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FILED
JUN 17 2015
SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Jeffrey D. Allen, on behalf of [redacted] Appellant, v. South Carolina Budget and Control Board, Employee Insurance Program, Respondent.	Docket No. 10-ALJ-30-0710-AP **ORDER DENYING MOTION FOR ATTORNEY'S FEES**

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JUL 27 2015
SC Court of Appeals

Appellant Jeffrey D. Allen originally appealed this matter to the Administrative Law Court ("the ALC" or "the Court") pursuant to section 1-11-710(C) of the South Carolina Code (2008) and section 1-23-600(D) and (E) of the South Carolina Code (2008). In this matter, Appellant, on behalf of [redacted] sought review of Respondent South Carolina Public Employee Benefit Authority, Employee Insurance Program's[1] ("Respondent's") decision denying coverage for diabetes education pursuant to the "diabetes mandate statute"[2] through the Group Health Benefits Plan of the Employees of the State of South Carolina, the Public School Districts, and Participating Entities ("the State Health Plan"). This Court affirmed Respondent's decision that the diabetes mandate statute did not apply to the State Health Plan. However, on March 4, 2015, the South Carolina Supreme Court reversed this Court to hold the South Carolina diabetes mandate statute applies to the State Health Plan and, therefore, diabetes education was covered under the State Health Plan.

Appellant now moves this Court to grant Appellant attorney's fees pursuant to section 15-77-300 of the South Carolina Code (Supp. 2009).[3] Section 15-77-300 provides the request for attorney's fees must be filed within thirty days of the final disposition of the case. When there is an appeal, final disposition of the case occurs when the remittitur is filed. See Brackenbrook North Charleston, LP v. County of Charleston, 366 S.C. 503, 507, 623 S.E.2d 91, 93 (2005). In this case,

[1] Effective July 1, 2012, the Employee Insurance Program (EIP), a division of the South Carolina Budget and Control Board ("Board"), was transferred from the Board to a newly created agency, the South Carolina Public Employee Benefit Authority pursuant to Act 278 of 2012.
[2] S.C. Code Ann. § 38-71-46 (Supp. 2009).
[3] Effective February 24, 2010, section 15-77-300 was amended. This administrative appeal was initially filed September 30, 2009. Accordingly, this Court will rely on the version of section 15-77-300 applicable in 2009.

the remittitur was issued on March 20, 2015, and Appellant filed its request for attorney's fees on April 17, 2015. Accordingly, Appellant's request is timely.

Attorney's Fees Under the State Action Statute

Section 15-77-300 provides, in relevant part:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

There is no question that Appellant satisfies the requirements of being a party in a contested state action and prevailing in that action. The question presented in this motion is whether Respondent acted without substantial justification in pressing its claim and whether there are any special circumstances that would make the award of attorney's fees unjust. See § 15-77-300(1) & (2).

Appellant contends Respondent's claim was without substantial justification and there are no special circumstances that would make an award of attorney's fees unjust. In support of its argument that Respondent was not substantially justified, Appellant cites to several cases, including McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991) and Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325 (2008).

In McDowell, the appellant brought an action against the South Carolina Department of Social Services ("DSS"), arguing DSS erred in finding her ineligible for food stamps. 304 S.C. at 541, 405 S.E.2d at 832. In its decision, DSS had decided a car jointly titled in the appellant's name and her son's name was an asset of the appellant's for the purpose of establishing whether she met the financial requirements for food stamps. Id. The circuit court affirmed DSS's decision; however, the South Carolina Court of Appeals reversed, finding the appellant held the car as trustee of a resulting trust in favor of her son and the car was not her asset. Id. Appellant then requested attorney's fees under § 15-77-300 and the case came before the South Carolina Supreme Court. In determining whether DSS was substantially justified in pressing its claim, the supreme court cited to Heath v. County of Aiken, 302 S.C. 78, 394 S.E.2d 709 (1990), which held substantial justification means "justified to a degree that could satisfy a reasonable person." Id. at 542, 405 S.E.2d at 832. Or, stated differently, "[a]n agency action supported by substantial justification is

one which has a reasonable basis in law and fact." Id. Accordingly, in analyzing a request for attorney's fees under the state action statute, a court looks to "the agency's position in litigating this case to determine whether it is one which has a reasonable basis in law and fact." Id.

Applying this standard to the facts in McDowell, the Supreme Court found:

> DSS ruled [] that for a resulting trust to arise, the property could not be jointly titled. This conclusion is incorrect under established South Carolina precedent. When property is titled jointly, a resulting trust does not arise *unless there is evidence to the contrary,* as in this case. [] DSS therefore relied on an erroneous legal conclusion in defending its decision in proceedings before the circuit court and Court of Appeals. DSS's litigation position was not substantially justified because it had no reasonable basis in law and fact.

Id. at 542-43, 405 S.E.2d at 833. Essentially, the Supreme Court held that the applicable law was clear and unambiguous and, therefore, DSS had no reasonable basis in law and fact to press its claim against the appellant.

In Layman, the Supreme Court further clarified what "substantial justification" means under section 15-77-300. It clarified that "[a]lthough an agency's loss on the merits does not create a presumption that its position was not substantially justified, Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct.App.2004), the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim." Layman, 376 S.C. at 445, 658 S.E.2d at 326. In Layman, the South Carolina Retirement System upheld the application of a statute that breached a contract with certain "TERI" participants in the retirement system. Applying the substantial justification framework, the Supreme Court determined:

> [T]he State's and the Retirement System's breach of an unambiguous contract with the TERI participants is analogous to the County's violation of an unambiguous statute in Heath. In other words, we find that the State and the Retirement System had no reasonable basis in law or in fact on which to defend the breach of an unambiguous contract with certain TERI participants. Accordingly, we hold that the State and the Retirement System were not substantially justified in pressing their claim, and therefore, the circuit judge correctly concluded that counsel for TERI plaintiffs were entitled to attorneys' fees under the state action statute.

Id. at 449, 658 S.E.2d at 328. Like in McDowell, the Supreme Court found the law and fact were clear and unambiguous; therefore, the agency was not substantially justified in pressing its claim.

Additionally, the supreme court distinguished its determination in Layman from the South Carolina Court of Appeals' decision in Video Gaming Consultants, Inc. v. South Carolina Department of Revenue, 358 S.C. 647, 595 S.E.2d 890 (Ct.App.2004), in which the court of

appeals found the Department of Revenue was substantially justified in pressing its claim under a statute that was later declared unconstitutional. Layman, 376 S.C. at 447, 658 S.E.2d at 327. Specifically, the Supreme Court cited the court of appeals' reasoning that "[a]s an administrative agency, the Department 'must follow the law as written until its constitutionality is judicially determined.'" Id. (citing Video Gaming Consultants, Inc., 358 S.C. at 652, 595 S.E.2d at 892). Therefore, if an agency presses a claim under a law that is constitutional at the time, it is substantially justified in pressing its claim even if the statute is later determined to be unconstitutional. See id.

Analysis

Here, the issue was whether the State Health Plan was subject to the diabetes mandate of 38-71-46 of the South Carolina Code, which requires "every health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State" to provide coverage for "outpatient self-management training and education for the treatment of people with diabetes mellitus . . . ." S.C. Code Ann § 38-71-46(A). The parties disagreed as to whether the State Health Plan qualified as group policy "health insurance coverage" under section 38-71-840(14) of the South Carolina Code, which defined "health insurance coverage" as:

> benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer . . . .

S.C. Code Ann. § 38-71-840(14). On the merits, Respondent argued the phrase "health insurance issuer" modified the entire statutory section. Respondent further argued that the State Health Plan clearly was not a "health insurance issuer" as defined in section 38-71-840(16) and, therefore, the State Health Plan was not subject to the diabetes mandate. Respondent also cited to its own guidance documents showing diabetes education was excluded from coverage and it cited to several statutory instances where the Legislature specifically made it clear mandates otherwise restricted to health insurers were to apply to the State Health Plan. In contrast, Appellant argued "health insurance issuer" only modified "health maintenance organization," and, without the restriction as argued by Respondent, the State Health Plan clearly fell within the definition of "health insurance coverage" and the diabetes mandate statute.

This Court agreed with the Respondent, finding "health insurance issuer" modified section 38-71-840(16) in its entirety and determining the State Health Plan did not qualify as a "health

insurance issuer." However, on appeal, the South Carolina Supreme Court agreed with Appellant. The Supreme Court held:

> We do not read "health care issuer" as modifying all preceding clauses in subsection (14). Benefits need not be provided by a "health care issuer" to qualify as "health insurance coverage" under section 38-71-840(14). Therefore, based on the plain language of section 38-71-840(14), the ALC erred in finding that the State Health Plan does not provide "health insurance coverage."

Rather, the Supreme Court found section 38-71-840(14) provided "health insurance coverage" is defined as "benefits consisting of medical care provided: (1) directly through insurance; (2) directly through reimbursement; or (3) provided otherwise" and the words "and including" expounded on the primary definition. Allen v. S. Carolina Pub. Employee Ben. Auth., 411 S.C. 611, 617, 769 S.E.2d 666, 670 (2015). Accordingly, the Supreme Court concluded "the plain language of the statute does not require health insurance coverage to be offered by a "health insurance issuer" and "[t]o conclude otherwise results in a tortured and illogical reading of the statute." Id. The Supreme Court also found that even assuming section 38-71-840(14) was ambiguous, the legislative history was not supportive of finding the mandate did not apply. Id. at 617-19, 769 S.E.2d at 670-71.

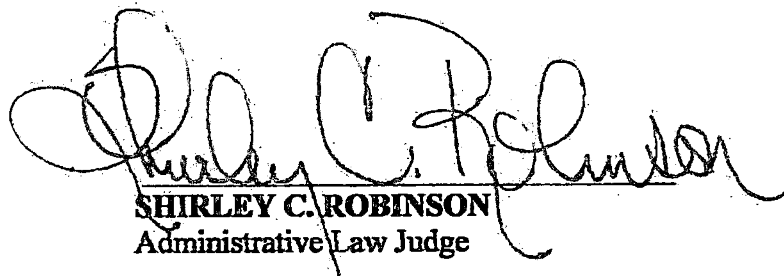
Applying the law to the facts, I first note this is not a situation in which the agency was enforcing a law that was later determined to be unconstitutional. See Video Gaming Consultants, Inc., 358 S.C. at 652, 595 S.E.2d at 892. Rather, the issue is whether Respondent was justified in pressing its claim "to a degree that could satisfy a reasonable person" and the agency's argument has a "basis in law and fact." McDowell, 304 S.C. at 542, 405 S.E.2d at 832. Moreover, in McDowell, Layman, and Heath, the critical determination can be summarized as whether the law relied on by the agency was clear and unambiguously against the agency's position. Further, the outcome of the case must also be considered. Layman, 376 S.C. at 445, 658 S.E.2d at 326.

I find this case to be distinguishable from McDowell, Layman, and Heath because I do not find section 38-71-840(14) and the related statutes analyzed in the case to be clear and unambiguous. Here, I find section 38-71-840(14) was ambiguous to an extent that justified Respondent in pressing the claim, particularly in light of its complicated grammatical structure, the longstanding agency practice denying similar claims without contest, the unique nature of the State Health Plan, and the legislative treatment of the State Health Plan in the citations provided by Respondent. While the supreme court ultimately found its interpretation of section 38-71-840(14) to be controlling, I find it was reasonable for Respondent to take these additional factors

into consideration when dealing with an ambiguous statute, and it was not unreasonable to come to the conclusion that the mandate did not apply to the State Health Plan. See McDowell, 304 S.C. at 542, 405 S.E.2d at 832. Moreover, this was a case of first impression, which the Fourth Circuit Court of Appeals has generally held to be justified. See Cody v. Caterisano, 631 F.3d 136, 142 (4th Cir. 2011) (noting "litigating cases of first impression is generally justifiable"). Accordingly, I find Respondent's position had a basis in law and fact and it was substantially justified in pressing its claim. See id.; S.C. Code Ann. § 15-77-300. Because I find Respondent's position was substantially justified, it is not necessary to address whether "there are no special circumstances that would make the award of attorney's fees unjust." S.C. Code Ann. § 15-77-300.

IT IS THEREFORE ORDERED that Appellant's Motion for Attorney's Fees is **DENIED.**

AND IT IS SO ORDERED.



SHIRLEY C. ROBINSON
Administrative Law Judge

June 17, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 17 day of June 2015

By: Debra Henderson
Judicial Law Clerk

WMA

WILLS MASSALON & ALLEN LLC

97 Broad Street • Charleston, SC 29401 • Post Office Box 859 • Charleston, SC 29402
Phone: 843-727-1144 • Fax: 843-727-7696 • www.wmalawfirm.net

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SC Court of Appeals

July 24, 2015

Direct Dial: (843) 793-6039

The Honorable Jenny Abbott Kitchings
Clerk, 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 or retirees v. South Carolina Budget and Control Board, Employee Insurance Program
Appellate Case No.: 2015-001561
Docket No.: 10-ALJ-30-0710-AP
Our File No. 595-1

Dear Ms. Kitchings:

Pursuant to your letter, dated July 22, 2015, please find enclosed Wills Massalon & Allen LLC's check #7040 in the amount of $100.00 representing the filing fee for the Notice of Appeal in regard to the above-referenced matter. In addition, please find two (2) redacted copies of the order being challenged on appeal. Please file one (1) copy, and return one (1) copy to me in the self-addressed, stamped envelope provided. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC

John A. Massalon
jmassalon@wmalawfirm.net

JAM/cb
Enclosures

cc: The Honorable Shirley C. Robinson
Theodore D. Willard, Jr., Esquire
Stephen Raymond Van Camp, Esquire
Terry E. Richardson, Jr., Esquire

WMA

WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, SC 29402

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629 (29211)
Columbia, SC 29201

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