

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

JAN - 6 2015

Case No. 2014-002513

S.C. Supreme Court

Richard Stogsdill,.....Petitioner,

v.

South Carolina Department of
Health and Human Services,.....Respondent.

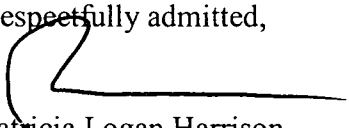
**MOTION TO SUPPLEMENT RECORD ON APPEAL
AND/OR TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS**

Petitioner hereby moves, pursuant to Rule 240(c)(3) and Rule 212(b) of the South Carolina Rules of Appellate Practice and Rule 201 of the South Carolina Rules of Evidence to supplement the Record on Appeal and/or to take judicial notice of the six documents listed below (page numbers refer to the pages attached to the Petitioner’s Reply filed on January 2, 2015, which was corrected on January 5, 2015):

Exhibit 1.	Order of Judge Joseph Anderson in <i>Stogsdill et. al v. DHHS and Anthony Keck</i> dated November 10, 2014, Case No. 3:12-cv-00007-JFA, Entry 131.	18
Exhibit 2.	Order of Judge Joseph Anderson in <i>Stogsdill et. al v. DHHS and Anthony Keck</i> dated December 31, 2014, Case No. 3:12-cv-00007-JFA, Entry 158.	46
Exhibit 3.	Motion to Dismiss Petition/Complaint for Remedial Writ dated July 23, 2014, <i>B.W.v. DHHS</i> , ALC Case No. 14-ALJ-08-0603-AP.	49
Exhibit 4.	Response to Motion to Dismiss Petition/Complaint for Remedial Writ dated August 4, 2014, <i>B.W.v. DHHS</i> , ALC Case No. 14-ALJ-08-0603-AP.	52
Exhibit 5.	S.C. Comptroller General Press Release dated August 20, 2010.	57
Exhibit 6.	S.C. Comptroller General Press Release dated August 20, 2014.	67

Grounds for this motion are discussed on the attached Memorandum of Law. Richard Stogsdill prays that this Court will admit these documents to be considered in determining whether or not to grant Certiorari in this case.

Respectfully admitted,



Patricia Logan Harrison
611 Holly Street
Columbia, SC 29205
803-256-2017
Attorney for Petitioner

Columbia, South Carolina

January 6, 2015

RECEIVED

JAN - 6 2015

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case No. 2014-002513

Richard Stogsdill,.....Petitioner,

v.

South Carolina Department of Health and Human Services,.....Respondent.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPLEMENT RECORD ON APPEAL AND/OR TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Petitioner requests that this Court take judicial notice or otherwise permit Petitioner to supplement the Record with the following documents that have been provided to the Court.

Exhibit 1. Order of Judge Joseph Anderson in *Stogsdill et. al v. DHHS and Anthony Keck* dated November 10, 2014, Case No. 3:12-cv-00007-JFA, Entry 131. 18

Exhibit 2. Order of Judge Joseph Anderson in *Stogsdill et. al v. DHHS and Anthony Keck* dated December 31, 2014, Case No. 3:12-cv-00007-JFA, Entry 158. 46

Exhibit 3. Motion to Dismiss Petition/Complaint for Remedial Writ dated July 23, 2014, *B.W.v. DHHS*, ALC Case No. 14-ALJ-08-0603-AP. 49

Exhibit 4. Response to Motion to Dismiss Petition/Complaint for Remedial Writ dated August 4, 2014, *B.W.v. DHHS*, ALC Case No. 14-ALJ-08-0603-AP. 52

Exhibit 5. S.C. Comptroller General Press Release dated August 20, 2010. 57

Exhibit 6. S.C. Comptroller General Press Release dated August 20, 2014. 67

Rule 212(b) of the Rules of Appellate Practice allow a party to supplement the Record at any time prior to argument with leave of the Court. In fairness to the opposing party, that Rule allows DHHS, in response, to designate any supplemental material which the agency desires to add if the Court grants Petitioner's Motion. Rule 240(c)(3) of the South Carolina Rules of Appellate Practice provides that where the Record on Appeal does not contain the facts relied upon in support of a motion, the parties may attach other documents in support of their position. The facts which Petitioner asks this Court to consider in this Motion relate to the public importance of this case, a factor the Court must consider in determining whether to grant the Petition for Cert.

Rule 201 governs judicial notice of adjudicative facts. Rule 201(b) provides that "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." A court may take judicial notice, whether requested or not. Rule 201(c). Rule 201(d) provides that "A court shall take judicial notice if requested by a party and supplied with the necessary information." (Emphasis added.) A party is entitled to request an opportunity to be heard "as to the propriety of taking judicial notice and the tenor of the matter noticed." Such a request may be made after judicial notice has been taken. Rule 201(f) provides that judicial notice may be taken at any stage of the proceeding, including by the Supreme Court.

The Court may take judicial notice of both adjudicative facts and legislative facts, but the Rule does not allow a judge to take judicial notice "of a fact merely because it is within his personal knowledge..." Rule 201. Providing a party the opportunity to be heard "appears to be a useful safeguard to protect a party's rights." Rule 201 Reporter's Comments, quoting J. Weinstein

and M. Berger, Weinstein's Evidence, ¶ 201[05] (1994).

In *Toole v. Salter*, this Court held that "Any evidence that assists in getting at the truth of the issue is relevant and admissible, unless because of some legal rule it is incompetent." *Toole v. Salter*, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967). (Finding that the trial court erred by failing to take judicial notice of the time of sunset.) See also Reporter's Comments to Rule 201. *Toole* was reaffirmed by South Carolina Supreme Court in *Anderson v. Buonforte*, 617 S.E.2d 750, 754, 365 S.C. 482 (SC, 2005); and by the South Carolina Court of Appeals in *Bankers Trust of South Carolina v. Bruce*, 323 S.E.2d 523, 529, 283 S.C. 408 (S.C. App., 1984) and in *Butler v. Gamma Nu Chapter of Sigma Chi*, 445 S.E.2d 468, 470, 314 S.C. 477 (S.C. App., 1994).

Exhibits 1 and 2 are orders of the United States Federal District Court which this Court may consider as supplemental authorities under Rule 208(b)(7). These orders should also be considered under Rule 201(b), because the content of these orders is capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. Exhibits 3 and 4 are documents filed by DHHS in the South Carolina Administrative Law Court and those documents are likewise from a source whose accuracy, as having been filed in that Court, cannot be questioned. (Although Petitioner does not agree with the result in that case, which is on appeal.)

Exhibits 5 and 6, discussed on page 2 of Petitioner's Reply, are public reports issued by the Comptroller of the State of South Carolina, which have been published on the Comptroller's website. This Court ruled in *State v. Broad River Power Company* upon the issue of whether it is proper to take judicial notice of reports of the State Comptroller:

The legislative journals of both houses of the General Assembly are judicially noticed, as well as the official reports of legislative departments, such as the Tax Commission and the Comptroller General. 23 C. J. 102; *State v. Piatt*, 2 S. C. 150, 155, 16 Am. Rep. 647. "Courts will not profess to be more ignorant than the rest of mankind," Fleischman,

Morris & Co. v. So. Ry. Co., 76 S. C. 237, 241, 56 S. E. 974, 975, 9 L. R. A. (N. S.) 519, and should take notice of whatever is or ought to be generally known within the limits of their jurisdiction. 15 R. C. L. p. 1057, Â§ 2.

177 S.C. 240, 181 S.E. 41, 48 (S.C., 1935). The Comptroller's reports at Exhibits 5 and 6 document that the cost of the program at issue in this appeal increased by tens of millions of dollars in 2010, contradicting the "budget reduction" justification for reducing and eliminating home-based services. The minutes of the Commission of the South Carolina Department of Disabilities and Special Needs (page 10 of Reply) and the 2014 Report of the South Carolina Legislative Audit Council (page 8) also fall under the "official reports" category of documents of which this Court may take judicial notice. Likewise, the Court may take judicial notice of DHHS' own website, under the reasoning of *Broad River Power Company*. The DHHS website instructs Medicaid participants that the hearing officer will consider letters from their physicians in reaching "fair hearing" decisions (pages 6 and 7), yet the agency argued to this Court that statements of physicians are hearsay evidence that should not even be considered in fair hearings.

In deciding whether it is just and equitable to take judicial notice or supplement the Record with these documents, the Court should consider that Richard was required to file his request for reconsideration with the director of the South Carolina Department of Disabilities and Special Needs within 10 days of receiving notice of the State's intention to reduce/terminate the services at issue in this case, and to file a request for a "fair hearing" within 30 days of receipt of Dr. Buscemi's letter denying that request. "Fair hearing" appellants have no right to discovery. The evidence that has come to light since Richard filed this appeal suggests that these State agencies have perpetrated a fraud upon the Court by (1) falsely informing CMS that the Medicaid waiver program was amended due to budget reductions, when the cost of the program increased by more than 25%; (2) denying his request for reconsideration based on the claim of the director of DDSN

that the agencies were without the authority to exceed the limits (“limits” which DHHS agreed to exceed in *Hickey v. DHHS*, Docket No. 10-ALJ-08-0656-AP (S.C.A.L.C. July 19, 2011). *Edge, Eubanks, Morgan and Myers v. DHHS*, Docket No. 10-ALJ-08-0504 (S.C.A..L.C. 2011), *Peter B. v. Sanford, supra* (3) continuing to rely upon the argument that the waiver reductions must be enforced due to the Regional Office at CMS having approved them, when the federal district court and the Court of Appeals for the Fourth Circuit have both ruled that CMS authorization does not determine whether Medicaid waiver amendments meet the requirements of federal law. *Peter B. v. DHHS, supra* and *Pashby v. Delia*, 709 F.3d 307 (4th Cir., 2013). Because the Medicaid waiver amendments affected thousands of recipients of Medicaid services, this is a matter of tremendous public concern.

In addition, the increase in the 37% increase in the per capita cost of this program, without authorization by the General Assembly, is a matter of great concern to taxpayers of this state. As the United States Supreme Court held in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*

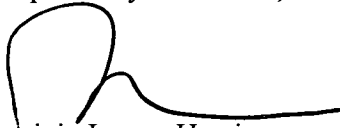
Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

322 U.S. 238 (1944), quoted in *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (S.C., 2003). Justice Roberts wrote in *Hazel-Atlas* that: “No fraud is more odious than an attempt to subvert the administration of justice.” *Id.* at 251. Justice has been subverted in this case, and many other cases, where DHHS has prevented Medicaid waiver participants from having their day in federal court, based on its arguments that their “sole remedy” lies in the state administrative

process. In *B.W. v. DHHS*, the hearing officer (now deputy director for DHHS) ruled that hearing officers are without authority to exceed waiver caps, thus Richard and others have not only been denied their day in federal court, but they have been sent on an exhausting wild goose chase for justice, while needed services have been withheld from them. R. 1135.

Richard prays that this Court will take judicial notice of the exhibits provided to the Court and the agency websites referenced in his Reply.

Respectfully submitted,



Patricia Logan Harrison
611 Holly Street
Columbia, South Carolina 29205
plh.cola@att.net
803 360 5555

Attorney for Petitioner

Columbia, South Carolina

January 6, 2014

RECEIVED

JAN - 6 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case No. 2014-002513

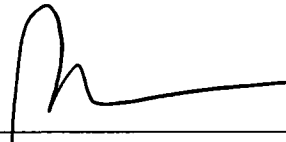
Richard Stogsdill,.....Appellant,

v.

South Carolina Department of
Health and Human Services,.....Respondent.

Certificate of Service

I, Patricia Logan Harrison, certify that I hand delivered the *Motion to Supplement Record on Appeal and/or to Take Judicial Notice of Adjudicative Facts* in the above case to Richard G. Hepfer, Esq., Office of General Counsel, South Department of Health and Human Services, 1801 Main St, Columbia, SC 29201, on January 6, 2014.



Patricia Logan Harrison
Law Office of Patricia Logan Harrison
611 Holly St.
Columbia, SC 29205
803-256-2017