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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Circuit Court Case No. 2009-CP-10-7404

ORIGINAL

Jeffrey D. Allen, individually,
as guardian for Jane Doe, a
minor, and as representative of
other similarly situated State
of South Carolina employees,

Appellant,

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SC Court of Appeals

v.

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

Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in declining to exercise its discretion to stay decision on Respondents’ motion for summary judgment?
2. Did the trial court err in granting Respondents’ motion for summary judgment and dismissing Appellant’s Complaint with prejudice on the basis that Appellant was required to exhaust administrative remedies?

STATEMENT OF THE CASE

Appellant, Jeffrey D. Allen (referred to herein as “Appellant”) is an employee of a local South Carolina school district and an insured/member of the State Health Plan (referred to herein as the “Plan”). His daughter (referred to herein as “Jane Doe”), a dependant covered by the Plan, was diagnosed with Type I Diabetes on November 27, 2007 at the age of two (2) years old. Appellant submitted claims under the Plan for coverage of the cost of outpatient diabetes training and education, but Blue Cross and Blue Shield of South Carolina and the South Carolina Budget and Control Board Employee Insurance Program (referred to herein as “Respondents”) denied the claims on the purported basis that the Plan does not include coverage for education or training for diabetes.

Appellant commenced the instant lawsuit on November 25, 2009, alleging, *inter alia*, that the Respondents’ denial of the claim violated the statutory mandate for

outpatient diabetes training and education contained in S.C. Code Ann. § 38-71-46¹, and that the case should be certified as a class action. (R. pp. 16-22).

Respondents initially moved to dismiss this case, and for judgment on the pleadings, arguing that Appellant had failed to exhaust his administrative remedies and that Blue Cross and Blue Shield of South Carolina is merely the administrator and not the insurer under the Plan, and Appellant opposed the motion. (R. pp. 35-135); (R. pp. 136-148); (R. pp. 149-293). A hearing was held before the Honorable Markley Dennis on March 4, 2010 and Judge Dennis denied Respondents' motions to dismiss and for

¹ S.C. Code Ann. § 38-71-46 provides (with emphasis added):

Diabetes Mellitus coverage in health insurance policies, diabetes education.

(A) On or after January 1, 2000, *every* health maintenance organization, *individual and group health insurance policy, or contract issued or renewed in this State must provide coverage for* the equipment, supplies, Food and Drug Administration-approved medication indicated for the treatment of diabetes, and *outpatient self-management training and education for the treatment of people with diabetes mellitus*, if medically necessary, and prescribed by a health care professional who is legally authorized to prescribe such items and who demonstrates adherence to minimum standards of care for diabetes mellitus as adopted and published by the Diabetes Initiative of South Carolina. This subsection does not prohibit a health maintenance organization or an individual or a group health insurance policy from providing coverage for medication according to formulary or using network providers. Coverage must not be denied unless the health care professional demonstrates a persistent pattern of failure to adhere to the minimal standards of care and unless the health maintenance organization or insurer has first provided written notice to the health care professional that coverage will be denied if the health care professional fails to adhere to the minimal standards of care.

(B) Services and payment for diabetes education programs shall conform to regulations of the Health Care Financing Administration, US Department of Health and Human Services, pursuant to Section 4105 of the Balanced Budget Act of 1997. Diabetes outpatient self-management training and education shall be provided by a registered or licensed health care professional with certification in diabetes by the National Certification Board of Diabetes Educators, or other accredited program approved by the Diabetes Initiative of South Carolina, or by the Diabetes Control Program of the SC Department of Health and Environmental Control in order to meet the needs of rural communities wherein certified health care professionals providing this service are not available.

(C) Nothing contained in this section may be construed to affect in any way the ability of a managed care plan to credential or re-credential a provider.

(D) For purposes of this section: "*Health insurance policy*" means a health benefit plan, contract, or evidence of coverage providing health insurance coverage as defined in Section 38-71-670(6) and Section 38-71-840(14).

judgment on the pleadings. (R. pp. 529-553); (R. p. 14); (R. p. 15). Thereafter, on March 19, 2010 Respondents served an Answer. (R. pp. 24-34)

Thereafter, on May 6, 2010 Appellant served interrogatories and requests for production upon Respondents. Respondents did not provide responses to Appellant's discovery requests. Instead, Respondents filed a motion for protective order (to allow Respondents not to respond to Appellant's discovery requests) and a motion for summary judgment. (R. pp. 294-320); (R. pp. 432-437); (R. pp. 321-431); (R. pp. 439-467).

Appellant filed a motion to compel discovery responses and a motion to stay decision on Respondents' motion for summary judgment. (R. pp. 468-491); (R. pp. 492-507). A hearing was held on August 26, 2010 before the Honorable Paul M. Burch and thereafter, by Order dated October 12, 2010, Judge Burch denied Appellant's motions to compel discovery responses and to stay decision on Respondents' motion for summary judgment, and granted Respondents' motion for summary judgment and dismissed Appellant's Complaint with prejudice. (R. pp. 554-592); (R. pp. 4-13).

Appellant filed a motion to alter, amend, or reconsider Judge Burch's October 12, 2010 Order, and Judge Burch, after considering the parties' briefing on the motion, denied the motion by Order dated November 23, 2010. (R. pp. 508-509); (R. pp. 510-514); (R. pp. 515-522); (R. pp. 523-528); (R. pp. 2-3). Appellant received written notice of the entry of the November 23, 2010 order on December 8, 2010. Judge Burch's grant of summary judgment was based solely on the issue of exhaustion of administrative remedies and did not consider whether S.C. Code Ann. § 38-71-46 applies to the Plan. (R. pp. 4-13). Appellant served a Notice of Appeal on January 7, 2011.

Prior to and throughout the time the instant lawsuit has been pending, Appellant has also appealed the denial of his claim for outpatient diabetes training and education through the administrative process for doing so, first to Blue Cross and Blue Shield of South Carolina, then to the South Carolina Budget and Control Board Employee Insurance Program, and then ultimately by submitting a Request for Contested Case Hearing on September 22, 2010 to the South Carolina Administrative Law Court (referred to herein as the "ALC"). The administrative appeal in the ALC is still pending.

ARGUMENT

1. *The Trial Court Erred in Declining to Exercise its Discretion to Stay Decision on Respondents' Motion for Summary Judgment.*

Appellant requested that Judge Burch either deny Respondents' motion for summary judgment or exercise his discretion to stay decision on the motion for summary judgment while the administrative appeal of Appellant's claim was still pending and to give the parties an opportunity to conduct discovery. Judge Burch declined to do so, and instead granted Respondents' motion for summary judgment and dismissed Appellant's Complaint with prejudice. Judge Burch should have stayed decision on Respondents' motion for summary judgment.

Jane Doe was first diagnosed with Type I diabetes on November 27, 2007 at the age of two (2) years old, and diabetic education and training was provided during her initial three-day hospital stay. Respondents have repeatedly denied Appellant's claims for coverage of the costs of diabetes education and training (four claims since December 17, 2007, totaling over \$1,000). However, despite Appellant's numerous requests for an explanation of the denial of the claims and after nearly three (3) years of frustration and compliance with the administrative claims process, the South Carolina Budget and

Control Board Employee Insurance Program on August 24, 2010 finally issued its denial of the claims and explained for the first time its assertion that S.C. Code Ann. § 38-71-46 does not apply to the Plan. As noted above, Appellant has appealed that agency decision to the ALC and the appeal is still pending.

In light of the State of South Carolina board/agency being named as a Defendant in the instant lawsuit, Appellant and his undersigned attorneys made the decision to commence the suit within two (2) years of the date of the diagnosis, so as not to risk a possible statute of limitations defense related to the two (2) year statute of limitations in the South Carolina Tort Claims Act, if applicable. It was proper for Appellant to file the instant lawsuit while his administrative appeals were still pending because, as stated by this Court, “[a] party should not be required to ‘roll the dice’ on whether a collateral administrative proceeding will conclude prior to the running of an applicable statute of limitations in order to preserve a claim properly within the jurisdiction of the circuit court.” *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 531 (S.C. Ct. App. 2009).

The court in *Capital City* held that where a party would be harmed by the running of the statute of limitations or otherwise prejudiced if its claim is dismissed for failure to exhaust administrative remedies, and the court has determined that resolution of the administrative proceeding would impact the circuit court case, then the circuit court should properly consider a stay or continuance of the judicial action until the administrative proceedings have concluded. *Id.* at 531. While the outcome of the administrative proceeding could moot the instant lawsuit, another possible outcome is that the ALC (or possibly this Court) determines the ALC does not have the power to grant the relief requested and that the issues should be decided by the circuit court. This

is the classic *catch-22* for a plaintiff, and for this reason Judge Burch should have exercised his discretion to stay decision on Respondents' motion for summary judgment while the administrative appeal of Appellant's claim was still pending, and given the parties an opportunity to conduct discovery.

Judge Burch had broad discretion in his supervision over the progression and disposition of the instant case in the interests of justice and judicial economy. *See Williams v. Bordon's Inc.*, 262 S.E.2d 881, 883 (S.C. 1980). Judge Burch should have exercised his discretion and stayed decision on Respondents' motion for summary judgment instead of granting the motion for summary judgment and dismissing Appellant's Complaint with prejudice. Appellant should not be prejudiced by his decision to protect himself (and all putative class members) against a possible statute of limitations defense, particularly when there is no guidance in the law of whether the ALC has the power to grant the relief requested in the instant lawsuit, including: (1) certification of a class; (2) a declaration that the Plan violates S.C. Code Ann. § 38-71-46; (3) a declaration of the future rights of the putative class members with regard to claims for diabetes education and training under the Plan; (4) reformation of the Plan to comply with S.C. Code Ann. § 38-71-46; (5) an injunction to stop the Respondents from continuing their unlawful actions in the future; (6) disgorgement and return of all profits and/or monies which should have been paid to the putative class members; and (7) costs and attorneys' fees.

While the parties to this case were awaiting Judge Burch's ruling in this matter, this Court issued an opinion in *South Carolina Dept. of Consumer Affairs v. Foreclosure Specialists, Inc.* Op. No. 4749 (S.C. Ct. App. Filed Sept. 29, 2010). That case is

instructive because, although addressing a different statutory scheme -- the Consumer Credit Counseling Act, this Court found that, under the more general Administrative Law Court statutes, also relied upon by Respondents in this case, the ALC did not in fact have the power to grant the Department of Consumer Affairs a refund of fees collected in violation of the Consumer Credit Counseling Act, and that any action for such relief should have been brought in circuit court. While not substantively on point, the case illustrates the risk and difficulty of predicting where the lines fall between the jurisdiction of the ALC and the circuit court.

The proper course would have been for Judge Burch to stay decision on Respondents' motion for summary judgment pending the final outcome of Appellant's administrative claim and to give the parties an opportunity to conduct discovery instead of granting the motion for summary judgment and dismissing Appellant's Complaint with prejudice.

2. *The Trial Court Erred in Granting Respondents' Motion for Summary Judgment and Dismissing Appellant's Complaint with Prejudice on the Basis that Appellant was Required to Exhaust Administrative Remedies.*

Judge Burch granted Respondents' motion for summary judgment on the basis that the administrative remedies under S.C. Code Ann. § 1-11-710(C) were Appellant's exclusive remedy. However, Judge Burch did not address the differences between what is "pending" in the administrative process and the causes of action asserted in the instant lawsuit. The causes of action asserted in the instant lawsuit are not "claims for benefits" within the meaning of section 1-11-710(C), and continuing with the administrative appeal would not provide Appellant with an adequate remedy.

With regard to many, if not most, insurance claims, the Respondents' exhaustion defense would be applicable. However, a review of several of those cases illustrates how this case is different. For example, in *James v. South Carolina Budget and Control Board*, 640 S.E.2d 474 (S.C. Ct. App. 2007), this Court upheld the circuit court's reversal of the Budget and Control Board's denial of a claim for a child's cranial molding device as not medically necessary. That case was heard by the Budget and Control Board, appealed through the Administrative Procedures Act to the circuit court, and then to this Court. In *Grier v. South Carolina Budget and Control Board*, 07-ALJ-30-0139 (2008), the ALC upheld reversal of the Budget and Control Board's denial of a claim for abdominoplasty ("tummy tuck") as not medically necessary. In *Hendley v. South Carolina Budget and Control Board*, 481 S.E.2d 159 (S.C. Ct. App. 1996) this Court affirmed the lower court's reversal of a decision made by the Budget and Control Board to deny coverage for a hair prosthesis (or "wig") through interpretation of the language of the benefit plan regarding prosthesis. All of these cases involved the agency/administrative review of and interpretation of its own policies and contracts, and single claims for benefits. In contrast, in the instant lawsuit Appellant seeks: (1) certification of a class; (2) a declaration that the Plan violates S.C. Code Ann. § 38-71-46; (3) a declaration of the future rights of the putative class members with regard to claims for diabetes education and training under the Plan; (4) reformation of the Plan to comply with S.C. Code Ann. § 38-71-46; (5) an injunction to stop the Respondents from continuing their unlawful actions in the future; (6) disgorgement and return of all profits and/or monies which should have been paid to the putative class members; and (7) costs and attorneys' fees. The potential result in favor of Appellant from the pending

administrative proceeding would not provide the relief sought by Appellant and the putative class members in the instant lawsuit.

Section 1-11-710(C) provides that “*claims for benefits* under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board [South Carolina Budget and Control Board], which shall constitute the exclusive remedy for these claims, subject only to appellate judicial review consistent with the standards provided in Section 1-23-380.” S.C. Code Ann. § 1-11-710(C) (emphasis added).

Section 1-23-380 entitled “Judicial Review Upon Exhaustion of Administrative Remedies” “does not limit utilization of or the scope of judicial review *available under other means of review, redress, relief, or trial de novo* provided by law.” S.C. Code Ann. § 1-23-380(A) (Supp. 2009) (emphasis added).

If the denial of Appellant’s claims for diabetes education and training benefits is reversed in the ALC, then presumably Appellant would receive coverage only for his diabetes education claims. However, neither the Appellant’s benefit plan nor the putative class members’ benefit plans would necessarily be reformed to provide the statutorily mandated insurance coverage for diabetes education. Appellant’s prevailing in the administrative process would not require Respondents to review all denials made in violation of the diabetes education mandate statute since its enactment in 2000.

Appellant’s prevailing in the administrative process would not enjoin Respondents from violating the diabetes mandate in the future, nor force disgorgement of revenues and profits related to the illegal conduct.

Generally, “[w]hen an administrative remedy is available *to determine a question of fact*, one must seek the administrative remedy or be precluded from pursuing relief in the courts.” *Stinney v. Sumter School Dist. 17*, 675 S.E.2d 760, 763 (S.C. Ct. App. 2009) (citing *Hyde v. Dept. of Mental Health*, 442 S.E.2d 582, 583 (S.C. 1994)) (emphasis added). “A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body.” *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 529 (S.C. Ct. App. 2009) quoting *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 632 S.E.2d 864, 867 (S.C. 2006) (citing *Ward v. State*, 538 S.E.2d 245 (S.C. 2000)); *see also Stinney*, 675 S.E.2d at 763 (recognizing that inadequacy of the administrative appeal is an exception to the general rule requiring exhaustion).

The purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reason for denying the diabetes education claim, would not assist the Court in this case. The alleged wrong – violation of the statutory mandate as to an entire class of persons—is not one which the administrative process was designed to address. To limit Appellant to the administrative process would be to require him to pursue a vain and futile act. Courts have recognized an exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act. *See Moore v. Sumter County Council*, 387 S.E.2d 455, 458 (S.C. 1990).

In *Capital City Ins. Co. v. BP Staff, Inc.*, 674 S.E.2d 524, 529 (S.C. Ct. App. 2009), this Court recently addressed the exhaustion of administrative remedies issue, and explained that exhaustion is a “rule of policy, convenience and discretion, rather than one

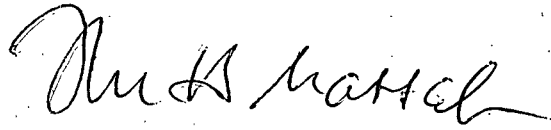
of law, and is not jurisdictional.” And, the failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction. *Id.* In the instant case, Appellant’s declaratory judgment, equitable and injunctive claims are part of the general class of cases which the court of common pleas has jurisdiction to hear. The mere fact that Appellant was also engaged in an administrative proceeding regarding a single claim for benefits did not divest the circuit court of its power to hear and determine the claims asserted in Appellant’s Complaint. Thus, the trial court had subject matter jurisdiction to hear Appellant’s claims, should not have dismissed Appellant’s Complaint, and especially not with prejudice.

Additionally, Appellant respectfully directs the Court’s attention to *Drummond v. State of South Carolina*, 378 S.C. 362, 662 S.E.2d 587 (2008), wherein the South Carolina Supreme Court recently affirmed that the ALC and its administrative law judges “are an agency of the executive branch of government” and cannot rule on the validity of a statute or regulation. While the instant case is not a direct challenge of the constitutionality of the subject statutory coverage mandate, the South Carolina Budget and Control Board is a state agency and it has promulgated its “decision” that the Plan does not provide coverage for diabetic education. It is the validity of that state agency’s decision which is being challenged in this case. In *Drummond*, the court held that although the appellant was not challenging the constitutionality of the regulation, he was challenging its validity under state law. Because the ALC is part of the executive branch, as stated in *Video Gaming Consultants, Inc. v. South Carolina Dep’t of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000), it has no authority to rule on the validity of the regulation.

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests that the Court reverse the trial court's grant of summary judgment in favor of Respondents.

Respectfully submitted,



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Paul M. Burch, Circuit Court Judge

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S.C. Court of Appeals Case No. 2011183026

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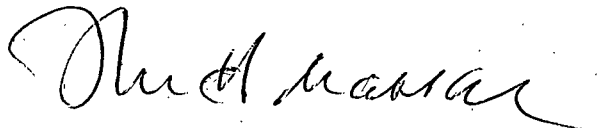
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CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief complies with Rule 211(b), SCACR.

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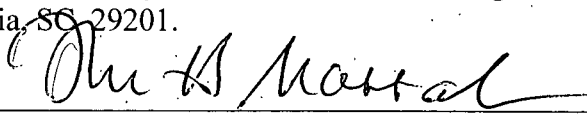
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PROOF OF SERVICE

I certify that I have served the Final Brief and Final Reply of Appellant on Respondent of record by depositing a copy of it in the United States Mail, postage prepaid, on September 1, 2011, addressed to their attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886, Columbia, SC, 29211 and Kelly H. Rainsford, State Budget & Control Board, 1201 Main Street, Suite 300, Columbia, SC 29201.


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