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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

PETITION FOR REHEARING

John A. Massalon
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-and-
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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES

1. *The Order overlooked the lack of legal or factual support for the Respondents' multiple justifications in asserting the diabetes mandate in section 38-71-46 did not apply to the State Health Plan.*

2. *The result of the Order's reliance on the ALJ opinion, which was reversed, and one (1) dissent in a 4-1 Supreme Court decision to establish substantial justification contradicts the plain language of attorneys' fee statute, S.C. Code Ann. § 15-77-300.*

ARGUMENT

1. *The Order overlooked the lack of legal or factual support for the Respondents' multiple justifications in asserting the diabetes mandate in section 38-71-46 did not apply to the State Health Plan.*

The Court's Order fails to address that the original justification of the State's decision not to apply the diabetes mandate statute which, by its plainest terms, applied to "*every* health maintenance organization, individual and group health insurance policy, or contract issued or

renewed in this State . . ." see S.C. Code Ann. § 38-71-46(A) (emphasis added), summarily concluded that "the Committee [EIP] also observed the Department of Insurance and the General Assembly *historically have acknowledged* the Department [of Insurance] has no jurisdiction over EIP." (Allen v. S.C. PEBA, S.C. Supreme Court App. Case No. 2012-213186; R. p. 176-177). The State Health Plan initially took this jurisdictional position that the General Assembly's plain language in Title 38 – The Insurance Code did not apply to it because it was part of the executive branch (State Budget and Control Board, at the time), yet said position had no legal support. The myriad attempts to locate support for that erroneous and unreasonable position failed. And, the state's attempts to insert ERISA law into its arguments failed as well as it is well-known that ERISA has no application to state governments.

Later, once the matter was before the ALJ, the State Health Plan attempted to bolster that position with reference to what it described as "complicated grammatical structure" and future legislative "history" -- both positions which were plainly rejected by the South Carolina Supreme Court. The grammatical structure was not actually complicated if one read it in a plain and reasonable manner, and there existed no legislative history (i.e. prior to the enactment of the diabetes mandate) which supported the State Health Plan's claims.

The Order simply states that the State Health Plan is a unique creation, found in a different section of the South Carolina Code from the general insurance statutes. However, that conclusion does not inform the questions of how to interpret a plain and unambiguous statute.

2. *The result of the Order's reliance on the ALJ opinion, which was reversed, and one (1) dissent in a 4-1 Supreme Court decision to establish substantial justification contradicts the plain language of attorneys' fee statute, S.C. Code Ann. § 15-77-300.*

Contrary to the plain language of the attorneys' fee statue at issue, the Court's Order unjustifiably modifies the language of the statute calling for fees against the state where the state's position is "without *substantial* justification" to one where a petitioner could only obtain fees if the state's position was "without *any* justification." (emphasis added). The plain language of section 15-77-300 does not contain any such qualification. Section 15-77-300 states, in relevant part:

> (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

(emphasis added). Id. (Law Co-op 2005).

The Court's Order ignores that four (4) out of five (5) justices on the South Carolina Supreme Court rejected the state's interpretation, and exclaimed it was "inconceivable" that the General Assembly intended to exclude those insured under the State Health Plan from receiving the benefits of the diabetes mandate statute. Allen v. PEBA, 411 S.C. 611, 618-19, 769 S.E.2d 666, 670 (2015). The Order also ignores that this appeal from the ALJ was certified by the Supreme Court for direct transfer, on motion of the Appellant, under SCRAP, Rule 204(b) requiring that the case involve an issue of significant public interest or a legal principle of major importance.

There is nothing in the language of the majority opinion that indicates the four majority justices thought the issue a close question, and there were no separate concurring opinions. While Appellant does not question that the ALJ and the dissenting justice are reasonable people and jurists, as referenced in the Order, the "merits decisions and their rationales 'are the most powerful available indicators of the strength, hence reasonableness, of the ultimately rejected position.'" United States v. Paisley, 957 F.2d 1161, 1167 (4th Cir. 1992).

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests that the Court agree to schedule a rehearing of this matter.

Respectfully submitted,

October 4, 2017

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v.

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

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 4, 2017 addressed to its attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, 1002 Calhoun Street, Columbia, SC, 29201-2406 and Stephen Raymond Van Camp, Esquire, 202 Arbor Lake Drive, Columbia, SC 29223.

October 4, 2017

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

RE: Jeffrey D. Allen, on behalf of Jane Doe v. South Carolina Budget and Control Board, Employee Insurance Program
Appellate Case No.: 2015-001561
Our File No.: 595-1

Dear Ms. Kitchings:

Enclosed please find the following in regard to the above-referenced matter:

1. The original and seven (7) copies of the Appellant's Petition for Rehearing;
2. The original and seven (7) copies of the Proof of Service; and
3. Wills Massalon & Allen LLC's check #9207 in the amount of $25.00.

Please file the originals, file stamp the copies, returning a copy of each document to me in the enclosed self-address, stamped envelope. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC

John A. Massalon
jmassalon@wmalawfirm.net

Enclosures

cc: Theodore D. Willard, Jr.
Stephen Raymond Van Camp, Esquire

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