

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY

DeAndrea G. Benjamin, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2015-000637

Home Benefits, Inc. and the
American Traveler Motor
Club, Inc.,

Appellants,

v.

South Carolina Department of
Consumer Affairs,

Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. SHOULD THIS COURT AFFIRM THE DENIAL OF ATTORNEY'S FEES BECAUSE HOME BENEFITS/AMERICAN TRAVELER HAVE NOT SHOWN THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ATTORNEY'S FEES?
- II. DID THE CIRCUIT COURT PROPERLY DENY HOME BENEFITS/AMERICAN TRAVELER'S REQUEST FOR ATTORNEY'S FEES BECAUSE THEY DID NOT ESTABLISH THE PREREQUISITES REQUIRED BY SECTION 15-77-300?
- III. DID THE CIRCUIT COURT PROPERLY DENY HOME BENEFITS/AMERICAN TRAVELER'S REQUEST FOR ATTORNEY'S FEES BECAUSE THEY DID NOT SHOW SUCH AWARD WOULD BE EQUITABLE AND JUST PURSUANT TO SECTION 15-53-100?

STATEMENT OF THE CASE

On January 20, 2009, Home Benefits/American Traveler filed an appeal at the Administrative Law Court requesting injunctive relief and a hearing regarding the Department's Declaratory Ruling 3.202-7608 issued October 30, 2008 ("2008 Ruling"). On June 5, 2012, when the parties appeared for a hearing before the Administrative Law Court, the parties reached an agreement that Home Benefits/American Traveler would withdraw their appeal from the Administrative Law Court and file this case at the Richland County Court of Common Pleas. [Transcript 6/5/2012 pp. 33-36]. While the case was pending at the Administrative Law Court and later at the circuit court, the parties entered multiple consent orders agreeing to the stay of enforcement and implementation of the 2008 Ruling until a full hearing on the merits resulting in a final order and decision by the court no longer subject to appeal or review. [Consent Order at ALC 3/23/2009; Consent Order at ALC 7/31/2012; Consent Order in Court of Common Pleas 2/5/2013].

On September 21, 2012, Home Benefits/American Traveler filed an action for declaratory relief in the Richland County Court of Common Pleas. [Summons and Complaint]. On November 30, 2012, the Department filed a Motion to Dismiss on the grounds that a declaratory judgment would not terminate the uncertainty or controversy giving rise to the proceeding. [Motion to Dismiss]. The court denied the Department's Motion to Dismiss on March 5, 2013. [Order Denying Motion to Dismiss]. The Department filed its Answer on April 2, 2013. [Answer].

On August 23, 2013, Home Benefits/American Traveler filed a Motion for Summary Judgment. [Motion for Summary Judgment]. The Department filed a Memorandum in Opposition to the Motion for Summary Judgment. [Memo in Opposition]. The court held a hearing on the Motion on October 15, 2013, and the parties subsequently submitted proposed orders. On April 30, 2014, the court issued an Order Granting Plaintiffs' Partial Summary Judgment. [Order Granting Partial Summary Judgment]. The court concluded it could not grant summary judgment for Home Benefits/American Traveler on the issue of notice as it is a contested question of fact. [Order Granting Partial Summary Judgment, p. 20]. The Department received the court's order on May 8, 2014.

On May 19, 2014, the Department served a Rule 59(e) Motion to Alter or Amend the Judgment on Home Benefits/American Traveler. [Rule 59(e) Motion]. In its Motion, the Department cited nine grounds as the basis for the court to alter or amend the Order Granting Plaintiffs' Partial Summary Judgment. Home Benefits/American Traveler filed a Return in Opposition to the Department's Motion. [Return in Opposition to Rule 59(e) Motion]. The Department requested on several occasions the opportunity to argue its

Motion to Alter or Amend. Without holding a hearing on the Motion, the court issued a Form 4 Order on February 20, 2015, denying the Department's "first seven grounds," granting the Department's "seventh ground," ordering Home Benefits/American Traveler to bear the cost of their attorneys' fees, and ending the case. [Form 4 Order]. On March 20, 2015, the Department filed its Notice of Appeal and served it on Home Benefits/American Traveler.

On March 23, 2015, the court issued an amended Form 4 Order, denying the Department's first seven grounds, granting the Department's "eighth ground," ordering Home Benefits/American Traveler to bear the cost of their attorneys' fees, and ending the case. [Amended Form 4 Order]. The court acknowledged there was a typographical error in the original Form 4 Order, which the court intended to correct by issuing the Amended Form 4 Order.¹

FACTS

Respondent South Carolina Department of Consumer Affairs ("Department") is the administrator and enforcer of the South Carolina Consumer Protection Code ("the Code"), Section 37-1-101 et seq., as well as other regulatory statutes outside the Code. See e.g. S.C. Code Ann. § 44-79-10 et seq. (physical fitness centers); § 32-7-10 et seq. (preneed funeral contracts). The Department is the sole state agency designated by the General Assembly to construe and provide official legal interpretations of the Code. See

¹ The Department asserts the circuit court was divested of jurisdiction to issue the Amended Form 4 Order on March 23. The Department filed its notice of appeal to the Court of Appeals on March 20 without knowledge that counsel for Home Benefits/American Traveler had contacted the court requesting an amended order. It is the Department's position, therefore, that as of March 20, the Court of Appeals had exclusive jurisdiction to hear the appeal of the Order Granting Partial Summary Judgment and the Form 4 Order issued denying the Department's Motion to Alter or Amend. See Rule 205, SCACR.

S.C. Code Ann. § 37-6-104(1)(b) and 37-6-506. On October 1, 1976, the Department issued Declaratory Ruling 3.202-7608 (“1976 Ruling”), allowing non-credit insurance—such as single premium accidental death and dismemberment insurance—to be sold in licensed locations of finance companies if the sale is not made in connection with a loan and the sale complies with certain procedures set forth in the ruling. [Declaratory Ruling No. 3.202-7608 dated 10/1/1976].

Appellants Home Benefits, Inc. and the American Traveler Motor Club, Inc. (“Home Benefits/American Traveler”) sell homeowner protection plans and motor club services. [Spiegel Affidavit 10/11/2013 p. 1-2]. On June 2, 2005, the Department issued an informal opinion to Home Benefits/American Traveler allowing their plans to be sold at licensed locations of supervised lenders at the time a supervised loan is made as long as the sale is not made in connection with a loan and the sale is in compliance with the procedures set forth in the 1976 Ruling. [Letter from Pinkston dated 6/2/2005]. Home Benefits/American Traveler subsequently began offering and selling their homeowners protection plan and motor club services in licensed supervised lender offices in South Carolina. [Spiegel Affidavit 10/11/2013 p. 2].

On December 19, 2007, the Department sent notice to the subscribers of the Department’s “Advance Notice Mailing List” that the Department was reviewing and reconsidering the 1976 Ruling. [Letter dated 12/19/2007]. On January 7, 2008, the Department sent a separate notice directly to Home Benefits/American Traveler regarding the Department’s review and reconsideration of the 1976 Ruling. [Email from Gray dated 1/7/2008]. On October 30, 2008, the Department issued a written ruling (“2008 Ruling”) withdrawing the 1976 Ruling. [Declaratory Ruling No. 3.202-7608

dated 10/30/2008]. The Department explained that it was withdrawing the 1976 Ruling because the actual practices used to sell the products evidenced that the products were made in connection with the loan. [Declaratory Ruling No. 3.202-7608 dated 10/30/2008].

On November 20, 2008, the Department met with Home Benefits/American Traveler to discuss the withdrawal of the 1976 Ruling. [Letter from Pinkston dated 12/17/2008]. On November 21, 2008, Home Benefits/American Traveler submitted a written request for reconsideration to the Department. [Letter from Pinkston dated 12/17/2008]. On December 17, 2008, the Department notified Home Benefits/American Traveler that the 2008 Ruling would remain in effect, which means the 1976 Ruling is withdrawn in its entirety and no longer considered valid. [Letter from Pinkston dated 12/17/2008].

On November 1, 2010, while Home Benefits/American Traveler's appeal was pending before the Administrative Law Court, the Department issued a revised ruling ("2010 Ruling") at the request of the Administrative Law Judge. The 2010 Ruling withdrew the 1976 Ruling and substituted the 2010 Ruling for the 1976 Ruling as well as any opinions previously issued by the Department that were inconsistent with the 2010 Ruling. [Declaratory Ruling No. 3.202-7608 (Reexamination) dated 11/1/2010].

ARGUMENTS

I. HOME BENEFITS/AMERICAN TRAVELER HAVE NOT MET THEIR BURDEN OF PROVING THE CIRCUIT COURT'S DENIAL OF ATTORNEY'S FEES WAS AN ABUSE OF DISCRETION.

The circuit court's denial of attorney's fees in this case was appropriate and should be upheld by this Court. The circuit court's decision to deny attorney's fees under a state statute will not be disturbed on appeal absent an abuse of discretion. Kiriakides v. Sch. Dist. of Greenville Cnty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Id. (quoting Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008)).

In this appeal, Home Benefits/American Traveler has not shown the circuit court abused its discretion in denying attorney's fees. In fact, the vast bulk of Home Benefits/American Traveler's Initial Brief does not address the issue of attorney's fees at all. Where Home Benefits/American Traveler do address the issue of attorney's fees, they assert "The ability for the Plaintiffs' [sic] to recovery [sic] attorney's fees is appropriate and can be awarded. It is relief that is allowed and which was sought by the Plaintiffs. {CITE} [sic]." [Initial Brief of Appellants p. 9]. Home Benefits/American Traveler offer conclusory statements that their ability to recover attorney's fees is appropriate and attorney's fees can be awarded. [Initial Brief of Appellants p. 9]. The only authority cited on the issue of attorney's fees is Section 15-53-100 of the South Carolina Code of Laws, which states that: "In any proceeding under this chapter the court may make such award of costs as may seem equitable and just." However, Home Benefits/American Traveler fail to cite any authority supporting the proposition that an award of attorney's fees would be equitable and just in this particular litigation. This Court has held that when an appellant fails to cite supporting authority for its position and merely makes conclusory statements, the appellant has abandoned the issue on appeal.

Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-594 (Ct. App. 2005).

Home Benefits/American Traveler have abandoned the issue of attorney's fees on appeal.

Furthermore, Home Benefits/American Traveler fail to offer any authority or analysis regarding how the circuit court abused its discretion in declining to award attorney's fees in this case. Thus, Home Benefits/American Traveler not only have failed to show an abuse of discretion in this case but also have abandoned the issue of attorney's fees on appeal.

II. THE CIRCUIT COURT CORRECTLY DENIED HOME BENEFITS/AMERICAN TRAVELER'S REQUEST FOR ATTORNEY'S FEES BECAUSE THEY DID NOT ESTABLISH THE PREREQUISITES REQUIRED BY SECTION 15-77-300.

When a party seeks the award of attorney's fees pursuant to Section 15-77-300, the South Carolina Supreme Court has held:

[T]here are three prerequisites which must be established prior to the recovery of attorney's fees and costs by a party contesting state action. . . . first, the contesting party must be the "prevailing party;" second, the court must find "that the agency acted without substantial justification in pressing its claim against the party;" and third, the court must find "that there are no special circumstances that would make an award of attorney's fees unjust."

Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990) (quoting Heath v. County of Aiken, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988)). The circuit court properly denied attorney's fees because Home Benefits/American Traveler did not meet any of the three prerequisites for recovering pursuant to Section 15-77-300.

A. BECAUSE HOME BENEFITS/AMERICAN TRAVELER WERE NOT PREVAILING PARTIES, THE CIRCUIT COURT CORRECTLY DENIED HOME BENEFITS/AMERICAN TRAVELER'S REQUEST FOR ATTORNEY'S FEES.

A party contesting state action must be the prevailing party before a court will consider granting or denying attorney's fees based on the factors in S.C. Code Ann. § 15-77-300. See McMillan v. Dept. of Agriculture, 364 S.C. 60, 611 S.E.2d 323 (2005). A prevailing party is the one who prevails on the main issue in an action. See Heath v. County of Aiken, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990) (citing Buza v. Columbia Lumber Co., 395 P.2d 511, 514 (1964)). "A court determines the prevailing party by evaluating the degree of success obtained." Heath v. County of Aiken, 302 S.C. 178, 183, 394 S.E.2d 709, 711 (1990).

1. HOME BENEFITS/AMERICAN TRAVELER WERE NOT PREVAILING PARTIES BECAUSE THE ORDER GRANTING PARTIAL SUMMARY JUDGMENT WAS BASED ON A RULING THAT WAS NON-EXISTENT AT THE TIME THE ORDER WAS ISSUED.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

In 2010, while this case was on appeal in the Administrative Law Court, Home Benefits/American Traveler expressed concern that the 2008 Ruling was deficient because it lacked a proper basis in law and fact necessary to change Department's 1976 Ruling. [Transcript dated August 12, 2010, pp. 44-51]. In an effort to equitably resolve this procedural issue, the Administrative Law Court instructed the Department to issue a new ruling with greater legal and factual support to supersede the 2008 Ruling, and the Department complied by issuing the 2010 Ruling. [Transcript dated August 12, 2010, pp. 44-51; 2010 Ruling]. The 2010 Ruling superseded the 2008 Ruling and became the only valid Ruling by the Department on this provision. [2010 Ruling].

In granting partial summary judgment, the circuit court focused in large part on what it found to be deficiencies in the 2008 Ruling. For example, the court found that the Department provided no information regarding its reasons for repealing the 1976 Ruling and issuing the 2008 Ruling. [Order p. 3]. The court further found that the 2008 Ruling did not address whether the 1976 Ruling was inconsistent with federal law. [Order p. 3] However, the court's judgment on these issues had "no practical, legal effect upon the existing controversy" because the 2010 Ruling rendered any lack of analysis in the 2008 Ruling moot. Mathis, at 346, 195 S.E.2d at 715.

In 2012, while this case was on appeal at the Administrative Law Court, both parties agreed that the case should be removed to circuit court as a declaratory judgment action in order to obtain a full hearing on the merits. [Transcript dated June 5, 2012, pp. 33-36]. However, once the case was removed to circuit court, Home Benefits/American Traveler filed a motion for summary judgment contending that the 2008 Ruling lacked a proper basis for repealing the 1976 Ruling and issuing a new declaratory ruling. [See Motion for Summary Judgment dated 8/22/2013]. Any mention of the 2010 Ruling was conspicuously absent from Home Benefits/American Travelers' Motion for Summary Judgment and the argument they presented at the hearing on that Motion. [See Transcript dated 10/15/2013; see also Motion for Summary Judgment dated 8/22/2013]. On April 29, 2014, the circuit court granted partial summary judgment, recognizing that there was a contested question of fact on the issue of notice. The court failed to address the 2010 Ruling, focusing instead on the 2008 Ruling. [See Order].

The court did not amend the order to address the 2010 Ruling, even after the Department noted this error in its Motion to Alter or Amend. [See Defendant's Motion to

Alter or Amend the Judgment]. The Department issued the 2010 Ruling at the request of the Administrative Law Judge prior to this case being filed at the circuit court. [Transcript dated August 12, 2010, p. 53]. Also, Home Benefits/American Traveler referenced the 2010 Ruling in their pleadings. [Complaint, p. 10]. The circuit court was aware that the 2008 Ruling had been withdrawn and the 2010 Ruling had been issued addressing any alleged deficiencies appearing in the 2008 Ruling. [Affidavit of Carri Grube Lybarker dated October 15, 2013]. Counsel for Home Benefits/American Traveler focused on the 2008 Ruling instead of the 2010 Ruling at the hearing on the Motion for Summary Judgment and ignored the mutually agreed upon goal of this litigation, to wit: establishing a procedure to properly withdraw a declaratory ruling. Because the circuit court relied on issues rendered moot by the 2010 Ruling and did not address the underlying contested facts and legal procedural requirements in its grant of partial summary judgment in this case, Home Benefits/American Traveler is not the prevailing party as their degree of success is unascertainable.

2. HOME BENEFITS/AMERICAN TRAVELER DO NOT QUALIFY AS PREVAILING PARTIES BECAUSE THERE WAS NEVER A RESOLUTION ON THE MERITS OF THE CASE.

A party who succeeds on a procedural motion “does not qualify as a ‘prevailing party’ entitled to recover attorney’s fees under § 15-77-300 because there was never a resolution on the merits.” Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 51, 398 S.E.2d 498, 499 (1990). While summary judgment is more substantive than a procedural ruling, it does not equate to a full hearing on the merits of the case. “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” Williamsburg Rural v. Williamsburg, 357

S.C. 251, 269 593 S.E.2d 154 (S.C. App., 2003) (citing Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 563 S.E.2d 331 (2002); Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002)). “The judicial function relative to fact-analysis on a motion for summary judgment is ‘limited to ascertaining whether any factual issue pertinent to the controversy exists; it does not extend to resolution of any such issue.’” Bowen v. Lee Process Sys. Co., 342 S.C. 232, 240 536 S.E.2d 86 (Ct. App. 2000) (quoting Garter-Bare Co. v. Munsingwear, Inc., 650 F.2d 975, 983 (9th Cir. 1980) (internal citations omitted)).

In this case, the parties agreed that the legal and factual contentions were complex and required a full hearing on the merits. [Transcript dated 6/5/2012, pp. 33-36]. In fact, both parties signed three separate consent orders agreeing to stay enforcement and implementation of the 2008 Ruling until they could get a full hearing on the merits to resolve the underlying issues. [Consent Order at ALC 3/23/2009; Consent Order at ALC 7/31/2012; Consent Order in Court of Common Pleas 2/5/2013]. In 2012, while the case was on appeal at the Administrative Law Court, the parties agreed to seek a full and final hearing on the merits by filing a declaratory judgment action in the circuit court. [Transcript at ALC June 5, 2012]. The Department anticipated that a full hearing on the merits would address the contested facts and allow the court to give a declaratory judgment as to procedural requirements, specifically regarding notice, of withdrawing a declaratory ruling. Instead, Home Benefits/American Traveler filed a motion for summary judgment, which the court partially granted on April 29, 2014.

In the Order, the court found that summary judgment could not be granted regarding “the issue of notice as it is a factual one that must be determined.” [Order p.24]. Home Benefits/American Traveler asserted they did not receive proper notice that

the Department was reconsidering its 1976 Ruling. [Order p.20-21]. The Department, however, offered documentation that it specifically provided notice to Home Benefits/American Traveler in January 2008. [Affidavit of Lybarker]. The court acknowledged that there was a contested question of fact regarding the issue of notice and, as a result, granted only partial summary judgment. [Order pp. 20-21].

The Department anticipated that, at a minimum, before the conclusion of this case, there would be a full hearing on the issue of notice and the court would set forth the procedures to be followed in order to withdraw a declaratory ruling. As a result, the Department would have guidance if in the future the Department needed to reconsider or withdraw a declaratory ruling. In the Order of February 20, 2015, however, the court ended the case without ever holding a hearing on the merits or ruling on what constitutes proper notice. [Order p. 24]. The court not only denied the Department's Motion to Alter or Amend [Form 4 Order dated February 20, 2015; Amended Form 4 Order dated March 23, 2015], but also deprived the Department of the guidance it was seeking regarding the issue of notice.

Although the action in Jasper was dismissed on a procedural motion rather than a motion for summary judgment, the court's grant of partial summary judgment was largely based on the 2008 Ruling which was nonexistent as it had been superseded by the 2010 Ruling, offered contradictory guidance as to the proper procedure for withdrawing a declaratory ruling, and failed to resolve contested issues. [2010 Ruling; Order; Department's Motion to Alter or Amend]. As such, there was "never a resolution on the merits." Jasper, at 51, 398 S.E.2d 499. Home Benefits/American Traveler, therefore, do not qualify as prevailing parties in this case.

B. BECAUSE THE DEPARTMENT WAS JUSTIFIED IN PRESSING ITS CLAIM IN THIS MUTUALLY AGREED UPON LITIGATION, THE CIRCUIT COURT CORRECTLY DENIED HOME BENEFITS/AMERICAN TRAVELER'S REQUEST FOR ATTORNEY'S FEES.

Even if Home Benefits/American Traveler qualify as prevailing parties, this is not dispositive of a court's discretion in deciding whether to grant or deny attorney's fees. Although it is necessary for a contesting party to be the prevailing party in order to be eligible for recovery of attorneys' fees, fulfilling this requirement does not amount to an *automatic* grant of attorney's fees. See McMillan v. Dept. of Agriculture, 611 S.E.2d 323, 364 S.C. 60 (2005).

The second prerequisite to establish prior to the recovery of attorney's fees and costs by a party contesting state action is that the "agency acted without substantial justification in pressing its claim against the party." Heath v. County of Aiken, 302 S.C. 178, 181, 394 S.E.2d 709, 711 (1990). "Substantial justification" does not mean "justified to a high degree," but rather, it means "justified to a degree that could satisfy a reasonable person." Id. at 184, 394 S.E.2d at 712. Even if a state agency loses on the merits of a case, that does not create a presumption that the agency's position was not substantially justified. See Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004) (citing Kiareldeen v. Ashcroft, 273 F.3d 542 (3rd Cir. 2001)).

1. THE DEPARTMENT WAS SUBSTANTIALLY JUSTIFIED IN PRESSING ITS CLAIM IN THIS MUTUALLY AGREED UPON LITIGATION WHERE THE PARTIES ALL AGREED THIS WAS A COMPLEX ISSUE REQUIRING GUIDANCE FROM THE COURTS.

This action for declaratory judgment was filed in circuit court by Home Benefits/American Traveler pursuant to an agreement reached between the parties during

a hearing before the Administrative Law Court. After a discussion between the parties, Home Benefits/American Traveler's counsel stated he would file a declaratory judgment action in circuit court to "get an absolute ruling on the law . . . this is a very complex issue." [Transcript 6/5/2012 p. 34, l. 20 to p. 35, l. 8]. The Department consented to a dismissal in anticipation of a full hearing on the merits and decision at the circuit court. All parties agreed that this was a very complex issue requiring guidance by the courts and that a declaratory judgment action would be the best vehicle. As such, the parties intended to have a full hearing on the merits resulting in a final order and decision by the court no longer subject to appeal or review. This intent was reflected in three separate Consent Orders signed by the parties. [Consent Order at ALC 3/25/2009; Consent Order at ALC 7/31/2012; Consent Order in Court of Common Pleas 2/5/2013].

The Department anticipated there would be a full hearing on the issue of notice and the court would set forth the procedures to be followed in order to withdraw a declaratory ruling. As a result, the Department would have guidance if in the future the Department needed to reconsider or withdraw a declaratory ruling. Due to the complexity of the issues in this case, the Department was substantially justified in pressing its claim in this mutually agreed upon litigation to seek the guidance of the circuit court regarding this and any future withdrawals of declaratory rulings. The circuit court correctly denied attorney's fees and costs because the record below clearly shows the Department was substantially justified in litigating this matter.

2. THE DEPARTMENT WAS SUBSTANTIALLY JUSTIFIED IN PRESSING ITS CLAIM IN THIS MUTUALLY AGREED UPON LITIGATION BECAUSE THE DEPARTMENT COMPLIED WITH THE STATUTES AND REGULATIONS APPLICABLE TO DECLARATORY JUDGMENTS.

The Department complied with all applicable laws when issuing the 2008 Ruling to withdraw the 1976 Ruling. [Affidavit of Lybarker dated 10/15/2013, p. 2]. The Department is the sole state agency designated by the General Assembly to construe and provide official legal interpretations of the Code. See S.C. Code Ann. § 37-6-104(1)(b) and 37-6-506. The Administrator of the Department has the power to issue rules, declaratory rulings, and administrative interpretations of the Code. S.C. Code Ann. § 37-6-104(1)(e) and -409; S.C. Code Ann. Regs. 28-26. The Administrator's declaratory rulings are separate and distinct from a rule. S.C. Code Ann. § 37-6-402(5)(b). By definition, a rule does not include declaratory rulings issued by the Administrator pursuant to Section 37-6-409. Moreover, the process for issuing rules differs from the process for issuing declaratory rulings.

The Department complied with all statutes and regulations pertaining to the issuance of a declaratory ruling. [Affidavit of Lybarker dated 10/15/2013, p. 2]. This is particularly significant given that there are no statutes or regulations pertaining to amending or repealing a declaratory ruling. Still, the Department made every effort to provide a meaningful review as well as notice and opportunity for input from persons who might be affected by the 2008 Ruling. [Affidavit of Carri Grube Lybarker dated 10/15/2013]. In addition to notifying more than 250 persons on the Department's "Advance Notice Mailing List," the Department specifically mailed a notice to Home Benefits/American Traveler on January 7, 2008. [Affidavit of Lybarker dated 10/15/2013]. It was properly addressed with proper postage, delivered to the U.S. mail, and not returned. [Affidavit of Lybarker dated 10/15/2013].

The procedures for repealing a rule require a hearing to be scheduled if requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members. S.C. Code Ann. § 37-6-404(b). However, no such requirement exists for repealing a declaratory ruling. Rather, a hearing may be held regarding a declaratory ruling if the Administrator *in her discretion* deems the matter to be of sufficient public importance. S.C. Code Ann. Regs. 28-25(A)(2). In this case, the Administrator had no basis for determining that the matter was of sufficient public importance. The fact that there were no responses, comments, or requests to be heard from the more than 250 persons notified by the Department, including Home Benefits/American Traveler, provided evidence that the matter was not of sufficient public importance. If a matter is of public importance, certainly at least one of the more than 250 persons notified would have contacted the Department during the ten-month period that the declaratory ruling was under consideration.

The Department complied with all applicable statutes and regulations in the process of reconsidering and withdrawing the 1976 Ruling. Even though the circuit court determined that the Department should have done something more than what was required by the statutes and regulations, the Department was substantially justified in pressing its claim in this mutually agreed upon litigation. The circuit court, therefore, correctly denied attorney's fees and costs.

C. BECAUSE THE AWARD OF ATTORNEY'S FEES WOULD BE UNJUST, THE CIRCUIT COURT CORRECTLY DENIED HOME BENEFITS/ AMERICAN TRAVELER'S REQUEST FOR ATTORNEY'S FEES.

The third prerequisite to establish prior to the recovery of attorney's fees and costs by a party contesting state action is that there "are no special circumstances that

would make an award of attorney's fees unjust." Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). In this case there are special circumstances that would make an award of attorney's fees unjust.

1. GIVEN THE AGREEMENT BETWEEN THE PARTIES TO SEEK GUIDANCE FROM THE COURTS, THE AWARD OF ATTORNEY'S FEES WOULD BE UNJUST.

This action for declaratory judgment was filed in circuit court by Home Benefits/American Traveler pursuant to an agreement between the parties. The goal of the parties in pursuing this declaratory judgment action in circuit court was to determine the proper procedure for withdrawing and issuing a declaratory ruling. [Transcript at ALC dated August 12, 2010, p. 16]. All parties agreed that this is a very complex issue requiring guidance from the courts. [Transcript at ALC dated August 12, 2010, p. 16]. Because the parties mutually agreed to litigate this case in light of the complexity of the issues, it would be unjust to require any party to bear the attorney's fees and costs for another consenting party in these circumstances.

Moreover, the objective of both parties to this litigation was to establish the proper procedure to withdraw a declaratory ruling. Instead, Home Benefits/American Traveler filed a Motion for Summary Judgment based on the 2008 Ruling that was superseded by the 2010 Ruling. Thus, Home Benefits/American Traveler effectively agreed to take this case to a full hearing on the merits and then filed a Motion for Summary Judgment based upon a ruling that had been rescinded and robbed the parties of the agreed upon goal of this litigation. As a result, the Department was never afforded the full hearing on the merits that all parties agreed was needed. [See Consent Order at

ALC 3/23/2009; Consent Order at ALC 7/31/2012; Consent Order in Court of Common Pleas 2/5/2013].

2. THE AWARD OF ATTORNEY'S FEES WOULD BE UNJUST BECAUSE THE CIRCUIT COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT AND ENDING THE CASE.

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Lanham v. Blue Cross & Blue Shield, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002); Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). All ambiguities, conclusions, and inferences arising from the pleadings, depositions, affidavits, and discovery on file must be construed most strongly against the moving party. BPS Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991); Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Froneberger v. Smith, 406 S.C. 37, 748 S.E.2d 625 (Ct. App. 2013). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

In this case, the court applied the wrong standard of review when granting partial summary judgment. The court should have based its decision to grant or deny the motion for summary judgment on Rule 56 of the South Carolina Rules of Civil Procedure. In order to grant the motion for summary judgment in this case, the court should have first found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. SCRCP 56(c). Instead, the court based its grant of partial summary judgment on S.C. Code Ann. Section 1-23-380(5), and concluded that the Department acted arbitrarily and capriciously, which was the incorrect standard to apply without a full hearing on the merits of the contested facts. While summary judgment is more substantive than a procedural dismissal, it does not equate to a full hearing on the merits. As such, the court converted a motion for summary judgment into a final decision on the merits.

Viewing the evidence and inferences that reasonably can be drawn therefrom in a light most favorable to the Department, the non-moving party, the court erred in granting partial summary judgment and ending the case. The Department presented evidence that the 1976 Ruling may have been issued contrary to federal law. [Lybarker Affidavit, para. 16]. In fact, the Department presented a letter written by Home Benefits/American Traveler's counsel in 1977, when he was an attorney with the Department, acknowledging that an opinion issued by the Federal Reserve Board is inconsistent with the 1976 Ruling. [Attachment E to Answer]. The record before the circuit court also included three separate opinions issued by the Federal Reserve Board in the 1970's, all of which conflict with the Department's 1976 Ruling. All of this evidence supported the Department's position that the 1976 Ruling was erroneous when it was originally issued.

It is well settled case law that deference is not to be given even to a long-standing interpretation when the interpretation was wrong from the beginning. Media General Communications, Inc. v. S.C. Dept. of Revenue, 388 S.C. 138, 694 S.E.2d 525 (2010). The court's decision that the 1976 Ruling complies with existing federal and state law was an error of law.

Further, the court found that summary judgment could not be granted regarding "the issue of notice as it is a factual one that must be determined." [Order p. 24]. Home Benefits/American Traveler asserted they did not receive proper notice to alert them that the Department was considering the possibility of withdrawing or rescinding the 1976 Ruling. The Department, however, offered documentation that it not only provided notice to the Department's "Advance Notice Mailing List" but specifically provided separate notice to Home Benefits/American Traveler in January 2008. [Email from Gray dated 1/7/2008]. The court acknowledged that there was a contested question of fact regarding the issue of notice. [Order pp. 20-21]. For that reason, the court only granted partial summary judgment. In the Order of February 20, 2015, however, the court ended the case without ever holding a hearing on the merits or ruling on what constitutes proper notice. The circuit court, therefore, erred in ending the case without addressing the issue of notice.

Also, the court was aware that the 2008 Ruling had been withdrawn and substituted with a declaratory ruling on November 1, 2010, that gave more detail as to why the Department withdrew the 1976 Ruling. [Lybarker Affidavit, paragraph 13]. The 2010 Ruling gave a reasoned analysis for the repeal of the 1976 Ruling and creates a question of fact as to whether the Department provided probative and substantial

evidence that there was an underlying, statutory basis for such change and repeal. This is an important question of fact because the court ruled that the Department could not “lawfully repeal a formal statutory interpretation of such long standing nature without probative and substantial evidence that there is an underlying, statutory basis for such change and repeal.” [Order p. 21]. This determination by the court was a substantial stepping stone in concluding that the Department acted arbitrarily and capriciously in repealing the 1976 Ruling. The court’s failure to address the 2010 Ruling rather than the 2008 Ruling was an error of law.

The court erred in granting partial summary judgment and ending the case. As such, it would be unjust to require the Department to pay attorney’s fees.

III. THE CIRCUIT COURT CORRECTLY DENIED HOME BENEFITS/AMERICAN TRAVELER’S REQUEST FOR ATTORNEY’S FEES BECAUSE THEY DID NOT SHOW SUCH AWARD WOULD BE EQUITABLE AND JUST PURSUANT TO SECTION 15-53-100.

As discussed in an earlier argument, Home Benefits/American Traveler has not shown that an award of attorney’s fees in this case would be equitable and just under Section 15-53-100. This Court has held that when an appellant fails to cite supporting authority for its position and merely makes conclusory statements, the appellant has abandoned the issue on appeal. Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-594 (Ct. App. 2005). Home Benefits/American Traveler offer conclusory statements that their ability to recover attorney’s fees is appropriate and attorney’s fees can be awarded, without citing any supporting authority. [Initial Brief of Appellants p. 9]. Although Home Benefits/American Traveler quote Section 15-53-100, they fail to cite any authority supporting the proposition that an award of attorney’s fees would be

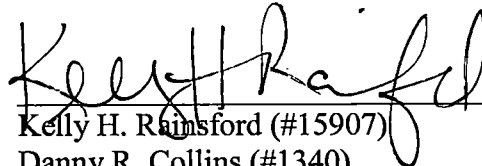
equitable and just in this particular litigation. In addition, they fail to offer any authority or analysis regarding how the circuit court abused its discretion in declining to award attorney's fees in this case. Thus, Home Benefits/American Traveler not only has failed to show an abuse of discretion in this case but also has abandoned the issue of attorney's fees on appeal. Furthermore, for the reasons stated in Argument II(C) herein, an award of attorney's fees would not be equitable and just in this litigation.

CONCLUSION

The Department requests this Court affirm the circuit court's denial of attorney's fees for the reasons stated herein or for any other ground appearing in the Record on Appeal pursuant to Rule 220(c), SCACR.

June 19, 2015

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2015-000637

Home Benefits, Inc. and the
American Traveler Motor
Club, Inc.,

Appellants,

v.

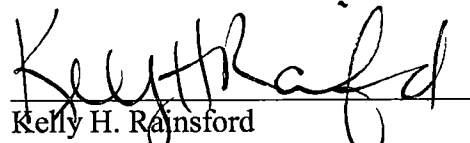
South Carolina Department of
Consumer Affairs,

Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and the Designation of Matter to be Included in the Record on Appeal on Home Benefits, Inc., and the American Traveler Motor Club, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on June 19, 2015, addressed to their attorneys of record, Steven W. Hamm and C. Jo Anne Wessinger Hill, Richardson Plowden & Robinson, P.A., Post Office Drawer 7788, Columbia, South Carolina 29202.

June 19, 2015


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RECEIVED

JUN 19 2015

SC Court of Appeals



Carri Grube Lybarker
Administrator

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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29211

RE: Home Benefits, Inc. and the American Traveler Motor Club, Inc. v. South Carolina
Department of Consumer Affairs, Appellate Case No. 2015-000637

Dear Ms. Kitchings:

Enclosed for filing are an original and three copies of the Initial Brief of Respondent as well as the Designation of Matter to be Included in the Record on Appeal, along with a Proof of Service, on behalf of Appellant/Respondent South Carolina Department of Consumer Affairs. Please return a clocked copy to us.

If you have any questions, please feel free to contact me at (803)734-4236.

Sincerely,

Kelly H. Rainsford

Enclosures

cc: Steven W. Hamm, Esq. (via email and U.S. Mail)
C. Jo Anne Wessinger Hill, Esq. (via email and U.S. Mail)

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