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

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

Appellant,

v.

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

Respondents.

REPLY

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A. THE LOWER COURT SHOULD HAVE DENIED THE MOTION FOR SUMMARY JUDMENT BECAUSE AS A MATTER OF LAW, EXHAUSTION IS NOT APPLICABLE TO THE CLAIMS MADE IN THE CIRCUIT COURT CASE

Appellant first takes this opportunity to refer the court to a recent decision of the South Carolina Supreme Court, which has just come to the attention of Appellant's counsel, reversing a case cited in Appellant's Brief, Stinney v. Sumter School District 17, 382 S.C. 352, 675 S.E.2d 760 (Ct. App. 2009). Stinney v. Sumter School District 17, 391 S.C. 547, 707 S.E.2d 397 (2011). In that decision, the Supreme Court explained, in *dicta*, that when a litigant invokes the original jurisdiction of the circuit court to adjudicate a claim for which "an administrative remedy is not available for the injury suffered, the doctrine of exhaustion is not applicable." Id. at 551, n.1, 675 S.E.2d at 399, n.1.

Allen's Complaint invoked the original jurisdiction of the circuit court, and includes claims for which "administrative remedies" are not available. This civil action was filed as a class action seeking declaratory and injunctive remedies, it does not seek a refund for "claims for benefits" – the statutory violation for which the legislature has provided the administrative remedy relied upon by Respondents. (R. pp. 16-23). Section 1-11-710(C) of the South Carolina Code 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 "[j]udicial 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).

As referenced in Stinney, this does not mean that any litigant in an administrative process can bring a separate suit to collaterally attack the findings of the administrative bodies. "Res judicata still applies in the administrative setting, and such determinations *may* bar subsequent litigation." Id. (citing Earle v. Aycock, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981) (administrative decision can have preclusive effect in collateral litigation)) (emphasis added). However, in this case, the administrative process, prior to ever reaching even the ALC, took so long that Allen was faced with a potential statute of limitations defense should he await the conclusion of the administrative process. The health insurance claim which serves as the origin of the merits of this case was first denied by Blue Cross Blue Shield on August 28, 2008. (R. pp. 176, 182-83). Allen complied with the deadlines imposed by Blue Cross at this first stage of the internal appeal process, and had not even received a decision on the very first level request for reconsideration of the initial denial by the time of the filing of the civil action Complaint in late November 2009 – approximately two years from the date of the first claim for diabetes education by Jane Doe. (R. pp. 175-80).

In response to the Complaint, EIP filed a Motion to Dismiss and Allen opposed said motion in a Memorandum in Opposition and supporting Affidavits regarding the ongoing administrative process on February 26, 2010. (R. pp. 35-135) (R. pp. 149-293). Further, at the time of that February 26, 2010 filing, Blue Cross had yet to issue a decision on the very first level of the "administrative process." (R. p. 180). It was not

until two days before the August 26, 2010 hearing on the EIP's second attempt to dismiss this case -- its Motion for Summary Judgment, the grant of which is the basis of this appeal-- that the EIP, for the very first time, explained why it contended that the diabetes mandate statute did not apply to the State Health Plan. (R. pp. 571-72) (R., pp. 453-466, 465-66).[1]

As explained in Stinney, a final decision by this court on appeal from the ALC in the parallel administrative case that the EIP is not bound to follow the diabetes insurance mandate, S.C. Code Ann. § 38-71-46, *may* have preclusive effect on this civil action. However, should the EIP's determination that, as a matter of law, it is not subject to the diabetes insurance mandate ultimately be rejected, that conclusion of law would greatly impact this case for class and injunctive relief. And, because exhaustion is not applicable to the claims made in this civil action, the doctrine of exhaustion is not applicable. The lower court's order granting summary judgment and dismissing this case *with prejudice* should be reversed.

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[1] By letter dated August 24, 2010, the EIP Appeals Committee wrote Appellant that it was denying his claim and again stated summarily that S.C. Code § 38-71-46 did not apply to the State Health Plan. (R. p. 465-66). The underlying basis for the conclusion that the diabetes coverage mandate did not apply to the State Health Plan was explained (for the first time) as follows:

> Lastly, the Committee noted the repeated assertions regarding S.C. Code 38-71-46 and Claimant's attorney's assertion that no one has explained why it does not apply to the State Health Plan. While the Committee noted the alternative methods for obtaining diabetes education noted above, the Committee also observed the Department of Insurance and the General Assembly *historically have acknowledged* the Department [of Insurance] has no jurisdiction over EIP. EIP is not a health insurance issuer under the Code. In the areas on which the General Assembly has wanted to include EIP in the Accident and Health Insurance provisions of Title 38, Chapter 31, it has specifically said so. Therefore, because 38-71-46 does not refer to EIP or the State Health Plan, it does not apply to the State Health Plan.

(emphasis added). (R. p. 466, n.22). That explanation contains a single footnote which references S.C. Code Ann. §1-11-780 -- a statute addressing "mental health coverage" – presumably as the legal authority for the proposition that the South Carolina Department of Insurance has no jurisdiction over the South Carolina State Budget and Control Board's Employee Insurance Program .

B. WHETHER THE TRIAL COURT SHOULD HAVE ISSUED A STAY ORDER PENDING THE OUTCOME OF THE ADMINISTRATIVE CASE IS PRESERVED FOR APPEAL.

Contrary to the argument by Respondents, the record reflects that the Appellant raised the propriety of a stay prior to entry of judgment in the lower court. A "party must file [a Rule 59(e), SCRCP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Because Appellant raised this issue and reference to a stay was omitted from the lower court's summary judgment order, including it in the Motion to Alter or Amend pursuant to SCRCP, Rule 59(e) was proper and necessary. (R. pp. 4-13, 508-09). The Rule 59(e) motion was denied, and therefore that issue was raised and ruled upon. (R. pp.2-3).

Some procedural history of the motions made before the lower court is relevant to the discussion of this issue. The EIP filed a Motion to Dismiss and for Judgment on the Pleadings in lieu of Answering the Allen Complaint filed on November 25, 2009. (R. pp.35-135). Said motion was based on grounds of failure to exhaust administrative remedies. Allen filed Affidavits and a Memorandum in Opposition to the Motion to Dismiss. (R. pp. 149-293). The motion was heard on March 4, 2010 by the Hon. Markley Dennis, and the court issued an Order denying the Motion. (R. pp. 14-15). The EIP filed its Answer, and in response to Allen's serving written discovery requests, the EIP filed a Motion for Protective Order and Motion for Summary Judgment, without providing any responses to discovery. (R. pp. 294-320) (R. pp. 321-431). In response, Allen filed a Motion to Compel and a Motion to Stay Decision on Motion for Summary Judgment pending discovery, and filed memoranda in support of its motions and in

opposition to the EIP's motion for protective order and for summary judgment. (R. pp. 468-507). Practically, there had been no change or progression of the civil action between the filing of first Motion to Dismiss and the Motion for Summary Judgment, the grant of which is now on appeal.

As nothing had changed in the case, Allen did not copy his legal argument from the earlier filed memorandum in opposition to the EIP's motion to dismiss on the identical issue, and expressly referenced the arguments made in opposition to the EIP's assertion of requirement to exhaust administrative remedies. (R. p. 501). Specifically, the memorandum stated:

> The issue of exhaustion of administrative remedies, which Defendants assert is a basis for summary judgment, was fully briefed and argued pursuant to Defendants' motion to dismiss and for judgment on the pleadings, which, as mentioned above, were denied. Defendant is now attempting a second bite at the apple by again asserting the issue of exhaustion of administrative remedies as a purported basis for summary judgment. Plaintiff incorporates by reference Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, and the exhibits/affidavits attached thereto, in opposition to this purported basis for summary judgment.

Id. That brief relied on and discussed in detail the South Carolina Court of Appeals' decision in Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (S.C. Ct. App. 2009), wherein this Court held that where a party would be harmed by the running of the statute of limitations or otherwise prejudiced if its claim is dismissed on exhaustion of 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. (R. pp. 152-56).

At the hearing on August 26, 2010, Judge Burch heard arguments on the pending motions and subsequently issued an order granting summary judgment to the EIP and dismissing this case *with prejudice* based on a finding that Allen is required to exhaust administrative remedies. (R. pp. 4-13). Judge Burch's Order omitted any reference to consideration of staying the circuit court case until the administrative action was concluded. Id. As a result of that omission, Allen filed a Motion to Alter or Amend and argued that the court's order failed to discuss why it is not exercising its discretion to stay the civil action pending the outcome of the administrative case. (R. pp. 508-14). That Motion to Alter or Amend was denied. (R. pp. 2-3). The Respondent's argument that this issue is not preserved for review is without support.

EIP cites to the case of State v. Colf, 332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998) for the proposition that the briefing accorded the discussion of staying the case pending the outcome of administrative remedies was conclusory, and therefore did not rise to the level of "raised" before the lower court. That case, however, is distinguishable from the case at bar, and did not involve the standards for issue preservation. The issue in Colf was whether the appellate brief contained sufficient argument to preserve that issue for decision. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.' "Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988)). It is undisputed that the Allen administrative proceeding was made known and ongoing at the time of the hearing before Judge Burch, and what the circuit

court should do with the circuit court case in light of that pending administrative action was encompassed in the merits of all issues raised before the circuit court.

C. THE LOWER COURT SHOULD HAVE STAYED THE CASE PENDING THE OUTCOME OF THE ADMINISTRATIVE PROCEEDING

The circuit court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy. See Williams v. Bordon's Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). "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., 382 S.C. at 105, 674 S.E.2d at 531.

Jane Doe was first diagnosed with Type I diabetes on November 27, 2007 at the age of two, and diabetic education and training was provided during her initial 3-day hospital stay. (R. pp. 175-76). In reviewing all claims for diabetic education made by Allen, Defendants have denied three other such claims dating back to December 17, 2007. (R. p. 179). In light of the State of South Carolina board/agency being named as a Defendant, the undersigned made the determination to commence this action within two (2) years of the date of diagnosis, so as not to risk missing the two-year statute of limitations often applicable to claims against the State or State agencies. Allen should not be prejudiced by a decision to protect himself against all statute of limitations defenses, particularly when there is no guidance in the law of whether the Administrative

Law Court has the power to grant the relief requested by the Plaintiffs, and the key legal question at issue has not been ruled upon by any court.[2]

In South Carolina Dept. of Consumer Affairs v. Foreclosure Specialists, Inc., 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010), the court held that the ALC did not in fact have the power to grant the Dept. 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 admittedly addressing a different statutory scheme -- the Consumer Credit Counseling Act, the case illustrates the risk and difficulty of predicting where the lines fall between the jurisdiction of the ALC and the circuit court. The scope and meaning of the statute on which the EIP relies, S.C. Code Ann. § 1-11-710(C) has never been addressed by any published opinion, and both the applicability of that statute and the diabetes mandate statute are novel issues of law.

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 on exhaustion of 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 this case; another possible outcome is that the ALC (or the South Carolina Court of Appeals) determines the ALC does not have the

[2] Despite Allen commencing both the civil action and administrative action in late 2009 and early 2010, respectively, to date no court has made any ruling on the substantive question of law at issue in this case -- the applicability of the South Carolina diabetes mandate to the State Health Plan. Two circuit court judges have been presented with the issue, and both made procedural rulings which avoided the necessity of ruling on the question of law. Briefing is completed on the substantive issue also pending the ALC, but no decision has been rendered as of the date of this Reply.

jurisdiction to award the relief requested and that the plaintiffs should, instead, be in circuit court. This is the classic *catch-22* for a plaintiff, and this court should reverse the order granting summary judgment and remand the case to the circuit court to enter an order staying the case pending the final outcome of the administrative proceeding (including all appeals).

CONCLUSION

Based on the foregoing, the lower court's order should be reversed.

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August 31, 2011

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CERTIFICATE OF COUNSEL

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

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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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