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MAR 17 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 2013-002415

Brook Waddle Appellant,

v.

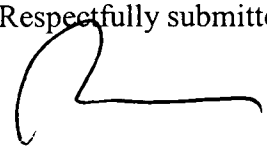
South Carolina Department of Health and Human Services.....Respondent.

PETITION FOR REHEARING/RECONSIDERATION
SUGGESTION FOR EN BANC HEARING

Petitioner, Brook Waddle, petitions the South Carolina Court of Appeals for a rehearing/reconsideration and hearing en banc of the court's recent decision in Brook Waddle v. South Carolina Department of Health and Human Services, Op. No. 2016-UP-109 (S.C.Ct. Ap. filed March 2, 2016).

The grounds for the petition for rehearing/reconsideration and hearing en banc are addressed in the supporting memorandum filed herewith and incorporated herein.

Respectfully submitted,



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March 17, 2016

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South Carolina Department of Health and Human Services.....Respondent.

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING/RECONSIDERATION
SUGGESTION FOR *EN BANC* HEARING

Petitioner, Brook Waddle, respectfully petitions the South Carolina Court of Appeals for a rehearing/reconsideration of the court's recent decision in *Brook Waddle v. South Carolina Department of Health and Human Services*, Op. No. 2016-UP-109 (S.C.Ct. Ap. filed March 2, 2016). Petitioner requests that this Court reconsider its opinion and suggests that a hearing be scheduled to hear this case *en banc*, due to the public importance of the due process issues in this case.

In support of this Petition, Petitioner respectfully submits the following points that were overlooked or misapprehended by this Court.

Petitioner believes that the Court may have misconstrued this case as being solely about

whether an oximeter cable was belatedly provided to Petitioner, after this case reached the Administrative Law Court level. But, the issue in this case is far more important than that.

The issue in this case is about the process - and the denial of fundamental due process rights. It is about whether the Judicial Branch will enforce due process rights of the most vulnerable citizens of South Carolina and require DHHS to stop violating the Fourteenth Amendment and statutory rights of Medicaid participants, as required by 42 U.S.C. 1396a(a)(3) and federal rules and regulations interpreting that statute.

Who has standing to complain about the violations identified in Petitioner's brief, if Brook does not?

Persons who appear at a hearing do not, according to this Court's ruling in *Stogsdill v. DHHS*, 410 S.C. 273, 763 S.E.2d 638, 642 (S.C. App. 2014). In that case, this Court determined that the Medicaid participant's due process rights were not violated where he did not receive any notice of the reduction in services and was not informed, before the hearing, of the grounds upon which DHHS intended to argue at the hearing. *Stogsdill v. S.C. Dep't of Health & Human Servs.*, 410 S.C. 273, 763 S.E.2d 638, 642 (S.C. App. 2014). This Court found that Stogsdill "...suffered no prejudice in this case based on the inadequate notice of proposed changes..." but it did recognize that Medicaid participants "should have the fullest and fairest opportunity to exercise their rights." *Id.* This Court remanded Stogsdill's case to assess his needs, without applying the waiver caps. But no assessment has been performed twenty months after that decision was rendered and Stogsdill still has not received the services his physician ordered.

That was a repeat performance for DHHS. In 2009, in Stogsdill's first "fair hearing" appeal, after a hearing, the hearing officer remanded his case, ordering DHHS to assess his needs,

giving consideration to the order of his physician. DHHS ignored that order and did not reassess Stogsdill. Instead, without providing a notice, DHHS attempted to reduce his services to 28 hours a week. After Stogsdill filed a second notice of appeal, his providers were sent a notice terminating authorization for funding of the personal care services he was then receiving.

Stogsdill's attempt to enforce his due process claims in the federal court also hit a brick wall. *Stogsdill v. DHHS*, Case No. C/A No. 3:12-cv-0007 (S.C.D.C. November 10, 2014).¹ In that case, the federal court ruled that Stogsdill's only remedy for the State's violation of his due process rights was in the state court, because he did file a "fair hearing" appeal. Thus, even though the record closed in his state appeal in 2010, the court found that he had no right to litigate even those violations occurring after 2010 in federal court in a lawsuit filed in 2012. So, Stogsdill would be required to file a "fair hearing" appeal every time DHHS denied a requested service - then go through years of litigation in the Executive Branch.

So, persons who do file a fair hearing request have no rights to complain about the process, but neither do people who do not file an administrative appeal, according to the district court. The district court dismissed the due process claims of Stogsdill's co-plaintiff, Rob Levin, because he did not file a "fair hearing" appeal, saying:

Levin's only claim as to violation of his Due Process rights states, "Since January 1, 2010, [Levin's] services have been further reduced and reimbursement rates to his providers and physicians have been systematically reduced and these reductions in services and rates are likely to continue, yet Plaintiffs have been denied the opportunity for review because the state administrative system is futile and costs more than it would cost to buy the services, supplies, and equipment being appealed." (ECF 72, p. 27, ¶ 143). Levin never requested reconsideration of the reduction in services, nor did he appeal any reduction in services to SCDHHS, the proper agency to hear such requests. S.C. Code Ann. Regs. 126-152(B).

¹ An appeal has been filed in the Court of Appeals for the Fourth Circuit. *Stogsdill v. DHHS*, Case No. 13-1984.

There does not appear to be any evidence of alleged due process violations as to Levin. Levin's own failure to appeal the determination of a reduction in services because he deems the system to be "futile" does not give rise to a violation of his due process rights at the hands of the defendants. Therefore, the Court grants SCDHHS' motion for summary judgment as to the first cause of action alleged by Levin for violation of statutory and constitutional due process.

Stogsdill v. Keck at 26. So, Medicaid appellants, if they show up at a hearing have no due process rights. If they do not request a hearing and do not show up, they have no due process rights either. This is why Brook's case is so very important. She asked for a hearing and did not receive one. The notice provided to her does not meet the clear requirements of 42 C.F.R. 431.210. The equipment she needed was not provided with reasonable promptness and a final state administrative decision was not rendered within 90 days. She does not fall into either of the two above categories of people who the courts have said have no right to complain about DHHS' illegal actions.

This Court erred as a matter of law when it ruled that her case was moot. In *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (S.C. App., 2003), this Court ruled that it may take jurisdiction of a case, "despite mootness, if the issue raised is capable of repetition, but evading review." *Treasured Arts, Inc. v. Watson*, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995) (Under the mootness doctrine of capable of repetition yet evading review, a case is not rendered moot when a challenged action was in its duration too short to be fully litigated prior to its completion and there was a reasonable expectation that the same complaining party would be subjected to the same action again.); *South Carolina Dep't of Mental Health v. State*, 301 S.C. 75, 76, 390 S.E.2d 185, 185 (1990) ([Although the issue presented was moot, "appeal was allowed because it raises a question that is capable of repetition, but which usually becomes moot

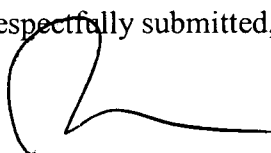
before it can be reviewed"); *Evans v. South Carolina Dep't of Soc. Servs.*, 303 S.C. 108, 110, 399 S.E.2d 156, 157 (1990) (addressing a moot question because the controversy presents a "recurring dilemma" which needed clarification for future guidance); 1 Am.Jur.2d Actions 50 (2003) (noting the general rule that "courts will not decide moot questions is subject to an exception where the question, though moot, is ... likely to recur and evade judicial resolution in the future"). The party bringing the action need only show the issue raised is capable of repetition and is not required to prove there is a "reasonable expectation" the issue [356 S.C. 555] will arise again. *Byrd*, 321 S.C. at 431-32, 468 S.E.2d at 864 (finding South Carolina has adopted the "lenient" approach to evading review analysis).

Brook's case is about a "recurring dilemma" which needs clarification for future guidance and it is capable of repetition, yet has evaded review. Not only is Brook subject to having small ticket items denied, or not provided with reasonable promptness, she continues to suffer from the due process violations complained of in this action. She has suffered the same fate Stogsdill suffers, because no state court has held DHHS accountable for complying with the federal notice, hearing and reasonable promptness mandate. She filed a fair hearing request in 2007 and is now back in the Administrative Law Court for the third time with no opportunity in nine years for judicial review in that appeal. In 2013, the hearing officer ordered DHHS to provide Brook nursing and personal care services and to pay her mother a sizeable amount of money. In June, 2014, Brook filed an emergency petition after DHHS refused to comply with the order of its own hearing officer. The Administrative Law Court still has taken no action on that emergency petition. Brook is still not receiving the services ordered by the hearing officer in 2013 and her mother still has not been paid the amount of money the DHHS hearing officer ordered her agency

to pay. Brook's claims in this appeal that DHHS systemically fails to comply with the reasonable promptness and due process mandates and the Americans with Disabilities Act are certainly not moot, as she personally continues to suffer the consequences for those violations of fundamental due process rights.

The fact that no final administrative decision has been issued in her first "fair hearing" appeal nine years after she filed her 2007 "fair hearing" appeal is conclusive evidence that DHHS continues to violate that federal mandate and that this appeal meets the "capable of repetition, yet evading review" standard set forth in *Sloan* and the other cases cited in this Court's order dismissing Brook's appeal. Brook prays that this Court will reconsider its decision to dismiss her appeal and schedule oral arguments, and suggests that an *en banc* hearing would be appropriate due to the extreme public importance of this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'P. Logan Harrison', written over the typed name.

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Appellate Case No. 2013-002415

CERTIFICATE OF SERVICE

John N. Harrison certifies that he has served the *Petition for Rehearing/Reconsideration and Suggestion for En Banc Hearing* in the above case by hand delivery to the following on March 17, 2016:

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March 17, 2016

Hand Delivery

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: **Brook Waddle v. SC Department of Health and Human Services**
Appellate Case No. 2013-002415

1. Appeal Dismissed March 2, 2016
2. *Petition for Rehearing/Reconsideration and Suggestion for En Banc Hearing*

Dear Ms. Kitchings:

Enclosed is the original *Petition* listed above along with six copies and the \$25.00 filing fee. Also enclosed is the *Certificate of Service*, plus copies of this letter, the *Petition* and the *Certificate* for clocking.

Sincerely,



Patricia Logan Harrison

Enclosures

c: Damon C. Wlodarczyk, Esq.
Shealy Boland Reibold, Esq.
Kenneth C. Anthony, Jr., Esq.

PLH:jnh