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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2015-001561

Jeffrey D. Allen, on behalf of Jane Doe.....Appellant.

v.

South Carolina Budget and Control Board,
Employee Insurance Program.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Administrative Law Court abuse its discretion in finding the South Carolina Public Employee Benefit Authority, Employee Insurance Program's position that the Diabetes Education Mandate Statute did not apply to the State Health Plan was substantially justified, resulting in a denial of appellant's motion for attorney's fees?

2. Should this Court award $61,802.97 in attorney's Fees and Costs to the Appellant?

II. STATEMENT OF THE CASE

Jeffrey Allen ("Appellant") appeals the Administrative Law Court's ("ALC") decision denying Appellant's Motion For Attorney's Fees pursuant to S.C. Code Ann. § 15-77-300 (Supp. 2009). The current appeal arises out of a previous appeal wherein Appellant appealed the decision of the ALC upholding the denial of $560 in benefits for separately-billed diabetes education training under the Group Health Benefits Plan of the Employees of the State of South Carolina, the Public School Districts, and Participating Entities ("State Health Plan"). (R. pp. 15-26). As an employee of Dorchester County School District Two, Appellant participated in the state health benefit program offered through the State of South Carolina Budget and Control Board Employee Insurance Program ("EIP").[1] (R. p. 15). Appellant specifically covered his daughter ("Dependent") on his health coverage through the State Health Plan.

On August 24, 2010, the EIP Appeals Committee issued a decision denying coverage

[1] Effective July 1, 2012, 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.

for diabetes education on the basis it was not covered as a separately-billed claim under the State Health Plan. Pursuant to S.C. Code Ann. § 1-11-710(C) (2005), Appellant appealed the final determination of the EIP Appeals Committee to the ALC on September 22, 2010. In this appeal, Appellant also alleged entitlement to class action relief. By order dated August 13, 2012, the ALC upheld EIP's denial of Appellant's claim and found that it did not need to address the class action allegations. (R. pp. 15-26).

On September 14, 2012, Appellant filed a notice of appeal with the South Carolina Court of Appeals. On December 6, 2012, the South Carolina Supreme Court granted Appellant's motion to certify the appeal from the Court of Appeals to the South Carolina Supreme Court.

On March 5, 2015, the South Carolina Supreme Court, in a 4-1 decision, reversed the ALC's finding that S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan, but found that Appellant's request for class action relief before the ALC failed as a matter of law. (R. pp. 34-48).

On remittitur, Appellant moved for an award of attorney's fees pursuant to the state action statute, S.C. Code Ann. § 15-77-300 (2015). (R. pp. 52-123, 124-150). On June 17, 2014, the ALC issued an Order denying the Motion for Attorney's Fees. (R. pp. 28-33). This appeal followed.

III. STATEMENT OF THE FACTS

On March 4, 2105, the South Carolina Supreme Court, in a 4 to 1 decision, reversed the ALC on the matter of statutory interpretation related to whether or not S.C. Code Ann. § 38-71-46 applied to insurance benefits under the State Health Plan. The Supreme Court also found that Appellant was not entitled to class action relief against the State Health

Plan. See Allen v. SC Pub. Employee Benefit Auth. (PEBA), 411 S.C. 611, 769 S.E.2d 666 (2015); (R. pp.34-48).

The issue in the underlying case 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).

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 the terms of the State Health Plan 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.[2] Appellant

[2] Specifically, Respondent pointed out that in the 1990s and into the 2000s, the Legislature passed a series of health insurance coverage mandates in Title 38, Chapter 71, Article 1. With the exception of § 38-71-280, regarding autism spectrum disorder, none of these laws

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.

The Administrative Law 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." (R. pp. 15-26). However, on appeal, the South Carolina Supreme Court in a 4-1 decision agreed with Appellant. (R. pp. 34-48).

In the dissenting opinion, Justice Pleicones noted:

> I agree with the ALC's conclusion that the EIP is not a "health insurance issuer" because the EIP is not licensed to engage in the business of insurance in this State and not subject to State insurance regulation. See S.C. Code Ann. § 1-11-780 (Supp. 2013) ("[t]he State Employee Insurance Program. . . is not under the jurisdiction of the Department of Insurance"). Since the EIP is not a "health insurance issuer" under section 38-71-840(A)(16), the Plan does not provide "health insurance coverage" as defined in section 38-71-840(A)(14). Further, since section 38-71-46 only mandates diabetes education coverage for a "health insurance policy" that provides "health insurance coverage" as defined by section 38-71-840(A)(14), I agree with the ALC that Appellant's claim was properly denied.

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or their preceding bills mentioned EIP, the State Health Plan, or the Budget and Control Board. Then in 2007, the Legislature passed § 38-71-280, mandating coverage for autism spectrum disorder care. In § 38-71-280, the Legislature specifically stated it desired the statute apply to EIP: "It includes the State Health Plan. . . . 'State Health Plan' means the employee and retiree insurance program provided for in Article 5, Chapter 11, Title 1." S.C. Code Ann. § 38-71-280(A)(4)-(5). The statute made specific reference to EIP's governing Code sections, again underscoring the General Assembly's knowledge that EIP is governed differently. Accordingly, the Legislature deliberately referenced the State Health Plan and EIP's enabling statutes to make the Legislature's intent clear that § 38-71-280 applied to EIP because simply passing a statute in Title 38, Chapter 71, without a special reference or cross-reference would not do so. The Legislature made it very clear when mandates otherwise restricted to health insurers were to apply to the State Health Plan. When EIP was to be included, the Legislature either: (1) amended EIP's governing statutes in Title 1, Chapter 11, Article 5; (2) made a direct reference to those statutes in its legislation; or (3) at a minimum, identified EIP by name in its legislation.

. . .

> If a General Insurance Statute applies to the Plan even when the Plan is not mentioned, then there would have been no reason to include the express reference to the Plan in any General Insurance Statute... In construing a statute, we are to assume the General Assembly was aware of past statutes, and we are to give effect to all the words in a statute... The majority's reading renders the references in the later statutes superfluous and leads to the absurd result that all General Insurance Statutes apply to the Plan unless the Plan is expressly excluded. (Citations omitted).

411 S.C. at 624; 769 S.E.2d at 673; (R. pp. 46-47).

On remittitur, Petitioner moved for an award of attorney's fees pursuant to the state action statute, S.C. Code Ann. § 15-77-300 (Supp. 2009), which provides for an award of reasonable attorney's fees in cases involving state action if the court finds that the agency acted without substantial justification in pressing its claim, and if there are no special circumstances that would make an attorney's fee award unjust. (R. pp. 52-123, 124-150).

On June 17, 2014, the ALC issued an Order denying the Motion for Attorney's Fees. (R. pp. 28-33). The ALC found:

> ... 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. 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.

Order at 5-6; (R. pp. 32-33).

ARGUMENTS

I. THE ALC DID NOT ABUSE ITS DISCRETION IN FINDING THAT RESPONDENT'S POSITION THAT S.C. CODE ANN. §38-71-46 DID NOT APPLY TO THE STATE HEALTH PLAN WAS SUBSTANTIALLY JUSTIFIED.

A. Standard of Review

The decision to award or deny attorney's fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) "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. (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001)).

B. The ALC Did Not Abuse Its Discretion In Finding That EIP's Interpretation of The Statute was Substantially Justified By the Complicated Grammatical Structure of The Statute, The Legislative Treatment of The State Health Plan and The Unique Nature of The State Health Plan.

The ALC did not abuse its discretion in finding that EIP's interpretation of the statute was substantially justified by the complicated grammatical structure of the statute, its legislative treatment of the State Health Plan and the unique nature of the State Health Plan. The Supreme Court of South Carolina has held that "[s]ubstantial justification for purposes of the state action statute means justified to a degree that could satisfy a reasonable person." Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325 (2008) (internal quotation marks and citations omitted). Stated differently, "the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and in fact." Id. at 445, 658 S.E.2d at 326. The Court in Layman further recognized that "an

agency's loss on the merits does not create a presumption that its position was not substantially justified. . . ." Id. Similarly, in Pierce v. Underwood, 487 U.S. 552 (1988), which was cited in Layman, the U.S. Supreme Court noted that "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." 487 U.S. at 566 n.2. "In other words, §15-77-300 is not a statute that provides for an award of attorneys' fees in every instance in which the government agency loses the case; to so hold would convert the statute into a 'loser pays' statute. Rather, §15-77-300 provides for the payment of fees only when the agency loses while taking a position for which there was not a reasonable basis in law and fact." R.P. v. S.C. Dept. of Health and Human Services, 06-ALJ-08-0605-AP (April 14, 2014).

§ 38-71-46(D), defines what "health insurance polic[ies]" are covered under the diabetes education mandate in section 38-71-46(A). Since the Plan is a group health plan, section 38-71-46(D) requires the use of S.C. Code Ann. § 38-71-840(A)(14) (2002) to determine whether the Plan provides "health insurance coverage," so as to be a "health insurance policy" covered by the diabetes education mandate.

Section 38-71-840 (14) provides:

> "Health insurance coverage" means 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...

Ultimately, whether the Plan qualifies as "health insurance coverage" depends on what the phrase "offered by a health insurance issuer" modifies in S.C. Code Ann. § 38-71-840(14) (2002). The claims administrator, the EIP Health Appeals Committee, ALC,

and Justice Pleicones read "[b]enefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care" as describing what types of provided benefits qualify as "health insurance coverage." They also read the next section "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" as describing what types of insuring agreements offer "health insurance coverage." The term "offered by health insurance issuer" modifies the three types of insurance agreements in the statute, that is, (1) a hospital or medical service policy or certificate, (2) a hospital or medical service plan contract, or (3) a health maintenance organization contract. Accordingly, to qualify as "health insurance coverage" the policy, certificate, or contract must be issued by a "health insurance issuer."

Multiple prior decision makers all took the position that EIP was not a "health insurance issuer" as this term is defined in S.C. Code Ann. § 38-71-840(16) (2002), which stated:

> "Health insurance issuer" or "issuer" means any entity that provides health insurance coverage in this State. For purposes of this section, "issuer" includes an insurance company, a health maintenance organization, and any other entity providing health insurance coverage which is licensed to engage in the business of insurance in this State and which is subject to state insurance regulation.

EIP was not a "health insurance issuer" because EIP was not licensed to engage in the business of insurance in this State and not subject to State insurance regulation. See S.C. Code Ann. § 1-11-780 (Supp. 2013) ("[t]he State Employee Insurance Program. . . is not under the jurisdiction of the Department of Insurance"). Since EIP is not a "health insurance issuer" under section 38-71-840(16), the Plan did not provide "health insurance

coverage" as defined in section 38-71-840(14). Further, since section 38-71-46 only mandates diabetes education coverage for a "health insurance policy" that provides "health insurance coverage" as defined by section 38-71-840(14), EIP and the prior decision makers all found that Appellant's claim was properly denied.

EIP's position that its interpretation was also supported by the legislative intent of the statute was also substantially justified. If the language of a statute gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the statute itself. Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). The General Assembly has chosen to separate the State Health Plan from general insurance regulation by placing the State Health Plan's governing statutes in Title 1, Chapter 11 of the S.C. Code, rather than in Title 38, Chapter 71 (General Insurance Statutes). Since the General Assembly separated the Plan from the General Insurance Statutes, it has included an express reference to the Plan in the General Insurance Statutes when those statutes are to apply to the State Health Plan. See S.C. Code Ann. § 38-71-785(B) (Supp. 2013) ("This section applies. . .including the state health plan. . ."); S.C. Code Ann. § 38-71-243(B) (Supp. 2013) ("This section applies. . .including the state health plan. . ."). Furthermore, in the context of coverage mandates, the General Assembly has made a direct reference to the State Health Plan when it intends for a mandate found in the General Insurance Statutes to apply to the Plan. See S.C. Code Ann. § 38-71-280 (Supp. 2013) (mandating coverage for autism spectrum disorder, "[i]t includes the State Health Plan. . . 'State Health Plan' means the employee and retirees insurance program provided for in Article 5, Chapter 11, Title 1").

The diabetes education mandate, however, contained no reference to the Plan either

in the text or the enacting legislation. As Justice Pleicones stated in his dissent, "[i]f a General Insurance Statute applies to the Plan even when the Plan is not mentioned, then there would have been no reason to include the express reference to the Plan in any General Insurance Statute..."Allen, 411 S.C. at 624; 769 S.E.2d at 673; (R. p. 47).

Interestingly, the majority in Allen recognized its decision could be perceived as being inconsistent with prevailing law when it noted in footnote 10 of the decision that, "[a]lthough section 38-71-46 indicates that the General Assembly intended for the diabetes mandate to apply to the State Health Plan, we do not conclude that the canon of construction 'expression unius est exclusion alterius' applies here, or that the State Health Plan is governed by every general insurance statute where the General Assembly failed to expressly exclude the State Health Plan." Id. Despite this footnote, the majority failed to provide any guidance to determine which Title 38 mandates apply to the State Health Plan and which ones do not.

C. The ALC Did Not Abuse Its Discretion By Finding That EIP's Position Was Substantially Justified Because The Interpretation of § 38-71-46 Was A Novel Question of Law.

The ALC also did not abuse its discretion by finding that EIP's position was substantially justified because the interpretation of § 38-71-46 was a novel question of law that had never been litigated. Appellant's own brief conceded that the interpretation of § 38-71-46 had never been previously litigated, when it stated on page 12 of its brief that the Supreme Court agreed to hear the case because "[t]he Court indicated that [the] issue was a novel issue of law." (Appellant's Brief, p. 12). Because the interpretation of § 38-71-46 had never been previously litigated, EIP's decision that it did not apply to the Plan was substantially justified. See R.P. v. S.C. Dept. of Health and Human Services, at *7 (holding

that the fact that an issue had never been previously litigated was a reason courts have held a position was substantially justified); Cody v. Caterisano, 631 F.3d 136, 142 (4th Cir. 2011) ("litigating cases of first impression is generally justifiable"); Southern Dredging Co., Inc. v. U.S., 1996 WL 516158, 3 (4th Cir. 1996) ("In lawsuits involving first-impression interpretations of statutes, many circuits, including ours, have found that the United States is presumptively substantially justified within the meaning of the EAJA if its position is a reasonable legal position and the question is being addressed for the first time in the circuit"). Because the interpretation of § 38-71-46 had never been litigated in any context, the ALC did not abuse its discretion by finding EIP was substantially justified in challenging its application to the Plan.

D. The ALC Did Not Abuse Its Discretion By Finding That EIP's Position Was Substantially Justified Based On EIP'S Longstanding Agency Practice of Enforcing The Terms of The State Health Plan As Written.

The ALC did not abuse its discretion in finding that EIP's position was substantially justified based on EIP's longstanding agency practice of enforcing the terms of the State Health Plan as written. It is undisputed that under the terms of the State Health Plan as written that services for diabetes education were excluded. During Appellant's Supreme Court appeal, Plaintiff conceded this point when it abandoned any argument that diabetes educational training was covered under the language of the State Health Plan. Allen, 411 S.C. at 613 n7, 769 S.E.2d at 668 n7; (R. p. 36). Because EIP was merely enforcing the terms of the State Health Plan as written, EIP's position was substantially justified.

E. As An Additional Sustaining Ground The ALC Did Not Abuse Its Discretion By Finding That EIP's Position Was Substantially Justified Because Prior Multiple Decision Makers Came To The Same Conclusion.

Respondent's decision that S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan was substantially justified in that EIP's position had been accepted by multiple prior decision makers. The claims administrator, the EIP Health Appeals Committee, the ALC and Justice Pleicones of the Supreme Court all held that § 38-71-46 did not apply to the Plan. This fact alone strongly suggests that the issue was one over which reasonable minds could differ. As Chief Administrative Law Judge Ralph King Anderson, III found in R.P. v. S.C. Dept. of Health and Human Services, 06-ALJ-08-0605-AP (April 14, 2014):

> In the present case, as already noted, a DHHS Hearing Officer, an ALJ, and two of five Justices of the South Carolina Supreme Court held that R. 88-210 was inapplicable to eligibility decisions. The contrary view ultimately prevailed, but it was adopted only by a 3-2 decision in the Supreme Court, That fact alone strongly suggests the issue was one over which reasonable minds could differ. Moreover, in this instance, the dissenting opinion was amply detailed and well-reasoned. Accordingly, the agency's position was substantially justified.

Id. at *5.

A number of cases have held that when an agency's litigation position has met with some degree of success in the courts, even if it does not prevail in the end, the agency's position should be regarded as reasonable and supported by substantial justification. In U.S. v. Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 382 (7th Cir. 2010) it was held that "there is a presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified." See also, e.g., U.S. Commodity Futures Trading Com'n v. WeCorp, Inc., 878 F. Supp. 2d 1160, 1164-65 (D. Hawaii 2012). Similarly, in Wyandotte Sav. Bank v. N.L.R.B., 682 F.2d 119, 120 (6th Cir. 1982), the court held that when the government's position had been adopted by dissenting or concurring judges in appellate decisions, then "[c]learly, the Board had a reasonable basis for [its position]."

The same reasoning has been applied in several federal cases in South Carolina in which the District Judge declined to accept the Magistrate Judge's Report and Recommendations, but still held that the government's unsuccessful position was substantially justified. In Levine v. Astrue, 2010 WL 3522383, *2 (D.S.C. 2010), the Court held that while "reasonable minds disagreed about the Commissioner's final decision," and the government did not ultimately prevail, the "substantially justified" standard of Pierce, supra, is satisfied because "there is a genuine dispute [or] reasonable people could differ as to the appropriateness of the contested action." 2010 WL 3522383, at *1. Accord, McKoy v. Colvin, 2013 WL 6780585,* 3 (D.S.C. 2013) ("the fact that the Magistrate Judge recommended that the Commissioner's decision be affirmed suggests that the Commissioner's position was substantially justified...," even though "ultimately not convincing.").

Because the claims administrator, the EIP Health Appeals Committee, the ALC and Justice Pleicones of the Supreme Court, in a lengthy, detailed, well-reasoned dissent, all held that § 38-71-46 did not apply to the Plan, EIP's position was substantially justified.

II. APPELLANT IS NOT ENTITLED TO $61,802.97 IN ATTORNEY'S FEES AND COSTS.

A. Because Appellant Has No Written Fee Agreement With His Counsel For This Case, And Submitted No Evidence That Appellant Actually Incurred Fees In This Case, An Award Of Attorney's Fees Is Improper.

Appellant is not entitled to attorney's fees and costs in this case in that Appellant has no written fee agreement with his counsel for this case, and there is no evidence that the client actually incurred fees for this case. On the first page of the fee agreement attached to the Affidavit of John Massalon as Exhibit C, it states that the agreement is regarding the

case entitled "Jeffrey Allen, Individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees v. S.C. Budget & Control Board," "Case No.: 09-CP-10-7407". (R. p. 76). This circuit court case is a different case than the one at issue here. Appellant's own brief states that, "it is undisputed that this ALC case was ongoing while Appellant attempted to, institute and maintain a circuit court case seeking a class action." (Appellant's Brief, p. 13).

On November 25, 2009, Appellant filed a putative class action suit against the South Carolina Budget and Control Board, EIP, and BCBSSC in the Court of Common Pleas for the Ninth Judicial Circuit in Charleston, Case No.: 09-CP-10-7407. By order dated October 15, 2010, the Circuit Court granted EIP's and BCBSSC's motion for summary judgment dismissing Appellant's case with prejudice. (R. pp. 5-14). This decision was upheld by the South Carolina Court of Appeals on July 18, 2012. Allen v. South Carolina Budget and Control Board, Employee Insurance Program, Opinion No. 2012-UP-433 (S.C. Ct. App. filed July 18, 2012). (R. pp. 49-51). The South Carolina Supreme Court denied Appellant's petition for cert. in that case on March 4, 2015 in Appellate Case No. 2012-213206. (R. p. 27).

Although the Appellant and his counsel could have broadened the litigation covered by the fee agreement, they failed to do so. Nowhere in the fee agreement is there a mention that the agreement covers any litigation other than the purported circuit court class action specifically named in the agreement. Additionally, there is no evidence that in the absence of some class action recovery, which the Court denied, any of Appellant's counsel were looking to Appellant for the payment of any fees and costs. As discussed below, the conclusion that Appellant's counsel did not actually incur any fees is emphasized by the

fact that the litigation and/or fee agreement was not an arms-length transaction, but involved a mother representing her husband/child's interest.

Because Appellant has submitted no written fee agreement in this case, nor any evidence that Appellant had actually incurred any fees in this case, no attorney's fees can be awarded under §15-77-300. See Rule 1.5(c), RPC, Rule 407, SCACR ("a contingent fee agreement shall be in a writing signed by the client . . . ."); See generally S.C. Dep't of Soc. Servs. v. Mary C., 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011); Williamson v. Middleton, 383 S.C. 490, 495-96, 681 S.E.2d 867, 870-71 (2009) (finding attorney could not recover attorney's fees when attorney presented no evidence that client actually incurred fees and when no fee agreement existed between the client and attorney).

B. Because Attorney Christy Allen Was Representing Her Spouse and/or Her Daughter, And Her Interests Were Identical To Her Spouse and/or Daughter, Attorney Allen Was In Fact Acting Pro Se. Accordingly, Attorney's Fees Are Inappropriate.

Appellant is the spouse of, and Dependent is the daughter of, Christy Allen, the Partner at Wills, Massalon, & Allen who spent the majority of the time working on this case. Because Ms. Allen was representing her spouse, who was acting on behalf of their minor daughter, and Ms. Allen's interests were identical to those of Appellant and Dependent, Ms. Allen actually was acting as a pro se party and not as an attorney. In Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000), the South Carolina Supreme Court found that a pro se litigant, whether an attorney or layperson, does not become "liable for or subject to fees charged by an attorney." In Hopkins v. Hopkins, 343 S.C. 301; 540 S.E.2d 454 (2000), the Court expanded its rule to apply to cases where an attorney was representing a family member. In Hopkins, a father in a child support case was being represented by his second wife who was an attorney. The father argued that he was entitled

to recover attorney's fees for his attorney/wife's service. The Supreme Court disagreed holding:

> Similarly, here, we find no evidence Father actually became "liable for or subject to" attorneys' fees for his attorney/wife's service. There is no contract or fee agreement in the record,[3] nor is there any indication or testimony that Father's wife/attorney has attempted or intends to collect the fees from Father. Accordingly, Father did not prove that he became liable for the fees, such that the family court properly denied Father's request. Cf. Lisa v. Strom, 183 Ariz. 415, 904 P.2d 1239, 1242 (Ariz. 1995) (finding award of attorneys' fees has an "indispensable requirement . . . [there] be a genuine financial obligation on the part of the litigants to pay such fees," and that wife represented by her attorney/husband had no such genuine obligation).

Hopkins, at 457. The general rule against awarding fees to attorney-litigants is based upon a perception that such awards are windfalls to persons who have spent no money and incurred no debt for legal representation. See, e.g., Lisa v. Strom , 904 P.2d 1239 (Ariz 1995) (cited by the S.C. Supreme Court in Hopkins). Accordingly, because Attorney Allen was acting pro se, an award of attorney's fees would be improper.[4]

C. Appellant's Request For Fees Is Excessive and Not Supported By The Record.

Assuming for the sake of argument that Appellant could recover fees and costs for his ALC appeal, Appellant did not file his ALC appeal until September 22, 2010.

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[3] As was previously discussed, Appellant has no fee agreement in place for the current action.

[4] It should be noted that even if Appellant was allowed class action recovery that the firm of Wills,Massalon, & Allen could not act as class counsel due to a conflict of interest created by the Appellant being the spouse and/or dependent of Attorney Allen. Eubank v. Pella Corp., 753 F.3d 718, 721, 728-729 (7th Cir.2014) (court of appeals disapproved settlement as "inequitable--even scandalous" when settlement disproportionately favored defendant and because of "fatal conflicts of interest" that resulted when class representative was father-in-law of class attorney); Petrovic v. AMOCO Oil Co., 200 F.3d 1140, 1155 (8th Cir. 1999) (district court properly granted motion for disqualification when there was close family relationship between class counsel and class representative); Kirby v. Cullinet Software, Inc., 116 F.R.D. 303, 309-310 (D. Mass. 1987) (named plaintiff was inadequate representative because his son was partner in law firm representing plaintiff class).

Therefore, Appellant cannot recover fees and costs incurred before that date as a matter of law.

Additionally, Appellant's attorney's fee and cost estimate has a fatal flaw in that its methodology is based entirely on speculation. See Woodson v. DLI Props, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014) (damage calculations cannot be based on speculation). Appellant states at page 13 of his brief that:

> Appellants have submitted Affidavits of counsel, along with detailed time and expense records. See Affidavits of John A Massalon, Christy Ford Allen, and Terry B Richardson. It is undisputed that this ALC case was ongoing while Appellant attempted to institute and maintain a circuit court case seeking a class action. According to the Affidavits submitted, the time kept did not differentiate between the circuit court case and this administrative case. In order to address this complexity, Appellants have reduced the total time and expenses sought by 50%. (See Summary of Fees and Costs, infra.)

(Appellant's Brief, p. 13). However, a review of the time and expense records[5] contain multiple entries that only were related to the circuit court case, and not the present case.

The following entries are examples of time entries and expenses that were incurred on or after September 22, 2010 that were related to circuit court case only:

Wills, Massalon, & Allen Time and Expense Records

CFA	Oct 27/2010	Receipt and review of entry judgment	0.1
CFA	Oct 28/2010	Office conference with Attorney Hamrick re: 59e and appeal	0.4
CFA	Nov 5/2010	Prepare 59e motion and memo	2.5
CFA	Nov 24/2010	Prepare reply to opposition to motion to alter or amend	1
CFA	Nov 29/2010	Receipt and review of record on appeal	0.2
CFA	Dec 2/2010	Review record on appeal, research, and telephone conference with M Hamrick re same	2

[5] In some instances the billing records attached to Appellant's motion are unclear and/or are incomplete due to the work descriptions being cut off. Because Appellant has the burden of proving entitlement to and the amount of fees and costs, these unclear and/or incomplete records fail to carry Appellant's burden.

CFA	Dec 15/2010	Review issues with Record on Appeal	1
CFA	Dec 15/2010	Prepare appellate brief	3.5
CFA	Dec 15/2010	Telephone and email to attorney Willard re same	0.3
CFA	Dec 15/2010	Electronic correspondence exchange with Judge's office re extension	0.2
CFA	Dec 16/2010	Continue to prepare appellate brief	2.5
CFA	Dec 17/2010	Transmit and finalize supplemental record for appeal	0.5
CFA	Dec 17/2010	Continue to work on brief	2.5
CFA	Dec 28/2010	Revise appeal brief	2
CFA	Dec 29/2010	Continue to prepare appeal brief	0.5
CFA	Dec 29/2010	Receipt and review of electronic correspondence from Attorney Willard re record on appeal	0.1
CFA	Jan 3/2011	Electronic correspondence exchange with Attorney Willard re supplemental record on appeal	0.2
CFA	Jan 5/2011	Telephone conference with M Hamrick re class cert issue and SC appeals filings	1
CFA	Jan 31/2011	Follow up re appeal brief deadlines	0.2
CFA	Feb 23/2011	Telephone conference with M Hamrick re filing appellate brief	0.7
CFA	Jun 27/2011	Receipt and review of respondent's brief on appeal	0.4
CFA	Jul 8/2011	Prepare reply to brief	1
CFA	Jul 8/2011	Telephone conference with M Hamrick re reply to SCCA	1
CFA	Jul 11/2011	Prepare reply brief to SCCA appeal	5.3
CFA	Jul 13/2011	Prepare reply to opposition brief in appeal	6
CFA	Aug 8/2011	Telephone conference with T Gressette re appeal, and receipt and review of record on appeal	0.7
CFA	Aug 9/2011	Receipt and review of record on appeal for filing	1.5
CFA	Aug 10/2011	Receipt and review of Final draft of record on appeal	0.9
CFA	Aug 30/2011	Prepare and finalize final briefs in SC Court of Appeals case	3.5
CFA	Aug 31/2011	Prepare final reply brief for filing	2
CFA	Sep 20/2011	Deal with volume on appeal issue -resolved	0.5
CFA	May 9/2012	Travel to and from Columbia for appellate hearing	5.5
CFA	May 9/2012	Attend hearing	1
CFA	Mar 4/2015	Receipt and review of Order	0.5
CFA	Mar 4/2015	Telephone conference with T Richardson, D Haltiwanger, research issue about supplement.	2
CFA	Mar 5/2015	Finalize motion to amend petition for cert in state case	1
CFA	Mar 5/2015	Receipt and review of Supreme Court Order	0.5
CFA	Mar 5/2015	Telephone conference with T Richardson	0.5
CFA	Mar 5/2015	Prepare motion to amend petition for cert to include supplemental authority	1.5
FF	Feb 9/2010	Review and print relevant Budget and Control Board Meeting minutes for years 2006,200...	1.6
FF	Feb 10/2010	Review and print relevant sections of SC Budget and	

		control Board Meeting Minutes for 2...	0.4
FF	Feb 24/2010	Begin scanning, marking and preparing exhibits for Plaintiff's Memorandum in Opposition	0.6
FF	Feb 25/2010	Prepare, copy and mark exhibits for Plaintiff's Memorandum in Opposition to Def's Motion	1
FF	Feb 26/2010	Telephone conference with Judge Dennis' law clerk re: hearing and delivery of Memorandum.	0.1
FF	Feb 26/2010	Prepare letter to Judge Dennis with Pl's Memorandum in Opposition to Def's Motion to Di..	0.2
FF	Feb 26/2010	Finalize Memorandum in Opposition and Exhibits for filing	0.4
FF	Feb 26/2010	Prepare letter to Clerk of Court filing Memorandum in Opposition	0.2
FF	Feb 26/2010	Prepare electronic correspondence to Theodore Willard and Kelly Rainsford	0.1
FF	Apr 29/2010	Revise and create redline versions of Responses to Answers to interrogatories and RFP of E..	0.3
FF	May 19/2010	Prepare letter to Perry Woodside re: discovery served on Defendants	0.2
FF	Jul 16/2010	Prepare letter to Matt Hamrick	0.2
FF	Nov 8/2010	Prepare letter to Clerk of court with Motion to Alter or Amend; Prepare Motion Slip; Ema..	0.4
FF	Nov 23/2010	Prepare letter to Clerk of Court filing Plaintiff's Reply to Defendant's Opposition to Motion	0.2
FF	Jan 17/2011	Revise/review Brief; telephone conference with Procopy; Prepare Proof of Service	0.5
FF	Jan 18/2011	Telephone conference with ProCopy re: Brief of Appellant; review and scan Brief; Review	0.5
FF	Jul 14/2011	Revise and finalize Initial Brief; Prepare Proof of Service; Review SCRCP for proper filing pro..	1.1
FF	Sep 1/2011	Prepare Brief covers, 20 copies of each brief; telephone conference with ProCopy; Prepare..	1.1
JAM	Oct 14/2009	Office conference with Attorney Allen re potential suit against Blue Cross	0.5
JAM	Nov 6/2009	Office conference with Ms. Allen re new suit against Blue Cross/Blue Shield	1
JAM	Jan 5/2010	Receipt and review of correspondence from Theodore Willard reFOIA request	0.1
JAM	Jan 7/2010	Receipt and review of email re motion to dismiss and prepare email to Mr. Richardson, Mr...	0.2
JAM	Jan 22/2010	Receipt and review of email re scheduling hearing on motion for summary judgment in All..	0.1
JAM	Mar 3/2010	Office conference with Mr. Hamrick and Ms. Allen to prepare for hearing on motion to dis..	1.4
JAM	Mar 4/2010	Complete preparation for hearing on motion to dismiss	1.6

JAM	Mar 4/2010	Participate in hearing and follow-up meeting with Mr. Richardson, Mr. Hamrick and Ms. All...	2
JAM	Apr 5/2010	Telephone conference with Ms. Allen, Mr. Hamrick and Dr. Woodside re discovery	0.6
JAM	Apr 13/2010	Telephone conference with Mr. Woodside, Ms. Allen and Mr. Hamrick re discovery reques...	1.2
JAM	Jun 7/2010	Telephone call to Mr. Willard re motion for summary judgment and motion to compel	0.2
JAM	Sep 6/2010	Receipt and review of draft proposed order denying summary judgment	0.2
JAM	Nov 8/2010	Review Rule 59 (e) motion	0.2
JAM	Feb 8/2010	Receipt and review of correspondence from Court of Appeals and prepare email to Ms. All...	0.2
JAM	Feb 13/2012	Receipt and review of letter from Court of Appeals re scheduling	0.3
JAM	Feb 14/2012	Electronic correspondence exchange with Mr. Richardson re scheduling; telephone call to...	0.5
JAM	May 1/2012	Begin preparing for oral argument	1
JAM	May 8/2012	Prepare for oral argument	1
JAM	May 9/2012	Finish preparing for oral argument; travel to Columbia, participate in oral argument and re..	7
KAP	Jan 14/2013	Contact Courier service: Dash set up time for delivery to Supreme Court	0.2
KMM	Jan 12/2010	Review Minutes of State Budget & Control Meeting from 2008, 2007 & 2006 for Attorney...	2
KMM	Jan 19/2010	Prepare West Law documents for Attorney Allen for filing	1
KMM	Jan 25/2010	Pick-up Affidavit of Dr. Lachlin from MUSC.	0.4
Allen	Nov 8/2010	Charleston County Clerk of Court GB; Filing Fees - Motion to Alter or Amend	$25
Allen	Jun 1/2012	Christy Ford Allen GB; Travel to/from Columbia, SC for...	$123.21
Allen	Aug 2/2012	South Carolina Court of Appeals GB; Filing Fees (Petition for Rehearing on Ban...	$25
Allen	Oct 17/2012	The South Carolina Supreme Court GB 595-1; Filing Fees Petition for Writ of Certiorari	$100
Allen	Oct 17/2012	The South Carolina Supreme Court on GB 595-1; Filing Fees Motion to Certify for Review by..	$25
Allen	Oct 19/2012	Bullett Deliveries GB 595-1; Travel to/from Columbia, SC (Court of Appeal...	$180

(R. pp. 67-74, 88-94).

RPWB Time and Expense Records

trichardson	5/22/2012	Travel to Columbia, Hearing; travel back to Barnwell.	4
trichardson	10/18/2012	Review Initial Brief to Court of Appeals; emails.	1
trichardson	10/19/2012	Review Petition for Cert.	0.8
mhamrick	9/28/2010	Review Bo Willard's correspondence to Judge Burch regarding Administration Law Court appeal. E-mail correspondence to Judge Burch regarding Administrative Law Court appeal.	0.5
mhamrick	10/27/2010	Review order granting summary judgment.	0.3
mhamrick	11/8/2010	Review draft motion to alter or amend summary judgment order.	0.3
mhamrick	11/23/2010	Review Record on Appeal; Review final motion to alter or amend summary judgment order.	0.4
mhamrick	2/23/2011	Draft, file and serve motion for extension to file initial appellate brief.	0.4
mhamrick	3/16/2011	Telephone call from SC Court of Appeals regarding extension to file initial brief.	0.1
mhamrick	4/1/2011	Telephone conference with Christy Ford Allen regarding status conference call with Judge Few.	0.3
mhamrick	4/4/2011	Telephone status conference call with Judge Few.	0.3
mhamrick	7/8/2011	Review Respondent's initial brief.	0.6
mhamrick	7/8/2011	Review and revise reply brief.	0.7
mhamrick	7/12/2011	Review and revise reply brief.	0.7
mhamrick	7/14/2011	Review final reply brief.	0.5
2-Jun-10	Clerk of Court, Charleston County - Motion Filing fee		$25
15-Jun-10	Clerk of Court, Charleston County - Motion Filing fee		$25

(R. pp. 102-107).

Because the above fees and costs were incurred in the circuit court case and circuit court appeal, and not the current case, these fees and costs are not recoverable.

Also, the nature, extent and difficulty of the case does not support an award of attorney's fees and costs in the amount requested by Appellant. As was previously discussed, while Appellant technically prevailed on the issue of whether § 38-71-46 applied to the State Health Plan, Appellant lost on the second issue on the appeal, whether or not

the ALC erred in failing to address the availability of class action relief before the ALC. Appellant's interjection of these class action issues complicated the case and resulted in the parties incurring additional time and expense in dealing with these issues. It would be improper for Appellant to benefit from its own unsuccessful efforts to further complicate what otherwise would have been a routine administrative appeal. As a result of the Supreme Court's ruling, this case involved a routine administrative appeal for $560 of benefits from the State Health Plan. It strains credulity to suggest that in the absence of the unsuccessful class action issue, Appellant's case reasonably would require the participation of two law firms, four attorneys at $300 to $600 per hour, and four paralegals at $75 per hour. A reduction of attorney's fees is appropriate where a case has been overstaffed. Sparrow v. McDaniel, 852 F.2d 762 (4th Cir. 1998); Goodwin v. Metts, 973 F.2d 378 (4th Cir. 1992); see also, Thomas v. Peacock, 39 F.3d 493 (4th Cir. 1994) rev'd on other grounds, 516 U.S. 349 (1996). (Assessing attorney's fees in a suit on ERISA to recover payments to pension fund, the district judge should have examined instances where fees were awarded for the presence of both of Plaintiff's attorneys even though the presence of only one would have sufficed). Here, Appellant's case clearly was overstaffed. Accordingly, if the Court finds that an award of fees is appropriate, which Respondent denies, that reward should be significantly reduced to reflect an amount of fees and costs one attorney reasonably would incur to handle an appeal of a $560 benefit claim.

Contrary to Appellant's assertion, the beneficial result obtained was extremely limited. As was previously discussed, Appellant's request for class action relief was rejected, leaving only Plaintiff's claim for $560. Additionally, there is a real question that the relief requested by Appellant, coverage for insulin pump training, would have been

covered under the general diabetes training contemplated by § 38-71-46 (B) and Medicare regulations. Medicare regulations make no mention of coverage for insulin pump training. Because the beneficial results obtained by Appellant were extremely limited, an award of attorney's fees and costs is not appropriate and/or should be minimal.

Although the Supreme Court's decision held that § 38-71-46 applied to the State Health Plan, the Court did not reach a decision on whether or not Appellant's claim should have been paid under § 38-71-46. Based on the language of § 38-71-46 (B), in all likelihood, Appellant's claim would not be covered by § 38-71-46. § 38-71-46 (B) states:

> (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.

Id.

As can be seen by an official publication regarding diabetes education issued by the U.S. Department of Health and Human Services, the training covered by Medicare (Diabetes self-management training) and the state-mandated training as well, is far more general than insulin pump training. This training includes the following:

- General information about diabetes, the benefits of blood sugar control, and the risks of poor blood sugar control;
- Nutrition and how to manage your diet;
- Options to manage and improve blood sugar control;
- Exercise and why it's important to your health;
- How to take your medications properly;
- Blood sugar testing and how to use the information to improve your diabetes control;
- How to prevent, recognize, and treat acute and chronic complications from your diabetes;

- Foot, skin, and dental care;
- How diet, exercise, and medication affect blood sugar;
- Behavior changes, goal setting, risk reduction, and problem solving;
- How to adjust emotionally to having diabetes;
- Family involvement and support; and
- The use of the health care system and community resources.

See http://www.medicare.gov/Pubs/pdf/11022.pdf.[6] Because Medicare does not list insulin pump training as part of the diabetes self-management training, Appellant's claim would not have been covered under § 38-71-46 (B).

Finally, the cases relied upon by Appellant as evidence of customary legal fees for similar cases are easily distinguished and do not support the amount of attorney's fees requested in this case. Layman v. State, 378 S.C. 434, 658 S.E.2d 320 (2008) is easily distinguished in that the Appellant in Layman was the prevailing party in a certified class action involving millions of dollars. Likewise, Saunders v. South Carolina Public Service Authority d/b/a Santee Cooper, C/A No. 2:93-3077-23 (D.S.C. 1993) also involved multiple plaintiffs and millions of dollars in recovery. Unlike Layman and Saunders, here the Appellant did not prevail on the class action issue and the case was severely overstaffed, therefore fees based on $300 to $600 per hour would be unreasonable based on a $560

[6] This publication also states: "[c]lasses are taught by health care providers who have special training in diabetes education. You're covered to get a total of 10 hours of initial training within a continuous 12-month period and 2 hours of follow-up training each year after that. One of the hours can be given on a one-on-one basis. The other 9 hours of training are given in a group class. The initial training must be completed no more than 12 months from the time you start the training. Important: Your doctor may prescribe 10 hours of individual training if you're blind or deaf, have language limitations, or if no group classes have been available within 2 months of your doctor's order. To be eligible for 2 more hours of follow-up training each year after the year you received initial training, you must get another written order from your doctor. The 2 hours of follow-up training can be with a group, or you may have one-on-one sessions. Remember, your doctor must prescribe this follow-up training each year for Medicare to cover it." http://www.medicare.gov/Pubs/pdf/11022.pdf

recovery.

IV. CONCLUSION

For the foregoing reasons, the decision of the ALC should be affirmed.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2015-001561

Jeffrey D. Allen, on behalf of Jane Doe.....Appellant.

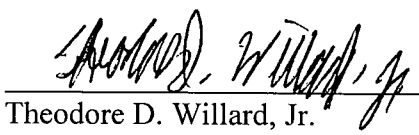
v.

South Carolina Budget and Control Board,
Employee Insurance Program.....Respondent.

CERTIFICATE OF COUNSEL

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

November 16, 2015



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APPEAL FROM THE ADMINISTRATIVE LAW COURT

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South Carolina Public Employee Benefit Authority,
Employee Insurance Program.....Respondent.

PROOF OF SERVICE

I certify that I have served the Brief of Respondent by depositing a copy of the same in the United States mail, postage prepaid, on November 18, 2015, addressed to the attorneys of record, John A. Massalon, Wills Massalon & Allen, LLC, Post Office Box 859, Charleston, South Carolina 29402 and Terry E. Richardson, Jr., Richardson Patrick Westbrook & Brickman, LLC, Post Office Box 1368, Barnwell, South Carolina 29812.

November 18, 2015

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