THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No.: 2015-001561
Unpublished Opinion No. 2017-UP-358 (S.C. Ct. App. Filed September 20, 2017)

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

v.

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

PETITION FOR CERTIORARI

February 5, 2018

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CERTIFICATION PETITION FOR REHEARING MADE AND RULED UPON

The undersigned certifies that the Petitioner made a timely Motion for Rehearing from the Order of the Court of Appeals, and said Motion for Rehearing was denied on January 5, 2018.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the denial of Petitioner's Motion for Attorneys' Fees under S.C. Code Ann. §15-77-300 (hereinafter "state action statute) when the justifications for the state's reasoning had no basis in the law or in fact, and were flatly rejected by four out of five justices of this Court in Allen v. S.C. Pub. Emple. Benefit Auth., 2015 S.C. LEXIS 107 (Mar. 4, 2015).
2. Does the reasoning of the Court of Appeals' decision result in too narrow of a reading of the state action statute, rendering it a nearly impossible standard for any appellant to meet – a result contrary to the plain language of the attorneys' fee statute.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

Petitioner originally appealed the State Health Plan's August 24, 2010 denial of a claim for diabetes education to the Administrative Law Court ("ALC") and sought class relief. The ALC, adopting the State Health Plan's arguments, affirmed the agency's position that the diabetes insurance mandate enacted by the General Assembly in 2000, S.C. Code Ann. 38-71-46 (Supp. 2009) did not apply to the State Health Plan. (R. pp. 15-26). Petitioner sought to certify the appeal directly to the Supreme Court for review due to its significant public interest, which was granted. On March 4, 2015, the South Carolina Supreme Court reversed the findings of the ALC in a 4-1 published decision holding that the South Carolina diabetes mandate statute did in fact apply to the State Health Plan as a matter of law. Allen v. S.C. Pub. Emple. Benefit Auth.,

2015 S.C. LEXIS 107 (Mar. 4, 2015). Thereafter, Petitioner filed a timely Motion for Attorneys' Fees before the ALC pursuant to the state action attorneys' fee authorization statute, S.C. Code 15-77-300. The ALC denied the Motion for Attorneys' Fees. The Court of Appeals affirmed the denial of attorneys' fee on September 20, 2017. Petitioner filed a Motion for Rehearing, which was denied on January 5, 2018.

In 2009, Petitioner sought an explanation from the State Health Plan of the denial of a claim made for his minor child for diabetes education. When no substantive response was forthcoming, Allen submitted a demand as to why the diabetes education insurance mandate, S.C. Code Ann. § 38-71-46, requiring "*every* health maintenance organization, individual and group health insurance policy, or contract issues or renewed in this State" did not require payment of the subject claim and all similar claims. (R. p. 179-184). After several internal levels of appeal taking nearly a year, the State Health Plan issued its final decision on August 24, 2010.

The State Health Plan decision contains the following one (1) paragraph "justification" for its legal conclusion that the diabetes insurance mandate does not apply to the State Health Plan:

> Lastly, the Committee noted the repeated assertions regarding S.C. Code 38-71-46 and Claimant's attorney's assertion that no one has explained why it does not apply to the State Health Plan. While the Committee noted the alternative methods for obtaining diabetes education noted above, the Committee also observed the Department of Insurance and the General Assembly *historically have acknowledged* the Department [of Insurance] has no jurisdiction over EIP [Employee Insurance Plan]. EIP is not a health insurance issuer under the Code. In the areas on which the General Assembly has wanted to include EIP in the Accident and Health Insurance provisions of Title 38, Chapter 31, it has specifically said so. Therefore, because 38-71-46 does not refer to EIP or the State Health Plan, it does not apply to the State Health Plan.

(R. p. 176-177). This explanation contained a single footnote which referenced S.C. Code Ann. §1-11-780 -- a statute enacted years *after* the diabetes insurance mandate addressing mental health coverage and referencing the State Health Plan specifically. The only support for this underlying legal conclusion appeared on the Medical Affairs Review Coordinator's Response in long-hand dated March 15, 2010 and signed by Ashby M. Jordan, MD, V.P. Medical Affairs wherein she writes "the statute referenced in the appeal document does not apply to the State Health Plan." (R. p. 178).

ARGUMENT

The Court should grant the Petition for Certiorari to determine whether the Court of Appeals err in upholding the denial of Petitioner's Motion for Attorneys' Fees under S.C. Code Ann. §15-77-300 (hereinafter "state action statute) when the justifications for the state's reasoning had no basis in the law or in fact, and were flatly rejected by four out of five justices of this Court in Allen v. S.C. Pub. Emple. Benefit Auth., 2015 S.C. LEXIS 107 (Mar. 4, 2015).

Section 15-77-300 permits an award of reasonable attorneys' 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 attorneys' fee award unjust. Id. It 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).

When a state agency's claims have no "reasonable basis in law or fact," they are without substantial justification. Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990). In Heath, the Supreme Court found that the County of Aiken had violated a state statute prohibiting county governing bodies from developing certain personnel policies under the direction of elected officials. Id. In evaluating the claim that the statute had not been followed by the County, the Supreme Court found that the statute at issue was "unambiguous," and further determined that the County's actions had violated the statute. On the basis --that the statute was clear and that the county's actions had violated that statute, the Court held that attorneys' fees were due under the state action statute.

In McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539, 543, 405 S.E.2d 830 (1991), a case involving food stamp benefits, DSS relied on an erroneous legal analysis in pursuing its position that McDowell's jointly titled assets disqualified her from benefits. The Supreme Court eventually rejected DSS's legal analysis and held that the DSS's position was incorrect as a matter of law. In addressing the request for attorneys' fees, the Court commented that the facts regarding McDowell's joint ownership of the car were undisputed, and that DSS maintained the wrong legal conclusion, and therefore its position was not "substantially justified." In the case of Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008) (awarding $445,226.30 in attorneys' fees based on hourly lodestar analysis against the State and State Retirement System), the Court found that the Retirement System's breach of an unambiguous contract was the equivalent to the breach of an unambiguous statute, and allowed attorneys' fees under the state action statute. Id. at 449, 658 S.E.2d 320.

When a state agency enforces a preexisting statutory mandate, which is only later determined to be unconstitutional it is entitled to presumption that its actions were substantially justified. See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004) (agency must follow the law as written until the statute is judicially addressed). In this case, the State Health Plan did the opposite. It refused to apply the diabetes coverage statutory mandate which had been the force of law since 2000; it specifically excluded from its insurance plan coverage for diabetes education, despite that mandate. Its refusal was without any legal justification. It is certainly not entitled to any presumption in its favor.

The diabetes insurance coverage mandate, S.C. Code Ann. § 38-71-46, mandated broad insurance coverage for claims related to diabetes treatment, diabetes mediations, diabetes supplies, and diabetes management education services. Nonetheless, the State Health Plan excluded from its plan coverage for educational/medical social services, which admittedly excluded diabetes management education claims. (R. p. 175; R. p.178).

This Court wholly rejected the State Health Plan's legal analysis:

> [w]e find that the General Assembly sought to alleviate and prevent diabetes's potentially devastating effects on those South Carolinians suffering from the disease by mandating coverage for the equipment, supplies, medication, and education for the treatment of diabetes. Thus, given the prevalence of diabetes in South Carolina, coupled with the General Assembly's purpose behind [the diabetes mandate statute], we find it *inconceivable* that the General Assembly intended to exclude South Carolinians insured by the State Health Plan from receiving benefits. . .

(emphasis added). Allen v. S.C. Pub. Empl. Benefit Auth., 2015 S.C. LEXIS 107, at *8 (Mar. 4, 2015). The Court also agreed with Petitioner that the plain language of the statute, in the context of grammatical construction, supported the conclusion that benefits need not be provided by a "health care issuer," as that term was defined, in order to qualify as health insurance coverage under the statute. Id. at *7-8. In *dicta*, assuming for argument purposes only that the statute was

ambiguous, the Court rejected the State Health Plan's effort to support its conclusion with other insurance mandates passed years after the diabetes mandate in which the State Health Plan was expressly referenced. Id. at *10-11. Because the other references to the State Health Plan in the general insurance statute were enacted years after the diabetes mandate (enacted in 1999), "they should be viewed in the light of when they were enacted, [and] do not support the ALC's conclusions that the General Assembly did not intend for [the diabetes mandate statute] to apply to the State Health Plan." The Court further rejected an argument that the placement of certain definitions in Title 1 and Title 38 should inform the question, and rejected the effort to apply Employee Retirement Income Security Act of 1974 (ERISA) case law to distinguish self- insured plans for state insurance mandates. Id. at *12.

In affirming the ALJ, the Court of Appeals gave little attention to the reasoning of the majority in the Supreme Court's opinion. Instead, the Court of Appeals relied on the ALJ's acceptance of the state's position and the fact that one Supreme Court Justice dissented from the majority opinion. This was error.

In its order denying attorneys' fees, the ALC concluded the statute was ambiguous, a finding directly contrary to that of the Supreme Court, and thus the law of the case. (R. p. 28-33)[1]. The ALC also relied on what it described as "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." (R. p. 32). First, neither the Supreme Court's Order (nor the Petitioner's position) on reading the grammatical structure was particularly complicated. The Court

[1] Curiously, despite holding that the diabetes mandate statute was ambiguous for purposes of denying Petitioner's Motion for Attorneys' fees, the ALC previously held that the same diabetes mandate statute was "not ambiguous" in its inapplicability to the State Health Plan (R. p. 15-26).

concluded, instead that the State Health Plan's reading of the statute (which was adopted by the ALC) was "tortured and illogical," and commented on how when the legislature uses the phrase "every," it is generally intended to mean exactly that. There is neither factual nor legal support for the conclusion that the grammatical structure of the mandate rendered it ambiguous.

Second, Petitioner is unaware of any evidence in the record, other than lawyer argument, that the State Health Plan had a "longstanding agency practice denying similar claims without contest." An argument that the State's action was substantially justified simply because no one had ever complained about it before cannot withstand scrutiny. While the question of whether the statute applied to the State Health Plan might be considered novel because no one had previously gone to the effort to formally challenge the State Health Plan's legal opinion, "[t]he fact that novel issues were raised does not mean [the state agency] was substantially justified, ..." See Cornelius v. Oconee County, 369 S.C. 531, 633 S.E.2d 92 (2006) (affirming award of attorneys' fees under state action statute). Lastly, the Supreme Court flatly rejected the State Health Plan's attempt to bootstrap future legislation regarding insurance mandates' applicability to the State Health Plan, and therefore the ALC's reliance on that position is too without legal basis.

The Court of Appeals held that the ALJ did not abuse its discretion in denying Petitioner's motion for attorney fees under § 15-77-300. In order to award attorneys' fees under the state action statute the court must find that the State's reason for taking the action it took was "not substantially justified." In this case, the Court of Appeals erroneously focused on the reasonableness of the ALJ's decision, while it should have focused on the justifications the State used when it denied the claim.

Unlike some other appeals from administrative courts, the State Health Plan cases are heard by the ALC in the ALC's appellate capacity. See S.C. Code Ann. § 1-11-710 (C) (providing that benefit claims under the State Health Plan are determined by procedures established by the board [SC Budget and Control Board] subject only to appellate review consistent with the Administrative Court standards in section 1-23-380). The original state action is the August 24, 2010 State Health Plan Committee decision to deny the claim and refusal to acknowledge the diabetes insurance mandate's application to the State Health Plan. (R., 176-177). That August 24, 2010 position is the position that should have been reviewed to determine whether the State's actions were with or without substantial justification.

If one were to follow the logic of the Court of Appeals, no prevailing party in a state action case would ever qualify for an award of attorneys' fees when on appeal from the ALC. The Court of Appeals used the fact that the ALJ agreed with the State and that one (1) dissenting Supreme Court justice agreed with the ALJ as sufficient evidence that the State's position was substantially justified. The Court of Appeals concluded that while the state's position in the litigation was not the prevailing view ultimately, "it was sufficiently justified to 'satisfy a reasonable person.'" The flaw in this reasoning is that there will always be at least one (1) person, some judge in particular, who agreed with the state's position because, otherwise, there would be no decision from which to appeal. The state action statute does not say that attorneys' fees are appropriate only when no person agrees with the state position. That is too narrow a reading of the state action statute, and the Court of Appeals' decisions should be reversed.

CONCLUSION

This is the classic case where attorneys' fees should be awarded to the prevailing party under the state action statute. The state's legal position on an unambiguous statute was

unjustified. The language of the statute was plain that it applies to the State Health Plan. There was no language excluding the State Health Plan. There were no factual disputes at play, and the Supreme Court rejected all of the legal positions propounded by the state agency. In this case, because the State Health Plan acted directly contrary to a statutory mandate which by its plain terms applied to "*every* health maintenance organization, individual and group health insurance policy, or contract issues or renewed in this State . .. " See S.C. Code Ann. § 38-71-46(A) (emphasis added), the State Health Plan should be found to have lacked justification for denying the benefit to its members.

This court should grant this Petition for Certiorari to review the decisions of the Court of Appeals.

Respectfully submitted,

February 5, 2018

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PROOF OF SERVICE

I certify that I have served the Petition for Certiorari on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 5, 2018 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.

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