THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Edgar W. Dickson, Presiding Judge

Case No. 2010-CP-40-1095
Appellate Case No. 2015-000109

Protection and Advocacy for People with Disabilities, Inc., ... Appellant,

v.

Beverly A. H. Buscemi, Ph.D., in her official capacity as State Director, South Carolina Department of Disabilities and Special Needs and The South Carolina Department of Disabilities and Special Needs, and Kelly Hanson Floyd, Nancy Banov, W. Robert Harrell, Rick Huntress, Deborah McPherson and Dr. Otis Speight in their Official Capacities as Members of the Department of Disabilities and Special Needs Commission, ... Respondents.

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This Reply corrects major mistakes in Respondent's brief.

I. DDSN mischaracterizes the only authority in South Carolina to interpret P&A's authorization to conduct Team Advocacy Inspections.

DDSN wrongly characterized the only South Carolina case to address the issue of P&A's authority to conduct Team Advocacy Inspections. DDSN states that *DHEC v. Bellwood Manor*, 2010 WL 6782577 (Admin. Law Ct. Nov. 22, 2010) "did not address the issue of records in any way." (Resp. Br. p. 35.) That simply is not true. Not only did the court discuss records, the court also stated that the Team Advocacy Inspections consisted of a review of records, such as the Medication Administration Records ("MARs"), to ensure medication was properly administered. *Bellwood Manor*, 2010 WL 6782577 at *2. Specifically, in the findings of fact, the Administrative Law Court found that Team Advocacy Inspections encompasses:

> a physical inspection of the facility **and its records** and interview residents, **in order to ensure** that the residence is properly maintained and staffed, supplied with sufficient food, **medication is properly handled and administered**, and that residents have access to their finances and medications, and are free to come and go as they wish.

Id. In *Bellwood Manor*, the Administrative Law Court held "P&A is authorized, pursuant to S.C. Code Ann. § 43-33-350(4) (Supp. 2009), to conduct a Team Advocacy inspection of [the Community Residential Care Facility that sought to prohibit Team Advocacy Inspections by P&A]. *Id.* at *9. Since the Court previously found that the Team Advocacy Inspections included a review of records—to include records of the administration of medication—the implication is that P&A is authorized, pursuant to S.C. Code Ann. § 43-33-350(4) to inspect records, including medical administration records,

during Team Advocacy Inspections. While DDSN may not like the *Bellwood Manor* case, it cannot ignore it.

II. If the General Assembly intended to limit P&A's authority to review documents during Team Advocacy Inspections, then the General Assembly would have expressly done so.

DDSN focuses its response on the argument that the language of Section 43-33-370(2) evidences the General Assembly's intent that P&A cannot review medical records during Team Advocacy Inspections. (Resp. Br. p. 13-15.)[1] Unlike Section 43-33-350(4), Section 43-33-370(2) contains specific restrictions on what P&A may inspect.

Section 43-33-370(2) expressly limits P&A's authority to inspect and copy records in response to a complaint by stating P&A cannot inspect "the individual medical, treatment or other personal records of other persons [who are not the subject of the complaint] in the program or facility." However, the inclusion of this language in Section 43-33-370(2) does not demonstrate the General Assembly's intent to restrict P&A's ability to review documents during Team Advocacy Inspections under Section 43-33-350(4). In fact, the inclusion of the express language in Section 43-33-370(2) coupled with the express exclusion of the same language in Section 43-33-350(4) demonstrates a clear legislative intent that Section 43-33-350(4) does not contain the same restrictions on P&A's authority.

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[1] The issue before the Court is one of straightforward statutory construction. Tellingly, DDSN's brief does not lead with the analysis of the plain language of Section 43-33-350(4), choosing instead to look at a completely different statute in order to justify DDSN's disregard of the General Assembly's clear intent. (Resp. Br. p. 13.) However, the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). As explained in P&A's initial brief, the plain language of the statute evidences the General Assembly's intent for P&A to have the authority to inspect MARs as part of Team Advocacy Inspections. Even if the Court finds it necessary to look beyond 43-33-350(4) in order to ascertain the intent of the General Assembly, the Court will still reach the same conclusion—the General Assembly intended for the term plans of care to include MARs.

South Carolina adheres to the canon of statutory construction known as the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius." *German Evangelical Lutheran Church of Charleston v. City of Charleston*, 352 S.C. 600, 576 S.E.2d 150 (2003); *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). This canon of statutory construction holds that "to express or include one thing implies the exclusion of another." *German Evangelical*, 352 S.C. at 153, 576 S.E.2d at 606 (citing Black's Law Dictionary 602 (7th ed. 1999)). This canon is applicable here—in the opposite manner in which DDSN believes the doctrine applies.

The General Assembly specifically included the restrictions on P&A's ability to inspect and copy records in response to a complaint found in Section 43-33-370(2). However, in drafting the remainder of the same chapter of the code, the General Assembly drafted Section 43-33-350(4) without this same language. Moreover, when the General Assembly revised Section 43-33-350(4) in 1993, the General Assembly again chose not to add the same restrictive language to Section 43-33-350(4).[2] The General Assembly could have very easily included this restrictive language in Section 43-33-350(4) but did not do so. Stated differently, the General Assembly specifically included restrictions on P&A's authority to review records when responding to a complaint under Section 43-33-370(2), yet they specifically excluded any such restriction on P&A's authority to review records as part of a Team Advocacy Inspection under Section 43-33-350(4). Therefore, under the doctrine of "expressio unius est exclusio alterius" or

[2] Section 43-33-370(2) has not been revised since first enacted in 1979. S.C. Code Ann. § 43-33-370(2). Thus, the General Assembly was well aware of the restrictive language contained in Section 43-33-370(2) and its effect when the 1993 amendment to Section 43-33-350(4) occurred. *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003). ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.").

"inclusio est exclusio alterius," the General Assembly's failure to include this express restriction on P&A's authority in Section 43-33-350(4) is indicative of a legislative intent that P&A's authority to review records under Section 43-33-350(4) is not restricted in the same manner.

Both the trial court and DDSN misconstrue how this doctrine applies to Section 43-33-350(4). DDSN argues that because Section 43-33-350(4) expressly allows P&A to review "plans of care," but does not grant P&A the authority to review other records, this evidences the General Assembly's intent to restrict P&A's authority to review records. (Resp. Br. p. 28-29.) That argument not only misconstrues how the doctrine applies but also misses the entire point of this case: to determine what the term "plans of care" encompasses.

When the General Assembly sought to limit P&A's authority to inspect records the General Assembly used express language restricting P&A's authority. Thus, the General Assembly was aware of the language necessary to restrict P&A's inspection powers. The fact that the General Assembly failed to use the similar restrictive language when granting P&A the authority to review documents during a Team Advocacy Inspection demonstrates the intent not to restrict P&A's authority under Section 43-33-350(4). This also demonstrates that the use of the term "including" enlarges the scope of Section 43-33-350(4), contrary to DDSN and the trial court's contention. *See In re Grewe,* 4 F.3d 299, 305 n.5 (4th Cir. 1993) (the "general rule of statutory construction" is that using the word "'including' enlarges the scope of [a statute] rather than limits it.").

DDSN also argues that had the General Assembly intended for the 1993 amendment to Section 43-33-350(4), which added the term "plans of care," to allow P&A

to provide oversight to "all aspects of care,"[3] then the General Assembly could have used different language; such as authorizing a review of "all records" or to conduct inspection of "all the aspects of care." (Resp. Br. p. 28.)[4] However, as previously explained, when the General Assembly sought to limit P&A's authority concerning the inspection of records the General Assembly expressly did so. Thus, the fact that the General Assembly did not include the phrases DDSN alleges the General Assembly could have included in the 1993 amendment does not evidence intent to limit P&A's authority when conducting Team Advocacy Inspections. Rather, had the General Assembly sought to limit P&A's authority under Section 43-33-350(4), the General Assembly would have used the restrictive language found in Section 43-33-370(2).

It is not surprising that the General Assembly did not include the restrictive language in the statute governing P&A's authority to conduct Team Advocacy Inspections, given the fact that the inspections arise in a completely separate context from investigating a complaint. The authority to investigate only arises when P&A receives a signed "written request to investigate a complaint" or "a complaint of abuse or threatened abuse" by a developmentally disabled individual. S.C. Code Ann. § 43-33-370. Conversely, P&A can conduct an "unannounced" Team Advocacy Inspection at any time and no justification is required for conducting the inspection. S.C. Code Ann. § 43-33-350(4). Thus, P&A's authority to conduct Team Advocacy Inspections under Section 43-

[3] DDSN quotes this phrase in their brief. It is unclear where the quote is from, as the phrase is not contained in P&A's initial brief.

[4] Essentially, this argument asserts had the General Assembly intended for P&A to review MARs as part of a review of "plans of care," then the General Assembly would have used more specific language. Since the General Assembly did not use specific language, P&A's review is limited to the document that DDSN asserts is the "plan of care." However, DDSN does not have the authority to unilaterally determine what is the "plan of care" and DDSN's determination of what is the "plan of care" is not entitled to deference. *See infra* Part III.

33-350(4) is much broader than its authority to conduct an investigation under Section 43-33-370.

Further evidencing this broad grant of authority, the General Assembly did not place restrictions on what living conditions P&A may inspect when conducting a Team Advocacy Inspection despite placing explicit restrictions on P&A's ability to investigate. This is due to the different nature of each power. The purpose of conducting an investigation under Section 43-33-370 is to determine if the specific allegations are true. In order to make that determination, P&A does not need unfettered access to every document contained at a facility where the complaint arises. Rather, P&A needs access to the documents regarding the individual about which the complaint is lodged, which Section 43-33-370 grants. S.C. Code Ann. § 43-33-370. On the other hand, the purpose of a Team Advocacy Inspection under Section 43-33-350(4) is to assess the living conditions for every individual housed in the facility. In order to make that assessment, P&A requires much broader authority to review documents, which Section 43-33-350(4) grants by not including the explicit restrictive language of 43-33-370. S.C. Code Ann. § 43-33-350(4). As the General Assembly did not include that restrictive language, this Court should reverse the trial court and hold that P&A may review living conditions, such as MARs, as part of a Team Advocacy Inspection.

III. DDSN essentially contends their unilateral interpretation of what is a "plan of care" is entitled to deference.

DDSN argues throughout their brief that DDSN "regards" a certain document as *the* plan of care and this interpretation is entitled to deference. In fact, DDSN refers to this document in their brief as the "specific document DDSN has always regarded as the

'plan of care'" twelve times.[5] The brief even contains an argument section titled: "Usage of the term 'plan of care' by DDSN." (*Id.* at p. 21.) Regardless of the heading the argument falls under, DDSN's constant theme is that DDSN has already determined what is the plan of care, and that determination is entitled to deference. In an argument section titled "References to federal law" DDSN summarizes their argument—supposedly regarding why references to federal law where necessary to interpret a state statute—by stating, "the point is that Def. Ex. 1 is regarded as the plan of care by DDSN[.]" (*Id.* at p. 25.) This encapsulates the overall premise of DDSN's brief: it has a document that it regards as the "plan of care" and its determination is final.

However, DDSN fails to explain how the phrase "plans of care" in a clause added to Section 43-33-350(4) in 1993 refers "only"[6] to a specific DDSN document that is not even titled "plan of care."[7] Additionally, DDSN contends that this statute was never used to inspect DDSN facilities before 2007. (Resp. Br. p. 5.) Again, there is no explanation as to how the phrase "plans of care" refers to a specific document that exists only in DDSN files when the General Assembly authorized P&A to review "plans of care"

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[5] DDSN does not always use this exact phrase, but something to similar effect. The term, or something to similar effect, appears on the following pages of DDSN's brief: once on p. 9, once on p. 10, twice on p. 11, four times on p. 21, three times on p. 22, and once on p. 25. DDSN is so adamant that their unilateral interpretation of what is "the plan of care" is entitled to deference that DDSN begins to assert this argument in the fact section of their brief. (Resp. Br. p. 9) ("The specific document that DDSN has always regarded as the 'plan of care' is . . . 'Service Coordination Annual Assessment.'")

[6] DDSN refers to there being "only" one specific document that is the plan of care multiple times in their brief. (Resp. Br. p. 10.) ("DDSN contends that the statute only permits P&A to review the one document regarded as the 'plan of care.'"); (Resp. Br. p. 22) ("DDSN advised P&A several times in 2009 that the agency regarded documents such as Def. Ex. 1 to be the only document regarded as the plan of care"); (Resp. Br. p. 24.) ("[T]here is only one specific document, Def. Ex. 1 and its predecessors, that is recognized as the plan of care."). Again, conveniently for DDSN, this is supposedly their self-selected document.

[7] DDSN never gives an explanation is to why both documents that DDSN claims have been, at one point in time, the "plan of care," are not titled "plan of care." Rather, the documents are titled "Service Coordination Annual Assessment" and "Single Plan." (Def. Ex. 1; Lacy Affidavit; R. 272, 385.)

starting in 1993—fourteen years before DDSN unilaterally determined what the phrase "plans of care" means.

Moreover, the testimony of DDSN's own witness demonstrates that there is not a single document that DDSN has always regarded as the "plan of care." DDSN asserts that Defendant's exhibit 1 and the first exhibit attached to the Lacy Affidavit are the documents that DDSN has always regarded as the "plan of care." (*Id.* at 9-10.) However, even a quick review of both documents reveals they are vastly different. Most notably, the document attached to the Lacy Affidavit provides for quarterly reviews and is thus updated at least four times a year, while Defendant's exhibit 1 is an annual assessment that is updated only once annually. (Lacy Aff.; Def. Ex. 1; R. 384, 272.) At trial, Dr. Lacy testified that the Defendant's exhibit 1 replaced the document attached to the Lacy Affidavit. (Tr. p. 84:3-14; R. 186.) Thus, DDSN does not have a single document that it has always regarded as the "plan of care." Rather, the document has changed considerably throughout the years, and what is required to be in the "plan of care" changes with each unilateral decision of DDSN as to what is the "plan of care."

DDSN does not have the authority to unilaterally determine what the "plan of care" is. *See* S.C. Code Ann. § 44-20-250 (setting out the powers and responsibilities of DDSN). DDSN provides no support for its contention that because DDSN regards a certain document as the "plan of care" the courts and P&A should defer to that determination. Nor does DDSN cite to a single case or statute that authorizes DDSN to determine what document is the "plan of care" that P&A is authorized by the General Assembly to review during Team Advocacy Inspections. (Resp. Br. p. 9-10, 21-22, 25.) Nor could DDSN do so, because no such authority exists. Accordingly, this Court should

ignore DDSN's arguments that rely on the assertion that DDSN has unilaterally determined what constitutes the "plan of care." Rather, this Court should look to the plain meaning of the term, and hold that "plans of care" includes medical records, such as MARs.[8]

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and hold that "plans of care" encompasses MARs and other on-site documents regarding CTH residents.

SIGNATURE PAGE ATTACHED

[8] DDSN appears to assert that P&A did not make a plain meaning argument below in the footnote on page 19 of their brief. However, P&A specifically argued that the trial court unjustifiably looked beyond the plain meaning of the statute in reaching the decision below. (P&A Rule 59 Motion p. 2-9; R. 472-479; DDSN response to Rule 59 motion p. 1-3, R. 489-491) Thus, this Court can decide the issue on the plain meaning of the statute and does not need to look to outside sources. If DDSN is asserting a different argument in the footnote, P&A is unable to ascertain what that argument is.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, Protection and Advocacy for People with Disabilities, Inc. do hereby certify that I have served all counsel/parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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