THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 5383
(S.C. Ct. App. filed February 24, 2016)

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., ... Respondents,

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, ... Petitioners.

AMENDED PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that their Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on April 22, 2016. App. 7-8.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in reversing the circuit court's holding that P&A lacked standing, when P&A provided no evidence of injury to any specific individual or to itself as a result of the absence of DDSN regulations.

II. Whether the Court of Appeals erred in remanding the merits issue in the case, rather than affirming the circuit court decision on the merits.

III. In the alternative, whether, if the case is remanded, the circuit court should also consider the extent, if any, of the alleged injuries to Plaintiffs, especially in light of subsequent developments in South Carolina case law.

STATEMENT OF THE CASE

A. Procedural history.

This action was filed on April 5, 2007 by a number of anonymous guardians of anonymous disabled individuals and by the entity Protection and Advocacy for People With Disabilities, Inc. ("P&A"). Plaintiffs sought an order requiring the Department of Disabilities and Special Needs ("DDSN") to promulgate regulations in areas where Plaintiffs would prefer state agency action to occur by regulation. The Defendants are DDSN and a number of its officials, hereinafter collectively referenced simply as DDSN.

DDSN originally moved to dismiss this action on May 31, 2007, but Judge Childs denied that motion by Order dated December 13, 2007. R. 25. DDSN then filed an Answer on December 21, 2007. In their Answer, Defendants denied, for lack of information, the specific facts regarding each of the anonymous individual Plaintiffs. R. 82-94. As an affirmative defense, DDSN challenged the standing of all Plaintiffs to bring this action. R. 93. DDSN also denied that there was a duty to promulgate regulations. *Id.*

DDSN moved for summary judgment on June 9, 2008. R. 97. The motion was scheduled to be heard in May 2010, but at DDSN's request, Judge Manning took the motion under advisement in order to permit DDSN to file a reply to a brief filed by Plaintiffs on the day of the hearing.

While the case was under advisement, Plaintiffs asked that DDSN's summary judgment motion be held in abeyance in order for Plaintiffs to take several depositions. Judge Manning allowed the depositions to be taken. Eventually, on June 6, 2013, Plaintiffs filed their own summary judgment motion. Additional briefs were filed by both parties in early August 2013. Plaintiffs had initially claimed that the case involves contested issues of fact and that it should not be resolved on summary judgment. However, when Plaintiffs filed their own motion for summary judgment in 2013, they effectively agreed that the issues in the case were solely legal issues. R. 250.

Both sides' Motions for Summary Judgment were reassigned to Judge G. Thomas Cooper, and were heard by him on August 6, 2013. By Order dated September 24, 2103, Judge Cooper granted summary judgment for Defendants, and denied Plaintiffs' motion. R. 1-19.

Plaintiffs sought reconsideration of Judge Cooper's Order. R. 546. Judge Cooper denied that motion by Order dated December 30, 2013, but made one minor modification to the Order at DDSN's request. R. 21-22.

Plaintiffs filed a Notice of Appeal on February 3, 2014. The Court of Appeals affirmed in part, reversed in part, and remanded the case by an opinion dated February 24, 2016. App. 1-6. The Court of Appeals affirmed the circuit court's conclusion that the individual Plaintiffs lacked standing, App. 6, but tersely concluded that Plaintiff Protection and Advocacy did have standing. App. 5-6.[1] Regarding the merits of the case, the circuit court concluded that "Even if some or all Plaintiffs are deemed to have standing, their claims lack substantive merit. . . ." R. 10. Almost half of the 18-page Order contained a thorough discussion of the merits of the case. R. 10-19. The Court of Appeals, however, concluded that this part of the Order was "not sufficiently detailed," and reversed the case for more litigation of the merits, even though both sides had moved for summary judgment. App. 6.

[1] Plaintiffs did not ask the Court of Appeals to reconsider its conclusion that the individual Plaintiffs lacked standing.

Defendants petitioned for rehearing, and that petition was summarily denied. No substitute opinion was issued. App. 7-8. Defendants now seek review in this Court by way of writ of certiorari.

B. Facts.

In the Complaint, filed in 2007, the eleven individual Plaintiffs alleged certain facts pertaining to each of them as of that time, and further claimed that they were injured in some way as a result of the absence of regulations. Because Plaintiffs elected to file anonymously, and indeed opposed DDSN's motion to have Plaintiffs' identities disclosed, DDSN in its Answer denied for lack of information Plaintiffs' specific allegations about their individual situations. The individual Plaintiffs did not thereafter file public affidavits or other documents in support of their respective claims. By 2013, when the case was heard in the circuit court, nearly six years after the filing of the Complaint, there was not only an absence of evidence of Plaintiffs' respective situations when the Complaint was filed in 2007, there was also no evidence as to their situations in 2013, by which time there could have been considerable changes to their situations. Given that the there was no evidence of injury to the individual Plaintiffs as a result of the absence of regulations, the Court of Appeals correctly affirmed the dismissal of the individual Plaintiffs. App. 6.

As a result of the affirmance of the dismissal of the claims of the individual Plaintiffs, the only facts now pertinent to this case are those concerning alleged injury to P&A itself. The only evidence presented by P&A of injury to itself was a paragraph in an affidavit to the effect that it was time-consuming for P&A to search DDSN's comprehensive online policies and directives. R. 165. There was no indication that the promulgation of regulations would have caused P&A's searches to have proceeded any more quickly.

ARGUMENT

The issue of the extent to which a protection and advocacy agency such as Plaintiff P&A in this case has standing is a substantial and important one, as well as being a novel issue in South Carolina. The statute which created P&A, which is similar to such statutes in other states, did not purport to confer standing on P&A in situations where standing did not already exist. The Court of Appeals held that P&A had standing, even though there was no evidence of actual injury either to specific individuals within P&A's client base. Nor was there any plausible evidence of actual injury to P&A itself. Unless the decision of the Court of Appeals is reversed or vacated, P&A will have been given the ability to ask the courts of this state to serve as commissions of review of state agency practices in the absence of a justiciable controversy. In other words, if the opinion stands, 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." This practice was held in *Lewis v. Casey*, 518 U.S. 343, 349 (1996), to be "not the role of courts."[2]

As the circuit court order held, citing cases from several other jurisdictions, there are two ways in which an organization such as P&A can establish standing. R. 7. The first is to show injury to a specific individual within P&A's client base. No such showing was made. The second is to show injury to P&A itself, a showing which, realistically speaking ,also was not made. The opinion of Court of Appeals neither cited nor discussed the cases dealing with standing of protection and advocacy organizations, although those cases were cited in the Order of the circuit court and were discussed in DDSN's brief in the Court of Appeals.

In any event, it was unnecessary for the Court of Appeals to rule on the issue of P&A's standing, because that court could assumed for purposes of argument that the organization had standing, but affirmed the case on the merits. Finally, and in alternative, if the case is remanded, DDSN requests that the remand order provide for additional inquiry as to the alleged injuries claimed by Plaintiffs.

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[2] As the circuit noted, *Lewis* has been favorably cited by this Court on the issue of the need for a plaintiff to show actual injury. R. I, 5, citing *Howard v. South Carolina Dept. of Corrections*, 399 S.C. 618, 633-634, 733 S.E.2d 211, 219-220 (2012) and *Hendricks v. South Carolina Dept. of Corrections*, 385 S.C. 625, 629, 686 S.E.2d 191, 193 (2009).

I. The Court of Appeals erred in reversing the circuit court's holding that P&A lacked standing, when P&A provided no evidence of injury to any specific individual or to itself as a result of the absence of DDSN regulations.

A. P&A did not attempt to show an injury to any specific individual.

The Court of Appeals held that S.C. Code Ann. § 43-33-350(1) conferred standing on Plaintiff Protection and Advocacy (P&A) "to pursue remedies to insure the protection of the rights of disabled persons." App. 5. Given that there was no showing of actual injury to "the rights of disabled persons," this conclusion was erroneous, because it would permit suit to be brought on behalf of disabled persons without the need for a showing of injury to any person.

The limits of standing for organizations such as P&A are illustrated in *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999). There an advocacy group similar to P&A was deemed to have no standing to argue about an agency's procedures in the 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." 175 F.3d at 887. *See also, Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.,* 24 F.Supp.2d 808, 816 (M.D.Tenn.1998)(holding that the plaintiff protection and advocacy group did not establish that it had standing to sue where it failed to name

specific individuals who had suffered concrete harm);[3] *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F.Supp.2d 353, 365-67 (E.D.Pa.2001)(denying standing to the protection and advocacy system because it had failed to "identify a specific constituent who is being harmed by the [d]efendant's actions").

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 least one such individual. P&A never attempted to come forward with such a showing of harm to any specific individual.[4]

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

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[3] Requiring a showing of harm to a specific individual does not necessarily also require that the individual be named in the litigation, as long as there is actual proof of injury to that person. However, in this case, no such proof was offered.

[4] 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.

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 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. . . .

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

A review of Paragraphs 5 and 6 of Prevost Affidavit, R. I, 164, paraphrased by the Court of Appeals, App. 5, demonstrates that the affidavit contains only similarly-generalized assertions. There are no references in the affidavit to any specific injury to any specific individual.

This holding of *Doe v. Stincer* is in accord 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)(emphasis added). *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. As already noted, the Prevost affidavit cited by the Court, App. 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 all of these reasons, the Court of Appeals erred in holding that P&A had standing to "pursue remedies to insure the protection of the rights of disabled persons." App. 5.

B. P&A did not prove the existence of an injury to itself.

With regard to the alleged injury to P&A itself, the Court of Appeals held only that "we find P&A has sufficiently asserted injuries it has suffered as a result of DDSN's alleged failure to promulgate regulations." App. 5-6. The apparent basis for this conclusion was Paragraph 7 of the Prevost affidavit, R. I, 165. However, the only assertion of harm to P&A in that paragraph, was, as

paraphrased by the Court of Appeals, that "P&A must expend resources and time in attempting to find and analyze the directives and standards DDSN has issued . . . ." App. 5.

That assertion in the Prevost affidavit is plainly implausible, and falls far short of showing any injury to P&A. Even at the time of the affidavit (2010), DDSN's DDSN Directives (over 120 in all) were indexed and published online on the DDSN website, as shown by the online clickable table of contents in the record. 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.[5] 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,

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

unsupported, and implausible affidavits").[6] 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).

The online index to the Directives makes it clear that it is at least as easy, and probably easier, for P&A or anyone else to locate an applicable Directive online as it would be to find the same substantive content if it had been embodied in a regulation. This is particularly true for P&A (the only party claiming injury on this basis), because P&A routinely and regularly works with the subject matter of the directives. The online index, R. I, 435-39, reveals a plain and simple outline of the topics covered. Thus, even if DDSN's rules had taken the form of 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 is whether a particular statute requires the promulgation of regulations. The question of whether regulations are required does not turn on whether agency policy is expressed in a user-friendly manner. Thus, even if the assertions in the Prevost affidavit had not been

[6] 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.

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. In addition, under the tests of standing set forth in *Sea Pines, supra,* P&A's showing falls short of meeting the "redressability" requirement. An order requiring regulations would not necessarily reduce the time it takes for P&A to locate the applicable rules.

Aside from this one implausible claim that the online Directives are difficult for P&A to search and analyze, P&A has made absolutely no showing at all that the absence of regulations has caused P&A any injury. The effect of the opinion of the Court of Appeals is therefore to permit litigation to be pursued by a non-injured plaintiff organization, whose members have likewise not been shown to have been injured. This conclusion runs contrary to the well-established principles regarding justiciability and standing. As a result, this Court should grant certiorari and vacate the decision of the Court of Appeals which holds that P&A has standing in this case.[7]

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[7] As an aside, DDSN would note that it did not challenge P&A's standing in another case now awaiting decision in the Court of Appeals. *Protection and Advocacy for People with Disabilities, Inc. v. Beverly A. H. Buscemi, Ph.D., et al.*, No. 2015-000109. In that case, another provision in P&A's enabling act, § 43-33-350(4), provided P&A with the power to conduct certain inspections. The issue in that case is whether certain types of records are covered by that statute. There was no question that P&A's allegations in that case, if correct as a matter of law (but which DDSN denies), would establish injury to P&A as an organization, unlike the present case, in which no such injury to P&A has been shown.

II. The Court of Appeals erred in remanding the merits issue in the case, rather than affirming the circuit court decision on the merits.

Regardless of the outcome of the question of standing, DDSN respectfully submits that the Court of Appeals should have affirmed the circuit court's decision on the merits of the case, including its decision on "binding norms," rather than remanding for additional consideration of the merits.[8] The Court of Appeals remanded the case "for litigation of the issues regarding the requirements of the specific statutes concerning the promulgation of regulations by DDSN." App. 6. The opinion concluded that the circuit court's "findings in regards to the merits of P&A's appeal were not sufficiently detailed as to the specific claims raised." App. 6. No further explanation was given by the Court of Appeals.

The issue of whether DDSN was required by statute to promulgate certain regulations was primarily an issue of law. Plaintiffs' counsel never suggested, either at the hearing in the circuit court or thereafter, that there was anything remaining to be argued on this issue which the circuit court did not consider. To the contrary, Plaintiffs were accorded full opportunity to present their case on 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.

[8] The circuit court and all parties were in agreement that the issue concerning "binding norms" was not properly before the circuit court. R. I, 18 (noting that the issue was not raised in the Complaint). Br. of Appellants at 18 (same). Br. of Respondents at 19-21 (same).

The Order of the circuit court discussed the merits of Plaintiffs' statutory construction claim over the course of seven pages, concluding that none of the statutes cited by Plaintiffs mandated the promulgation of regulations. R. I, 10-17. Plaintiffs' primary claim was that S.C. Code § 44-20-220 required the promulgation of regulations. The circuit court held otherwise. R. 14-16. The statute provides in pertinent part as follows:

> **SECTION 44-20-220. Duties of Commission; per diem; appointment of Director of Disabilities and Special Needs; advisory committees.**
>
> The commission **shall** determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel. * * * The commission **is authorized to** promulgate regulations to carry out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries. In promulgating these regulations, the commission must consult with the advisory committee of the division for which the regulations shall apply.

This section contains two separate provisions: a mandatory requirement for the promulgation of regulations for "the operation of the department [DDSN], and a permissive provision that merely authorizes, but does not require, the promulgation of regulations for "carry[ing] out the provisions of this chapter and other laws related to mental retardation, related disabilities, head injuries, or spinal cord injuries." The circuit court recognized this distinction between the mandatory and permissive parts of the statute and held that the areas for which Plaintiffs sought to

have regulations promulgated fell under the permissive language of the statute, and not under the mandatory language. R. 14-16.[9]

If, as Plaintiffs have argued, regulations are mandatory for both subject areas (which includes carrying out the laws pertaining to the listed disabilities), then the second part of the statute, which authorizes but does not mandate regulations in that same subject area, becomes meaningless. Under Plaintiffs' construction, nothing would fall within the category of being the subject of non-mandatory regulations. Plaintiffs' construction would therefore violate the standard principle that "[t]he Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002).[10]

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[9] As the circuit court held, the language "is authorized to" does not create a mandatory duty. R. 15-16 (citing cases, including *Scalise v. Thornburgh*, 891 F.2d 640, 644 (7th Cir. 1989)(language "is authorized . . . to make regulations" is permissive, rather than mandatory).

[10] Plaintiffs also contended that two other statutes require the promulgation of regulations in specific subject areas. Those statutes are §44-20-790 (hearings involving program operators or licensees) and § 44-26-180 (research on human subjects). However, the circuit court specifically held that Plaintiffs had made no showing of standing to enforce these provisions. R. 13-14. Plaintiffs are obviously not program operators, and they made no showing that any of them had ever been involved in research on human subjects.

III. In the alternative, if the case is remanded, the circuit court should also consider the extent, if any, of the alleged injuries to Plaintiffs, especially in light of subsequent developments in South Carolina case law.

In the alternative, and without waiving any of the contentions made above, DDSN would submit that if this case is remanded at all, the circuit court on remand should also be permitted to give further consideration to 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.[11]

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 recipient of services 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 online 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),

[11] This request was presented to the Court of Appeals in DDSN's Petition for Rehearing. App. 19-22. Plaintiffs' Return to the Petition for Rehearing, App. 24-31, was silent on this point.

reh'g dismissed, No. 2014-002513, 2016 WL 1274739 (S.C. Mar. 24, 2016),[12] exempted matters contained in the Medicaid Waiver plan from the requirements of state law regarding regulations. (*Stogsdill* was decided some months after the circuit court order in the present case). The *Stogsdill* decision has rendered it substantially less likely that any individual will be prejudiced by the absence of state regulations, because most recipients of DDSN services are Medicaid-eligible persons. 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.[13]

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.,*

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[12] Stogsdill has sought certiorari in the U.S. Supreme Court. No. 15-904, *Stogsdill v. DHHS,* docketed 4/22/16. The cover page and "Questions Presented" page are filed as a supplement to this petition. The issue of a need for regulations was not listed in the questions presented, so the decision of the Court of Appeals on that point is now final.

[13] There is virtually no doubt that most recipients of DDSN services 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.

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, 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, if one could be shown to exist.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: /s/

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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, ...Petitioners.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioners, does hereby certify that service of the **Amended Petition for Writ of Certiorari** and the **Supplement to Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 20th day of May 2016:

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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Via U.S. Mail

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