 29465

IN RE: Jeffrey Allen v. SC Budget & Control Board
Hearing of March 4, 2010
Before The Honorable R. Markley Dennis, Jr.

Transcript	\$	81.25
Postage & Handling		3.00
TOTAL	\$	84.25

Check to be made Payable to: Deborah Garrison

Federal ID No.: 57-0897678

DUE ON RECEIPT - PLEASE MAIL CHECK TODAY

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Jeffrey D. Allen, as guardian ad litem	)	
for Jane Doe,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 09-CP-10-7404
	)	
South Carolina Budget & Control	)	
Board Insurance Program, and Blue	)	
Cross-Blue Shield of S.C.	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing was held in the above-captioned action on March 4, 2010, before The Honorable R. Markley Dennis, Jr. in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

John Massalon, Esq.
Appearing for Plaintiff

Theodore Williard, Esq.
Kelly H. Rainsford, Esq.
S.C. Budget & Control Board
Appearing for Defendant

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404

S.C. Court of Appeals Case Tracking No. 2011183026

Jeffrey D. Allen, individually,
as guardian for Jane Doe, a
minor, and as representative of
other similarly situated State
of South Carolina employees,

Appellant,

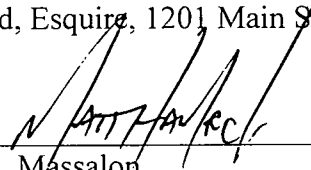
v.

South Carolina Budget and
Control Board Employee
Insurance Program and Blue
Cross and Blue Shield of
South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the letter to Elizabeth Carter supplementing Appellant's Request for Extension of Time to File Initial Brief and Designation of Matter to be Included in Record on Appeal, with its enclosures, upon South Carolina Budget and Control Board Employee Insurance Program, and Blue Cross and Blue Shield of South Carolina, by depositing a copy of it in the United States Mail, postage prepaid, on March 10, 2011, addressed to their attorneys of record, Theodore D. Willard, Jr., Esquire, 1002 Calhoun Street, Post Office Box 11886, Columbia, SC 29211; and Kelly H. Rainsford, Esquire, 1201 Main Street, Ste. 300, Columbia, SC 29211.



John A. Massalon
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, SC 29402
(843) 727-1144

-and-

Terry E. Richardson, Jr.
Matthew D. Hamrick
Richardson, Patrick, Westbrook &
Brickman, LLC
1017 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464
(843) 727-6500
ATTORNEYS FOR APPELLANT



The South Carolina Court of Appeals

JOHN CANNON FEW
CHIEF JUDGE

JOHN C. CALHOUN BUILDING
POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1890
FAX: (803) 734-2373
E-MAIL: jfew@sccourts.org

March 23, 2011

John A. Massalon, Esquire
Wills & Massalon, LLC
134 Meeting St, Ste. 100
Charleston, SC 29401

Terry E. Richardson, Jr., Esquire
Matthew D. Hamrick, Esquire
1017 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464

Kelly Hunter Rainsford, Esquire
State Budget & Control Board
1201 Main St., Ste. 300
Columbia, SC 29201-3230

Theodore DuBose Willard, Jr, Esquire
Montgomery Willard, LLC
P.O. Box 11886
Columbia, SC 29211

Re: Allen, Jeffrey v. SCBCB
Case Tracking #: 2011183026

Dear Counsel:

This letter serves as an Order granting Appellant's request for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter. I have extended the due date until April 16, 2011. I realize that this extension may not give you all the time you need to complete the Appellant's Initial Brief and Designation of Matter. I have set a conference call for 10:15 a.m. on Monday, April 4, 2011, to discuss an overall approach to setting due dates for all filings in this appeal.

The Appellant's Counsel is responsible for initiating the conference call by getting all parties on the phone at the allotted time. The call should last less than ten minutes. The participants in the call will include counsel for all parties and me. In preparation for the call, please consider the other time commitments you have in the near future so we can discuss a suitable timeframe for all parties to complete their briefs. If the time scheduled for the conference call creates a conflict, please contact the Clerk's Office at 734-1890 with all counsel on the phone. We will reschedule the call to suit you.

I look forward to talking to you on Monday.

FILED

[Handwritten signature]

Sincerely yours,

[Handwritten signature: John Cannon Few, by Janyer A. G...]
John Cannon Few

The South Carolina Court of Appeals

Jeffrey D. Allen, individually, as
guardian for Jane Doe, a minor, and as
representative of other similarly
situated State of South Carolina
employees,

Appellant,

v.

South Carolina Budget and Control
Board Employee Insurance Program
and Blue Cross and Blue Shield of
South Carolina,

Respondents.

The Honorable Paul M. Burch
Charleston County
Trial Court Case No. 2009-CP-10-07404

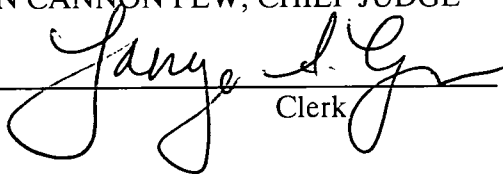
ORDER

Pursuant to a telephone conference with the parties, the Appellant's Initial Brief and Designation of Matter are due on April 26, 2011. The Respondents' Initial Brief and Designation of Matter are due June 27, 2011, and the Appellant's Initial Reply Brief is due twenty days thereafter.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE

BY


Clerk

Columbia, South Carolina

cc: John A. Massalon, Esquire
Terry E. Richardson, Jr., Esquire
Matthew D. Hamrick, Esquire
Kelly Hunter Rainsford, Esquire
Theodore DuBose Willard, Jr, Esquire

FILED

4/4/11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
S.C. Court of Appeals Case No. 2011183026

Jeffrey D. Allen, individually,
as guardian for Jane Doe, a
minor, and as representative of
other similarly situated State
of South Carolina employees,

Appellant,

v.

South Carolina Budget and
Control Board Employee
Insurance Program and Blue
Cross and Blue Shield of
South Carolina,

Respondent.

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

John A. Massalon
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, SC 29402
(843) 727-1144

-and-

Terry E. Richardson, Jr.
Matthew D. Hamrick
Richardson, Patrick, Westbrook &
Brickman, LLC
1017 Chuck Dawley Blvd.
Mt. Pleasant, SC 29464
(843) 727-6500
ATTORNEYS FOR APPELLANT

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SC Court of Appeals

Appellant designates the following matter to be included in the Record on Appeal:

Order Denying Plaintiff's Motion to Reconsider dated November 23, 2010

Order of Honorable Paul M. Burch dated October 12, 2010

Order of Honorable Markley Dennis dated March 8, 2010

Order of Honorable Markley Dennis dated March 10, 2010

Complaint filed November 25, 2009

Answer dated March 19, 2010

Transcript of March 4, 2010 hearing before Honorable Markley Dennis

Transcript of August 26, 2010 hearing before Honorable Paul M. Burch

Defendants' Notice of Motion and Motion to Dismiss and for Judgment on the Pleadings

Defendants' Memorandum in Support of Defendants' Motion to Dismiss and for Judgment on the Pleadings

Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss

Defendant's Notice of Motion and Motion for Protective Order

Defendant's Memorandum in Support of Motion for Protective Order

Defendant's Notice of Motion and Motion for Summary Judgment

Defendant's Memorandum in Support of Motion for Summary Judgment

Plaintiff's Notice of Motion and Motion to Compel Responses to Plaintiff's First Interrogatories and First Requests for Production and Motion to Stay Decision on Defendant's Motion for Summary Judgment

Plaintiff's Memorandum in Support of Motion to Compel Responses to Plaintiff's First Interrogatories and First Requests for Production, in Support of Motion to Stay Decision on Defendants' Motion for Summary Judgment or, in the Alternative, Denial of Defendants' Motion for Summary Judgment, and in Opposition to Defendants' Motion for Protective Order

Plaintiff's Notice of and Motion to Alter or Amend Pursuant to SCRCP, Rule 59(e)

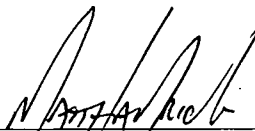
Plaintiff's Memorandum in Support of Motion to Alter or Amend Pursuant to SCRCP, Rule 59(e)

Defendants' Memorandum in Opposition to Plaintiff's Motion to Alter or Amend Pursuant to SCRPC, Rule 59(e)

Plaintiff's Reply to Defendants' Opposition to Motion to Alter or Amend Pursuant to SCRPC, Rule 59(e)

The undersigned attorney for Appellant hereby certifies that this Designation contains no matter which is irrelevant to the appeal.

Respectfully submitted,



John A. Massalon
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-and-

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
S.C. Court of Appeals Case No. 2011183026

Jeffrey D. Allen, individually,
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Appellant,

v.

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Insurance Program and Blue
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Respondent.

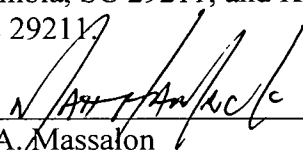
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APR 27 2011

SC Court of Appeals

PROOF OF SERVICE OF APPELLANT'S INITIAL BRIEF AND
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

I hereby certify that I have, this 26th day of April, 2011 served the Appellant's Initial Brief and Designation of Matter to be Included in Record on Appeal upon Respondents South Carolina Budget and Control Board Employee Insurance Program, and Blue Cross and Blue Shield of South Carolina, by depositing copies of said documents in the U.S. Mail, First Class, postage prepaid and addressed to their attorneys of record, Theodore D. Willard, Jr., Esquire, 1002 Calhoun Street, Post Office Box 11886, Columbia, SC 29211; and Kelly H. Rainsford, Esquire, 1201 Main Street, Ste. 300, Columbia, SC 29211.



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ATTORNEYS FOR APPELLANT



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

April 26, 2011

Hon. Tanya Gee, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Allen vs. S.C. Budget and Control Board, et al.
Common Pleas Case No.: 2009-CP-10-7404
Ct. of Appeals Case No.: 2011183026

James C. Bradley
Michael J. Brickman
Elizabeth Middleton Burke
J. David Butler
Aaron R. Dias
Jerry Hudson Evans
Nina H. Fields
Thomas P. Gressette, Jr.
H. Blair Hahn
Daniel S. Halliwanger
Matthew D. Hamrick
David Hendricks
Gregory A. Lofstead
Christian A. Marcum
Katie McElveen
Christopher J. Moore
Karl E. Novak
Kimberly Keevers Palmer
Charles W. Patrick, Jr.
Terry E. Richardson, Jr.
Thomas D. Rogers
A. Hoyt Rowell, III
Brady R. Thomas
T. Christopher Tuck
James L. Ward, Jr.
Edward J. Westbrook
Kenneth J. Wilson
Robert S. Wood

Of Counsel:
Daniel O. Myers
Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz

Dear Ms. Gee:

Enclosed for filing with the court please find: **INITIAL BRIEF OF APPELLANT, DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL and PROOF OF SERVICE OF APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL.** I would greatly appreciate it if you could send me a stamped copy of these documents. I have included a self-addressed stamped envelope for your convenience.

Thank you for your time.

Sincerely,

Julie Murray
Paralegal to Matthew D. Hamrick, Esq.

Enclosures

cc: Theodore D. Willard, Jr., Esq.
Kelly H. Rainsford, Esq.

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APR 27 2011

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
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Appellant,

v.

South Carolina Budget and
Control Board Employee
Insurance Program and Blue
Cross and Blue Shield of
South Carolina,

Respondent.

INITIAL BRIEF OF APPELLANT

John A. Massalon
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-and-

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in declining to exercise its discretion to stay decision on Respondents' motion for summary judgment?
2. Did the trial court err in granting Respondents' motion for summary judgment and dismissing Appellant's Complaint with prejudice on the basis that Appellant was required to exhaust administrative remedies?

STATEMENT OF THE CASE

Appellant, Jeffrey D. Allen (referred to herein as "Appellant") is an employee of a local South Carolina school district and an insured/member of the State Health Plan (referred to herein as the "Plan"). His daughter (referred to herein as "Jane Doe"), a dependant covered by the Plan, was diagnosed with Type I Diabetes on November 27, 2007 at the age of two (2) years old. Appellant submitted claims under the Plan for coverage of the cost of outpatient diabetes training and education, but Blue Cross and Blue Shield of South Carolina and the South Carolina Budget and Control Board Employee Insurance Program (referred to herein as "Respondents") denied the claims on the purported basis that the Plan does not include coverage for education or training for diabetes.

Appellant commenced the instant lawsuit on November 25, 2009, alleging, *inter alia*, that the Respondents' denial of the claim violated the statutory mandate for outpatient diabetes training and education contained in S.C. Code Ann. § 38-71-46¹, and that the case should be

¹ S.C. Code Ann. § 38-71-46 provides (with emphasis added):

Diabetes Mellitus coverage in health insurance policies, diabetes education.

certified as a class action. (See Complaint pp. 1-7).

Respondents initially moved to dismiss this case, and for judgment on the pleadings, arguing that Appellant had failed to exhaust his administrative remedies and that Blue Cross and Blue Shield of South Carolina is merely the administrator and not the insurer under the Plan, and Appellant opposed the motion. (See Defendants' Notice of Motion and Motion to Dismiss and for Judgment on the Pleadings; Defendants' Memorandum in Support of Defendants' Motion to Dismiss and for Judgment on the Pleadings; Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss). A hearing was held before the Honorable Markley Dennis on

(A) On or after January 1, 2000, *every* health maintenance organization, *individual and group health insurance policy, or contract issued or renewed in this State must provide coverage for* the equipment, supplies, Food and Drug Administration-approved medication indicated for the treatment of diabetes, and *outpatient self-management training and education for the treatment of people with diabetes mellitus*, if medically necessary, and prescribed by a health care professional who is legally authorized to prescribe such items and who demonstrates adherence to minimum standards of care for diabetes mellitus as adopted and published by the Diabetes Initiative of South Carolina. This subsection does not prohibit a health maintenance organization or an individual or a group health insurance policy from providing coverage for medication according to formulary or using network providers. Coverage must not be denied unless the health care professional demonstrates a persistent pattern of failure to adhere to the minimal standards of care and unless the health maintenance organization or insurer has first provided written notice to the health care professional that coverage will be denied if the health care professional fails to adhere to the minimal standards of care.

(B) Services and payment for diabetes education programs shall conform to regulations of the Health Care Financing Administration, US Department of Health and Human Services, pursuant to Section 4105 of the Balanced Budget Act of 1997. Diabetes outpatient self-management training and education shall be provided by a registered or licensed health care professional with certification in diabetes by the National Certification Board of Diabetes Educators, or other accredited program approved by the Diabetes Initiative of South Carolina, or by the Diabetes Control Program of the SC Department of Health and Environmental Control in order to meet the needs of rural communities wherein certified health care professionals providing this service are not available.

(C) Nothing contained in this section may be construed to affect in any way the ability of a managed care plan to credential or re-credential a provider.

(D) For purposes of this section: "*Health insurance policy*" means a *health benefit plan*, contract, or evidence of coverage providing health insurance coverage as defined in Section 38-71-670(6) and Section 38-71-840(14).

March 4, 2010 and Judge Dennis denied Respondents' motions to dismiss and for judgment on the pleadings. (*See* Transcript of March 4, 2010 hearing before Honorable Markley Dennis; Order of Honorable Markley Dennis dated March 8, 2010; Order of Honorable Markley Dennis dated March 10, 2010). Thereafter, on March 19, 2010 Respondents served an Answer. (*See* Answer dated March 19, 2010).

Thereafter, on May 6, 2010 Appellant served interrogatories and requests for production upon Respondents. Respondents did not provide responses to Appellant's discovery requests. Instead, Respondents filed a motion for protective order (to allow Respondents not to respond to Appellant's discovery requests) and a motion for summary judgment. (*See* Defendant's Notice of Motion and Motion for Protective Order; Defendant's Memorandum in Support of Motion for Protective Order; Defendant's Notice of Motion and Motion for Summary Judgment; Defendant's Memorandum in Support of Motion for Summary Judgment).

Appellant filed a motion to compel discovery responses and a motion to stay decision on Respondents' motion for summary judgment. (*See* Plaintiff's Notice of Motion and Motion to Compel Responses to Plaintiff's First Interrogatories and First Requests for Production and Motion to Stay Decision on Defendant's Motion for Summary Judgment; Plaintiff's Memorandum in Support of Motion to Compel Responses to Plaintiff's First Interrogatories and First Requests for Production, in Support of Motion to Stay Decision on Defendants' Motion for Summary Judgment or, in the Alternative, Denial of Defendants' Motion for Summary Judgment, and in Opposition to Defendants' Motion for Protective Order).

A hearing was held on August 26, 2010 before the Honorable Paul M. Burch and thereafter, by Order dated October 12, 2010, Judge Burch denied Appellant's motions to compel discovery responses and to stay decision on Respondents' motion for summary judgment, and

granted Respondents' motion for summary judgment and dismissed Appellant's Complaint with prejudice. (*See* Transcript of August 26, 2010 hearing before Honorable Paul M. Burch; Order of Honorable Paul M. Burch dated October 12, 2010).

Appellant filed a motion to alter, amend, or reconsider Judge Burch's October 12, 2010 Order, and Judge Burch, after considering the parties' briefing on the motion, denied the motion by Order dated November 23, 2010. (*See* Plaintiff's Notice of and Motion to Alter or Amend Pursuant to SCRCP, Rule 59(e); Plaintiff's Memorandum in Support of Motion to Alter or Amend Pursuant to SCRCP, Rule 59(e); Defendants' Memorandum in Opposition to Plaintiff's Motion to Alter or Amend Pursuant to SCRCP, Rule 59(e); Plaintiff's Reply to Defendants' Opposition to Motion to Alter or Amend Pursuant to SCRCP, Rule 59(e); Order Denying Plaintiff's Motion to Reconsider dated November 23, 2010).

Appellant received written notice of the entry of the November 23, 2010 order on December 8, 2010. Judge Burch's grant of summary judgment was based solely on the issue of exhaustion of administrative remedies and did not consider whether S.C. Code Ann. § 38-71-46 applies to the Plan. (*See* Order of Honorable Paul M. Burch dated October 12, 2010). Appellant served a Notice of Appeal on January 7, 2011.

Prior to and throughout the time the instant lawsuit has been pending, Appellant has also appealed the denial of his claim for outpatient diabetes training and education through the administrative process for doing so, first to Blue Cross and Blue Shield of South Carolina, then to the South Carolina Budget and Control Board Employee Insurance Program, and then ultimately by submitting a Request for Contested Case Hearing on September 22, 2010 to the South Carolina Administrative Law Court (referred to herein as the "ALC"). The administrative appeal in the ALC is still pending.

ARGUMENT

1. The Trial Court Erred in Declining to Exercise its Discretion to Stay Decision on Respondents' Motion for Summary Judgment.

Appellant requested that Judge Burch either deny Respondents' motion for summary judgment or exercise his discretion to stay decision on the motion for summary judgment while the administrative appeal of Appellant's claim was still pending and to give the parties an opportunity to conduct discovery. Judge Burch declined to do so, and instead granted Respondents' motion for summary judgment and dismissed Appellant's Complaint with prejudice. Judge Burch should have stayed decision on Respondents' motion for summary judgment.

Jane Doe was first diagnosed with Type I diabetes on November 27, 2007 at the age of two (2) years old, and diabetic education and training was provided during her initial three-day hospital stay. Respondents have repeatedly denied Appellant's claims for coverage of the costs of diabetes education and training (four claims since December 17, 2007, totaling over \$1,000). However, despite Appellant's numerous requests for an explanation of the denial of the claims and after nearly three (3) years of frustration and compliance with the administrative claims process, the South Carolina Budget and Control Board Employee Insurance Program on August 24, 2010 finally issued its denial of the claims and explained for the first time its assertion that S.C. Code Ann. § 38-71-46 does not apply to the Plan. As noted above, Appellant has appealed that agency decision to the ALC and the appeal is still pending.

In light of the State of South Carolina board/agency being named as a Defendant in the instant lawsuit, Appellant and his undersigned attorneys made the decision to commence the suit within two (2) years of the date of the diagnosis, so as not to risk a possible statute of limitations

defense related to the two (2) year statute of limitations in the South Carolina Tort Claims Act, if applicable. It was proper for Appellant to file the instant lawsuit while his administrative appeals were still pending because, as stated by this Court, “[a] party should not be required to ‘roll the dice’ on whether a collateral administrative proceeding will conclude prior to the running of an applicable statute of limitations in order to preserve a claim properly within the jurisdiction of the circuit court.” *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 531 (S.C. Ct. App. 2009).

The court in *Capital City* held that where a party would be harmed by the running of the statute of limitations or otherwise prejudiced if its claim is dismissed for failure to exhaust administrative remedies, and the court has determined that resolution of the administrative proceeding would impact the circuit court case, then the circuit court should properly consider a stay or continuance of the judicial action until the administrative proceedings have concluded. *Id.* at 531. While the outcome of the administrative proceeding could moot the instant lawsuit, another possible outcome is that the ALC (or possibly this Court) determines the ALC does not have the power to grant the relief requested and that the issues should be decided by the circuit court. This is the classic *catch-22* for a plaintiff, and for this reason Judge Burch should have exercised his discretion to stay decision on Respondents’ motion for summary judgment while the administrative appeal of Appellant’s claim was still pending, and given the parties an opportunity to conduct discovery.

Judge Burch had broad discretion in his supervision over the progression and disposition of the instant case in the interests of justice and judicial economy. See *Williams v. Bordon’s Inc.*, 262 S.E.2d 881, 883 (S.C. 1980). Judge Burch should have exercised his discretion and stayed decision on Respondents’ motion for summary judgment instead of granting the motion for

summary judgment and dismissing Appellant's Complaint with prejudice. Appellant should not be prejudiced by his decision to protect himself (and all putative class members) against a possible statute of limitations defense, particularly when there is no guidance in the law of whether the ALC has the power to grant the relief requested in the instant lawsuit, including: (1) certification of a class; (2) a declaration that the Plan violates S.C. Code Ann. § 38-71-46; (3) a declaration of the future rights of the putative class members with regard to claims for diabetes education and training under the Plan; (4) reformation of the Plan to comply with S.C. Code Ann. § 38-71-46; (5) an injunction to stop the Respondents from continuing their unlawful actions in the future; (6) disgorgement and return of all profits and/or monies which should have been paid to the putative class members; and (7) costs and attorneys' fees.

While the parties to this case were awaiting Judge Burch's ruling in this matter, this Court issued an opinion in *South Carolina Dept. of Consumer Affairs v. Foreclosure Specialists, Inc.* Op. No. 4749 (S.C. Ct. App. Filed Sept. 29, 2010). That case is instructive because, although addressing a different statutory scheme -- the Consumer Credit Counseling Act, this Court found that, under the more general Administrative Law Court statutes, also relied upon by Respondents in this case, the ALC did not in fact have the power to grant the Department of Consumer Affairs a refund of fees collected in violation of the Consumer Credit Counseling Act, and that any action for such relief should have been brought in circuit court. While not substantively on point, the case illustrates the risk and difficulty of predicting where the lines fall between the jurisdiction of the ALC and the circuit court.

The proper course would have been for Judge Burch to stay decision on Respondents' motion for summary judgment pending the final outcome of Appellant's administrative claim and to give the parties an opportunity to conduct discovery instead of granting the motion for

summary judgment and dismissing Appellant's Complaint with prejudice.

2. *The Trial Court Erred in Granting Respondents' Motion for Summary Judgment and Dismissing Appellant's Complaint with Prejudice on the Basis that Appellant was Required to Exhaust Administrative Remedies.*

Judge Burch granted Respondents' motion for summary judgment on the basis that the administrative remedies under S.C. Code Ann. § 1-11-710(C) were Appellant's exclusive remedy. However, Judge Burch did not address the differences between what is "pending" in the administrative process and the causes of action asserted in the instant lawsuit. The causes of action asserted in the instant lawsuit are not "claims for benefits" within the meaning of section 1-11-710(C), and continuing with the administrative appeal would not provide Appellant with an adequate remedy.

With regard to many, if not most, insurance claims, the Respondents' exhaustion defense would be applicable. However, a review of several of those cases illustrates how this case is different. For example, in *James v. South Carolina Budget and Control Board*, 640 S.E.2d 474 (S.C. Ct. App. 2007), this Court upheld the circuit court's reversal of the Budget and Control Board's denial of a claim for a child's cranial molding device as not medically necessary. That case was heard by the Budget and Control Board, appealed through the Administrative Procedures Act to the circuit court, and then to this Court. In *Grier v. South Carolina Budget and Control Board*, 07-ALJ-30-0139 (2008), the ALC upheld reversal of the Budget and Control Board's denial of a claim for abdominoplasty ("tummy tuck") as not medically necessary. In *Hendley v. South Carolina Budget and Control Board*, 481 S.E.2d 159 (S.C. Ct. App. 1996) this Court affirmed the lower court's reversal of a decision made by the Budget and Control Board to deny coverage for a hair prosthesis (or "wig") through interpretation of the language of the

benefit plan regarding prosthesis. All of these cases involved the agency/administrative review of and interpretation of its own policies and contracts, and single claims for benefits. In contrast, in the instant lawsuit Appellant seeks: (1) certification of a class; (2) a declaration that the Plan violates S.C. Code Ann. § 38-71-46; (3) a declaration of the future rights of the putative class members with regard to claims for diabetes education and training under the Plan; (4) reformation of the Plan to comply with S.C. Code Ann. § 38-71-46; (5) an injunction to stop the Respondents from continuing their unlawful actions in the future; (6) disgorgement and return of all profits and/or monies which should have been paid to the putative class members; and (7) costs and attorneys' fees. The potential result in favor of Appellant from the pending administrative proceeding would not provide the relief sought by Appellant and the putative class members in the instant lawsuit.

Section 1-11-710(C) provides that “*claims for benefits* under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board [South Carolina Budget and Control Board], which shall constitute the exclusive remedy for these claims, subject only to appellate judicial review consistent with the standards provided in Section 1-23-380.” S.C. Code Ann. § 1-11-710(C) (emphasis added). Section 1-23-380 entitled “Judicial Review Upon Exhaustion of Administrative Remedies” “does not limit utilization of or the scope of judicial review *available under other means of review, redress, relief, or trial de novo* provided by law.” S.C. Code Ann. § 1-23-380(A) (Supp. 2009) (emphasis added).

If the denial of Appellant's claims for diabetes education and training benefits is reversed in the ALC, then presumably Appellant would receive coverage only for his diabetes education claims. However, neither the Appellant's benefit plan nor the putative class members' benefit

plans would necessarily be reformed to provide the statutorily mandated insurance coverage for diabetes education. Appellant's prevailing in the administrative process would not require Respondents to review all denials made in violation of the diabetes education mandate statute since its enactment in 2000. Appellant's prevailing in the administrative process would not enjoin Respondents from violating the diabetes mandate in the future, nor force disgorgement of revenues and profits related to the illegal conduct.

Generally, "[w]hen an administrative remedy is available *to determine a question of fact*, one must seek the administrative remedy or be precluded from pursuing relief in the courts." *Stinney v. Sumter School Dist.* 17, 675 S.E.2d 760, 763 (S.C. Ct. App. 2009) (citing *Hyde v. Dept. of Mental Health*, 442 S.E.2d 582, 583 (S.C. 1994)) (emphasis added). "A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 529 (S.C. Ct. App. 2009) quoting *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 632 S.E.2d 864, 867 (S.C. 2006) (citing *Ward v. State*, 538 S.E.2d 245 (S.C. 2000)); *see also Stinney*, 675 S.E.2d at 763 (recognizing that inadequacy of the administrative appeal is an exception to the general rule requiring exhaustion).

The purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reason for denying the diabetes education claim, would not assist the Court in this case. The alleged wrong – violation of the statutory mandate as to an entire class of persons—is not one which the administrative process was designed to address. To limit Appellant to the administrative process would be to require him to pursue a vain and futile act. Courts have recognized an exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act. *See Moore v.*

Sumter County Council, 387 S.E.2d 455, 458 (S.C. 1990).

In *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 529 (S.C. Ct. App. 2009), this Court recently addressed the exhaustion of administrative remedies issue, and explained that exhaustion is a “rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional.” And, the failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction. *Id.* In the instant case, Appellant’s declaratory judgment, equitable and injunctive claims are part of the general class of cases which the court of common pleas has jurisdiction to hear. The mere fact that Appellant was also engaged in an administrative proceeding regarding a single claim for benefits did not divest the circuit court of its power to hear and determine the claims asserted in Appellant’s Complaint. Thus, the trial court had subject matter jurisdiction to hear Appellant’s claims, should not have dismissed Appellant’s Complaint, and especially not with prejudice.

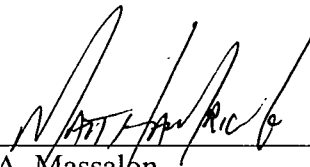
Additionally, Appellant respectfully directs the Court’s attention to *Drummond v. State of South Carolina*, 378 S.C. 362, 662 S.E.2d 587 (2008), wherein the South Carolina Supreme Court recently affirmed that the ALC and its administrative law judges “are an agency of the executive branch of government” and cannot rule on the validity of a statute or regulation. While the instant case is not a direct challenge of the constitutionality of the subject statutory coverage mandate, the South Carolina Budget and Control Board is a state agency and it has promulgated its “decision” that the Plan does not provide coverage for diabetic education. It is the validity of that state agency’s decision which is being challenged in this case. In *Drummond*, the court held that although the appellant was not challenging the constitutionality of the regulation, he was challenging its validity under state law. Because the ALC is part of the executive branch, as stated in *Video Gaming Consultants, Inc. v. South Carolina Dep’t of*

Revenue, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000), it has no authority to rule on the validity of the regulation.

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests that the Court reverse the trial court's grant of summary judgment in favor of Respondents.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2009-CP-10-7404

RECEIVED
JUN 24 2011
SC Court of Appeals

Jeffrey D. Allen, individually, as guardian for
Jane Doe, a minor, and as representative of other
Similarly situated State of South Carolina employees,.....Appellant.

vs.

South Carolina Budget and Control Board
Employee Insurance Program and BlueCross and
BlueShield of South Carolina,.....Respondents.

DESIGNATION OF MATTER
TO BE INCLUDED IN RECORD ON APPEAL

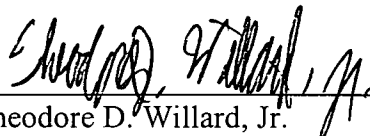
Respondents propose the following be included in the Record on Appeal:

1. Order of November 29, 2010;
2. Order of October 12, 2010;
3. Complaint;
4. Answer;
5. Transcript of Proceedings of August 26, 2010;
6. Defendants' Notice of Motion and Motion for Protective Order with Exhibits A-D;
7. Defendants' Memorandum in Support of Motion for Protective Order;
8. Defendants' Notice of Motion and Motion for Summary Judgment;
9. Affidavit of Robin Tester dated May 27, 2010 with Exhibits A-D;
10. Defendants' Memorandum in Support of Motion for Summary Judgment with Exhibits A&B;

11. Plaintiff's Notice of Motion and Motion to Compel Responses to Plaintiff's First Interrogatories and First Requests for Production and Motion to Stay Decision on Defendant's Motion for Summary Judgment;
12. Plaintiff's Memorandum in Support of Motion to Compel Responses to Plaintiff's First Interrogatories and First Requests for Production, in Support of Motion to Stay Decision on Defendants' Motion for Summary Judgment or, in the Alternative, Denial of Defendants' Motion for Summary Judgment, and in Oppositions to Defendants' Motion for Protective Order;
13. Plaintiff's Notice of and Motion to Alter or Amend Pursuant to SCRPC, Rule 59(e);
14. Plaintiff's Memorandum in Support of Motion to Alter or Amend Pursuant to SCRPC, Rule 59(e);
15. Defendants' Memorandum in Opposition to Plaintiff's Motion to Alter or Amend Pursuant to SCRPC, Rule 59(e);
16. Plaintiff's Reply to Defendants' Opposition to Motion to Alter or Amend Pursuant to SCRPC, Rule 59(e).

The undersigned certifies that this designation contains no matter which is irrelevant to this appeal.

June 23, 2011


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PROOF OF SERVICE

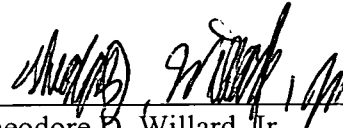
I certify that I have served the Designation of Matter to be Included in Record on Appeal on Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees by depositing a copy of it in the United States mail, postage prepaid on June 24, 2011, address to his attorneys of record Johan A. Massalon, Esquire, Post Office Box 859, Charleston, South Carolina 29402; and Matthew D. Hamrick, Esquire, 1017 Chuck Dawley Blvd., Mt. Pleasant, South Carolina 29464.

June 24, 2011

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JUN 24 2011

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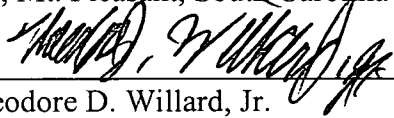
vs.

South Carolina Budget and Control Board,
Employee Insurance Program and BlueCross and
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PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief on Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees by depositing a copy of it in the United States mail, postage prepaid on June 24, 2011, address to his attorneys of record Johan A. Massalon, Esquire, Post Office Box 859, Charleston, South Carolina 29402; and Matthew D. Hamrick, Esquire, 1017 Chuck Dawley Blvd., Mt. Pleasant, South Carolina 29464.

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June 24, 2011

HAND DELIVERY

The Honorable Tanya A. Gee
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED
JUN 24 2011
SC Court of Appeals

Re: *Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees v. South Carolina Budget and Control Board Employee Insurance Program, et al.*
Court of Common Pleas Case No.: 2009-CP-10-7404
Court of Appeals Case No.: 2011183026
Our File No.: 294962

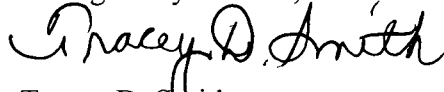
Dear Ms. Gee:

Enclosed, for filing, please find an original and one (1) copy of the Initial Brief of Respondents and Designation of Matter to Be Included in Record on Appeal in the above-referenced matter. I have also enclosed the Proof of Service of Respondents' Initial Brief and Designation of Matter to Be Included in Record on Appeal on the Appellant. I would appreciate it if you would provide filed stamped copies of the enclosed documents to the Courier.

With kind regards,

Very truly yours,

Montgomery Willard, LLC



Tracey D. Smith
Paralegal to Theodore D. Willard, Jr.

Enclosures

cc: John A. Massalon, Esquire (w/ encl.)
Matthew D. Hamrick, Esquire (w/ encl.)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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v.

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INITIAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN FAILING TO STAY A DECISION ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?
 - A. DID APPELLANT PROPERLY PRESERVE HIS ARGUMENT THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO STAY A DECISION ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT PENDING A DECISION ON APPELLANT'S ADMINISTRATIVE APPEAL TO THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT WHEN APPELLANT FAILED TO RAISE THIS ISSUE PRIOR TO JUDGMENT?
 - B. DID THE TRIAL COURT ABUSE ITS DISCRETION IN FAILING TO STAY A DECISION ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT PENDING COMPLETION OF DISCOVERY?
 - C. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DISMISSING APPELLANT'S CASE ON THE GROUNDS THAT S.C. CODE ANN. § 1-11-710(C) WAS APPELLANT'S EXCLUSIVE REMEDY, RATHER THAN STAYING A DECISION ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?
- II. DID THE TRIAL COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT S.C. CODE ANN. § 1-11-710(C) WAS APPELLANT'S EXCLUSIVE REMEDY, SUBJECT ONLY TO APPELLATE REVIEW BY THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT PURSUANT TO S.C. CODE ANN. § 1-23-600(D)?

STATEMENT OF THE CASE

On November 25, 2009, Appellant Jeffrey D. Allen, an employee of a South Carolina School District, brought a purported class action against the Group Health Benefits Plan of the Employees of the State of South Carolina, the Public School Districts, and Participating Entities ("State Health Plan") and BlueCross BlueShield of South Carolina ("BCBSSC"), alleging that S.C. Code Ann. § 38-71-46 mandated coverage under the State Health Plan for diabetes outpatient self-management training and education. (Complaint). Appellant alleged causes of action for declaratory judgment to interpret the terms of the State Health Plan, disgorgement of benefits under the State Health Plan, reformation of the State Health Plan, and for injunctive relief.

Respondents answered the complaint, denying Appellant's allegations and alleging multiple affirmative defenses, including but not limited to failure to state a claim; preemption by the exclusive statutory remedies contained in S.C. Code Ann. § 1-11-710(C); failure to exhaust administrative remedies; and lack of jurisdiction. (Answer).

On June 2, 2010, Respondents moved for summary judgment on the grounds S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan; Appellant's causes of action were preempted by the exclusive statutory remedies set forth in S.C. Code Ann. § 1-11-710(C); Appellant failed to exhaust his administrative remedies under the State Health Plan pursuant to S.C. Code Ann. § 1-11-710(C) and § 1-23-380; and this matter should be before the Administrative Law Court ("ALC") pursuant to S.C. Code Ann. § 1-23-600(D), in that any action reviewing a decision under the State Health Plan is subject to the exclusive jurisdiction of the ALC. (Defendants' Motion for Summary Judgment).

Respondents further moved for a protective order staying Appellant's discovery

pending a determination of Respondent's motion for summary judgment. (Defendants' Motion For A Protective Order). Appellant moved to stay Respondents' motion for summary judgment pending the completion of discovery and to compel responses to Plaintiff's discovery. (Plaintiff's Motion to Stay and to Compel).

A hearing was held on the parties' outstanding motions on August 26, 2010, before the Honorable Paul M. Burch. By order dated October 12, 2010, the Court denied Appellant's motion to stay and compel and granted Respondents' motion for summary judgment and for a protective order. (Order of Honorable Paul M. Burch dated October 12, 2010).

On November 8, 2010, Appellant filed a motion to alter or amend the trial court's October 12, 2010 order pursuant to SCRCP 59(e). (Plaintiff's Motion to Alter or Amend, dated November 8, 2010). Both parties submitted supporting memoranda. (See Plaintiff's Memorandum In Support of Motion to Alter or Amend, Defendants' Memorandum in Opposition to Plaintiff's Motion to Alter or Amend, Plaintiff's Reply Memorandum). By order filed November 29, 2010, the trial court denied Appellant's motion to alter or amend judgment. (Order of Honorable Paul Burch filed November 29, 2011).

Appellant received written notice of the entry of the November 29, 2010 order on December 8, 2010. Appellant served his notice of appeal on January 7, 2011.

STATEMENT OF FACTS

The issue in this case is whether a participant in the State Health Plan can obtain benefits under the plan without availing himself of the statutorily required administrative remedies. The State Health Plan is a self-funded, non-federal governmental health plan administered by the South Carolina Budget and Control Board Employee Insurance Program ("EIP") on behalf of the State of South Carolina. (Affidavit of Robin Tester, ¶ 3). BlueCross BlueShield of South Carolina ("BCBSSC") is the third-party claims administrator for the State Health Plan. BCBSSC is not an insurer of the State Health Plan. (Affidavit of Robin Tester, ¶ 4).

Appellant alleged S.C. Code Ann. § 38-71-46 mandated coverage under the State Health Plan for diabetes outpatient self-management training and education. Appellant alleged causes of action for declaratory judgment to interpret the terms of the State Health Plan, disgorgement of benefits under the State Health Plan, reformation of the State Health Plan and for injunctive relief. Appellant's complaint alleged:

5. This is an action for declaratory judgment arising from Defendants' unlawful issuance and administration of the State of South Carolina EIP Standard Plan, a plan of health benefits and insurance offered to all current and retired state employees, including public school district employees, for violation of a SC Code Section 38-71-46, for disgorgement of revenues received as a result of the unlawful issuance and administration, and for declaration to determine the value of unlawfully withheld benefits.

11. As the named Plaintiff is an employee of a South Carolina school district, has been enrolled in the EIP Standard Plan, has enrolled his dependent child in said plan who was diagnosed with Diabetes at the age of two years old, and has made multiple claims for his dependent child with a value of approximately One Thousand & 00/100 US Dollars (\$1000.00) for diabetes outpatient self-management training and education which were denied by Defendant BCBSSC as administrator to the EIP,

his claim, right and privileges are typical of the proposed class.

19. Plaintiff seeks, individually and as legal guardian for Jane Doe, and on behalf of all class members, a declaration of the rights of the parties hereto: that Defendants are required to issue and administer all health benefit plans offered through the EIP in compliance with the express mandate of South Carolina Code Section 38-71-46.

20. Plaintiff seeks an Order of the Court reforming the terms of the health benefit plan provided to all class members effective January 1, 2000 to provide the mandated diabetes coverage.

21. Plaintiff seeks an Order of the Court requiring the Defendants to disgorge monies received as a result of unlawful denials of the mandatory diabetes coverage, and to pay them to members of the putative class the present value of said unlawfully withheld revenues.

24. The Defendants should be enjoined from the wrongful takings as described above and from further denial of claims for the diabetes outpatient self-management training and education.

(Appellant's Complaint).

It is undisputed that prior to filing the current action, and while the current action was pending at the lower court, Appellant continued to avail himself of his administrative remedies under § 1-11-710(C). On September 30, 2009, Appellant made a first level appeal to the BCBSSC Appeals Committee regarding the denial of his claim for benefits under the State Health Plan, arguing that S.C. Code Ann. § 38-71-46 applied to the State Health Plan. (Affidavit of Robin E. Tester ¶7, Exhibit A).

On April 2, 2010, the BCBSSC Appeals Committee sent a letter informing Appellant it was upholding the denial of Appellant's claim because the terms of the State Health Plan specifically excluded the requested services. BCBSSC also stated S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. (Affidavit of Robin Tester ¶8,

Exhibit B). This letter further gave Appellant 90 days from April 2, 2010, to appeal this decision to the EIP Health Appeals Committee.

On June 30, 2010, Appellant appealed the denial of his claim to the EIP Health Appeals Committee. (Exhibit A to Defendants' Memorandum in Support of Summary Judgment). As the contents of this letter reflect, Appellant's appeal to the EIP Health Appeals Committee included the issue of the applicability of S.C. Code Ann. § 38-71-46 to the State Health Plan.

On August 24, 2010, the EIP Health Appeals Committee denied Appellant's claim for benefits via letter and noted S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. This letter also informed Appellant his next level of appeal was to the ALC. (Exhibit A to Defendants' Memorandum in Support of Summary Judgment).

On September 22, 2010, Appellant filed an administrative appeal with the ALC. (Appellant's ALC Appeal Notice dated September 22, 2010). As of the date of this brief, Appellant's administrative appeal is still pending in the ALC.

ARGUMENTS

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO STAY A DECISION ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

Granting a motion for stay of proceedings rests entirely within the discretion of the trial judge. Spartanburg v. Belk's Dep't Store, 199 S.C. 458, 20 S.E.2d 157 (1942).

A. APPELLANT FAILED TO RAISE THE ISSUE PRIOR TO JUDGMENT.

Appellant's argument—that the trial court abused its discretion in failing to stay a decision on Respondents' motion for summary judgment, pending a decision on Appellant's administrative appeal in the ALC—fails because Appellant neglected to make this argument until after judgment was entered. (Plaintiff's Motion to Compel Responses to Plaintiff's First Interrogatories and First Request To Produce and Motion To Stay Decision on Defendants' Motion For Summary Judgment). Appellant did not argue that the trial court should stay the matter to allow the exhaustion of Appellant's administrative appeal until Appellant made his motion to alter or amend judgment pursuant to SCRCP 59(e). "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not." C.A.H. v. L.H., 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (citing Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990)). Because Appellant never raised this issue prior to entry of judgment in favor of Respondents, Appellant's argument fails. Even assuming arguendo that the Appellant did assert this position prior to judgment, his argument fails on its merits, as discussed fully below.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO STAY A DECISION ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT PENDING THE COMPLETION OF DISCOVERY.

While Appellant did argue prior to judgment that the trial court should have stayed a decision on Respondent's motion for summary judgment to allow Appellant to conduct discovery, Appellant's brief makes only makes two conclusory references to such a stay on pages 7 and 9, and it does so with no argument or citation of authority. "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). "An issue is also deemed abandoned if the argument in the brief is merely conclusory." State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), aff'd as modified, 337 S.C. 622, 525 S.E.2d 246 (2000). Accordingly, Appellant's argument for stay of the summary judgment decision to allow for discovery is waived.

Even assuming Appellant's argument for a stay is not waived, Appellant purposely availed himself of the State Health Plan's administrative remedies. Therefore, the trial court was left to decide the purely legal issue of whether Appellant's exclusive remedy was an appeal to the ALC. The issue of interpretation of a statute is a question of law for the court. Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). While Plaintiff's counsel did submit a Rule 56(f) affidavit, that affidavit failed to identify any evidence Plaintiff expected to discover that would be relevant to whether the administrative remedies under S.C. Code Ann. § 1-11-710(C) were Plaintiff's exclusive remedy, subject only to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600(D). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). Because development of the facts was not

needed to interpret the statute at issue, the trial court did not abuse its discretion in failing to stay a decision on Respondents' summary judgment motion until the completion of discovery.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING APPELLANT'S CASE ON THE GROUNDS THAT S.C. CODE ANN. § 1-11-710(C) WAS APPELLANT'S EXCLUSIVE REMEDY, RATHER THAN STAYING A DECISION ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Even assuming that Appellant properly preserved and/or did not waive the stay issue, Appellant's argument—that this action should be stayed rather than dismissed, pending resolution of an administrative proceeding—is misplaced because the administrative proceeding was Appellant's exclusive remedy as a matter of law. A participant and/or beneficiary challenging an award of benefits under the State Health Plan is limited to the remedies set forth in S.C. Code Ann. § 1-11-710(C), which provides as follows:

Notwithstanding Sections 1-23-310 and 1-23-320 or any other provision of law, claims for benefits under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board, which shall constitute the exclusive remedy for these claims, subject only to appellate review consistent with standards provided in Section 1-23-380.

Id. (emphasis added).

Pursuant to the allegations of Appellant's Complaint, Appellant requested the court interpret the terms of the State Health Plan to include the coverage set out in S.C. Code Ann. § 38-71-46. Appellant further alleged he was entitled to disgorged benefits from the plan for unlawful denials of coverage and for injunctive relief enjoining "further denial of claims for diabetes out-patient self-management training and education." (Complaint ¶24). The interpretation of the State Health Plan and the resolution of claims

for benefits under the Plan are exactly the types of remedies contemplated by § 1-11-710(C).¹

In Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001), the South Carolina Supreme Court upheld the dismissal of the plaintiff's complaint because it found exhausting administrative remedies under the S.C. Procurement Code constituted the plaintiff's exclusive remedy. The Court went on to hold the term "exclusive remedy" indicates "exclusivity of jurisdiction." Id. at 170, 551 S.E.2d at 270. The Court also found "because a statute waiving the State's immunity must be strictly construed, the State can be sued only in the manner and upon the terms and conditions prescribed by the statute." Id., 551 S.E.2d at 270. Finally, the Court held dismissal was appropriate. The Court stated:

Since Unisys is required to exhaust its administrative remedies as a matter of law, dismissal under Rule 12(b)(6) for failure to state a claim was proper. Further, because an action was pending pursuant to the Procurement Code as required when this action was brought, dismissal was also proper under Rule 12(b)(8) [another action is pending between the same parties for the same claim]. See Southern Ry. Co. v. Order of Ry. Conductors, 210 S.C. 121, 41 S.E.2d 774 (1947) (exhaustion of remedies will preclude original resort to courts where statute by express terms gives exclusive jurisdiction to administrative agency).

Id. at 176-77, 551 S.E.2d at 273.

Contrary to Appellant's argument, Capital City Insurance Company v. B.P. Staff,

¹ Paragraph 1.3 of the State Health Plan states:

1.3 Applicable Law

This Plan is established and will be maintained with the intention of meeting the requirements of all applicable federal and state laws. Any provision of this Plan, which is in conflict with the law of any governmental body or agency that has jurisdiction over this Plan, shall be interpreted to conform to the minimum requirements of such laws.

(Affidavit of Robin E. Tester, Exhibit C, p.1) (Emphasis added).

382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009), does not stand for the blanket proposition that a stay is more appropriate than a dismissal. In fact, the South Carolina Court of Appeals in Capital City, relying on the holding in Unisys, acknowledged that:

The South Carolina Supreme Court has instructed that dismissal may be proper under Rule 12(b)(6) SCRPC where the opposing party is required to exhaust administrative remedies as a matter of law, but failed to do so. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute). Thus, we must determine whether exhaustion of administrative remedies was required as a matter of law; if not, we next determine whether the court abused its discretion in dismissing the case until exhaustion of the administrative process is complete in order to assist in the disposition of the circuit court proceeding.

Capital City at 529.

The rule Appellant relied upon—that an action should be stayed rather than dismissed—does not apply where the administrative agency has exclusive jurisdiction to consider the complaint initially brought in the court. U.S. v. Mich. Nat'l Corp., 419 U.S. 1, n.2 (1974); Pan Am. World Airways v. U.S., 371 U.S. 296 (1963). In the present case, dismissal was appropriate because a participant and/or beneficiary challenging an award of benefits under the State Health Plan was limited to the administrative remedies set forth in S.C. Code Ann. § 1-11-710(C).

Appellant's reliance on South Carolina Department of Consumer Affairs v. Foreclosure Specialists, 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010) is misplaced. Foreclosure Specialists is easily distinguished from the present case in part because, as Appellant concedes, Foreclosure Specialists involved a statutory scheme with a different set of enumerated remedies. The South Carolina Consumer Credit Counseling Act allowed plaintiffs seeking relief to bring two types of actions: an "administrative action"

in the ALC, and a “civil action” in circuit court. S.C. Code Ann. § § 37-6-108(A); 37-6-113(C). The Court of Appeals held:

[t]here is nothing in the 2005 amendments that changes the procedure that a civil action has to be brought in circuit court. Because the relief sought by the Department in this action is available in a civil action pursuant to Section 37-6-113(A), and because a civil action must still be brought in circuit court, the ALC was correct in ruling that it did not have the power to grant the relief [to recover actual damages and excess charges paid by consumers].

Foreclosure Specialists, 390 S.C. at 186, 700 S.E.2d at 470. Unlike the Consumer Credit Counseling Act, which specifically allowed a civil action, the administrative remedies under S.C. Code Ann. § 1-11-710(C) were Appellant’s exclusive remedy to challenge a claim for benefits under the State Health Plan, subject only to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600 (D).

Finally, Appellant’s argument that he should not be forced to “roll the dice” with respect to the statute of limitations has no application. Appellant timely availed himself of these remedies. Because Appellant appealed to the ALC on a timely basis, Appellant was not threatened by the expiration of the statute of limitations. Accordingly, Appellant suffered no prejudice as a result of the dismissal.²

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE ADMINISTRATIVE REMEDIES UNDER S.C. CODE ANN. § 1-11-710 (C) WERE APPELLANT’S EXCLUSIVE REMEDIES, SUBJECT ONLY TO APPELLATE REVIEW BY THE ADMINISTRATIVE LAW COURT PURSUANT TO S.C. CODE ANN. § 1-23-600(D).

Appellant’s argument that summary judgment was improperly granted because his complaint was not a claim for benefits under the State Health Plan was incorrect and was not supported by the allegations of his pleadings. Appellant’s complaint alleges:

² Appellant’s argument that he is protecting the claims of putative class members also fails in that the putative class members would also be required to exhaust their individual

5. This is an action for declaratory judgment arising from Defendants' unlawful issuance and administration of the State of South Carolina EIP Standard Plan, a plan of health benefits and insurance offered to all current and retired state employees, including public school district employees, for violation of a SC Code Section 38-71-46, for disgorgement of revenues received as a result of the unlawful issuance and administration, and for declaration to determine the value of unlawfully withheld benefits.

. . .

12. As the named Plaintiff is an employee of a South Carolina school district, has been enrolled in the EIP Standard Plan, has enrolled his dependent child in said plan who was diagnosed with Diabetes at the age of two years old, and has made multiple claims for his dependent child with a value of approximately One Thousand & 00/100 US Dollars (\$1000.00) for diabetes outpatient self-management training and education which were denied by Defendant BCBSSC as administrator to the EIP, his claim, right and privileges are typical of the proposed class.

. . .

22. Plaintiff seeks, individually and as legal guardian for Jane Doe, and on behalf of all class members, a declaration of the rights of the parties hereto: that Defendants are required to issue and administer all health benefit plans offered through the EIP in compliance with the express mandate of South Carolina Code Section 38-71-46.

23. Plaintiff seeks an Order of the Court reforming the terms of the health benefit plan provided to all class members effective January 1, 2000 to provide the mandated diabetes coverage.

24. Plaintiff seeks an Order of the Court requiring the Defendants to disgorge monies received as a result of unlawful denials of the mandatory diabetes coverage, and to pay them to members of the putative class the present value of said unlawfully withheld revenues.

. . .

24. The Defendants should be enjoined from the wrongful takings as described above and from further denial of claims for the diabetes outpatient self-management training and education.

(Plaintiff's Complaint).

As the Court correctly found in its order,

Pursuant to the allegations of Plaintiff's Complaint, Plaintiff is requesting the Court interpret the terms of the State Health Plan to include the coverage set out in S.C. Code Ann. § 38-71-46. Plaintiff further alleges he is entitled to disgorge benefits from the plan for unlawful denials of coverage and for injunctive relief enjoining "further denial of claims for diabetes out-patient self-management training and education." (Complaint ¶24). The interpretation of the State Health Plan and the resolution of claims for benefits under the Plan are exactly the types of remedies contemplated by § 1-11-710(C).

(Order at 4 -5).

Appellant's attempt to circumvent the statutory requirements of § 1-11-710(C) by alleging a purported class action and/or a declaratory judgment action is of no avail. The administrative remedies under S.C. Code Ann. § 1-11-710 (C) were Appellant's, and any putative class members', exclusive remedy, subject only to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600 (D). See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute). Accordingly, all of Appellant's causes of action were preempted by S.C. Code Ann. § 1-11-710(C). "Because a statute waiving the State's immunity must be strictly construed, the State can be sued only in the manner and upon the terms and conditions prescribed by the statute." Unisys, 346 S.C. at 170, 551 S.E.2d at 270 (citing S.C. Const. art. X, § 10 ("The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted"³)).

A court ordinarily will refuse to grant a declaratory judgment where a special statutory remedy has been provided. "Gratuitous interference" in the administrative

³ The provisions of this section are identical to S.C. Const. art. XVII, § 2, meaning this sentence appears twice in the South Carolina Constitution.

process should be avoided. Williams Furniture Corp. v. Southern Coatings & Chem. Co., 216 S.C. 1, 7-8, 56 S.E.2d 576, 579 (1949); Smith v. S.C. Ret. Sys., 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999). The Court, therefore, should not serve as a substitute for “a tribunal of original jurisdiction in issues that are ripe for litigation by the usual processes.” Williams Furniture Corp., 216 S.C. at 8, 56 S.E.2d at 579; see also Garris v. Governing Bd. of S.C. Reinsurance Facility, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995) (“Declaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances,” as “relief is not generally available to one who has not exhausted administrative remedies.”). In general, judicial review is appropriate only when appeal is from a final agency order. Id. at 821 (citing S.C. Code Ann. § 1-23-380(A)). Accordingly, the trial court properly granted Respondents’ motion for summary judgment.

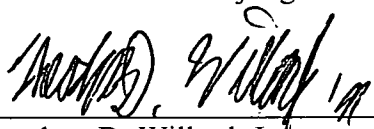
Appellant’s argument that it was futile for Appellant to exhaust his administrative remedies is misplaced. Undeniably, Plaintiff purposely availed himself of the administrative remedies under the State Health Plan and fully exhausted the internal appeals process. Because Appellant exhausted the Plan’s administrative remedies and filed an appeal with the ALC, any futility argument was waived and/or mooted. Simply put, Appellant still has a viable remedy by virtue of his administrative appeal to the ALC, which has exclusive jurisdiction over such actions.

Appellant also argues that based on Drummond v. State of South Carolina, 378 S.C. 362, 662 S.E.2d 587 (2008), the ALC cannot rule on whether or not S.C. Code Ann. § 38-71-46 applies to the State Health Plan. However, Drummond stands for the proposition that the ALC cannot rule on the validity of a statute because the ALC is a part

of the executive branch. The ALC is charged with following the law “as written.” Video Gaming Consultants, Inc. v. S.C. Dep’t of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000) (“ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation.” (emphasis added)). Appellant argues that the final EIP Health Appeals Committee decision dated August 24, 2010, was a “regulation,” the validity of which cannot be challenged by the ALC. However, the August 24, 2010, decision was not a regulation but merely a decision by the EIP Health Appeals Committee regarding a claim for benefits, which was precisely the type of decision the ALC is authorized to hear in its appellate capacity. In the current case, no one was challenging the validity of S.C. Code Ann. § 38-71-46; rather, the challenge was whether S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. Therefore, the trial court correctly held that the rule set forth in Drummond has no application to the present case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the circuit court.



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June 23, 2011
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
S.C. Court of Appeals Case No. 2011183026

Jeffrey D. Allen, individually,
as guardian for Jane Doe, a
minor, and as representative of
other similarly situated State
of South Carolina employees,

Appellant,

v.

South Carolina Budget and
Control Board Employee
Insurance Program and Blue
Cross and Blue Shield of
South Carolina,

Respondents.

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to Court of Appeals

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ARGUMENT

A. THE LOWER COURT SHOULD HAVE DENIED THE MOTION FOR SUMMARY JUDGMENT BECAUSE AS A MATTER OF LAW, EXHAUSTION IS NOT APPLICABLE TO THE CLAIMS MADE IN THE CIRCUIT COURT CASE

Appellant first takes this opportunity to refer the court to a recent decision of the South Carolina Supreme Court, which has just come to the attention of Appellant's counsel, reversing a case cited in Appellant's Brief, Stinney v. Sumter School District 17, 382 S.C. 352, 675 S.E.2d 760 (Ct. App. 2009). Stinney v. Sumter School District 17, 391 S.C. 547, 707 S.E.2d 397 (2011). In that decision, the Supreme Court explained, in *dicta*, that when a litigant invokes the original jurisdiction of the circuit court to adjudicate a claim for which "an administrative remedy is not available for the injury suffered, the doctrine of exhaustion is not applicable." *Id.* at 551, n.1, 675 S.E.2d at 399, n.1.

Allen's Complaint invoked the original jurisdiction of the circuit court, and includes claims for which "administrative remedies" are not available. This civil action was filed as a class action seeking declaratory and injunctive remedies, it does not seek a refund for "claims for benefits" – the statutory violation for which the legislature has provided the administrative remedy relied upon by Respondents. (Compl.) Section 1-11-710(C) of the South Carolina Code provides that "*claims for benefits* under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board [South Carolina Budget and Control Board], which shall constitute the exclusive remedy for these claims, subject only to appellate judicial review consistent with the standards provided in Section 1-23-380." S.C. Code Ann. § 1-11-710(C) (emphasis added). Section 1-23-380 entitled "[j]udicial review upon exhaustion of

administrative remedies” “does not limit utilization of or the scope of judicial review *available under other means of review, redress, relief, or trial de novo* provided by law.” S.C. Code Ann. § 1-23-380 (A) (Supp. 2009).

As referenced in Stinney, this does not mean that any litigant in an administrative process can bring a separate suit to collaterally attack the findings of the administrative bodies. “Res judicata still applies in the administrative setting, and such determinations *may* bar subsequent litigation.” Id. (citing Earle v. Aycock, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981) (administrative decision can have preclusive effect in collateral litigation)) (emphasis added). However, in this case, the administrative process, prior to ever reaching even the ALC, took so long that Allen was faced with a potential statute of limitations defense should he await the conclusion of the administrative process. The health insurance claim which serves as the origin of the merits of this case was first denied by Blue Cross Blue Shield on August 28, 2008. (Pl’s Memo in Opp. To Def.’s Mot. to Dismiss at Allen Affidavit). Allen complied with the deadlines imposed by Blue Cross at this first stage of the internal appeal process, and had not even received a decision on the very first level request for reconsideration of the initial denial by the time of the filing of the civil action Complaint in late November 2009 – approximately two years from the date of the first claim for diabetes education by Jane Doe. Id.

In response to the Complaint, EIP filed a Motion to Dismiss and Allen opposed said motion in a Memorandum in Opposition and supporting Affidavits regarding the ongoing administrative process on February 26, 2010. (Pl’s Memo in Opp. To Def.’s Mot. to Dismiss). Further, at the time of that February 26, 2010 filing, Blue Cross had yet to issue a decision on the very first level of the “administrative process.” Id. at Exhibit

Allen Affidavit). It was not until two days before the August 26, 2010 hearing on the EIP's second attempt to dismiss this case -- its Motion for Summary Judgment, the grant of which is the basis of this appeal-- that the EIP, for the very first time, explained why it contended that the diabetes mandate statute did not apply to the State Health Plan. (Transcript, 8/26/10, at pp. 18-19 & Def's Memo in Support of Mot. for SJ at 16-29).¹

As explained in Stinney, a final decision by this court on appeal from the ALC in the parallel administrative case that the EIP is not bound to follow the diabetes insurance mandate, S.C. Code Ann. § 38-71-46, *may* have preclusive effect on this civil action. However, should the EIP's determination that, as a matter of law, it is not subject to the diabetes insurance mandate ultimately be rejected, that conclusion of law would greatly impact this case for class and injunctive relief. And, because exhaustion is not applicable to the claims made in this civil action, the doctrine of exhaustion is not applicable. The lower court's order granting summary judgment and dismissing this case *with prejudice* should be reversed.

¹ By letter dated August 24, 2010, the EIP Appeals Committee wrote Appellant that it was denying his claim and again stated summarily that S.C. Code § 38-71-46 did not apply to the State Health Plan. (Def's Memo in Support of Mot. for SJ at 16-29). The underlying basis for the conclusion that the diabetes coverage mandate did not apply to the State Health Plan was explained (for the first time) as follows:

Lastly, the Committee noted the repeated assertions regarding S.C. Code 38-71-46 and Claimant's attorney's assertion that no one has explained why it does not apply to the State Health Plan. While the Committee noted the alternative methods for obtaining diabetes education noted above, the Committee also observed the Department of Insurance and the General Assembly *historically have acknowledged* the Department [of Insurance] has no jurisdiction over EIP. EIP is not a health insurance issuer under the Code. In the areas on which the General Assembly has wanted to include EIP in the Accident and Health Insurance provisions of Title 38, Chapter 31, it has specifically said so. Therefore, because 38-71-46 does not refer to EIP or the State Health Plan, it does not apply to the State Health Plan.

(emphasis added). *Id.* at 28-29 & n.22. That explanation contains a single footnote which references S.C. Code Ann. § 1-11-780 -- a statute addressing "mental health coverage" -- presumably as the legal authority for the proposition that the South Carolina Department of Insurance has no jurisdiction over the South Carolina State Budget and Control Board's Employee Insurance Program.

B. WHETHER THE TRIAL COURT SHOULD HAVE ISSUED A STAY ORDER
PENDING THE OUTCOME OF THE ADMINISTRATIVE CASE IS
PRESERVED FOR APPEAL.

Contrary to the argument by Respondents, the record reflects that the Appellant raised the propriety of a stay prior to entry of judgment in the lower court. A “party must file [a Rule 59(e), SCRCPP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Because Appellant raised this issue and reference to a stay was omitted from the lower court’s summary judgment order, including it in the Motion to Alter or Amend pursuant to SCRCPP, Rule 59(e) was proper and necessary. (Order, Motion to Alter or Amend). The Rule 59(e) motion was denied, and therefore that issue was raised and ruled upon. (Order dated Nov. 23, 2010).

Some procedural history of the motions made before the lower court is relevant to the discussion of this issue. The EIP filed a Motion to Dismiss and for Judgment on the Pleadings in lieu of Answering the Allen Complaint filed on November 25, 2009. (Def’s Mot. To Dismiss and for Judg. on Pleadings). Said motion was based on grounds of failure to exhaust administrative remedies. Allen filed Affidavits and a Memorandum in Opposition to the Motion to Dismiss. (Pl’s Memo in Opp. To Def.’s Mot. to Dismiss & Affidavits.) The motion was heard on March 4, 2010 by the Hon. Markley Dennis, and the court issued an Order denying the Motion. (Order, Judge Dennis). The EIP filed its Answer, and in response Allen’s serving written discovery requests, the EIP filed a Motion for Protective Order and Motion for Summary Judgment, without providing any responses to discovery. (Def’s Mot. for P.O, and Mot. for SJ) In response, Allen filed a Motion to Compel and a Motion to Stay Decision on Motion for Summary Judgment

pending discovery, and filed memoranda in support of its motions and in opposition to the EIP's motion for protective order and for summary judgment. (Mot. to Compel, Mot. to Stay, and Memo in Support of Pl's Mots. and in Opp. To Def's Mots.). Practically, there had been no change or progression of the civil action between the filing of first Motion to Dismiss and the Motion for Summary Judgment, the grant of which is now on appeal.

As nothing had changed in the case, Allen did not copy his legal argument from the earlier filed memorandum in opposition to the EIP's motion to dismiss on the identical issue, and expressly referenced the arguments made in opposition to the EIP's assertion of requirement to exhaust administrative remedies. (Pl's Memo in Support of Pl's Mots. and in Opp. to Def's Mots. at p. 10). Specifically, the memorandum stated:

The issue of exhaustion of administrative remedies, which Defendants assert is a basis for summary judgment, was fully briefed and argued pursuant to Defendants' motion to dismiss and for judgment on the pleadings, which, as mentioned above, were denied. Defendant is now attempting a second bite at the apple by again asserting the issue of exhaustion of administrative remedies as a purported basis for summary judgment. Plaintiff incorporates by reference Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, and the exhibits/affidavits attached thereto, in opposition to this purported basis for summary judgment.

Id. That brief relied on and discussed in detail the South Carolina Court of Appeals' decision in Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (S.C. Ct. App. 2009), wherein this Court held that where a party would be harmed by the running of the statute of limitations or otherwise prejudiced if its claim is dismissed on exhaustion of administrative remedies, and the court has determined that resolution of the administrative proceeding would impact the circuit court case, then the circuit court should properly consider a stay or continuance of the judicial action until the

administrative proceedings have concluded. *Id.* at 531. (Pl's Memo in Opp. to Defs' Mot to Dismiss at pp. 11-12).

At the hearing on August 26, 2010, Judge Burch heard arguments on the pending motions and subsequently issued an order granting summary judgment to the EIP and dismissing this case *with prejudice* based on a finding that Allen is required to exhaust administrative remedies. (Order, Judge Burch dated 10/12/10). Judge Burch's Order omitted any reference to consideration of staying the circuit court case until the administrative action was concluded. *Id.* As a result of that omission, Allen filed a Motion to Alter or Amend and argued that the court's order failed to discuss why it is not exercising its discretion to stay the civil action pending the outcome of the administrative case. (Mot. to Alter or Amend.) That Motion to Alter or Amend was denied. (Order, Judge Burch dated 11/23/10). The Respondent's argument that this issue is not preserved for review is without support.

EIP cites to the case of State v. Colf, 332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998) for the proposition that the briefing accorded the discussion of staying the case pending the outcome of administrative remedies was conclusory, and therefore did not rise to the level of "raised" before the lower court. That case, however, is distinguishable from the case at bar, and did not involve the standards for issue preservation. The issue in Colf was whether the appellate brief contained sufficient argument to preserve that issue for decision. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 100

L.Ed.2d 178 (1988)). It is undisputed that the Allen administrative proceeding was made known and ongoing at the time of the hearing before Judge Burch, and what the circuit court should do with the circuit court case in light of that pending administrative action was encompassed in the merits of all issues raised before the circuit court.

C. THE LOWER COURT SHOULD HAVE STAYED THE CASE PENDING THE OUTCOME OF THE ADMINISTRATIVE PROCEEDING

The circuit court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy. See Williams v. Bordon's Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). "A party should not be required to 'roll the dice' on whether a collateral administrative proceeding will conclude prior to the running of an applicable statute of limitations in order to preserve a claim properly within the jurisdiction of the circuit court." Capital City Ins. Co., 382 S.C. at 105, 674 S.E.2d at 531.

Jane Doë was first diagnosed with Type I diabetes on November 27, 2007 at the age of two, and diabetic education and training was provided during her initial 3-day hospital stay. (Pl's Memo in Opp. To Def.'s Mot. to Dismiss at Allen Affidavit at ¶ ¶ 6). In reviewing all claims for diabetic education made by Allen, Defendants have denied three other such claims dating back to December 17, 2007. Id. at ¶ 22. Id. at In light of the State of South Carolina board/agency being named as a Defendant, the undersigned made the determination to commence this action within two (2) years of the date of diagnosis, so as not to risk missing the two-year statute of limitations often applicable to claims against the State or State agencies. Allen should not be prejudiced by a decision to protect himself against all statute of limitations defenses, particularly when there is no guidance in the law of whether the Administrative Law Court has the power to grant the

relief requested by the Plaintiffs, and the key legal question at issue has not been ruled upon by any court.²

In South Carolina Dept. of Consumer Affairs v. Foreclosure Specialists, Inc., 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010), the court held that the ALC did not in fact have the power to grant the Dept. a refund of fees collected in violation of the Consumer Credit Counseling Act, and that any action for such relief should have been brought in circuit court. While admittedly addressing a different statutory scheme -- the Consumer Credit Counseling Act, the case illustrates the risk and difficulty of predicting where the lines fall between the jurisdiction of the ALC and the circuit court. The scope and meaning of the statute on which the EIP relies, S.C. Code Ann. § 1-11-710(C) has never been addressed by any published opinion, and both the applicability of that statute and the diabetes mandate statute are novel issues of law.

The court in Capital City held that where a party would be harmed by the running of the statute of limitations or otherwise prejudiced if its claim is dismissed on exhaustion of administrative remedies, and the court has determined that resolution of the administrative proceeding would impact the circuit court case, then the circuit court should properly consider a stay or continuance of the judicial action until the administrative proceedings have concluded. Id. at 531. While the outcome of the administrative proceeding could moot this case; another possible outcome is that the ALC (or the South Carolina Court of Appeals) determines the ALC does not have the

² Despite Allen commencing both the civil action and administrative action in late 2009 and early 2010, respectively, to date no court has made any ruling on the substantive question of law at issue in this case -- the applicability of the South Carolina diabetes mandate to the State Health Plan. Two circuit court judges have been presented with the issue, and both made procedural rulings which avoided the necessity of ruling on the question of law. Briefing is completed on the substantive issue also pending the ALC, but no decision has been rendered as of the date of this Reply.

CERTIFICATE OF SERVICE

I hereby certify that I have this _____ day of _____, 2011 served the foregoing pleading or paper by depositing a copy of it in the US Mail, first class, postage pre-paid, addressed as follows, and also by email transmission as follows:

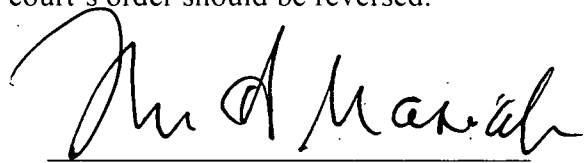
Theodore D. Willard, Jr., Esq.
MONTGOMERY WILLARD, LLC
1002 Calhoun Street
Post Office Box 11886
Columbia, SC 29211
tdw@montgomerywillard.com

Kelly H. Rainsford, Esq.
State Budget & Control Board
1201 Main Street, Ste. 300
Columbia, SC 29211
krainsford@digs.sc.gov

jurisdiction to award the relief requested and that the plaintiffs should, instead, be in circuit court. This is the classic *catch-22* for a plaintiff, and this court should reverse the order granting summary judgment and remand the case to the circuit court to enter an order staying the case pending the final outcome of the administrative proceeding (including all appeals).

CONCLUSION

Based on the foregoing, the lower court's order should be reversed.



John A. Massalon
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29401
(843) 727-1144

ATTORNEYS FOR PLAINTIFF

-and-

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Matthew D. Hamrick
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1017 Chuck Dawley Blvd.
Mt. Pleasant, South Carolina 29464
(843) 727-6500

Charleston, SC

July 14, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
S.C. Court of Appeals Case No. 2011183026

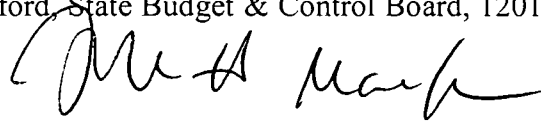
Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,.....Appellant,

v.

South Carolina Budget and Control Board,
Employee Insurance Program Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Reply of Appellant on Respondent of record by
depositing a copy of it in the United States Mail, postage prepaid, on July 14, 2011, addressed to
their attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886,
Columbia, SC, 29211 and Kelly H. Rainsford, State Budget & Control Board, 1201 Main Street,
Suite 300, Columbia, SC 29201.



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174 East Bay Street
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Charleston, SC 29407

ATTORNEYS FOR APPELLANT



The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 22, 2011

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Columbia, SC 29201-3230

Theodore DuBose Willard, Jr, Esquire
Montgomery Willard, LLC
P.O. Box 11886
Columbia, SC 29211

Re: Allen, Jeffrey v. SCBCB
Case Tracking #: 2011183026

Dear Counsel:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec



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WESTBROOK & BRICKMAN, LLC

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Brady R. Thomas
T. Christopher Tuck
James L. Ward, Jr.
Edward J. Westbrook
Kenneth J. Wilson
Robert S. Wood

August 10, 2011

The Honorable Tanya Gee, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: **Substitution of Counsel**
Allen vs. S.C. Budget and Control Board, et al.,
Court of Appeals Case No.: 2011183026
Common Pleas Case No.: 2009-CP-10-7404

Of Counsel:
Daniel O. Myers
Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz

Dear Ms. Gee:

I write to enter an appearance as Counsel for the Appellant in the above-captioned case and to have my name substituted for that of Matthew D. Hamrick who is no longer practicing with our firm.

By copy of this letter to The Honorable Julie J. Armstrong, Charleston County Clerk of Court, and to the Administrative Law Court, I am requesting that the records maintained by those offices be amended to reflect my substitution as well.

Counsel for the Appellant-Plaintiff should now be listed as follows.

John A. Massalon, Esq.
Wills Massalon & Allen, LLC
Post Office Box 859
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(843) 727-1144

-and-

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Terry E. Richardson, Jr., Esq.
Richardson, Patrick, Westbrook & Brickman, LLC
1037 Chuck Dawley Boulevard, Building A
Mt. Pleasant, SC 29464
(843) 727-6595

Sincerely,

Thomas P. Gressette, Jr.

cc: The Honorable Julie J. Armstrong, Clerk of Court, Charleston County
South Carolina Administrative Law Court
All Counsel of Record
Matthew D. Hamrick

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AUG 12 2011
SC Court of Appeals



RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC

August 12, 2011

Hon. Tanya Gee, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *Allen vs. S.C. Budget and Control Board, et al.*
Common Pleas Case No.: 2009-CP-10-7404
Ct. of Appeals Case No.: 2011183026

James C. Bradley
Michael J. Brickman
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Of Counsel:
Daniel O. Myers
Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz

Dear Ms. Gee:

Enclosed for filing with the court please find a Proof of Service for Plaintiff's Record on Appeal that was served upon the defendants today. I would greatly appreciate it if you could send me a stamped copy of this document. I have included a self-addressed stamped envelope for your convenience.

Thank you for your time.

Sincerely,

Julie Murray
Paralegal

Enclosure

cc: Theodore D. Willard, Jr., Esq.
Kelly H. Rainsford, Esq.
The Honorable Julie J. Armstrong, Clerk of Court, Charleston County
S.C. Court Administration
John A. Massalon, Esq.
Christy F. Allen, Esq.

RECEIVED

AUG 15 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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September 15, 2011

John A. Massalon, Esquire
Wills Massalon & Allen, LLC
97 Broad Street
Charleston, SC 29401

Re: Allen, Jeffrey v. SCBCB
Case Tracking #: 2011183026

Dear Mr. Massalon:

We have received the Record on Appeal and all final briefs in the above matter. Unfortunately, corrections will need to be completed for the Record on Appeal before it can be accepted as filed.

Within ten days of this letter, you are requested to have someone from your office come to the Edgar A. Brown Building located at 1205 Pendleton Street in Columbia, and place labels on the covers of the original and all copies of the Record on Appeal. These labels should be appropriately sized and should include the lower court number and should distinguish all those copies that are "Volume 1" and all those that are "Volume 2".

Please call at least 24 hours before your arrival so that the documents can be made available immediately upon your arrival.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Thomas P. Gressette, Jr., Esquire
Terry E. Richardson, Jr., Esquire
Kelly Hunter Rainsford, Esquire
Theodore DuBose Willard, Jr, Esquire



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February 14, 2012

The Honorable V. Claire Allen
Deputy Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RECEIVED

FEB 16 2012

SC Court of Appeals

RE: Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees v. SC Budget & Control Board
SC Court of Appeals Case No.: 2011183026
Circuit Court Case No.: 09-CP-10-7404
File No.: 595-1

Dear Ms. Allen:

I am in receipt of your letter dated February 10, 2012 indicating that this case will likely be considered during the May, 2012 term of court. I discussed the potential hearing dates with my co-counsel, and we do not have any scheduling conflicts which would take priority over an oral argument in this matter. However, due to some previously scheduled commitments which do not take priority, my co-counsel and I would prefer to appear for oral argument (if the Court decides to hear oral arguments) on May 7th, 8th or 9th. We understand that this request is not binding on the court, but we would appreciate any consideration that you could grant us.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC

John A. Massalon

jmassalon@wmalawfirm.net

cc: Terry E. Richardson, Jr., Esquire
Thomas Gressette, Esquire
Theodore D. Willard, Jr., Esquire
Kelly H. Rainsford, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 18, 2012

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Theodore DuBose Willard, Jr, Esquire
Montgomery Willard, LLC
P.O. Box 11886
Columbia, SC 29211-1886

Re: Allen, Jeffrey v. SCBCB

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,


CLERK



Case No. 2011-183026
Roster No. 19277

AFFIRMED

The State of South Carolina
IN THE COURT OF APPEALS

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor,
and as representative of other similarly situated State of South
Carolina employees, Appellant,

v.

South Carolina Budget and Control Board Employee Insurance
Program and Blue Cross and Blue Shield of South Carolina,
Respondents

PER CURIAM:

Daniel G. Pieper
A. Lee

John D. Deeth

South Carolina Court of Appeals
Clerk's Office, Columbia, S.C.

FILED

JUL 18 2012

Janya A. Gee
Clerk

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Jeffrey D. Allen, individually, as guardian for Jane Doe,
a minor, and as representative of other similarly situated
State of South Carolina employees, Appellant,

v.

South Carolina Budget and Control Board Employee
Insurance Program and Blue Cross and Blue Shield of
South Carolina, Respondents.

Appellate Case No. 2011-183026

Appeal From Charleston County
Paul M. Burch, Circuit Court Judge

Unpublished Opinion No. 2012-UP-433
Heard May 9, 2012 – Filed July 18, 2012

AFFIRMED

John A. Massalon, of Wills, Massalon & Allen, LLC, of
Charleston, for Appellant.

Theodore DuBose Willard, Jr., of Montgomery Willard,
LLC; of Columbia, for Respondent Blue Cross and Blue
Shield of South Carolina; Kelly Hunter Rainsford, of

Columbia, for Respondent South Carolina Budget and
Control Board Employee Insurance Program.

PER CURIAM: Jeffrey Allen appeals the circuit court's grant of summary judgment in favor of the South Carolina Budget and Control Board Employee Insurance Program and Blue Cross and Blue Shield of South Carolina. He argues the circuit court erred in finding he was required to exhaust his administrative remedies before pursuing a claim in circuit court. He also contends the circuit court erred in not staying the circuit court litigation pending the resolution of the matter in the Administrative Law Court. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

As to the issue of staying the circuit court proceedings: *Tallent v. S.C. Dep't of Transp.*, 363 S.C. 160, 165, 609 S.E.2d 544, 546 (Ct. App. 2005) ("A party cannot use a motion to reconsider, alter[,] or amend a judgment to present an issue that could have been raised prior to the judgment but was not."), *rev'd sub nom. on other grounds*, *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007); *MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRCPP motion which could have been raised at trial.").

As to whether the circuit court erred in requiring Allen to exhaust his administrative remedies: *Smith v. S.C. Ret. Sys.*, 336 S.C. 505, 523, 520 S.E.2d 339, 349 (Ct. App. 1999) ("The question of whether exhaustion of administrative remedies is required is a matter within the sound discretion of the trial court that will not be disturbed on appeal absent an abuse of that discretion."); *id.* ("An abuse of discretion occurs where the trial court is controlled by an error of law or where the [c]ourt's order is based on factual conclusions without evidentiary support."); *id.* at 527, 520 S.E.2d at 351 ("[A] court ordinarily will refuse to grant a declaratory judgment where a special statutory remedy has been provided."); *id.* ("'Gratuitous interference' in the administrative process should be avoided." (quoting *Williams Furniture Corp. v. S. Coatings & Chem. Co.*, 216 S.C. 1, 7-8, 56 S.E.2d 576, 579 (1949))); S.C. Code Ann. § 1-11-710(C) (2005) (stating "claims for benefits under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board, which shall constitute the exclusive remedy for these claims . . .").

AFFIRMED.

PIEPER, KONDUROS, and GEATHERS, JJ., concur.

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February 16, 2012

V. Claire Allen, Deputy Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees v. South Carolina Budget and Control Board Employee Insurance Program, et al.*
Court of Common Pleas Case No.: 2009-CP-10-7404
Court of Appeals Case No.: 2011183026
Our File No.: 294962

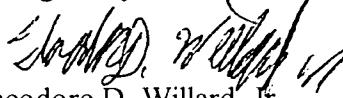
Dear Ms. Allen:

I am co-counsel for Respondents in the above case. Pursuant to your letter of February 10, 2012, this letter is to inform the Court that as of today's date, I have no scheduling conflicts with potential oral argument on May 7, 8, 9, 22, 23 or 24. I do have a federal court jury trial case that may be called for trial anytime after May 1. However, as of today's date, no definite trial date has been set.

With kind regards,

Very truly yours,

Montgomery Willard, LLC


Theodore D. Willard, Jr.

Enclosures

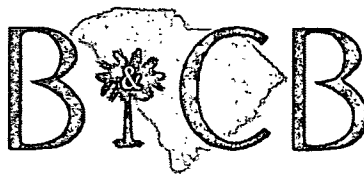
cc: Kelly H. Rainsford, Esquire
John A. Massalon, Esquire
Thomas P. Gressette, Jr., Esquire

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FEB 17 2012
SC Court of Appeals

NIKKI R. HALEY, CHAIR
GOVERNOR

CURTIS M. LOFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



SC BUDGET AND CONTROL BOARD

Employee Insurance Program
Stephen Van Camp, Director

803-734-0678
Fax: 803-737-0557

HUGH K. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE
COMMITTEE

W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS
COMMITTEE

MARCIA ADAMS
EXECUTIVE DIRECTOR

February 17, 2012

The Honorable V. Claire Allen
Deputy Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Allen, Jeffrey v. SCBCB
S.C. Court of Appeals Case No.: 2011183026

Dear Ms. Allen:

I am co-counsel for Respondents in the above-referenced case. Pursuant to your letter of February 10, 2012, this letter is to inform the Court that as of today's date, I have no scheduling conflicts with potential oral argument on May 7, 8, 9, 22, 23, or 24.

Sincerely,

Kelly H. Rainsford

cc: Theodore D. Willard, Jr., Esquire
John A. Massalon, Esquire
Thomas P. Gressette, Jr., Esquire

RECEIVED
FEB 21 2012
SC Court of Appeals



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Kimberly Keevers Palmer
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Terry E. Richardson, Jr.
Thomas D. Rogers
A. Hoyt Rowell, III
Brady R. Thomas
T. Christopher Tuck
James L. Ward, Jr.
Edward J. Westbrook
Kenneth J. Wilson
Robert S. Wood

April 16, 2012

Hon. Tanya Gee, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: **Substitution of Counsel**
Allen vs.-S.C. Budget and Control Board, et al.
Common Pleas Case No.: 2009-CP-10-7404
Ct. of Appeals Case No.: 2011183026

Of Counsel:
Daniel O. Myers
Gordon C. Rhea (CA, DC & USVI only)
James H. Rion, Jr.
Howard Siegel (DC & MD only)
David L. Suggs (MN & NY only)
Robert M. Turkewitz

Dear Ms. Gee:

I wish to withdraw my appearance as Counsel for the Appellant in the above-captioned case. I will be leaving Richardson, Patrick, Westbrook & Brickman, LLC at the end of the month. Terry Richardson of this firm will continue to represent the Appellant.

By copy of this letter to The Honorable Julie J. Armstrong, Charleston County Clerk of Court, and to the Administrative Law Court, I am requesting that the records maintained by those offices be amended to reflect my withdrawal as well.

Counsel for the Appellant-Plaintiff should now be listed as follows:

John A. Massalon, Esq.
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, SC 29402
(843) 727-1144

-and-

Terry E. Richardson, Jr., Esq.
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1037 Chuck Dawley Boulevard, Building A
Mt. Pleasant, SC 29464
(843) 727-6595

RECEIVED

APR 18 2012

SC Court of Appeals

Sincerely,

Thomas P. Gressette, Jr.

cc: The Honorable Julie J. Armstrong, Clerk of Court, Charleston County
South Carolina Administrative Law Court
All Counsel of Record

65061

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
S.C. Court of Appeals Case No. 2011183026

Jeffrey D. Allen, individually,
as guardian for Jane Doe, a
minor, and as representative of
other similarly situated State
of South Carolina employees,

Appellant,

v.

South Carolina Budget and
Control Board Employee
Insurance Program and Blue
Cross and Blue Shield of
South Carolina,

Respondent.

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AUG 02 2012

SC Court of Appeals

PETITION FOR REHEARING EN BANC

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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES

1. This is a matter of exceptional importance as it impacts public employees in South Carolina and their access to judicial determination on the applicability of a diabetes statutory mandate to the state insurance plan.
2. In affirming the grant of summary judgment with prejudice against the Appellant, this Court's opinion failed to address the differences between the claims alleged in this civil action with those subject to the Administrative Law Court proceeding ("ALC") (which has been pending and fully briefed and

awaiting action by the ALJ for eighteen (18) months), and therefore whether the differences in those claims render the exhaustion requirement in S.C. Code Ann. § 1-11-710(C) inapplicable to this civil action.

ARGUMENT

1. *This is matter of exceptional importance as it impacts public employees in South Carolina and their access to judicial determination on the applicability of a diabetes statutory mandate to the state insurance plan.*

Due to the delays Appellant has experienced within the administrative process, this Court should have reversed the grant of summary judgment, and at a minimum, remanded the case for entry of a stay pending the outcome of the Administrative Law Court action. “Protecting against abusive delay is an interest of justice.” *Martel v. Clair*, 132 S.Ct. 1276, 1286 (2012). The SC General Assembly mandated insurance coverage related to diabetes, a condition which affects nearly 10% of South Carolinians (R. pp. 17-18). Respondents unilaterally choose to ignore the legislative mandate and do not provide the insurance coverage required. The ultimate question in this matter is whether the Respondents can overrule the SC General Assembly.

Appellant, Jeffrey D. Allen (referred to herein as “Appellant”) is an employee of a local South Carolina school district and an insured/member of the State Health Plan (referred to herein as the “Plan”). (R. p. 170). His daughter (referred to herein as “Jane Doe”), a dependant covered by the Plan, was diagnosed with Type I Diabetes on November 27, 2007 at the age of two (2) years old. (R. pp. 175-76). Appellant submitted claims under the Plan for coverage of the cost of outpatient diabetes training and education in 2007 and in 2008, but Blue Cross and Blue Shield of South Carolina and the

South Carolina Budget and Control Board Employee Insurance Program (referred to herein as “Respondents”) denied the claims on the basis that the Plan does not include coverage for education or training for diabetes. (R. pp. 175-80).

After attempting to proceed with the agency appeals process for some time and after getting no explanation of the denial, Appellant commenced the instant lawsuit on November 25, 2009, alleging, *inter alia*, that the Respondents’ denial of the claim violated the statutory mandate for outpatient diabetes training and education contained in S.C. Code Ann. § 38-71-46¹, and that the case should be certified as a class action. (R. pp. 16-22).

¹ S.C. Code Ann. § 38-71-46 provides (with emphasis added):

Diabetes Mellitus coverage in health insurance policies, diabetes education.

(A) On or after January 1, 2000, *every* health maintenance organization, *individual and group health insurance policy, or contract issued or renewed in this State must provide coverage for* the equipment, supplies, Food and Drug Administration-approved medication indicated for the treatment of diabetes, and *outpatient self-management training and education for the treatment of people with diabetes mellitus*, if medically necessary, and prescribed by a health care professional who is legally authorized to prescribe such items and who demonstrates adherence to minimum standards of care for diabetes mellitus as adopted and published by the Diabetes Initiative of South Carolina. This subsection does not prohibit a health maintenance organization or an individual or a group health insurance policy from providing coverage for medication according to formulary or using network providers. Coverage must not be denied unless the health care professional demonstrates a persistent pattern of failure to adhere to the minimal standards of care and unless the health maintenance organization or insurer has first provided written notice to the health care professional that coverage will be denied if the health care professional fails to adhere to the minimal standards of care.

(B) Services and payment for diabetes education programs shall conform to regulations of the Health Care Financing Administration, US Department of Health and Human Services, pursuant to Section 4105 of the Balanced Budget Act of 1997. Diabetes outpatient self-management training and education shall be provided by a registered or licensed health care professional with certification in diabetes by the National Certification Board of Diabetes Educators, or other accredited program approved by the Diabetes Initiative of South Carolina, or by the Diabetes Control Program of the SC Department of Health and Environmental Control in order to meet the needs of rural communities wherein certified health care professionals providing this service are not available.

(C) Nothing contained in this section may be construed to affect in any way the ability of a managed care plan to credential or re-credential a provider.

In response to receiving written discovery from Appellant and in lieu of answering it, Respondents filed a motion for summary judgment. (R. pp. 294-320); (R. pp. 432-37); (R. pp. 321-431); (R. pp. 439-67). Appellant filed a motion to compel discovery responses, a motion to stay decision on Respondents' motion for summary judgment. (R. pp. 468-91); (R. pp. 492-507), and opposed the motion for summary judgment. On the eve of the circuit court hearing in August 2010, for the very first time, the SC Budget and Control Board Employee Insurance Program issued its decision attempting to explain why S.C. Code Ann. § 38-71-46 did not apply to the State Insurance Plan. (R. pp. 453-66). By this time, it had been over two (2) years since the date of Appellant's last claim denial, and over 18 months since Appellant had begun to navigate the internal agency appeals process prior to even being able to submit the appeal to the Administrative Law Court.

In the circuit court, the hearing was held on August 26, 2010, and the trial court denied Appellant's motions and granted Respondents' motion for summary judgment dismissing Appellant's Complaint with prejudice. (R. pp. 554-92); (R. pp. 4-13). This appeal was taken.

Respondents delayed this matter by taking eighteen (18) months from the Appellant's first objection to explain their position on why the diabetes mandate did not apply to them, and Appellant has now waited an additional eighteen (18) months for the ALC to set this matter for hearing or decide it. (Briefing there was fully complete as of March 3, 2011, and as of the date of this Petition, August 2, 2012, the ALC had not set a hearing nor issued its decision.)

(D) For purposes of this section: "*Health insurance policy*" means a health benefit plan, contract, or evidence of coverage providing health insurance coverage as defined in Section 38-71-670(6) and Section 38-71-840(14).

“A party should not be required to ‘roll the dice’ on whether a collateral administrative proceeding will conclude prior to the running of an applicable statute of limitations in order to preserve a claim properly within the jurisdiction of the circuit court.” *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 531 (S.C. Ct. App. 2009). The court in *Capital City* held that where a party would be harmed by the running of the statute of limitations or otherwise prejudiced if its claim is dismissed for failure to exhaust administrative remedies, and the court has determined that resolution of the administrative proceeding would impact the circuit court case, then the circuit court should properly consider a stay or continuance of the judicial action until the administrative proceedings have concluded. *Id.* While the outcome of the administrative proceeding could moot the instant lawsuit, another possible outcome is that the ALC (or possibly this Court on appeal from the ALC) determines the ALC does not have the power to grant the relief requested and that the issues should be decided by the circuit court. This is the classic *catch-22* for a plaintiff, and for this reason this Court should rehear this matter and reverse the grant of summary judgment. Appellant should not be prejudiced by his decision to protect himself (and all putative class members) against a possible statute of limitations defense, particularly when there is no guidance in the law of whether the ALC has the power to grant the relief requested in the instant lawsuit, including: (1) certification of a class; (2) a declaration that the Plan violates S.C. Code Ann. § 38-71-46; (3) a declaration of the future rights of the putative class members with regard to claims for diabetes education and training under the Plan; (4) reformation of the Plan to comply with S.C. Code Ann. § 38-71-46; (5) an injunction to stop the Respondents from continuing their unlawful actions in the future; (6) disgorgement and

return of all profits and/or monies which should have been paid to the putative class members; and (7) costs and attorneys' fees.

2. *In affirming the grant of summary judgment with prejudice against the Appellant, this Court's opinion failed to address the differences between the claims alleged in this civil action with those subject to the Administrative Law Court proceeding (which has been pending and fully briefed and awaiting action by the ALJ for eighteen (18) months), and therefore whether the differences in those claims render the exhaustion requirement in S.C. Code Ann. § 1-11-710(C) inapplicable to this civil action.*

This Court's opinion did not address the differences between what is subject to the administrative process and the causes of action asserted in the instant lawsuit. The causes of action asserted in the instant lawsuit are not "claims for benefits" within the meaning of section 1-11-710(C), and continuing with the administrative appeal would not provide Appellant with an adequate remedy.

In the instant lawsuit Appellant seeks: (1) certification of a class; (2) a declaration that the Plan violates S.C. Code Ann. § 38-71-46; (3) a declaration of the future rights of the putative class members with regard to claims for diabetes education and training under the Plan; (4) reformation of the Plan to comply with S.C. Code Ann. § 38-71-46; (5) an injunction to stop the Respondents from continuing their unlawful actions in the future; (6) disgorgement and return of all profits and/or monies which should have been paid to the putative class members; and (7) costs and attorneys' fees. (R. p. 22). The potential result in favor of Appellant from the pending administrative proceeding would not provide the relief sought by Appellant and the putative class members in the instant lawsuit.

Section 1-11-710(C) provides that "*claims for benefits* under any self-insured plan of insurance offered by the State to state and public school district employees and other

eligible individuals must be resolved by procedures established by the board [South Carolina Budget and Control Board], which shall constitute the exclusive remedy for these claims, subject only to appellate judicial review consistent with the standards provided in Section 1-23-380.” S.C. Code Ann. § 1-11-710(C) (emphasis added). Section 1-23-380 entitled “Judicial Review Upon Exhaustion of Administrative Remedies” “does not limit utilization of or the scope of judicial review *available under other means of review, redress, relief, or trial de novo* provided by law.” S.C. Code Ann. § 1-23-380(A) (Supp. 2009) (emphasis added).

If the denial of Appellant’s claims for diabetes education and training benefits is reversed in the ALC, then presumably Appellant would receive coverage only for his diabetes education claims. However, neither the Appellant’s benefit plan nor the putative class members’ benefit plans would necessarily be reformed to provide the statutorily mandated insurance coverage for diabetes education. Appellant’s prevailing in the administrative process would not require Respondents to review all denials made in violation of the diabetes education mandate statute since its enactment in 2000. Appellant’s prevailing in the administrative process would not enjoin Respondents from violating the diabetes mandate in the future, nor force disgorgement of revenues and profits related to the illegal conduct.

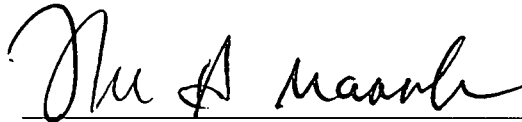
"A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 529 (S.C. Ct. App. 2009) quoting *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 632 S.E.2d 864, 867 (S.C. 2006) (citing *Ward v. State*, 538 S.E.2d 245 (S.C. 2000)); see also *Stinney*, 675 S.E.2d at 763

(recognizing that inadequacy of the administrative appeal is an exception to the general rule requiring exhaustion). The purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reason for denying the diabetes education claim, would not assist the Court in this case. The alleged wrong – violation of the statutory mandate as to an entire class of persons—is not one which the administrative process was designed to address.

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests that the Court rehear this matter en banc.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John A. Massalon", is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
S.C. Court of Appeals Case No. 2011183026

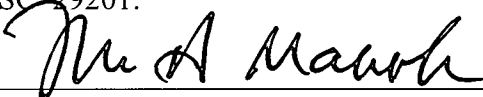
Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,.....Appellant,

v.

South Carolina Budget and Control Board,
Employee Insurance Program Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing en Banc on Respondent
of record by depositing a copy of it in the United States Mail, postage prepaid, on August 2,
2012, addressed to their attorneys of record, Theodore D. Willard, Jr., Montgomery Willard,
LLC, P.O. Box 11886, Columbia, SC, 29211 and Kelly H. Rainsford, State Budget & Control
Board, 1201 Main Street, Suite 300, Columbia, SC 29201.


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August 1, 2012

VIA OVERNIGHT MAIL
The Honorable Jeanette Barber
Clerk
South Carolina Court of Appeals
1015 Sumter Street
PO Box 11629
Columbia, SC 29211

RE: Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as
representative of other similarly situated State of South Carolina
employees v. SC Budget & Control Board
SC Court of Appeals Case No.: 2011183026
Circuit Court Case No.: 09-CP-10-7404
File No.: 595-1

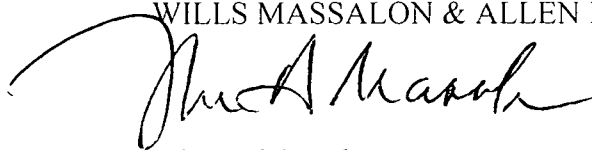
Dear Ms. Barber:

With regard to the above referenced matter, enclosed please find the original and six (6) copies of the Petition for Rehearing en Banc of Appellant, Certificate of Service, and filing fee in the amount of \$25.00. By copy of this letter to all counsel of record, I am serving them with a copy of the same. If you have any questions, please do not hesitate to give me a call.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC



John A. Massalon
jmassalon@wmalawfirm.net

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AUG 02 2012
SC Court of Appeals

Enclosures

cc: Terry E. Richardson, Jr., Esquire
Theodore D. Willard, Jr., Esquire
Kelly H. Rainsford, Esquire

The South Carolina Court of Appeals

Jeffrey D. Allen, individually, as guardian for Jane Doe,
a minor, and as representative of other similarly situated
State of South Carolina employees, Appellant,

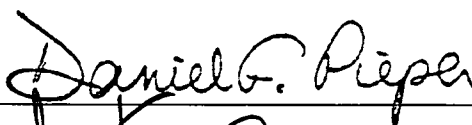
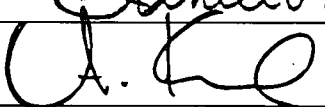
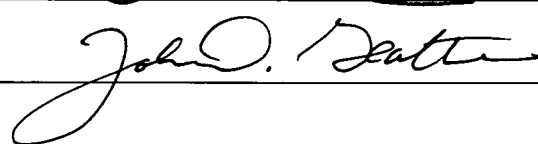
v.

South Carolina Budget and Control Board Employee
Insurance Program and Blue Cross and Blue Shield of
South Carolina, Respondents

Appellate Case No. 2011-183026

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	J.
	J.
	J.

Columbia, South Carolina

cc:
John A. Massalon
Theodore DuBose Willard, Jr.
Kelly Hunter Rainsford

FILED
19 September 2012



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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September 19, 2012

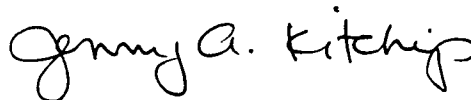
Mr. John A. Massalon
PO Box 859
Charleston SC 29402

Re: Allen, Jeffrey v. SCBCB
Appellate Case No. 2011-183026

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,


CLERK

cc: Theodore DuBose Willard, Jr.
Kelly Hunter Rainsford

12-433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
S.C. Court of Appeals Case No. 2011183026

Jeffrey D. Allen, individually,
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v.

South Carolina Budget and
Control Board Employee
Insurance Program and Blue
Cross and Blue Shield of
South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW
DECISION OF THE SOUTH CAROLINA COURT OF APPEALS (SCRAP 242(a))

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OCT 22 2012

SC Court of Appeals

APPENDIX

1. Petition for Writ of Certiorari to Review Decision of the South Carolina Court of Appeals (SCRAP 242(A))
2. Certificate of Counsel
3. Proof of Service
4. Record on Appeal, Volume I & II
5. Brief of Appellant
6. Brief of Respondent
7. Reply Brief of Appellant
8. Unpublished Opinion Heard filed July 18, 2012
9. Petition for Rehearing En Banc filed August 2, 2012
10. Order Denying the Petition for Rehearing filed September 19, 2012

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CERTIFICATION BY COUNSEL

The undersigned certifies that Petition for Rehearing was made in the South Carolina Court of Appeals on August 2, 2012, and that the South Carolina Court of Appeals finally ruled on said petition by denying it in an Order of September 19, 2012.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in not reversing the lower court's dismissal *with prejudice* of Appellant's case for failure to exhaust administrative remedies, when the administrative process was, while underway, inexplicably delayed, and when it remains unclear whether the subject claims are subject to administrative review or not?
2. Should the Appellant have to roll the dice on whether the collateral administrative proceeding will conclude prior to the running of statute of limitations in order to preserve a claim properly within the jurisdiction of the circuit court?

STATEMENT OF CASE

Appellant Allen finds himself in the equivalent of a procedural Gordian knot. Allen is seeking to compel Respondent State Health Plan to comply with a statutory

mandate for diabetes education insurance coverage found at S.C. Code Ann. § 38-71-46.¹ He began the administrative process in February 2009 by seeking reconsideration of Respondents' denial of the claim for diabetes education made by his three year old daughter for an education session, held at MUSC, and prescribed by her doctors for use and operation of an insulin pump. (R. Vol. 1, pp. 185-86). The State Health Plan ignored and confused the claim. (R. Vol. 1, pp. 175-216). After nine (9) months with no meaningful response, Allen filed the circuit court action which is the origin of this case in November 2009 – two days short of two (2) years from his daughter's diagnosis of Type I diabetes – the event precipitating her first diabetes education claim denial. (R, Vol. 1, pp. 16-23). Allen's circuit court case does not seek recovery for the approximate \$500 insurance claim, but seeks declaratory, class, equitable, and injunctive relief requiring the State Health Plan to comply with the mandate as to all South Carolinians. *Id.*

Instead of engaging in discovery and despite denial of its initial Motion to Dismiss, the State Health Plan quickly moved for a protective order (R. Vol, 1, pp. 294-320, 432-37), and summary judgment on the grounds that Allen had failed to exhaust administrative remedies and that the diabetes mandate statute did not apply to the State Health Plan. (R. Vol. 1-, pp. 321-431, 439-67). Allen attempted to compel discovery,

¹ Section 38-71-46, provides in relevant part: Diabetes Mellitus coverage in health insurance policies, diabetes education.

(A) On or after January 1, 2000, every health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State must provide coverage for the equipment, supplies, Food and Drug Administration-approved medication indicated for the treatment of diabetes, and outpatient self-management training and education for the treatment of people with diabetes mellitus, . . .

(D) For purposes of this section: "Health insurance policy" means a health benefit plan, contract, or evidence of coverage providing health insurance coverage as defined in Section 38-71-670(6) and Section 38-71-840(14).

requested a stay of decision on summary judgment, and opposed summary judgment (R. Vol. 2, pp. 468-91, 492-507). On the eve of the circuit court summary judgment hearing on August 24, 2010, the State Health Plan issued its decision in the administrative proceeding, and *for the first time* attempted to explain why the diabetes mandate statute did not apply to it. (R. Vol. 2, pp. 453-66). By this time, it had been over two (2) years since the last claim was denied, and over 18 months since Allen had become mired in the internal agency appeals process, which had yet to even reach the Administrative Law Court level of appeal.

The circuit court hearing was held on August 26, 2010. The court granted summary judgment against Allen for failure to exhaust administrative remedies (without ruling on the substantive question of whether the statute applies to the State Health Plan) and dismissed Allen's case *with prejudice*. (R. pp. 554-92); (R. pp. 4-13). This appeal followed.

Allen continued on with the administrative process, filed his appeal in the Administrative Law Court, and waited – for two (2) more years. On July 18, 2012, the Court of Appeals affirmed the circuit court's dismissal with prejudice by unpublished order. At that time, though, it had been nearly 3 ½ years, and no judge --not in the circuit court, not in the appeals court, and not in administrative court-- had issued a ruling on the substantive issue of whether the broad language of the diabetes mandate statute applies to the State Health Plan, and if not, why.²

² On August 15, 2012, Allen received a copy of the ALJ's Order which held that the diabetes mandate statute did not apply to the State Health Plan. Allen has appealed in *Allen v. South Carolina Public Employee Benefit Authority, Employee Insurance Program*, Case No: 2012-212988, and is filing contemporaneously herewith a Motion to

Allen is simply seeking to keep this circuit court case alive so that, should he prevail on the merits – the State Health Plan is required to comply with the diabetes mandate statute-, he will have a circuit court case in which to finally proceed.

ARGUMENT

1. *This matter presents novel questions of law, and is of exceptional importance as it impacts public employees in South Carolina and their access to judicial determination on the applicability of a diabetes statutory mandate to the state insurance plan.*

“Protecting against abusive delay is an interest of justice.” *Martel v. Clair*, 132 S.Ct. 1276, 1286 (2012). In 1999, the SC General Assembly enacted an insurance coverage mandate for diabetes treatment, supplies, and education. Diabetes is a condition which affects nearly 10% of South Carolinians (R. pp. 17-18). Respondent State Health Plan ignores the mandate. The ultimate question in this matter is whether the State Health Plan can overrule the SC General Assembly, and whether there is adequate judicial review. These are novel questions of law.

“A party should not be required to ‘roll the dice’ on whether a collateral administrative proceeding will conclude prior to the running of an applicable statute of limitations in order to preserve a claim properly within the jurisdiction of the circuit court.” *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105, 674 S.E.2d 524, 531 (Ct. App. 2009). The court in *Capital City* held that where a party would be harmed by the running of the statute of limitations or otherwise prejudiced if its claim is dismissed for failure to exhaust administrative remedies, and the court has determined that resolution of the administrative proceeding would impact the circuit court case, then the circuit court

Certify for Review by the Supreme Court pursuant to SCRAP, Rule 204(b) in hopes that the Court will consolidate these matters for final consideration.

should properly consider a stay or continuance of the judicial action until the administrative proceedings have concluded. *Id.* While the outcome of the administrative proceeding could moot the instant lawsuit, another possible outcome is that the SC Court of Appeals or this Court (on appeal from the Administrative Law Court) determines the ALC does not have the power to grant the relief requested and that the issues should be decided by the circuit court. This is the classic *catch-22* for a plaintiff, and for this reason this Court should exercise its discretion to review this matter. Allen should not be prejudiced by his decision to protect himself (and all putative class members) against a possible statute of limitations defense, particularly when there is no guidance in the law of whether the ALC has the power to grant the relief requested in the instant lawsuit, including: (1) certification of a class; (2) a declaration that the Plan violates S.C. Code Ann. § 38-71-46; (3) a declaration of the future rights of the putative class members with regard to claims for diabetes education and training under the Plan; (4) reformation of the Plan to comply with S.C. Code Ann. § 38-71-46; (5) an injunction to stop the Respondents from continuing their unlawful actions in the future; (6) disgorgement and return of all profits and/or monies which should have been paid to the putative class members; and (7) costs and attorneys' fees.

2. *In affirming the grant of summary judgment with prejudice against Allen, the Court of Appeals' opinion failed to address the differences between the claims alleged in this civil action with those subject to the Administrative Law Court proceeding (which at the time, had been pending and awaiting action for eighteen (18) months), and therefore whether the differences in those claims render the exhaustion requirement in S.C. Code Ann. § 1-11-710(C) inapplicable to this civil action.*

The Court of Appeals' opinion did not address the differences between what is subject to the administrative process and the causes of action asserted in the instant

lawsuit. The causes of action asserted in the instant lawsuit are not “claims for benefits” within the meaning of section 1-11-710(C), and continuing with the administrative appeal would not provide Allen with an adequate remedy.

Section 1-11-710(C) provides that “*claims for benefits* under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board [South Carolina Budget and Control Board], which shall constitute the exclusive remedy for these claims, subject only to appellate judicial review consistent with the standards provided in Section 1-23-380.” S.C. Code Ann. § 1-11-710(C) (emphasis added). Section 1-23-380 entitled “Judicial Review Upon Exhaustion of Administrative Remedies” “does not limit utilization of or the scope of judicial review *available under other means of review, redress, relief*, or trial de novo provided by law.” S.C. Code Ann. § 1-23-380(A) (Supp. 2009) (emphasis added).

If the denial of Allen’s claims for diabetes education and training benefits is ultimately reversed, then Allen may only receive coverage for his diabetes education claim. However, neither Allen’s benefit plan nor the putative class members’ benefit plans would necessarily be reformed to provide the statutorily mandated insurance coverage for diabetes education. Allen’s prevailing would not necessarily require Respondent to review all denials made in violation of the diabetes education mandate statute since its enactment in 2000. Allen’s prevailing would not enjoin State Health Plan from violating the diabetes mandate in the future, nor force disgorgement of revenues and profits related to the illegal conduct.

"A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 529 (S.C. Ct. App. 2009) quoting *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 632 S.E.2d 864, 867 (S.C. 2006) (citing *Ward v. State*, 538 S.E.2d 245 (S.C. 2000)); see also *Stinney v. Sumter School District 17*, 382 S.C. 352, 675 S.E.2d 760 (2011) (rev'd on other grounds) (recognizing that inadequacy of the administrative appeal is an exception to the general rule requiring exhaustion). The purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reason for denying the diabetes education claim, would not assist the Court in this case. The alleged wrong – violation of the statutory mandate as to an entire class of persons—is not one which the administrative process was designed to address.

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests that the Court grant the Writ of Certiorari.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "John A. Massalon", is written over a horizontal line.

John A. Massalon
Wills Massalon & Allen, LLC
ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404
S.C. Court of Appeals Case No. 2011183026

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,.....Appellant,

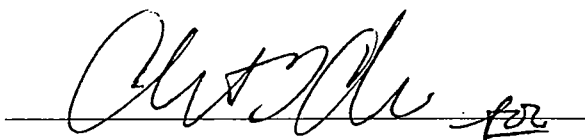
v.

South Carolina Budget and Control Board Employee Insurance Program and
Blue Cross and Blue Shield of South Carolina..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that the Petition for Writ of Certiorari to Review Decision of
the South Carolina Court of Appeals complies with Rule 242(a), SCRAP.

October 17, 2012

A handwritten signature in black ink, appearing to read "John A. Massalon", is written over a horizontal line. To the right of the signature, the word "for" is written in a smaller, cursive script.

John A. Massalon, Esquire (SCB# 10279)
Wills Massalon & Allen LLC
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Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire (SCB# 4721)
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
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Barnwell, SC 29812

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of other similarly situated State of South Carolina employees or retirees,.....Appellant,

v.

South Carolina Budget and Control Board Employee Insurance Program and
Blue Cross and Blue Shield of South Carolina.....Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Writ of Certiorari to Review
Decision of the South Carolina Court of Appeals (SCRAP 242(a)) on the Respondent of record
and the South Carolina Court of Appeals by depositing a copy of it in the United States Mail,
postage prepaid, on October 17, 2012, addressed to Respondent attorneys of record, Theodore D.
Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886, Columbia, SC, 29211, Kelly H.
Rainsford, State Budget & Control Board, 1201 Main Street, Suite 300, Columbia, SC 29201
and to the Clerk of SC Court of Appeals, The Honorable Jenny A. Kitchings, P.O. Box 11629,
Columbia, SC 29211.



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October 17, 2012

Direct Dial: (843) 793-6039

The Honorable Daniel E. Shearouse
Clerk of Court Supreme Court
Supreme Court of SC
P.O. Box 11330
Columbia, SC 29211

RE: Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees v. South Carolina Budget and Control Board Employee Insurance Program and Blue Cross and Blue Shield of South Carolina
Circuit Court Case No. 2009-CP-10-7404
SC Court of Appeals Case No. 2011183026
File No. 595-1

Dear Mr. Shearouse:

Enclosed please find the following in regard to the above-referenced matter:

1. The original and six (6) copies of the Petition for Writ of Certiorari to Review Decision of the South Carolina Court of Appeals (SCRAP 242(a));
2. The original and six (6) copies of the Proof of Service of Petition for Writ of Certiorari;
3. The original and six (6) copies of the Certificate of Counsel of the Petition for Writ of Certiorari;
4. A check for filing fee in the amount of \$100.00; and
5. One bound and one unbound copy of the Appendix to the Petition for Writ of Certiorari, which includes SC Court of Appeals Case No.: 2011183026 filings:
 - a. Record on Appeal, Vol. I & Vol. II
 - b. Brief of Appellant
 - c. Brief of Respondents
 - d. Brief of Appellants
 - e. Unpublished Opinion filed 7/18/12
 - f. Petition for Rehearing received by Court of Appeals on 8/2/12
 - g. Order denying Petition for Rehearing filed 9/19/12;

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OCT 22 2012
SC Court of Appeals

If you have any questions, please do not hesitate to contact me.

October 17, 2012

Page 2

With kind regards, I am

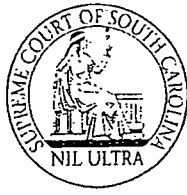
Sincerely,

WILLS MASSALON & ALLEN LLC


John A. Massalon, Esquire 
jmassalon@wmalawfirm.net

Enclosures

cc: Terry E. Richardson, Jr., Esquire (w/o appendix)
Theodore D. Willard, Jr., Esquire (w/o appendix)
Kelly H. Rainsford, Esquire (w/o appendix)
The Honorable Jenny A. Kitchings (w/o appendix)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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October 22, 2012

Mr. John A. Massalon
PO Box 859
Charleston SC 29402

Re: Jeffrey Allen v. SC Budget & Control
Appellate Case No. 2012-213206

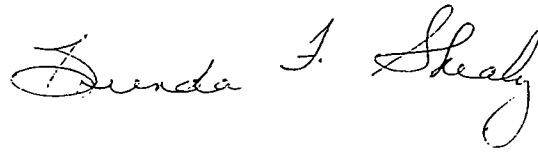
Dear Counsel:

This Court has received your Petition for Writ of Certiorari and Appendix, and the case has been assigned the appellate case number that appears above. **Please use this number on all future correspondence relating to this matter.**

All parties to this matter are advised that all filings must comply with the requirements of Rule 242 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at www.sccourts.org/courtOrders/HTMLFiles/2007-08-13-02.htm. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. **This office will not review filings for redaction or to determine if materials should be sealed.**

Very truly yours,

A handwritten signature in cursive script, reading "Brenda A. Shealy". The signature is written in dark ink and is positioned above the printed name.

CHIEF DEPUTY CLERK

cc:

Theodore DuBose Willard, Jr.

Kelly Hunter Rainsford

The Honorable Jenny Kitchings