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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,

Appellant,

v.

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

Respondent.

PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Table of Authorities 2

Statement of Issues on Appeal 2-3

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Martel v. Clair, 132 S.Ct. 1276, 1286 (2012) 3

Capital City Ins. Co. v. BP Staff, Inc., 674 S.E.2d 524, 531 (S.C. Ct. App. 2009) 5-6, 8

Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 632 S.E.2d 864, 867 (S.C. 2006) 8

Ward v. State, 538 S.E.2d 245 (S.C. 2000) 8

S.C. Code Ann. § 38-71-46 4-7

S.C. Code Ann. § 1-11-710(C) 7-8

S.C. Code Ann. § 1-23-380 8

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 legistlative 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. § 38-71-46[1], and that the case should be certified as a class action. (R. pp. 16-22).

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[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 Apellant'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.

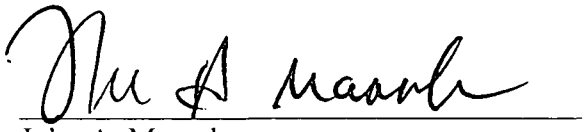
"A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Capital City Ins. Co. v. BP Staff, Inc*, 674 S.E.2d 524, 529 (S.C. Ct. App. 2009) quoting *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 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,



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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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