

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2007-CP-40-2187

SC Court of Appeals

Protection and Advocacy for the People with Disabilities, Inc.;
M.J.B. on behalf of and as next friend of J.B.; C.B.B. on behalf of
and as guardian of P.B.; G.C. and L.C. on behalf of and as next
friend of A.E.; J.H. on behalf of and as next friend of A.J.; G.M.
on behalf of and as next friend of E.M.; N.M. on behalf of and as
guardian of E.J.M.; R.P. on behalf of and as guardian of S.P.; R.R.
and J.R. on behalf of and as guardians of K.D.R.; and J.K. on
behalf of and as guardian of S.S., Appellants,

v.

South Carolina Department of Disabilities and Special Needs; Dr.
Beverly Buscemi, in her official capacity as Director of the South
Carolina Department of Disabilities and Special Needs; and Nancy
Banor, Deborah McPherson, Christine Sharp, Rick Huntress, Fred
Lynn, Harvey Shiver and Kelly Hanson Floyd, as Commissioners
of the South Carolina Department of Disabilities and Special
Needs, Respondents.

**MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

The Respondents South Carolina Department of Disabilities and Special
Needs, et. al, (that is, all Respondents, referenced herein at times as "DDSN") have

petitioned this Court for a rehearing of the recent decision in *Protection and Advocacy, et al., v. South Carolina Department of Disabilities and Special Needs, et. al*, Op. No. 5383 (S.C. Ct. App. filed February 24, 2016).

In Points 1 through 4 herein, Respondents request that this Court reconsider its opinion and affirm the decision of the circuit court. Alternatively, and without waiving the contentions set forth in Points 1 through 4, Respondents would request that if the case is to be remanded for additional consideration of the merits, as this Court has ordered, the remand order should also permit additional consideration of issues pertaining to standing and continuing justiciability, as discussed in Point 5 herein. This alternative request is based in part on changes in circumstances between 2007, the year in which this case was filed, and the present.

In support of affirmance of the circuit court, Respondents respectfully submit that the following points were overlooked or misapprehended by this Court.

1. In holding that Plaintiff Protection and Advocacy (P&A) has standing “to pursue remedies to insure the protection of the rights of disabled persons,” slip op. at 5, the Court overlooked or misapprehended the fact that P&A neither showed, nor even attempted to show, that any specific individual had been injured by the absence of regulations. The case law pertaining to the standing of similar protection and advocacy agencies in other states holds that such agencies only possess standing when they can show either (a) injury either to one or more

individuals within their constituency or (b) injury to the entity itself.¹ P&A in this case has shown neither.

2. With regard to the absence of a showing of injury to any specific individual (whether referenced by name or in some other fashion that would indicate a claim of concrete injury to a specific person), the order of the circuit court, R. I, 7, cited three cases in which P&A organizations were denied standing when they could not show injury to any specific individual. *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999); *Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.*, 24 F.Supp.2d 808, 816 (M.D.Tenn.1998); *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353, 365-67 (E.D.Pa.2001). Plaintiffs cited no case to the contrary, and the opinion of this Court did not cite any case that specifically addressed the standing of protection and advocacy organizations.²

In *Doe v. Stincer, supra*, the Eleventh Circuit recognized that a protection and advocacy organization could be held to have standing to represent individuals who are its constituents, but only if there was a showing of concrete harm to at

¹ The lack of injury to the P&A entity itself is discussed under Point 3 below.

² Plaintiffs did assert that *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353, *supra*, supported their claim that harm to the agency could establish standing Br. of Appellant at 13-14. However, that case held only that complaint's allegations pertaining to standing could survive a motion to dismiss. The court specifically held that its decision on standing might be reversed if the case had been at the summary judgment stage, instead of merely at the pleadings stage. 136 F.Supp.2d at 363. (A check of the federal PACER records indicates that the case was later dismissed with no further substantive orders having been issued.)

least one such individual. P&A never attempted to come forward with such a showing of harm to any specific individual.³

Doe v. Stincer involved a claim that certain hospital authorities were wrongfully denying mentally ill persons access to their medical records. In support of its claim to have standing, the plaintiff P&A agency in *Doe* provided an affidavit which was similar to the Prevost affidavit in the present case. The affidavit in *Doe* contained only general allegations to the effect that unspecified individuals were wrongfully being denied access to their medical records. No instance of harm to a specific individual was shown. 175 F.3d at 887. Nor was there a showing of causation between the denial of access to hospital records and any injury to any person. For these reasons, and as quoted in the circuit court order in the present case, the Eleventh Circuit rejected the organization's claim of standing, holding as that there was an absence of

any evidence that any of the Advocacy Center's constituents have been denied access to mental health records based on the Florida statute at issue here. Without such allegations, the Advocacy Center cannot show that any of its clients suffered a concrete injury that is traceable to the challenged statute and could be redressed by a favorable decision in this action-as it must to establish standing. . . .

³ P&A had no right to rely on the presence in the case of the anonymous individual Plaintiffs, when those claims had been denied for lack of information by the Defendants in the Answer. R. I, 84-91. In that same Answer, Defendants asserted the affirmative defense of lack of standing. R. I, 93.

R. I, 7, quoting 175 F.3d at 887 (emphasis added).

This conclusion is consistent with case law in South Carolina, which holds that “[an] organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S. Carolina Dep't of Nat. Res.*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001). *Accord, Carolina All. for Fair Employment v. S. Carolina Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999), cited at p. 6 of the opinion in this case. *Sea Pines* also holds that a plaintiff, in order to establish standing, must satisfy two other tests as well: a causal connection between the injury and the conduct complained of, and a likelihood that the injury will be redressed by a favorable decision. 345 S.C. at 601, 550 S.E.2d at 291.

Plaintiffs failed to make the showing required by these South Carolina cases. The Prevost affidavit cited by the Court, slip op. at 5, like the affidavit in *Doe*, did not mention any specific individual who was allegedly harmed. R. I, 164. The affidavit did not even refer to any of the anonymous individual Plaintiffs. In the absence of an allegedly-injured individual, there was obviously no possibility of showing the requisite causal connection. Finally, the Prevost affidavit did not specifically state how an order requiring regulations would redress even the generalized contentions set forth in Paragraphs 5 and 6 therein. *Id.* For these

reasons, DDSN respectfully submits that the portion of this Court's opinion which held that P&A had to assert the claims of individuals should be reconsidered and omitted.

3. Respondents also submit that this Court, in holding that "P&A has sufficiently asserted injuries it has suffered as a result of DDSN's alleged failure to promulgate regulations," slip op. at 5-6, overlooked the absence of a showing of injury to P&A itself, as well as the absence of a causal connection and redressability. The result, if the opinion stands in its present form, is that P&A could bring into court any number of abstract and hypothetical controversies between it and state agencies, essentially asking the courts to "to shape the institutions of government in such fashion as to comply with the laws and the Constitution," a practice held in *Lewis v. Casey*, 518 U.S. 343, 349 (1996), to be "not the role of courts."

The only factual allegation supporting P&A's claim of harm to itself was an assertion in Paragraph 7 of the Prevost affidavit that it was time-consuming for P&A to find DDSN's rules and to make sure the rules so located were still current. R. I, 165. That allegation was manifestly implausible. By the time of the Prevost affidavit (2010), DDSN had published over 120 DDSN Directives on the DDSN website, as the record shows. R. I, 236-242. The Directives contained (and still contain) agency policy and guidance on a wide range of subjects, including the

subjects for which Plaintiffs have claimed that regulations are necessary, and many other topics as well. *Id.* All of the Directives were listed by subject matter. *Id.* (Plaintiffs themselves included in the record a later (2013) online numerical index of the Directives, which is similar to the 2010 version. R. I, 435-39.⁴ As a result, the assertion in the Prevost affidavit about a time-consuming need “to search for the rules themselves,” R. I, 165, has been shown to be so implausible in fact that it cannot support a grant of summary judgment in favor of P&A on this issue. *See, e.g., United States v. Urbanek*, 39 F.3d 1179 (4th Cir. 1994)(nonmoving party could not overcome a summary judgment motion using only “self-serving, unsupported, and implausible affidavits”).⁵ South Carolina law is to the same effect, as illustrated by *Dean v. Ruscon Corp.*, 321 S.C. 360, 366, 468 S.E.2d 645, 648 (1996)(no question of fact existed when only one reasonable conclusion was supported by the evidence).

As shown by the online index to the Directives, it is at least as easy to locate an applicable Directive as it would be to find the same substantive content if it had been embodied in a regulation. Thus, even if DDSN’s rules had taken the form of

⁴ The degree of detail in the individual Directives is illustrated by one such Directive that is in the record. R. I, 362-373.

⁵ Even if P&A’s claim of difficulty in locating applicable provisions might have sufficed to deny summary judgment to DDSN, which DDSN does not concede, it was not sufficient to support a grant of summary judgment to P&A on the issue of injury to P&A itself, which is the effect of this Court’s decision.

regulations, any such regulations would not necessarily be any easier to locate than the Directives used by DDSN. To the contrary, the Directives are probably more easy to identify and search than regulations would be. In any event, the substantive legal issue of whether regulations are required does not turn on whether agency policy is expressed in a user-friendly manner, but on whether a particular statute requires the promulgation of regulations. Accordingly, even if the assertions in the Prevost affidavit had not been implausible as a matter of fact, they still would not establish as a matter of law that a legally-protected interest of P&A has been violated by the absence of regulations.

4. Respondents also respectfully submit that in holding that the circuit court order was “insufficiently detailed as to the specific claims raised,” slip op. at 6, the Court misapprehended the fact that the circuit court order reviewed and discussed all of the statutes on which Plaintiffs’ claims were based. That order, in the course of seven pages, concluded that none of those statutes mandated the promulgation of regulations. R. I, 10-17.

The opinion of this Court also vacated the circuit court’s “findings on the issue of binding norms.” The circuit court held first, that the “binding norm” issue had not been raised by Plaintiffs and that as a result, “it should not be considered.” R. I, 18. Plaintiffs argued the same thing on appeal, contending that “The lower court erred in making a ruling concerning binding norms when it was not an issue

raised in the Complaint by the Appellants.” Br. of Appellants at 28. DDSN would therefore submit that in vacating that holding, this Court’s opinion overlooked the fact that the circuit court and both sides to the case were in agreement that the “binding norm” issue was not properly in the case.⁶ DDSN would therefore request that the “binding norm” issue should not be addressed on remand, even if the case is remanded for the consideration of other issues.

With regard to the need for a remand in general, DDSN submits that Plaintiffs’ counsel was not denied the opportunity to present Plaintiffs’ case on standing and the merits to the circuit court, both in briefing and in argument. *See* R. I, 174-223; R. I, 250 - II, 535; R. II, 632-649, 658-663. The circuit court in turn fully addressed the claims actually made by Plaintiffs. The claim of Plaintiffs’ counsel in reply oral argument in this Court, which was to the effect that Plaintiffs were not fully heard in the circuit court, had never been previously asserted and is without foundation in any event, as shown by the citations to the record that appear earlier in this paragraph.

5. In the alternative, and without waiving any of the contentions made above, DDSN would submit that if this Court decides to adhere to its decision to

⁶ The other holding of the circuit court on the “binding norm” issue was that none of the Plaintiffs had shown actual injury as a result of the alleged use of “binding norms” by DDSN. Given that the issue had not been raised by the Complaint, this alternative holding was not strictly necessary to the decision reached by the circuit court.

remand the case for “litigation of the issues regarding the requirements of the specific statutes concerning the promulgation of regulations by DDSN,” slip op. at 6, the circuit court on remand should also be permitted to consider the issue of standing, that is, whether P&A or any individual has suffered any concrete harm as a result of the absence of regulations in some specific context. This request is based on the likelihood that changed circumstances in the nine-plus years since this case was filed have rendered the case no longer justiciable.

This case was filed in the latter part of 2007. Much has changed since then. For instance, as already mentioned above, the Directives are easily searchable and accessible online. The likelihood that any person has actually been prejudiced by the absence of regulations, never yet proven in any event, has become even less likely to exist in view of the published status of the Directives. In addition, this Court’s decision in *Stogsdill v. S. Carolina Dep't of Health & Human Servs.*, 410 S.C. 273, 280, 763 S.E.2d 638, 642 (Ct. App. 2014), cert. dismissed as improvidently granted, 415 S.C. 242, 781 S.E.2d 719 (2016), by exempting matters contained in the Medicaid Waiver plan from the requirements of state law regarding regulations, has rendered it substantially less likely that an individual will be prejudiced by the absence of state regulations, because most recipients of DDSN services are Medicaid-eligible persons. (*Stogsdill* was decided some months after the circuit court order in the present case). The existence of the *Stogsdill*

ruling also casts considerable doubt on P&A's claim to have been harmed by the absence of regulations, again because many, if not most, of P&A's constituents are Medicaid Waiver participants for whom the presence or absence of state regulations is much less likely to matter.⁷

If no adversely affected individual is identified (not necessarily by name), and assuming that P&A has shown no plausible injury to itself (as contended above and especially in light of *Stogsdill*), then there is simply no continuing case or controversy, and the case should be dismissed. *See, e.g., Pee Dee Elec. Coop. Inc., v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) (“A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute”). Absent an actual controversy, the court lacks jurisdiction to order relief. *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 373 (2013).

If, on the other hand, P&A can find someone who claims injury as a result of the absence of a specific regulation, then that claim of need for a regulation can be weighed in light of the facts surrounding such claimed actual injury and the effect,

⁷ There is almost surely no doubt that most DDSN clients are Medicaid recipients, but if there is any controversy about this issue, it is something which could be addressed on remand. This point was not in issue in 2013 when this case was decided by the circuit court, because the *Stogsdill* decision in this Court was still some months in the future.

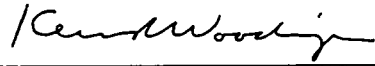
if any, that ordering a regulation might have in redressing any such injury. (For example, if someone could show that he or she had been denied benefits as a result of the absence of a regulation, then perhaps at least the requisite standing would have been shown—although most or all of the applicable eligibility requirements would be found in the state Medicaid Waiver document, and thus, as held in *Stogsdill*, would not need to be promulgated in a regulation. A remand which included a requirement that an individual claim be asserted would enable a reviewing court to examine the legal issues in this case in the factual context of an actual claimed injury. In addition, if the Court were to so order, a remand could also permit P&A, if it elects to do so, to see whether it can provide evidence of some real injury to itself as an entity.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court rehear its decision and issue an opinion affirming the decision of the circuit court on one or more of the bases set forth above, or in the alternative, remand for further consideration of issue of standing. If standing is established, the circuit court could then consider the issue of whether the applicable statutes require a regulation in that context.

Respectfully submitted,

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