

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 05 2018

APPEAL FROM THE ADMINISTRATIVE LAW COURT SUPREME 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Unpublished Opinion No. 2017-UP-358 (S.C. Ct.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.

APPENDIX TO PETITION FOR CERTIORARI

John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, South Carolina 29812 5951
(803) 541-7850

ATTORNEYS FOR PETITIONER

Other Counsel of Record:

Theodore D. Willard, Jr., Esquire
Montgomery Willard, LLC
1002 Calhoun Street
P.O. Box 11886
Columbia, South Carolina 29211-1186
(803) 779-3500

Stephen Van Camp, Esquire
South Carolina Public Employee
Benefit Employee Insurance Program
202 Arbor Lake Drive
Columbia, South Carolina 29223
(803) 734-1228

ATTORNEYS FOR RESPONDENT

INDEX TO APPENDIX

Record on Appeal	App 001
Appellant's Final Brief	App 189
Appellant's Final Reply Brief to Initial Brief	App 211
Brief of Respondent	App 221
S.C. Court of Appeals Unpublished Opinion No. 2017-UP-358	App 255
Appellant's Petition for Rehearing	App 258
Order Denying Petition for Rehearing	App 264

22204

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 30 2015

APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

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.

RECORD ON APPEAL

John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry B. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman,
LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812 5951
Attorneys for Appellant

Theodore D. Williard, Jr., Esquire
Montgomery Willard, LLC
P.O. Box 11886
Columbia, SC 29211

and

Stephen Raymond Van Camp, Esquire
202 Arbor Lake Drive
Columbia, SC 29223
Attorneys for Respondent

The Honorable Shirley C. Robinson
Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

INDEX

Index	1
-------------	---

ORDERS

Circuit Court Order Dated October 15, 2010 granting Defendant's Motion for Summary Judgment in Case No. 09-CP-10-7407	2
ALC Order dated August 13, 2012	15
South Carolina Supreme Court Order in Appellate Case No. 2012-213206 denying Petition for Certiorari	27
Order of ALJ of June 17, 2015 denying Appellant's Motion for Attorney's fees	28

DECISIONS

South Carolina Supreme Court Opinion 27504, including the dissenting opinion of Justice Pleicones	34
South Carolina Court of Appeals Opinion No. 2012-UP-433 (filed July 18, 2012)	49

PLEADINGS

Appellant's Motion for Attorneys' Fees with Supporting Affidavits	52
Respondent's Opposition to Motion for Attorneys' Fees	124
Appellant's Reply to Opposition to Motion for Attorneys' Fees	152

EXHIBITS AND OTHER MATERIALS OR DOCUMENTS

Allen v. S.C. PEBA, S.C. Supreme Court App. Case No. 2012-213186, Record on Appeal Vol. I, R.p. 171; 212-13; Vol. II, R.p. 395; Vol. III, R.p. 525-30	175
---	-----

MONTGOMERY WILLARD, LLC
ATTORNEYS AND COUNSELORS AT LAW
1002 CALHOUN STREET
COLUMBIA, SOUTH CAROLINA 29201
(803) 779-3500

Post Office Box 11886
COLUMBIA, SOUTH CAROLINA 29211-1886

FACSIMILE (803) 799-2755
WORLD WIDE WEB HTTP://WWW.MONTGOMERYWILLARD.COM

October 13, 2010

VIA OVERNIGHT MAIL
The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: Jeffrey Allen, individually, as guardian for Jane Doe, a minor, and as representative of
other similarly situated State of South Carolina Employees v. South Carolina Budget &
Control Board Employee Insurance Program, et al.
Case No. 2009-CP-10-7404
Our File No.: 294962

Dear Ms. Armstrong:

Enclosed please find the original Order signed by the Honorable Paul M. Burch granting Defendant
Defendants' Motion for a Protective Order and Defendants' Motion for Summary Judgment in the above-
referenced matter. Please file the original and return a filed stamped copy to me in the enclosed self-addressed
postage prepaid envelope.

Also, I have enclosed two \$25.00 checks for the filing of the enclosed.

By copy of this letter, I am serving a copy of same upon counsel for the Plaintiff.

With kind regards,

Very truly yours,

Montgomery Willard, LLC
Tracey D. Smith
Tracey D. Smith
Paralegal to Theodore D. Willard, Jr.

Enclosures

cc: Matthew D. Hamrick, Esquire (via overnight mail w/ encl.) ✓

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees,

Plaintiff,

vs.

South Carolina Budget and Control Board
Employee Insurance Program, et al.

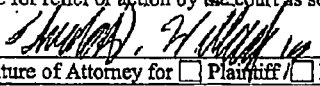
Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-10-7404

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney: Matthew D. Hamrick Bar No. _____ Address: 1017 Chuck Dawley Blvd., Mt. Pleasant, SC 29464 Phone: (843) 727-6500 Fax (843) 881-6183 E-mail: mhamrick@rpwb.com Other: _____		Defendant's Attorney: Theodore D. Willard, Jr., Bar No. _____ Address: _____ Post Office Box 11886, Columbia, SC 29211 Phone: (803) 779-3500 Fax (803) 799-2755 E-mail: tdw@montgomerywillard.com Other: _____	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____		Court Reporter Needed: ☐ YES/ ☐ NO	
Estimated Time Needed: _____			
SECTION II: Motion/Order Type			
☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☐ Defendant		October 13, 2010 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$50.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Jeffrey D. Allen, individually, as guardian)
for Jane Doe, a minor, and as representative)
of other similarly situated State of South)
Carolina employees,)

Civil Action No.: 2009-CP-10-7404

Plaintiffs,)

ORDER

v.)

South Carolina Budget and Control Board)
Employee Insurance Program and Blue)
Cross and Blue Shield of South Carolina,)

Defendants.)

This matter is before the Court on Defendants South Carolina Budget and Control Board Employee Insurance Program's ("EIP") and Blue Cross Blue Shield of South Carolina's ("BCBSSC") Motion for a Protective Order pursuant to South Carolina Rule of Civil Procedure 26 (c) and Motion for Summary Judgment pursuant to South Carolina Rule of Civil Procedure 56 and Plaintiff's Motion to Stay Defendants' Motion for Summary Judgment and Plaintiff's Motion to Compel responses to Plaintiff's discovery. On August 26, 2010, this Court heard arguments on the above motions. For the reasons stated below, based on the arguments of counsel, the written submissions, evidence, and affidavits submitted to the Court, this Court finds Defendants' Motion for a Protective Order and Motion for Summary Judgment should be granted, and Plaintiff's Motion to Stay Defendants' Motion for Summary Judgment and Plaintiff's Motion to Compel are denied.

I. BACKGROUND

The Group Health Benefits Plan of the Employees of the State of South Carolina, the

Public School Districts, and Participating Entities ("State Health Plan") is a self-funded, non-federal governmental health plan, which is administered by the South Carolina Budget and Control Board Employee Insurance Program ("EIP"). (Affidavit of Robin Tester, ¶ 3). BCBSSC is the third-party claims administrator for the State Health Plan. BCBSSC is not an insurer of the State Health Plan. (Affidavit of Robin Tester, ¶ 4).

Plaintiff, an employee of a South Carolina School District, brings this purported class action against the State Health Plan and BCBSSC, alleging S.C. Code Ann. § 38-71-46 mandates coverage under the State Health Plan for diabetes outpatient self-management training and education. Plaintiff alleges causes of action for declaratory judgment to interpret the terms of the State Health Plan, disgorgement of benefits under the State Health Plan, reformation of the State Health Plan and for injunctive relief. Plaintiff's Complaint alleges:

5. This is an action for declaratory judgment arising from Defendants' unlawful issuance and administration of the State of South Carolina EIP Standard Plan, a plan of health benefits and insurance offered to all current and retired state employees, including public school district employees, for violation of a SC Code Section 38-71-46, for disgorgement of revenues received as a result of the unlawful issuance and administration, and for declaration to determine the value of unlawfully withheld benefits.

11. As the named Plaintiff is an employee of a South Carolina school district, has been enrolled in the EIP Standard Plan, has enrolled his dependent child in said plan who was diagnosed with Diabetes at the age of two years old, and has made multiple claims for his dependent child with a value of approximately One Thousand & 00/100 US Dollars (\$1000.00) for diabetes outpatient self-management training and education which were denied by Defendant BCBSSC as administrator to the EIP, his claim, right and privileges are typical of the proposed class.

19. Plaintiff seeks, individually and as legal guardian for Jane Doe, and on behalf of all class members, a declaration of the rights of the parties hereto: that Defendants are required to issue and administer all health benefit plans offered

through the HIP in compliance with the express mandate of South Carolina Code Section 38-71-46.

20. Plaintiff seeks an Order of the Court reforming the terms of the health benefit plan provided to all class members effective January 1, 2000 to provide the mandated diabetes coverage.

21. Plaintiff seeks an Order of the Court requiring the Defendants to disgorge monies received as a result of unlawful denials of the mandatory diabetes coverage, and to pay them to members of the putative class the present value of said unlawfully withheld revenues.

24. The Defendants should be enjoined from the wrongful takings as described above and from further denial of claims for the diabetes outpatient self-management training and education.

Defendants moved for summary judgment on the following grounds: (1) the administrative remedies under S.C. Code Ann. § 1-11-710 (C) are Plaintiff's exclusive remedy, subject only to appeal to the South Carolina Administrative Law Court pursuant to S.C. Code Ann. § 1-23-600 (D); and (2) S.C. Code Ann. § 38-71-46 does not apply to the State Health Plan. Defendants further moved for a protective order staying Plaintiff's discovery pending a determination of Defendants' Motion for Summary Judgment. Plaintiff moved to stay Defendants' Motion for Summary Judgment and to compel responses to Plaintiff's discovery.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRPC; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The purpose of summary judgment is to

"expedite the disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

III. DISCUSSION

A. Defendants' Motion For Summary Judgment And Plaintiff's Motion To Stay Summary Judgment

The Court finds that the administrative remedies under S.C. Code Ann. § 1-11-710 (C) are Plaintiff's exclusive remedy, subject only to appellate review to the South Carolina Administrative Law Court ("ALC") pursuant to S.C. Code Ann. § 1-23-600 (D). A participant and/or beneficiary challenging an award of benefits under the State Health Plan is limited to the remedies set forth in S.C. Code Ann. § 1-11-710(C), which provides as follows:

Notwithstanding Sections 1-23-310 and 1-23-320 or any other provision of law, claims for benefits under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board, which shall constitute the exclusive remedy for these claims, subject only to appellate review consistent with standards provided in Section 1-23-380.

Id. (Emphasis added).

Pursuant to the allegations of Plaintiff's Complaint, Plaintiff is requesting the Court interpret the terms of the State Health Plan to include the coverage set out in S.C. Code Ann. § 38-71-46. Plaintiff further alleges he is entitled to disgorge benefits from the plan for unlawful denials of coverage and for injunctive relief enjoining "further denial of claims for diabetes out-patient self-management training and education." (Complaint ¶24). The interpretation of the

State Health Plan and the resolution of claims for benefits under the Plan are exactly the types of remedies contemplated by § 1-11-710(C).¹

It is undisputed that prior to filing the current action, and while the current action was pending, Plaintiff continued to avail himself of his administrative remedies under § 1-11-710(C). On September 30, 2009, Plaintiff made a first level appeal to the BCBSSC Appeals Committee regarding the denial of his claim for benefits under the State Health Plan, making the exact same argument he makes here concerning the application of S.C. Code Ann. § 38-71-46 to the State Health Plan. (Affidavit of Robin E. Tester ¶7, Exhibit A). By including this issue as part of his administrative appeal, Plaintiff recognized EIP had the authority to rule on the application of S.C. Code Ann. § 38-71-46 to the State Health Plan.

On April 2, 2010, the BCBSSC Appeals Committee informed Plaintiff in a letter that it was upholding the denial of Plaintiff's claim because the requested services were specifically excluded under the terms of the State Health Plan. BCBSSC also stated S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. (Affidavit of Robin Tester ¶8, Exhibit B). This letter further gave Plaintiff 90 days from April 2, 2010, to appeal this decision to the EIP Health Appeals Committee.

On June 30, 2010, Plaintiff appealed the denial of his claim to the EIP Health Appeals Committee. (Exhibit A to Defendants' Memorandum). As can be seen from the contents of this

¹ Paragraph 1.3 of the State Health Plan states:

1.3 Applicable Law

This Plan is established and will be maintained with the intention of meeting the requirements of all applicable federal and state laws. Any provision of this Plan, which is in conflict with the law of any governmental body or agency that has jurisdiction over this Plan, shall be interpreted to conform to the minimum requirements of such laws.

(Affidavit of Robin E. Tester, Exhibit C, p.1) (emphasis added).

letter, Plaintiff appealed the issue of the applicability of S.C. Code Ann. § 38-71-46 to the State Health Plan to the EIP Health Appeals Committee.

By letter dated August 24, 2010, the EIP Health Appeals Committee wrote Plaintiff that it was denying his claim for benefits and noted S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. This letter also informed Plaintiff that his next level of appeal was to the South Carolina Administrative Law Court. (Exhibit A to Defendants' Memorandum).

Appeals involving claims under the State Health Plan are under the exclusive jurisdiction of the ALC.² Pursuant to S.C. Code Ann. § 1-11-710(C), the exclusive remedy available to Plaintiff is the administrative review process provided by the Plan, "subject only to appellate judicial review consistent with the standards provided in Section 1-23-380." S.C. Code Ann. § 1-23-380 provides: "a party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article [the Administrative Procedures Act]." Additionally, S.C. Code Ann. § 1-23-600 (D) states: "[a]n administrative law judge also shall preside over all appeals from final decisions of contested cases pursuant to the Administrative Procedures Act...or another law..."

Plaintiff's argument that it was futile for Plaintiff to exhaust his administrative remedies, and that the letter of August 24, 2010 was evidence of this futility, is misplaced. Undeniably, Plaintiff purposely availed himself of the administrative remedies under the State Health Plan and fully exhausted the internal appeals process. Therefore, any futility argument was waived and/or mooted. Simply put, Plaintiff still has a viable remedy by appealing the denial of his claim to the ALC, which has exclusive jurisdiction over such actions.

The Court further finds Plaintiff's argument that summary judgment was premature

² Prior to July 1, 2006, appeals from EIP went directly to the Circuit Court. After July 1, 2006, pursuant to 2006 S.C. Acts 387, appeals from EIP go directly to the Administrative Law Court.

because discovery had not been completed also fails. The undisputed facts establish Plaintiff purposely availed himself of the State Health Plan's administrative remedies. Therefore, the Court was left to decide the purely legal issue of whether Plaintiff's exclusive remedy was an appeal to the ALC. The issue of interpretation of a statute is a question of law for the Court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). While Plaintiff's counsel did submit a Rule 56 (f) affidavit, that affidavit failed to identify any evidence Plaintiff expected to discover that would be relevant to the issue of whether the administrative remedies under S.C. Code Ann. § 1-11-710 (C) were Plaintiff's exclusive remedy, subject only to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600 (D). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

Plaintiff further argues that the issue of whether the administrative remedies under S.C. Code Ann. § 1-11-710 (C) were Plaintiff's exclusive remedy, subject only to appellate review to the ALC under S.C. Code Ann. § 1-23-600 (D), is a novel question of law that should not be decided at summary judgment. However, as the South Carolina Supreme Court held in Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996), where the dispute is not regarding the underlying facts but the interpretation of the law, and the development of the record will not aid in the resolution of the issues, it is proper to decide even novel questions of law on demurrer. See also Brown v. Howe, 338 S.C. 305, 526 S.E.2d 232 (Ct. App. 1999) (even novel questions of law can be decided at the motion to dismiss stage where development of the record will not aid resolution of the issues). In the present case, the underlying facts are not in dispute and further development of the record will not aid the resolution of the issue of whether the administrative remedies under S.C. Code Ann. § 1-11-710 (C) were Plaintiff's exclusive remedy, subject only

to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600 (D). Therefore, summary judgment is not premature.

Plaintiff also argues that based on Drummond v. State of South Carolina, 378 S.C. 362, 662 S.E.2d 587 (2008), the ALC cannot rule on whether or not S.C. Code Ann. § 38-71-46 applies to the State Health Plan. However, Drummond stands for the proposition that the ALC cannot rule on the validity of a statute because the ALC is a part of the executive branch. The ALC is charged with following the law "as written." Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000) ("ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionality is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation." (emphasis added)). Plaintiff argues that the final BIP Health Appeals Committee decision dated August 24, 2010, was a "regulation," the validity of which cannot be challenged by the ALC. However, the August 24, 2010, decision was not a regulation, but merely a decision by the BIP Health Appeals Committee, which was precisely the type of decision the ALC is authorized to hear in its appellate capacity. In the current case, no one was challenging the validity of S.C. Code Ann. § 38-71-46; rather, the challenge was whether S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan. Therefore, the rule set forth in Drummond has no application to the present case.

The undisputed evidence establishes Plaintiff exhausted his administrative remedies under the State Health Plan. Pursuant to § 1-11-710(C) and S.C. Code Ann. § 1-23-600 (D) Plaintiff's exclusive remedy now is to appeal to the ALC. Accordingly, this Court finds Plaintiff's Motion To Stay Defendants' Motion For Summary Judgment is denied, Defendants' Motion for Summary Judgment is granted, and Plaintiff's Complaint should be dismissed with

prejudice as a matter of law.³

B. Defendants' Motion For Protective Order and Plaintiff's Motion To Compel

The Court Further finds Defendants were entitled to a protective order staying Plaintiff's discovery pending a determination of Defendants' Motion for Summary Judgment and denying Plaintiff's Motion to Compel. Pursuant to SCRCP 26 (c), a party may move for a protective order "for good cause shown ... to protect a party or person from annoyance...oppression, or undue burden by expense, including one or more of the following: (1) that discovery not be had; (2) that the discovery may be had only on specified terms and conditions...." The Court may control the timing and sequence of discovery pursuant to SCRCP 26 (d).

An order under Rule 26(c) to stay discovery pending determination of a dispositive motion is an appropriate exercise of a court's discretion. See Thigpen v. United States, 800 F.2d 393, 396-97 (4th Cir. 1986) ("Nor did the court err by granting the government's motion under Fed.R.Civ.P. 26(c) to stay discovery pending disposition of the 12(b) (1) motion.... Trial courts ... are given wide discretion to control this discovery process...."), overruled on other grounds, Sheridan v. United States, 487 U.S. 392, 108 S.Ct. 2449, 101 L. Ed. 2d 352 (1988); Tilley v. United States, 270 F. Supp. 2d 731, 734 (M.D.N.C. 2003), affirmed, 85 Fed. Appx. 333 (4th Cir. 2004), cert denied, 543 U.S. 819, 125 S.Ct. 64, 160 L. Ed. 2d 27 (2004); Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C.1988); Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 201 F.R.D. 1, 3 (D.D.C. 2001).

A stay of discovery until the determination of a dispositive motion is appropriate when (1) the issue raised is strictly one of law, (2) the motion, if successful, would be dispositive of the entire action, (3) the issue is one that cannot be cured by amending the pleadings, and (4) there is

³ Because this Court finds Plaintiff's exclusive remedy is an appeal to the ALC, this Court need not address Defendants' second ground for summary judgment, whether S.C. Code Ann. § 38-71-46 applies to the State Health Plan.

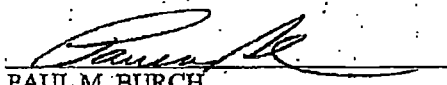
no showing of any prejudice if the Court were to stay discovery. United States v. County of Nassau, 188 F.R.D. 187 (E.D.N.Y. 1999).

In the present case, the issues raised by Defendants' Motion for Summary Judgment are dispositive legal issues. As was previously discussed, the development of the record will not aid in the resolution of the issue of whether the Plaintiff's administrative remedies under S.C. Code Ann. § 1-11-710 (C) are Plaintiff's exclusive remedy, subject only to appellate review to the ALC pursuant to S.C. Code Ann. § 1-23-600 (D). Additionally, the dispositive issues involved cannot be cured by Plaintiff amending his pleadings. Also, staying discovery will not prejudice Plaintiff in that Plaintiff will be saved from wasting time on voluminous, burdensome, and costly discovery only to find out at a later stage in the litigation that his exclusive statutory remedy is an administrative appeal to the ALC. Therefore, the Court finds Defendants' Motion for a Protective Order should be granted and Plaintiff's Motion To Compel should be denied.

IV. CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's Motion To Stay Defendants' Motion For Summary Judgment and Plaintiff's Motion To Compel, and grants Defendants' Motion for a Protective Order and Defendants' Motion for Summary Judgment. Accordingly, Plaintiff's Complaint is dismissed with prejudice.

IT IS SO ORDERED.


PAUL M. BURCH
PRESIDING JUDGE

September 10/12 2010
Charleston, South Carolina

AUG 13 2012

SC ADMIN. LAW COURT

2005. Specifically, Appellant and Dependent were covered under the Medical University of South Carolina ("MUSC") Options from September 1, 2005, to December 31, 2006. Beginning January 1, 2007, Appellant and Dependent were covered by the Standard Plan.

Appellant was diagnosed with Type I diabetes in November 2007. On August 5, 2008, Appellant, Appellant's spouse, Dependent's grandparents, and two daycare nurses attended a diabetes management educational session in relation to Dependent's new insulin pump. The total cost of the session was \$560.00. On August 27, 2008, BlueCross BlueShield of South Carolina ("BCBSSC"), the third-party claims administrator for the State Health Plan, sent Appellant an Explanation of Benefits ("EOB") showing the claim was denied. The explanatory note read, "[y]our benefit plan does not cover education and/or training for this condition," in accordance with the terms of the Plan. On February 25, 2009, Appellant's spouse wrote a letter of appeal to BCBSSC.

On April 20, 2009, BCBSSC sent Appellant an adjusted EOB. This EOB had no changes except for an explanatory note: rather than "your benefit plan does not cover education and/or training for this condition," the new EOB indicated that BCBSSC had requested additional medical information from the provider. BCBSSC subsequently received Dependent's medical records from MUSC. After receipt of the medical records, on March 15, 2010, Ashby Jordan, M.D., a board certified pediatrician and the Medical Director and Vice President of Medical Affairs for BCBSSC, reviewed Dependent's file in its entirety. Dr. Jordan noted the services referenced were specifically excluded by the Plan under Article 9, Paragraph O. Dr. Jordan stated Exclusion BB in Article 9 also applied, as there was no mention of these services in the Article 7, Schedule of Benefits section of the Plan. Finally, Dr. Jordan noted that a South Carolina statute, referenced by Appellant's spouse in her appeal document, did not apply to the Plan.

On March 19, 2010, BCBSSC sent Appellant a letter indicating the Medical Director had denied Appellant's appeal for the reasons stated above. Because the Medical Director did not approve the appeal, the appeal was sent for consideration to the BCBSSC appeals committee. On April 2, 2010, BCBSSC sent Appellant a letter denying Appellant's appeal for additional benefits for the August 5, 2008 educational session. The letter stated the BCBSSC appeals committee concluded that the Plan specifically excluded educational services in Article 9,

Paragraph O, and Article 7 excluded services not specifically covered. BCBSSC also noted that S.C. Code Ann. § 38-71-46 did not apply to the Plan.

On June 30, 2010, Appellant's attorney appealed the denial to the EIP Appeals Committee. On August 24, 2010, EIP wrote Appellant's counsel that the EIP Appeals Committee had denied the request for reimbursement for Dependent's diabetes education. Appellant subsequently appealed this denial to the ALC on September 22, 2010.

ISSUES ON APPEAL

1. Did the EIP err in finding that S.C. Code § 38-71-46 does not apply to the State Health Plan?
2. Did the EIP err in not finding the State Health Plan exclusion for "education programs" void as a matter of law as to diabetes education?
3. Did the EIP err in failing to reform the state health plan to comply with S.C. Code § 38-71-46?
4. Did the EIP err in failing to notify all persons affected by its failure to comply with S.C. Code Ann. § 38-71-46 since said law was first enacted in 2000?
5. Did the EIP err in not disgorging all monies which should have been paid out to participants on claims pursuant to S.C. Code § 38-71-46 for diabetes education?
6. Does the ALC have the authority to certify a class action pursuant to ALC Rule 68 and SCRCF 23?

STANDARD OF REVIEW

Appellate review by this Court of a final EIP decision is governed by the standards set forth in Section 1-23-380 of the South Carolina Code. See S.C. Code Ann. § 1-11-710(C) (2008) (requiring appellate judicial review of decisions of the South Carolina Budget and Control Board to be consistent with the standards provided in Section 1-23-380); S.C. Code Ann. § 1-23-600(E) (Supp. 2011) (directing administrative law judges to conduct appellate review in the same manner as prescribed in Section 1-23-380 for judicial review of a final agency decision). Section 1-23-380 provides that this Court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (Supp. 2011). However, pursuant to Section 1-23-380(5), this Court:

may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting Law v. Richland County School Dist. No. 1, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Hull v. Spartanburg County Assessor, 372 S.C. 420, 424, 341 S.E.2d 909, 911 (Ct. App. 2007) (quoting Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). Accordingly, "[t]he 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Grant v. S.C. Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm., 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

DISCUSSION

Education Services

The 2008 State Health Plan (the "Plan"), established by the South Carolina Budget and Control Board, provides in pertinent part:

Article 9

Exclusions and Limitations

No benefits will be provided under any Article of this Plan for any service, supply or charge for the following:

O: Any medical social services (except for those provided under the Hospice program and Home Health Care Program upon recommendation of the Utilization

Review Agency) or vocational, visual, recreational, educational, or milieu therapy;

BB. Benefits will not be provided for services or supplies not specifically listed in Article 7, Schedule of Benefits, inclusive;

State Health Plan

Doctor Visits

Treatments or consultations for an injury or illness are covered, as long as they are medically necessary and not associated with a service excluded by the plan.

Exclusions

Services Not Covered by the State Health Plan

There are some medical expenses the State Health Plan does not cover. The Plan of Benefits document (available in your benefits office or through EIP) contains a complete list of the exclusions.

In reviewing the Record on Appeal and in consideration of the applicable law, I conclude there is substantial evidence in the record to support EIP's claims determination that individually-billed diabetes management education was not covered under the terms of the Plan. While the Plan undisputedly covered the insulin pump and accessories, Dependent's separately-billed educational instruction was not included. Article 9, Paragraph O of the State Health Plan excludes educational services, outside of certain situations. Diabetes education, as a stand-alone claim, was not included under EIP's Hospice Program and/or Home Health Care Program and therefore was not covered. Additionally, Paragraph BB of the Plan states those services not enumerated in Article 7, Schedule of Benefits, are not covered; diabetes education was not listed in the Schedule of Benefits. Therefore, no benefits are payable for the educational services received by Appellant, Appellant's spouse, Dependent's grandparents, and two nurses on Dependent's behalf in relation to Dependent's insulin pump on August 5, 2008.

Contracts should be interpreted according to the general rules of construction, and the language is to be understood in its plain, ordinary and popular sense. Universal Underwriters v. Metro. Prop. & Life Ins. Co., 298 S.C. 404, 380 S.E.2d 858 (Ct. App. 1989). Based on the unambiguous language of the Plan applied to the evidence provided, EIP's decision denying Appellant's request for additional benefits was not an abuse of discretion and was supported by

substantial evidence; the services were separately-billed educational services, and as such, those services are excluded under the Plan.

S.C. Code Ann. § 38-71-46

Appellant argues that if the Plan excludes coverage for diabetes education, the Plan should be reformed pursuant to S.C. Code Ann. § 38-71-46 to cover diabetes education. In response, EIP argues that S.C. Code Ann. § 38-71-46 has no application to the Plan because it is a self-funded, non-federal governmental plan that is not subject to regulation by the South Carolina Department of Insurance (the "Department").

The cardinal rule of statutory construction is to give effect to the intent of the legislature. S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010); Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). Legislative intent is first and foremost determined by the language of the statute. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (citing Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997)). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." S.C. Coastal Conservation League, 390 S.C. at 425-26, 702 S.E.2d at 250; see, also Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." Id., 390 S.C. at 425, 702 S.E.2d at 250. The literal language of a statute should be disregarded only when the result is so plainly absurd that it clearly could not have been the intent of the legislature. Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910)).

"The legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense." Pee v. AVM, Inc., 344 S.C. 162, 168, 543 S.E.2d 232, 235 (Ct. App. 2001). "Where the legislature chooses not to define a term in the statute, courts should interpret the term in accordance with its usual and customary meaning." Id. at 168, 543 S.E.2d at 235 (citing Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994)). "The true guide to statutory construction is not the phraseology of

an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). "Once the Legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their notions of public policy." State Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 20, 382 S.E.2d 11, 14 (Ct. App. 1989).

A plain reading of Section 38-71-46 does not indicate that it has any application to the Plan. In fact, Section 38-71-46 does not indicate that it applies to the Plan, BIP, the South Carolina Budget and Control Board, or any combination thereof:

(A) On or after January 1, 2000, every health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State must provide coverage for the equipment, supplies, Food and Drug Administration-approved medication indicated for the treatment of diabetes, and outpatient self-management training and education for the treatment of people with diabetes mellitus, if medically necessary, and prescribed by a health care professional who is legally authorized to prescribe such items and who demonstrates adherence to minimum standards of care for diabetes mellitus as adopted and published by the Diabetes Initiative of South Carolina.

...

(D) For purposes of this section: "Health insurance policy" means a health benefit plan, contract, or evidence of coverage providing health insurance coverage as defined in Section 38-71-670(6) and Section 38-71-840(14).

S.C. Code Ann. § 38-71-46 (emphasis added).

In order for a "health insurance policy" to be subject to the requirements of Section 38-71-46, it must provide "health insurance coverage." S.C. Code Ann. § 38-71-840(14), which involves group health insurance,² defines health insurance coverage as follows:

(14) "Health insurance coverage" means benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer, except:

- (a) coverage only for accident, or disability income insurance, or any combination of accident and disability income insurance;
- (b) coverage issued as a supplement to liability insurance;
- (c) liability insurance, including general liability insurance and automobile liability insurance;

² Section 38-71-670(6) involves individual policies rather than group coverage and is not applicable to this case.

- (d) workers' compensation or similar insurance;
 - (e) automobile medical payment insurance;
 - (f) credit-only insurance;
 - (g) coverage for on-site medical clinics;
 - (h) other similar insurance coverage, specified in regulations, under which benefits for medical care are secondary or incidental to other insurance benefits;
 - (i) if offered separately:
 - (i) limited scope dental or vision benefits;
 - (ii) benefits for long-term care, nursing home care, home health care, community-based care, or any combination of these;
 - (iii) other similar, limited benefits as are specified in regulations;
 - (j) if offered as independent, noncoordinated benefits:
 - (i) coverage only for a specified disease or illness;
 - (ii) hospital indemnity or other fixed indemnity insurance;
 - (k) if offered as a separate insurance policy:
 - (i) Medicare supplemental health insurance as defined under Section 1882(g)(1) of the Social Security Act;
 - (ii) coverage supplemental to the coverage provided under Chapter 55, Title 10 of the United States Code; and
 - (iii) similar supplemental coverage under a group health plan.
- Id. (emphasis added).

Thus, to qualify as "health insurance coverage" as defined in the statute and to come under the rubric of Section 38-71-46, benefits under a policy or other contract must be provided by a "health insurance issuer." S.C. Code Ann. § 38-71-840(16) defines a "health insurance issuer" as:

(16) "Health insurance issuer" or "issuer" means any entity that provides health insurance coverage in this State. For purposes of this section, "issuer" includes an insurance company, a health maintenance organization, and any other entity providing health insurance coverage which is licensed to engage in the business of insurance in this State and which is subject to state insurance regulation.

Id. (emphasis added).

Because the Plan is not "health insurance coverage" pursuant to S.C. Code Ann. § 38-71-840(14), and because EIP is not licensed to engage in the business of insurance in this State and not a "health insurance issuer" subject to insurance regulation pursuant to S.C. Code Ann. § 38-71-840(16), S.C. Code Ann. § 38-71-46 has no application to the Plan. Moreover, there is an important distinction between a self-funded health plan and a fully-insured health plan, which is not limited to cases governed by the Employee Retirement Income Security Act (ERISA). In the ordinary meaning of the term, "self-insured" plans are those in which a business or other entity

maintains its own fund to cover any loss. The employer, in this case the State, has assumed the risk obligation, and "there is no contract with an insurance company." Black's Law Dictionary 664 (8th ed. abr. 2005).

Additionally, the United States Supreme Court has recognized that self-funded plans generally are not subject to state insurance regulation. See FMC Corporation v. Holliday, 498 U.S. 52 (1990). There is no dispute in this case that the State Health Plan is a self-funded, non-federal, governmental health plan for employees of state agencies, public school districts, and other public entities, administered by EIP, and is not a fully-insured plan. EIP is not licensed to engage in the business of insurance in this State and is not subject to insurance regulation by the SCDOI. Because S.C. Code Ann. § 38-71-46 is a state insurance statute, it has no application to a self-funded health plan.

Appellant next argues that the doctrine of "the enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." However, as concluded above, this doctrine has no applicability to the instant case because Section 38-71-46 is not ambiguous. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000) ("If a statute's language is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'"). Section 38-71-46 only applies to "health insurance coverage" issued by an "insurance issuer" licensed and regulated by the Department. The Plan is not "health insurance coverage," and EIP is not an "insurance issuer." The Plan does not meet the preliminary requirements under Section 38-71-840(16), and therefore, any analysis of the exclusions under Section 38-71-840(16) is irrelevant.

Even if Section 38-71-46 could be construed to be ambiguous, pronouncements by the South Carolina General Assembly indicate that this statute does not apply to the Plan. In a recently amended statute, the Legislature acknowledged the lack of jurisdiction of the Department over EIP:

The State Employee Insurance Program shall continue to provide mental health parity in the same manner and with the same management practices as included in the plan beginning in 2002, and is not under the jurisdiction of the Department of Insurance. The continuation by the State Employee Insurance Program of providing mental health parity in accordance with the plan set forth in 2002 constitutes compliance with this act.

2005 Act No. 76, § 3, codified as S.C. Code Ann. § 1-11-780 (Supp. 2010) (emphasis added). The remainder of the Act created Section 38-71-290, separately and distinctly from the portion of legislation addressing EIP. See 2005 Act No. 76, § 1. The Legislature was aware that it needed to name EIP outside of a general insurance statute in Title 38, Chapter 71, if it intended EIP to comply with the contents of that statute.

Further, the Legislature passed a series of health insurance coverage mandates in Title 38, Chapter 71, Article 1. With the exception of Section 38-71-280, regarding autism spectrum disorder, none of these laws or their preceding bills mentioned EIP, the Plan, or the Budget and Control Board. In 2007, the Legislature passed Section 38-7-280, mandating coverage for autism spectrum disorder care. In this statute, the Legislature specifically stated that it applied to EIP: "It includes the State Health Plan . . . 'State Health Plan' means the employee and retiree insurance program provided for in Article 5, Chapter 11, Title 1." S.C. Code Ann. § 38-71-280(A)(4)-(5). The statute made specific reference to EIP's governing Code sections, again underscoring the General Assembly's understanding that EIP is governed differently. Accordingly, the Legislature deliberately referenced the Plan and EIP's enabling statutes to make the Legislature's intent clear that Section 38-71-280 applied to EIP.

Amidst this series of legislation, the bill that would become Section 38-71-46 and mandate the provision of diabetes mellitus coverage by health insurers was introduced and passed in 1999, one session and one year before Section 1-11-760 (repealed 2005) would explicitly require EIP to provide mental health coverage. The original diabetes health insurance coverage legislation had no references to EIP in its text. See 1999 S.C. Act No. 98, codified at S.C. Code Ann. § 38-71-46. Notably, Section 38-71-46 was subsequently amended in the same session in which Section 1-11-760 (repealed 2005) became law. See 2000 S.C. Act No. 348 (amending coverage mandates for diabetes mellitus); 2000 S.C. Act No. 341 (mandating EIP provide mental health coverage). The Legislature was aware at the time Section 38-71-46 was amended in 2000 that for the statute to apply to EIP, EIP needed to be identified in the statute. However, the Legislature chose not to do so, and Section 38-71-46 makes no mention of its application to the Plan, unlike the contemporaneously and subsequently passed legislation. By Appellant's own admission, "the court should take judicial notice that the members of the South Carolina General Assembly have the option of participating in the State Health Plan themselves, and therefore knowledge of its existence cannot be minimized."

The Legislature made it very clear when mandates otherwise restricted to health insurers were to apply to the Plan. When EIP was to be included, the Legislature either: (1) amended EIP's governing statutes in Title 1, Chapter 11, Article 5; (2) made a direct reference to those statutes in its legislation; or (3) at a minimum, identified EIP by name in its legislation. The Legislature was aware EIP was not governed by the Department and specifically stated this fact in 2005 legislation. The Legislature also acknowledged that EIP was not governed by the mandates in Title 38, Chapter 71, Article 1, unless a specific intent to do so was stated in the statute. Finally, Section 38-71-46 itself was passed contemporaneously with other legislation specifically indicating application to EIP; yet Section 38-71-46 remained silent regarding EIP and the Plan. If the Legislature had intended Section 38-71-46 to apply to EIP, it would have indicated that in the statute itself or associated legislation.

Appellant also argues finding Section 38-71-46 does not apply to the Plan means the Plan is devoid of regulation. I disagree. First, the State Health Plan was created by the Legislature, and the Legislature acknowledges the existence of the Plan on a regular basis. For example, the Plan is included annually in the state budget provisos, which would not take place with a regular insurance plan. Second, the Plan is specifically regulated by S.C. Code Title 1, Chapter 11, Article 5, and those parts of Title 38, Chapter 71 that specifically refer to the Plan. Third, in addition to state regulation, federal laws and regulations, although not ERISA, also govern the Plan through the U.S. Department of Health and Human Services.³ Accordingly, Appellant's argument that the Plan is without regulation is incorrect.

Class Action

Appellant next argues that the ALC has the authority to permit this matter to proceed as a class action and allow class action relief. In light of the Court's disposition of this case, it is not necessary to address this issue. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999); Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1003) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

³ As a self-funded, nonfederal governmental plan, the State Health Plan is subject to the Public Health Service Act, 42 U.S.C. § 201 *et seq.*, which includes such well-known federal laws as HIPAA and COBRA, and was amended significantly by the recent health care reform act. See e.g., Centers for Medicare & Medicaid Servs., Regulations & Guidance, Self-funded Nonfederal Governmental Plans, <https://www.cms.gov/SelfFundedNonFedGovPlan/>.

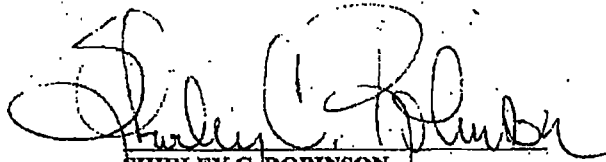
Accordingly, the Court concludes that there is substantial evidence in the record to support EIP's decision. Further, there is nothing in the Record on Appeal to suggest that EIP abused its discretion in this matter.

ORDER

For the reasons set forth above,

IT IS HEREBY ORDERED that the final decision of EIP, concluding that no benefits are payable for the \$560.00 claim filed for diabetes educational training on August 5, 2008, for Dependent's family and caregivers in conjunction with her covered insulin pump, is **AFFIRMED.**

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

August 13th, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy thereof, in the United States mail, postage paid, or in the emergency Mail Service addressed to the party(ies) or their attorney(s).
This 13 day of August 2012
By: Leah J. Henderson
Deputy Clerk

The Supreme Court of South Carolina

Jeffrey D. Allen, individually, as guardian for Jane Doe,
a minor, and as representative of other similarly situated
State of South Carolina employees, Petitioner,

vs.

South Carolina Budget and Control Board Employee
Insurance Program and Blue Cross and Blue Shield of
South Carolina, Respondents

Appellate Case No. 2012-219206

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *Allen v. S.C. Budget and Control Bd. Emp. Ins. Program*, Op. No. 2012-UP-433 (S.C. Ct. App. filed July 18, 2012). The petition is denied.


C.J.
FOR THE COURT

Columbia, South Carolina

March 4, 2015.

cc:

The Honorable Jenny Abbott Kitchings

The Honorable Julie J. Armstrong

John A. Massafon, Esquire

Theodore DuBose Willard, Jr., Esquire

Kelly Hunter Rainsford, Esquire

FILED

JUN 17 2015

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Jeffrey D. Allen, on behalf of Eva Allen,

Appellant,

v.

South Carolina Budget and Control Board,
Employee Insurance Program,

Respondent.

Docket No. 10-ALJ-30-0710-AP

**ORDER DENYING MOTION FOR
ATTORNEY'S FEES**

Appellant Jeffrey D. Allen originally appealed this matter to the Administrative Law Court ("the ALC" or "the Court") pursuant to section 1-11-710(C) of the South Carolina Code (2008) and section 1-23-600(D) and (E) of the South Carolina Code (2008). In this matter, Appellant, on behalf of Eva Allen, sought review of Respondent South Carolina Public Employee Benefit Authority, Employee Insurance Program's¹ ("Respondent's") decision denying coverage for diabetes education pursuant to the "diabetes mandate statute"² through the Group Health Benefits Plan of the Employees of the State of South Carolina, the Public School Districts, and Participating Entities ("the State Health Plan"). This Court affirmed Respondent's decision that the diabetes mandate statute did not apply to the State Health Plan. However, on March 4, 2015, the South Carolina Supreme Court reversed this Court to hold the South Carolina diabetes mandate statute applies to the State Health Plan and, therefore, diabetes education was covered under the State Health Plan.

Appellant now moves this Court to grant Appellant attorney's fees pursuant to section 15-77-300 of the South Carolina Code (Supp. 2009).³ Section 15-77-300 provides the request for attorney's fees must be filed within thirty days of the final disposition of the case. When there is an appeal, final disposition of the case occurs when the remittitur is filed. See Brackenbrook North Charleston, LP v. County of Charleston, 366 S.C. 503, 507, 623 S.E.2d 91, 93 (2005). In this case,

¹ Effective July 1, 2012, the Employee Insurance Program (EIP), a division of the South Carolina Budget and Control Board ("Board"), was transferred from the Board to a newly created agency, the South Carolina Public Employee Benefit Authority pursuant to Act 278 of 2012.

² S.C. Code Ann. § 38-71-46 (Supp. 2009).

³ Effective February 24, 2010, section 15-77-300 was amended. This administrative appeal was initially filed September 30, 2009. Accordingly, this Court will rely on the version of section 15-77-300 applicable in 2009.

the remittitur was issued on March 20, 2015, and Appellant filed its request for attorney's fees on April 17, 2015. Accordingly, Appellant's request is timely.

Attorney's Fees Under the State Action Statute

Section 15-77-300 provides, in relevant part:

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.

There is no question that Appellant satisfies the requirements of being a party in a contested state action and prevailing in that action. The question presented in this motion is whether Respondent acted without substantial justification in pressing its claim and whether there are any special circumstances that would make the award of attorney's fees unjust. See § 15-77-300(1) & (2).

Appellant contends Respondent's claim was without substantial justification and there are no special circumstances that would make an award of attorney's fees unjust. In support of its argument that Respondent was not substantially justified, Appellant cites to several cases, including McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991) and Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325 (2008).

In McDowell, the appellant brought an action against the South Carolina Department of Social Services ("DSS"), arguing DSS erred in finding her ineligible for food stamps. 304 S.C. at 541, 405 S.E.2d at 832. In its decision, DSS had decided a car jointly titled in the appellant's name and her son's name was an asset of the appellant's for the purpose of establishing whether she met the financial requirements for food stamps. Id. The circuit court affirmed DSS's decision; however, the South Carolina Court of Appeals reversed, finding the appellant held the car as trustee of a resulting trust in favor of her son and the car was not her asset. Id. Appellant then requested attorney's fees under § 15-77-300 and the case came before the South Carolina Supreme Court. In determining whether DSS was substantially justified in pressing its claim, the supreme court cited to Heath v. County of Aiken, 302 S.C. 78, 394 S.E.2d 709 (1990), which held substantial justification means "justified to a degree that could satisfy a reasonable person." Id. at 542, 405 S.E.2d at 832. Or, stated differently, "[a]n agency action supported by substantial justification is

one which has a reasonable basis in law and fact." Id. Accordingly, in analyzing a request for attorney's fees under the state action statute, a court looks to "the agency's position in litigating this case to determine whether it is one which has a reasonable basis in law and fact." Id.

Applying this standard to the facts in McDowell, the Supreme Court found:

DSS ruled [] that for a resulting trust to arise, the property could not be jointly titled. This conclusion is incorrect under established South Carolina precedent. When property is titled jointly, a resulting trust does not arise *unless there is evidence to the contrary*, as in this case. [] DSS therefore relied on an erroneous legal conclusion in defending its decision in proceedings before the circuit court and Court of Appeals. DSS's litigation position was not substantially justified because it had no reasonable basis in law and fact.

Id. at 542-43, 405 S.E.2d at 833. Essentially, the Supreme Court held that the applicable law was clear and unambiguous and, therefore, DSS had no reasonable basis in law and fact to press its claim against the appellant.

In Layman, the Supreme Court further clarified what "substantial justification" means under section 15-77-300. It clarified that "[a]lthough an agency's loss on the merits does not create a presumption that its position was not substantially justified, Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct.App.2004), the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim." Layman, 376 S.C. at 445, 658 S.E.2d at 326. In Layman, the South Carolina Retirement System upheld the application of a statute that breached a contract with certain "TERI" participants in the retirement system. Applying the substantial justification framework, the Supreme Court determined:

[T]he State's and the Retirement System's breach of an unambiguous contract with the TERI participants is analogous to the County's violation of an unambiguous statute in Heath. In other words, we find that the State and the Retirement System had no reasonable basis in law or in fact on which to defend the breach of an unambiguous contract with certain TERI participants. Accordingly, we hold that the State and the Retirement System were not substantially justified in pressing their claim, and therefore, the circuit judge correctly concluded that counsel for TERI plaintiffs were entitled to attorneys' fees under the state action statute.

Id. at 449, 658 S.E.2d at 328. Like in McDowell, the Supreme Court found the law and fact were clear and unambiguous; therefore, the agency was not substantially justified in pressing its claim.

Additionally, the supreme court distinguished its determination in Layman from the South Carolina Court of Appeals' decision in Video Gaming Consultants, Inc. v. South Carolina Department of Revenue, 358 S.C. 647, 595 S.E.2d 890 (Ct.App.2004), in which the court of

appeals found the Department of Revenue was substantially justified in pressing its claim under a statute that was later declared unconstitutional. Layman, 376 S.C. at 447, 658 S.E.2d at 327. Specifically, the Supreme Court cited the court of appeals' reasoning that "[a]s an administrative agency, the Department 'must follow the law as written until its constitutionality is judicially determined.'" Id. (citing Video Gaming Consultants, Inc., 358 S.C. at 652, 595 S.E.2d at 892). Therefore, if an agency presses a claim under a law that is constitutional at the time, it is substantially justified in pressing its claim even if the statute is later determined to be unconstitutional. See id.

Analysis

Here, the issue was whether the State Health Plan was subject to the diabetes mandate of 38-71-46 of the South Carolina Code, which requires "every health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State" to provide coverage for "outpatient self-management training and education for the treatment of people with diabetes mellitus" S.C. Code Ann § 38-71-46(A). The parties disagreed as to whether the State Health Plan qualified as group policy "health insurance coverage" under section 38-71-840(14) of the South Carolina Code, which defined "health insurance coverage" as:

benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer

S.C. Code Ann. § 38-71-840(14). On the merits, Respondent argued the phrase "health insurance issuer" modified the entire statutory section. Respondent further argued that the State Health Plan clearly was not a "health insurance issuer" as defined in section 38-71-840(16) and, therefore, the State Health Plan was not subject to the diabetes mandate. Respondent also cited to its own guidance documents showing diabetes education was excluded from coverage and it cited to several statutory instances where the Legislature specifically made it clear mandates otherwise restricted to health insurers were to apply to the State Health Plan. In contrast, Appellant argued "health insurance issuer" only modified "health maintenance organization," and, without the restriction as argued by Respondent, the State Health Plan clearly fell within the definition of "health insurance coverage" and the diabetes mandate statute.

This Court agreed with the Respondent, finding "health insurance issuer" modified section 38-71-840(16) in its entirety and determining the State Health Plan did not qualify as a "health

insurance issuer." However, on appeal, the South Carolina Supreme Court agreed with Appellant. The Supreme Court held:

We do not read "health care issuer" as modifying all preceding clauses in subsection (14). Benefits need not be provided by a "health care issuer" to qualify as "health insurance coverage" under section 38-71-840(14). Therefore, based on the plain language of section 38-71-840(14), the ALC erred in finding that the State Health Plan does not provide "health insurance coverage."

Rather, the Supreme Court found section 38-71-840(14) provided "health insurance coverage" is defined as "benefits consisting of medical care provided: (1) directly through insurance; (2) directly through reimbursement; or (3) provided otherwise" and the words "and including" expounded on the primary definition. Allen v. S. Carolina Pub. Employee Ben. Auth., 411 S.C. 611, 617, 769 S.E.2d 666, 670 (2015). Accordingly, the Supreme Court concluded "the plain language of the statute does not require health insurance coverage to be offered by a "health insurance issuer" and "[t]o conclude otherwise results in a tortured and illogical reading of the statute." Id. The Supreme Court also found that even assuming section 38-71-840(14) was ambiguous, the legislative history was not supportive of finding the mandate did not apply. Id. at 617-19, 769 S.E.2d at 670-71.

Applying the law to the facts, I first note this is not a situation in which the agency was enforcing a law that was later determined to be unconstitutional. See Video Gaming Consultants, Inc., 358 S.C. at 652, 595 S.E.2d at 892. Rather, the issue is whether Respondent was justified in pressing its claim "to a degree that could satisfy a reasonable person" and the agency's argument has a "basis in law and fact." McDowell, 304 S.C. at 542, 405 S.E.2d at 832. Moreover, in McDowell, Layman, and Heath, the critical determination can be summarized as whether the law relied on by the agency was clear and unambiguously against the agency's position. Further, the outcome of the case must also be considered. Layman, 376 S.C. at 445, 658 S.E.2d at 326.

I find this case to be distinguishable from McDowell, Layman, and Heath because I do not find section 38-71-840(14) and the related statutes analyzed in the case to be clear and unambiguous. Here, I find section 38-71-840(14) was ambiguous to an extent that justified Respondent in pressing the claim, particularly in light of its 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. While the supreme court ultimately found its interpretation of section 38-71-840(14) to be controlling, I find it was reasonable for Respondent to take these additional factors

into consideration when dealing with an ambiguous statute, and it was not unreasonable to come to the conclusion that the mandate did not apply to the State Health Plan. See McDowell, 304 S.C. at 542, 405 S.E.2d at 832. Moreover, this was a case of first impression, which the Fourth Circuit Court of Appeals has generally held to be justified. See Cody v. Caterisano, 631 F.3d 136, 142 (4th Cir. 2011) (noting "litigating cases of first impression is generally justifiable"). Accordingly, I find Respondent's position had a basis in law and fact and it was substantially justified in pressing its claim. See id.; S.C. Code Ann. § 15-77-300. Because I find Respondent's position was substantially justified, it is not necessary to address whether "there are no special circumstances that would make the award of attorney's fees unjust." S.C. Code Ann. § 15-77-300.

IT IS THEREFORE ORDERED that Appellant's Motion for Attorney's Fees is **DENIED**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

June 17, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the emergency Mail Service addressed to the party(ies) or their attorney(s).
This 17 day of June, 2015
By: Leah Anderson
JUDICIAL LAW CLERK

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

v.

South Carolina Public Employee Benefit Authority,
Employee Insurance Program, Respondents.

Appellate Case No. 2012-212988

Appeal from the Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 27504
Heard December 5, 2013 – Filed March 4, 2015

REVERSED

Terry E. Richardson, Jr., of Richardson, Patrick,
Westbrook & Brickman, LLC, of Barnwell, and John A.
Massalon, of Wills Massalon & Allen, LLC, of
Charleston, for Appellant.

Theodore D. Willard, Jr., of Montgomery Willard, LLC,
and Stephen Van Camp, both of Columbia, for
Respondent.

CHIEF JUSTICE TOAL: Jeffrey D. Allen (Appellant), on behalf of his daughter, appeals the Administrative Law Court's (ALC) order affirming the Appeals Committee of the South Carolina Budget and Control Board Employee Insurance Program's (EIP Appeals Committee) decision to deny Appellant's

insurance claim for his daughter's diabetes educational training session. We reverse.

FACTS/PROCEDURAL BACKGROUND

Appellant, a South Carolina public school district employee, is insured under the Group Health Benefits Plan of the Employees of the State of South Carolina, the public school districts, and participating entities (the State Health Plan).¹ The State Health Plan is offered through EIP.²

In November 2007, Appellant's daughter was diagnosed with Type 1 diabetes at the age of two years old.³ Appellant's daughter's doctor prescribed her an insulin pump to regulate her insulin levels. In August 2008—two weeks prior to attaching the pump to Appellant's daughter's body—her family and two school nurses attended a two-hour training session at the Medical University of South Carolina, during which a diabetic educator taught the caregivers how to operate the insulin pump.

Appellant submitted a \$560 claim for the educational training session.⁴ Blue

¹ The State Health Plan was created by the South Carolina Budget and Control Board (SCBCB) pursuant to section 1-11-710 of the South Carolina Code, which requires the board to "make available to active and retired employees of this State and its public school districts and their eligible dependents group health, dental, life, accidental death and dismemberment, and disability insurance plans and benefits in an equitable manner and of maximum benefit to those covered within the available resources." S.C. Code Ann. § 1-11-710(A)(1) (Supp. 2013).

² SCBCB created EIP to administer the State Health Plan. Recently, a newly created agency, the South Carolina Public Employee Benefit Authority (PEBA), assumed administration of EIP pursuant to Act No. 278, 2012 S.C. Acts 2278, 2319.

³ Appellant's daughter is insured as a dependent under Appellant's State Health Plan policy.

⁴ Appellant also submitted a claim for his daughter's insulin pump, which was covered by his policy.

Cross Blue Shield of South Carolina (Blue Cross) denied the claim on the grounds that the "benefit plan does not cover education and/or training for this condition."⁵ Appellant appealed the denial through Blue Cross's appeals process. Ultimately, Blue Cross's Appeals Review Committee upheld the denial of benefits on the basis that diabetes educational training is excluded under the State Health Plan, and that section 38-71-46 of the South Carolina Code,⁶ which mandates coverage for diabetes educational training in certain health insurance policies, does not apply to the State Health Plan.

Appellant appealed to the EIP Appeals Committee. The EIP Appeals Committee denied Appellant's claim, concluding that Appellant's State Health Plan policy expressly excluded diabetes educational training and that section 38-71-46 did not apply to the State Health Plan.

Appellant appealed to the ALC. In the ALC, Appellant argued that diabetes educational training is covered under the State Health Plan,⁷ and in the alternative, the State Health Plan should be reformed to comply with section 38-71-46. Additionally, Appellant requested that the ALC allow the matter to proceed as a class action lawsuit. On August 13, 2012, the ALC issued an order affirming the EIP Appeals Committee's decision that the terms of the State Health Plan do not cover diabetes educational training because the State Health Plan does not qualify as "health insurance coverage" as defined by the South Carolina Code.⁸ In light of the ALC's disposition of the case, the ALC declined to address whether it had the authority to permit the case to proceed as a class action.

Appellant appealed the ALC's order to the court of appeals. This Court certified the appeal pursuant to Rule 204(b), SCACR.

⁵ Blue Cross is the third-party claims administrator for the State Health Plan. As such, Blue Cross processes and pays claims under the State Health Plan and thus, provides the first level of review for coverage requests.

⁶ S.C. Code Ann. § 38-71-46 (2002).

⁷ Appellant has now abandoned this argument.

⁸ For a health insurance policy to be subject to section 38-71-46, it must provide "health insurance coverage" as defined by section 38-71-840(14) of the South Carolina Code. S.C. Code Ann. §§ 38-71-46, -840(14) (2002).

ISSUES

- I. Whether the ALC erred in concluding that section 38-71-46 does not apply to the State Health Plan?
- II. Whether the ALC erred in failing to address the availability of class action relief?

STANDARD OF REVIEW

A party who has exhausted all administrative remedies available within an agency and who is aggrieved by an ALC's final decision is entitled to judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2012). In an appeal from a decision by the ALC, the Administrative Procedures Act (APA) provides the appropriate standard of review. *See* S.C. Code Ann. § 1-23-610(B) (Supp. 2012). Under the APA, this Court will reverse an ALC's decision if it is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. A question of statutory interpretation is one of law for this Court to decide. *CFRE, L.L.C. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011))).

LAW/ANALYSIS

I. Applicability of Section 38-71-46 to the State Health Plan

Appellant argues that the ALC erred in concluding that section 38-71-46 of the South Carolina Code does not apply to the State Health Plan. We agree.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Bohlen v. Allen*, 228 S.C. 135, 141, 89 S.E.2d 99, 102 (1955)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). When interpreting a statute, the Court must read the language in a sense which harmonizes with its subject matter and accords with its general purpose. *Eagle Container Co., L.L.C. v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008) (quoting *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

Section 38-71-46 of the South Carolina Code mandates coverage for diabetes education in "every health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State" S.C. Code Ann. § 38-71-46(A) (emphasis added). For purposes of the mandate, group policy "health insurance coverage" is defined as:

benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise *and including* items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer

S.C. Code Ann. § 38-71-840(14) (2002) (emphasis added).⁹

We do not read "health care issuer" as modifying all preceding clauses in

⁹ The statute further provides a list of exceptions. S.C. Code Ann. § 38-71-840(14). None of the exceptions are applicable here.

subsection (14). Benefits need not be provided by a "health care issuer" to qualify as "health insurance coverage" under section 38-71-840(14). Therefore, based on the plain language of section 38-71-840(14), the ALC erred in finding that the State Health Plan does not provide "health insurance coverage."

Instead, the words "and including" in section 38-71-840(14) indicate that the General Assembly intended the statute's definition to be read in two parts, notwithstanding the list of exclusions. The first part of the definition provides that health insurance coverage is defined as benefits consisting of medical care provided: (1) directly through insurance; (2) directly through reimbursement; or (3) provided otherwise. S.C. Code Ann. § 38-71-840(14). After "and included," the definition is expanded to include "items and services paid for as medical care under:" (1) any hospital or medical service policy or certificate; (2) any hospital or medical service plan contract; or (3) any health maintenance contract offered by a health insurance issuer. *Id.* Therefore, the plain language of the statute does not require health insurance coverage to be offered by a "health insurance issuer." To conclude otherwise results in a tortured and illogical reading of the statute. *See Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.").

Section 38-71-46 is entitled "Diabetes Mellitus coverage in health insurance policies; diabetes education." We find that the General Assembly's choice of title and use of the word "every" in section 38-71-46(A) indicates that, indeed, it intended to mandate coverage for "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). Nowhere in the plain language of section 38-71-46 does the General Assembly exclude—explicitly or implicitly—the State Health Plan from the mandate provided for by this statute.¹⁰

Moreover, we must read the language of section 38-71-46 in accordance with the statute's general purpose. *See Eagle Container Co.*, 379 S.C. at 570, 666

¹⁰ Although section 38-71-46 indicates that the General Assembly intended for the diabetes mandate to apply to the State Health Plan, we do not conclude that the canon of construction "*expression unius est exclusio alterius*" applies here, or that the State Health Plan is governed by every general insurance statute where the General Assembly failed to expressly exclude the State Health Plan.

S.E.2d at 896. South Carolina is cursed by diabetes. According to the South Carolina Department of Health and Environmental Control's most recently published statistics, South Carolina ranks seventh highest in the nation for the percentage of its adult population with diabetes. S.C. Dep't of Health & Envtl. Control, *Fact Sheet: Diabetes in South Carolina*, SCDHEC.gov, 1 (Nov. 1, 2013), available at <http://www.scdhec.gov/administration/library/ML-025328.pdf>. Diabetes particularly plagues our state's African-American population, as one in seven African-Americans in South Carolina suffers from diabetes. *Id.* Uncontrolled diabetes can lead to serious complications, and is the seventh leading cause of death in South Carolina. *Id.* However, when diabetes is properly managed, people suffering from the disease often live long, healthy lives. *Id.* at 2. With these statistics in mind, we find that the General Assembly sought to alleviate and prevent diabetes' 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 enacting section 38-71-46, we find it inconceivable that the General Assembly intended to exclude South Carolinians insured by the State Health Plan from receiving the benefits of section 38-71-46's mandate. This result is especially unlikely in a case such as this one, where if the policy is interpreted as Respondents argue, it would cover an insulin pump, but not the education on how to use it. Therefore, we believe our reading comports with the general purpose and the plain language of section 38-71-46.

Assuming *arguendo* that section 38-71-840(14) is ambiguous, and that it is necessary to look beyond the plain language of that section, we still do not find that the General Assembly intended to exclude the State Health Plan from section 38-71-46's mandate. According to the ALC, the General Assembly developed a "method" for identifying whether a general insurance statute governs the State Health Plan by choosing whether or not to expressly reference the State Health Plan in each general insurance statute. However, the sections that include an express reference to the State Health Plan were enacted years *after* section 38-71-46, which was enacted in 1999. See S.C. Code Ann. §§ 38-71-243, -280, -785 (Supp. 2013).¹¹ Because these provisions should be viewed in light of when they

¹¹ Section 38-71-280 was enacted in 2007: Act No. 65, 2007 S.C. Acts 284, 284. Sections 38-71-243 and 38-71-785 were both enacted in 2010. Act. No. 143, 2010 S.C. Acts 1162, 1162-63; Act No. 217, 2010 S.C. Acts 1545, 1549-50.

were enacted, they do not support the ALC's conclusion that the General Assembly did not intend for section 38-71-46's mandate to apply to the State Health Plan.

Likewise, the distinction between Title 1 and Title 38 of the South Carolina Code cannot be relied upon as evidence that the General Assembly intended to exclude the State Health Plan from section 38-71-46's mandate. Title 1, Chapter 11, of the South Carolina Code defines the State Health Plan and sets forth procedures for its administration. *See* S.C. Code Ann. §§ 1-11-10 to -780 (2002 & Supp. 2013). We find that the General Assembly's decision to place the definitions and procedures in Title 1, instead of in Title 38, does not indicate its intent to exclude the State Health Plan from any insurance mandate included in Title 38 where it is not otherwise mentioned. Therefore, the General Assembly's decision to *define* the State Health Plan in Title 1 provides no indication of legislative intent here.

Finally, we find that the ALC erred in distinguishing self-insured plans for purposes of state insurance mandates and in finding that section 38-71-46 has no application to the State Health Plan because it is self-funded. In support of this proposition, the ALC cites *FMC Corp. v. Holliday*, 498 U.S. 52 (1990). However, in *Holliday*, the United States Supreme Court's inquiry was limited to health plans under the Employee Retirement Income Security Act of 1974 (ERISA), as the Court determined whether ERISA preempted the application of a Pennsylvania statute to a self-funded health care plan. *Id.* at 54. *Holliday* has no application to this case. We do not distinguish self-insurers for purposes of insurance mandates, and as discussed, *supra*, section 38-71-46's mandate applies to the State Health Plan.

Therefore, we hold, as a matter of law, that section 38-71-46 applies to the State Health Plan.

II. Failure to Address Class Action Relief

The ALC's disposition of this case permitted it to decline to address the issue of whether class action relief is available in this case. *See Futch v. McAllister Towing of Georgetown, Inc.* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that a court need not address remaining issues when resolution of a prior issue is dispositive). Based on our holding that section 38-71-46 applies to the State Health Plan, the availability of class action relief in this case is an issue that must be addressed, and a remand to the ALC to consider the class action issue would normally be appropriate. However, because this issue can be resolved as a

matter of law, we choose to address this issue.

Appellant argues that he is entitled to pursue this case as a class action before the ALC based on Rule 23 of the South Carolina Rules of Civil Procedure (SCRCP). He asserts that the SCRCP is applicable pursuant to Rule 68 of the South Carolina Rules of Procedure for the Administrative Law Court (SCRPALC). We disagree.

While this case was pending before the ALC, Rule 68, SCPALC, and the notes to that rule, stated:

Applicability of South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules. The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules.

2009 Revised Notes

The South Carolina Appellate Court Rules may, in the discretion of the presiding administrative law judge, be applied in appellate proceedings before the Court to resolve questions which are not addressed by the Court's appellate rules.

Based on the language of the rule and the accompanying notes, we find that the intent of the ALC in promulgating Rule 68 was to allow the SCRCP to be used to fill in the gaps in the SCPALC in a contested case before the ALC, and to allow the South Carolina Appellate Court Rules to be used to fill in the gaps in the SCPALC in an appeal before the ALC.

The present case was an appeal before the ALC. Therefore, the SCRCP, including Rule 23 relating to class actions, is simply inapplicable. Neither the SCPALC nor the South Carolina Appellate Court Rules provide for a class action to be commenced during an appeal. Therefore, Appellant's request for a class action proceeding before the ALC fails as a matter of law.

Further, since the filing of the appeal with this Court, the ALC has amended Rule 68, SCPALC, and its notes to read:

Applicability of South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules. The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules.

2014 Revised Notes

In contested cases only, the South Carolina Rules of Civil Procedure may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these Rules. Furthermore, the South Carolina Appellate Court Rules may be applied in like manner in appellate proceedings only.

The revised rule contains even a more direct statement that the SCRCF is inapplicable to appeals before the ALC. Since this amendment relates to procedure, it is fully applicable to any further proceedings before the ALC, including any remand by this Court. *Fairchild v. S.C. Dept. of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (same rules of construction are used to interpret rules as are used to interpret statutes); *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) ("When a statute is procedural, it ordinarily will be accorded a retroactive application in the sense that it will be applied to pending actions and proceedings.").¹²

¹² Appellant also argues that the EIP Appeals Committee erred in failing to consider his request for class certification. We find that this issue is not preserved for appellate review.

In the document seeking review from the EIP Appeals Committee, Appellant attached and incorporated the allegations of the complaint and other documents filed in a circuit court civil action that he had brought. While these documents were sufficient to put the EIP Appeals Committee on notice that Appellant was seeking class certification in the circuit court action, nothing in these documents was sufficient to place the EIP Appeals Committee on notice that Appellant was seeking to pursue a class action in the proceeding before the Committee. Therefore, any issue regarding the denial of a class action before the EIP Appeals

CONCLUSION

For the foregoing reasons, we reverse the ALC's decision that section 38-71-46 of the South Carolina Code does not apply to this matter. The EIP shall promptly determine and pay the benefits that are due for Appellant's daughter under the State Health Plan.

REVERSED.

**BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J.,
dissenting in a separate opinion.**

Committee is not preserved for appellate review. *Carson v. S.C. Dept. of Natural Res.*, 371 S.C. 114, 638 S.E.2d 45 (2002) (issue not raised to agency is not preserved for appellate review); *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939) (issues presented for appellate review must have been fairly and properly raised to the lower court).

Further, in the statement of the issues on appeal before the ALC, the sole issue relating to class action stated: "Does the ALC have the authority to certify a class action pursuant [SCRPALC] Rule 68 and SCRCF 23?" This issue did not raise any allegation of error by the EIP Appeals Committee. Therefore, any allegation of error on the part of the EIP Appeals Committee is not before this Court because it was not properly raised to the ALC. *Linda Mc Co. Inc. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010); Rule 37(B)(1), SCRPALC (The brief of a party shall contain "[a] statement of each of the issues presented for review. The statement shall be concise and direct as to each issue and may be stated in question form. Broad general statements may be disregarded by the Court. Ordinarily, no point will be considered that is not set forth in the statement of issues on appeal.").

JUSTICE PLEICONES: I respectfully dissent. I disagree with the majority that S.C. Code Ann. § 38-71-46 (2002) applies to the State Health Plan (Plan).

This case is controlled by section 38-71-46(D), which defines what "health insurance polic[ies]" are covered under the diabetes education mandate in section 38-71-46(A).¹³ Since the Plan is a group health plan, section 38-71-46(D) requires the use of S.C. Code Ann. § 38-71-840(14) (2002) to determine whether the Plan provides "health insurance coverage," so as to be a "health insurance policy" covered by this diabetes education mandate. In my opinion, it does not.

Section 38-71-840(14) provides:

"Health insurance coverage" means benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer....

Ultimately, whether the Plan qualifies as "health insurance coverage" depends on what the phrase "offered by a health insurance issuer" modifies in S.C. Code Ann. § 38-71-840(14) (2002).

I read section 38-71-840(14) differently than does the majority. I read "benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care" as describing what types of provided benefits qualify as "health insurance coverage." I read the next section "under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer" as describing what types of insuring agreements offer "health insurance coverage." The term "offered by health insurance issuer" modifies the three types of insurance agreements in the statute,

¹³ While section 38-71-46(A) states that "every health maintenance organization, individual and group health insurance policy" is covered under this mandate, section 38-71-46(D) requires that these policies provide "health insurance coverage" before this mandate is to apply. *See* § 38-71-46(D) ("For purposes of this section: 'Health insurance policy' means a health benefit plan, contract, or evidence of coverage providing health insurance coverage as defined in Section 38-71-670(6) and Section 38-71-840(14).").

that is, (1) a hospital or medical service policy or certificate, (2) a hospital or medical service plan contract, or (3) a health maintenance organization contract. Accordingly, to qualify as "health insurance coverage" the policy, certificate, or contract must be issued by a "health insurance issuer."

The next step is to determine whether the EIP is a "health insurance issuer." This term is defined in S.C. Code Ann. § 38-71-840(16) (2002):

"Health insurance issuer" or "issuer" means any entity that provides health insurance coverage in this State. For purposes of this section, "issuer" includes an insurance company, a health maintenance organization, and any other entity providing health insurance coverage which is licensed to engage in the business of insurance in this State and which is subject to state insurance regulation.

I agree with the ALC's conclusion that the EIP is not a "health insurance issuer" because the EIP is not licensed to engage in the business of insurance in this State and not subject to State insurance regulation. See S.C. Code Ann. § 1-11-780 (Supp. 2013) ("[t]he State Employee Insurance Program . . . is not under the jurisdiction of the Department of Insurance"). Since the EIP is not a "health insurance issuer" under section 38-71-840(16), the Plan does not provide "health insurance coverage" as defined in section 38-71-840(14). Further, since section 38-71-46 only mandates diabetes education coverage for a "health insurance policy" that provides "health insurance coverage" as defined by section 38-71-840(14), I agree with the ALC that Appellant's claim was properly denied.

Assuming, however, that we must reach the issue of intent, I would reach the same result.¹⁴ The General Assembly has chosen to separate the Plan from general insurance regulation by placing the Plan's governing statutes in Title 1, Chapter 11 of the S.C. Code, rather than in Title 38, Chapter 71 (General Insurance Statutes).¹⁵ Since the General Assembly separated the Plan from the General Insurance

¹⁴ If the language of a statute gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the statute itself. *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002).

¹⁵ I reiterate that the General Assembly has specified that EIP, and correspondingly the Plan, is not subject to regulation by the South Carolina Department of Insurance. S.C. Code Ann. § 1-11-780 (Supp. 2013).

Statutes, it has included an express reference to the Plan in the General Insurance Statutes when those statutes are to apply to the Plan. *See* S.C. Code Ann. § 38-71-785(B) (Supp. 2013) ("This section applies. . .including the state health plan. . ."); S.C. Code Ann. § 38-71-243(B) (Supp. 2013) ("This section applies. . .including the state health plan. . ."). Furthermore, in the context of coverage mandates, the General Assembly has made a direct reference to the Plan when it intends for a mandate found in the General Insurance Statutes to apply to the Plan. *See* S.C. Code Ann. § 38-71-280 (Supp. 2013) (mandating coverage for autism spectrum disorder, "[i]t includes the State Health Plan. . . 'State Health Plan' means the employee and retirees insurance program provided for in Article 5, Chapter 11, Title 1"). The diabetes education mandate, however, contains no reference to the Plan either in the text or the enacting legislation. Accordingly, I find that the General Assembly did not intend for the diabetes education mandate in section 38-71-46 to apply to the Plan.

I also disagree with the majority that the separate treatment of the Plan does not evidence intent for the Plan to be treated differently. Further, I disagree with the majority's contention that because sections 38-71-243, 38-71-280, and 38-71-785 were enacted after section 38-71-46, they cannot support the proposition that when the General Assembly intends for a General Insurance Statute to apply to the Plan, it expressly references the Plan. If a General Insurance Statute applies to the Plan even when the Plan is not mentioned, then there would have been no reason to include the express reference to the Plan in any General Insurance Statute. In construing a statute, we are to assume the General Assembly was aware of past statutes, and we are to give effect to all the words in a statute. *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (noting the basic presumption that the legislature has knowledge of previous legislation); *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. *Statutes* § 346) (noting that courts are to give effect to all words in a statute). The majority's reading renders the references in the later statutes superfluous and leads to the absurd result that all General Insurance Statutes apply to the Plan unless the Plan is expressly excluded.

Finally, while I am not unsympathetic to the thousands of South Carolinians who suffer from the devastating effects of diabetes, the existence of this health scourge, while tragic, is, in my opinion, of no assistance in our task of statutory construction. Therefore, I disagree with the majority's reliance on the prevalence of a disease in determining whether a coverage mandate found in a General Insurance Statute applies to the Plan.

I would affirm the ALC's holding that section 38-71-46 does not apply to the Plan and uphold the denial of Appellant's claim.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Jeffrey D. Allen, individually, as guardian for Jane Doe,
a minor, and as representative of other similarly situated
State of South Carolina employees, Appellant,

v.

South Carolina Budget and Control Board Employee
Insurance Program and Blue Cross and Blue Shield of
South Carolina, Respondents.

Appellate Case No. 2011-183026

Appeal From Charleston County
Paul M. Burch, Circuit Court Judge

Unpublished Opinion No. 2012-UP-433
Heard May 9, 2012 – Filed July 18, 2012

AFFIRMED

John A. Massalon, of Wills, Massalon & Allen, LLC, of
Charleston, for Appellant.

Theodore DuBose Willard, Jr., of Montgomery Willard,
LLC, of Columbia, for Respondent Blue Cross and Blue
Shield of South Carolina; Kelly Hunter Rainsford, of

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

PER CURIAM: Jeffrey Allen appeals the circuit court's grant of summary judgment in favor of the South Carolina Budget and Control Board Employee Insurance Program and Blue Cross and Blue Shield of South Carolina. He argues the circuit court erred in finding he was required to exhaust his administrative remedies before pursuing a claim in circuit court. He also contends the circuit court erred in not staying the circuit court litigation pending the resolution of the matter in the Administrative Law Court. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

As to the issue of staying the circuit court proceedings: *Tallent v. S.C. Dep't of Transp.*, 363 S.C. 160, 165, 609 S.E.2d 544, 546 (Ct. App. 2005) ("A party cannot use a motion to reconsider, alter[,] or amend a judgment to present an issue that could have been raised prior to the judgment but was not."), *rev'd sub nom. on other grounds, Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007); *MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRCF motion which could have been raised at trial.").

As to whether the circuit court erred in requiring Allen to exhaust his administrative remedies: *Smith v. S.C. Ret. Sys.*, 336 S.C. 505, 523, 520 S.E.2d 339, 349 (Ct. App. 1999) ("The question of whether exhaustion of administrative remedies is required is a matter within the sound discretion of the trial court that will not be disturbed on appeal absent an abuse of that discretion."); *id.* ("An abuse of discretion occurs where the trial court is controlled by an error of law or where the [c]ourt's order is based on factual conclusions without evidentiary support."); *id.* at 527, 520 S.E.2d at 351 ("[A] court ordinarily will refuse to grant a declaratory judgment where a special statutory remedy has been provided."); *id.* ("'Gratuitous interference' in the administrative process should be avoided." (quoting *Williams Furniture Corp. v. S. Coatings & Chem. Co.*, 216 S.C. 1, 7-8, 56 S.E.2d 576, 579 (1949))); S.C. Code Ann. § 1-11-710(C) (2005) (stating "claims for benefits under any self-insured plan of insurance offered by the State to state and public school district employees and other eligible individuals must be resolved by procedures established by the board, which shall constitute the exclusive remedy for these claims . . .").

AFFIRMED.

PIEPER, KONDUROS, and GEATHERS, JJ., concur.

FILED

APR 17 2015

THE STATE OF SOUTH CAROLINA

IN THE ADMINISTRATIVE LAW COURT

SC ADMIN. LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,
.....Appellant,

v.

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

APPELLANT'S MOTION FOR ATTORNEYS' FEES

This undersigned makes this Motion for Attorneys' fees pursuant that state action statute, S.C. Code Ann § 15-77-300.¹ On March 4, 2015, the South Carolina Supreme Court reversed the finding the ALJ and held that the South Carolina diabetes mandate statute did in fact apply to the State Health Plan. The state action attorneys' fee statute provides that the request for attorneys' fees shall be made within 30 days of final disposition of the case. When there is an appeal, final disposition of the case occurs when the remittitur is filed. See Brackenbrook North

¹ Effective February 24, 2010, the state action statute section 15-77-300 was amended. This administrative appeal began with the filing of the Appellant's initial letter of appeal dated September 30, 2009. Therefore, Appellant will rely on the prior version of section 15-77-300 in this Motion for Attorneys' Fees.

Charleston, LP v. County of Charleston, 366 S.C. 503, 623 S.E.2d 91 (2005). The Remittitur was issued on March 20, 2015.

I. APPLICATION OF STATE ACTION ATTORNEYS' FEE STATUTE

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 attorney's 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). Appellant was the prevailing party in this matter. A prevailing party under the state action statute is "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention." Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) (quoting Buza v. Columbia Lumber Co., 395 P.2d 511, 514 (1964)). Appellant was successful in this case on the main issue of the application of the diabetes insurance mandate, and as such is a prevailing party under that statute.

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. DSS, 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, 378 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.

While the fact of a defeat of the state agency does not create a presumption that its position was not substantially justified, the court must look to the substance and outcome of the matter litigated in making its determination under the statute. Layman, 658 S.E.2d at 445. In this case, the South Carolina General Assembly enacted a diabetes insurance coverage mandate in 1999. S.C. Code Ann. § 38-71-46. It mandated broad insurance coverage for claims related to diabetes treatment, diabetes medications, diabetes supplies, and diabetes management education services. Nonetheless, the State Health Plan, as administered by the state agency Public

Employees Benefit Authority, excluded from its plan coverage for educational /medical social services, which admittedly excluded diabetes management education claims. 2008 State Health Plan, Art. 9 (O); ALJ Order at p. 4-5.

In 2008, the State Health Plan refused to pay Appellant's claim for diabetes management education services provided at MUSC related to training family and caretakers how to use a prescribed (and covered) insulin pump for Appellant's two-year old dependent daughter. This claim and appeals followed. The State Health Plan took the position it was not required to comply with the diabetes insurance mandate statute. There were no disputed facts regarding appellant's claim. The issue decided by the South Carolina Supreme Court was an issue of law - statutory interpretation. The Supreme Court wholly rejected the State Health Plan's legal analysis, and adopted the appellant's analysis, on most points.

[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. SC Pub. Empl. Benefit Auth., 2015 SC LEXIS 100, * 8. The Court also agreed with Appellant 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.* ** 7-8. Assuming for argument purposes only that the statute was ambiguous, the Court rejected the State Health Plan's position that the court should consider the General Assembly's subsequent alleged "method" for identifying whether a general insurance statute applies to the State Health Plan by choosing whether or not to reference the State Health Plan

specifically in the insurance mandate in question. Id. ** 10-11. The Court stated 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. *12.

The Court held simply, "as a matter of law, that section 38-71-43 applies to the State Health Plan." Id.

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. There were no factual issues in play, and the Supreme Court rejected all legal positions propounded. In this case, because the State Health Plan acted directly contrary to a statutory mandate which by its plain terms applies 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), the State Health Plan should be found to have lacked justification for excluding the benefits from its Plan.

Under the state action statute and cases interpreting it, a state agency that enforces a preexisting statutory mandate, which is only later determined to be unconstitutional, is entitled to presumption that its actions were substantially justified. See Video Gaming Consultants, Inc. v. SC Dept. 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.

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 challenge the State Health Plan's position. "The fact that novel issues were raised does not mean [the state agency] was substantially justified, ..." Cornelius v. Oconee County, 369 S.C. 531, 633 S.E.2d 92 (2006) (affirming award of attorneys' fees under state action statute).

Lastly, there are *no special circumstances* which would make an award of attorneys' fee in this case unjust. To the contrary, it would be unjust to deny this request. The State Health Plan has been denying its insureds, all South Carolinian state or county employees, an insurance benefit they were entitled to by law since 2000. The State Health Plan was not required to even identify the number of claims, which should have been paid, but were in fact refused over the last fifteen (15) years. The State Health Plan was not required to reimburse (other than to the Appellant) all previously illegally denied benefits. The State Health Plan insisted on pursuing a legal strategy, which had no reasonable legal basis. The result of this litigation has enured to the benefit of all South Carolina employees insured under the State Health Plan. See Heath, 394 S.E.2d at 711 ("... it would obviously be unfair for Sheriff Heath to bear the costs of litigation which benefitted all the citizens of Aiken County."). Here, it would be unfair for Appellant to bear the costs of litigation which benefitted all state employees.

II. AMOUNT OF ATTORNEYS' FEES

The state action statute requires that the attorneys' fees awarded be "reasonable." Id. When determining reasonableness, courts, both state and federal case law consistently utilizes a lodestar analysis. See Layman v. State (utilizing lodestar analysis under state action statute).

Factors to be applied in determining a reasonable rate include: (1) the nature, extent, and difficulty of the case; (2) the time devoted; (3) the professional standing of counsel; (4) the beneficial results obtained; and (5) the customary legal fees for similar services. Id. at 458. See also Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).

A. Nature, Extent and Difficulty of Case:

Appellant initiated this action first commencing the internal State Health Plan appeals process in 2009. This task was a rather difficult task in that required navigation through several levels of appeals with the State Health Plans' Third Party Claims Administrator, Blue Cross and Blue Shield of South Carolina, the ALJ, and Supreme Court of South Carolina and took over five (5) years. Despite having received the first inquiry about the applicability of the diabetes mandate statute in August 2009, The State Health Plan did not issue any substantive explanation of its legal opinion until August 24, 2010 (which happened to be a couple days prior to an important procedure hearing in the circuit court action). Appellant immediately instituted this Appeal to the ALJ of the State Health Plan's August 24, 2010 decision. The matter was briefed in the ALC. However, the ALC scheduled no hearing, and issued its decision adopting the State Health Plan's position generally on August 13, 2012. Appellant then sought review of the ALJ decision directly in the South Carolina Supreme Court through SCRAP, Rule 204(b) for cases which involved "an issue of significant public interest or a legal principle of major importance." The Supreme Court agreed to hear the appeal directly from the ALC, and finally on March 4, 2015, the Supreme Court agreed with Appellant that the statute applied to the State Health Plan. The Court indicated that issue was a novel issue of law. This case was a difficult case to undertake; Appellant met resistance at many levels of the judicial process, but was ultimately able to succeed on the law after many years of litigation. This factor supports the award of an attorneys' fee award in this case.

B. The Time Involved:

Appellants have submitted Affidavits of counsel, along with detailed time and expense records. See Affidavits of John A Massalon, Christy Ford Allen, and Terry E Richardson. It is undisputed that this ALC case was ongoing while Appellant attempted to institute and maintain a circuit court case seeking a class action. According to the Affidavits submitted, the time kept did not differentiate between the circuit court case and this administrative case. In order to address this complexity, Appellants have reduced the total time and expenses sought by 50%. (See Summary of Fees and Costs, infra.)

C. The Professional Standing of Counsel.

Appellant has submitted along with the Affidavits, evidence of their experience and professional standing. This factor also supports an award of fees in this matter.

D. The beneficial results obtained.

Despite having lost at each stage of the administrative process, including appeal to the ALJ, the South Carolina Supreme Court agreed with Appellant that the diabetes mandate statute applies to the State Health Plan. This Order provides the grounds for which all persons insured by the State Health Plan, an insurance plan provided to the largest employer in the State of South Carolina, will receive insurance coverage for future diabetes education claims. These claims may include training of minor dependents on how to administer insulin, instruction on how to count carbohydrates when calculating appropriate insulin dosage, and instruction on nutritional analysis to include effects of fat, protein, and different types of carbohydrates on one's blood sugar levels. These are beneficial results, and results which will benefit a very large number of South Carolinians.

E. Customary Legal Fees for Similar Services

Counsel for Appellant has submitted four (4) Affidavits of counsel with personal knowledge of each lawyer and this area of legal practice which evidences that the hourly rates set forth below are customary in addition, to the Affidavits submitted in support of this Motion regarding the amount of time, nature of work performed, and customary hourly rates. The Supreme Court of South Carolina and US District Court of South Carolina have recently approved of hourly rates in the range on the hourly rates proposed by the counsel involved herein. See Layman v. State, 378 S.C. 434, 658 S.E2d 320 (2008) (allowing \$600 hourly rate for A. Cameron Lewis, as a premium hourly rate for difficult cases, and \$350.00 per hour rate for Keither M. Babcock); see also Saunders v. South Carolina Public Service Authority d/b/a Santee Cooper, C.A. 2:93-3077-23 (\$600.00 per hour for J. Edward Bell).²

Appellant submits the following summary of the information provided in the corresponding Affidavits:

	TOTAL ATTORNEYS' FEES:			
	Total Hours	Net 50%	Hourly Rate	Totals
Terry E. Richardson	33.50	16.75	600.00	10,050.00
John A. Massalon	30.70	15.35	350.00	5,372.50
Christy Ford Allen	245.50	122.75	300.00	36,825.00
Matthew Hamrick	20.00	10.0	300.00	3,000.00
Krystal Parrish	23.6	11.8	75.00	885.00
Charline Barrasso	8.0	4.0	75.00	300.00

² This case is very different than the recently decided case on R.P. v SC DHHS, 06-ALJ-08-0605 (currently pending on appeal) where the ALC denied fee petition on finding of substantial justification. That case had involved at least 2 multi day evidentiary hearings, and other appeals. Appellant in this case was never provided the opportunity to argue at a hearing or make any kind of presentation, in the initial "internal agency review" or before the ALC. This case is not one involving disputed facts. Furthermore, unlike the R.P. case, the South Carolina Supreme Court specifically adopted the vast majority of the Appellant's arguments on the issue of statutory interpretation, and rejected each argument made by the state agency. The facts of that case distinguish it from this case, and this case should be decided on its own merits.

Faith Prink	11.3	5.65	75.00	423.75
Katie Macomson	3.4	1.7	75.00	<u>127.50</u>
TOTAL FEES				\$57,438.75

TOTAL EXPENSES:

<u>Wills Massalon & Allen, LLC:</u>	<u>Total</u>	<u>Net 50%</u>
Copies	3572.69	1786.345
Postage	278.07	139.04
Service of Process	275.47	137.735
Phone Conference	35.91	17.955
Legal Research	893.70	446.85
Filing Fees	482.00	241.00
Travel/Mileage	308.21	154.105
Expert Fees	2246.25	-0- (expert fee related to circuit court case)
Total WMA Expenses		\$2,895.03

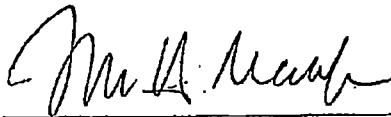
<u>RPWB, LLC</u>	<u>Total</u>	<u>Net 50%</u>
Copies	517.15	258.57
Fax	8.00	4.00
Postage	35.26	17.63
Scanned Images	29.92	14.96
Legal Research	38.63	19.32
Filing Fees	275.00	137.5
Transcripts	1805.31	902.65
Mileage	229.12	<u>114.56</u>
		\$1,469.19
TOTAL EXPENSES:		\$4,364.22

GRAND TOTAL ATTORNEYS FEES AND COSTS: \$61,802.97

III. CONCLUSION

The court should find that the State Health Plan is required to pay Appellant a total of \$61,803.97 in attorneys' fees and costs.

Respectfully submitted,



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144
SC Bar Number: 010279

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812

WILLS MASSALON & ALLEN, LLC
AFFIDAVIT OF JOHN A. MASSALON

John A. Massalon, being duly sworn, gives the following Affidavit:

1. I am a lawyer in Charleston, South Carolina.
2. I am employed by Wills Massalon & Allen LLC, and my law practice is focused on civil litigation, including business litigation, professional liability, and real estate litigation.
3. I am a member of the South Carolina Bar, and have been in private practice in Charleston for over 25 years. I regularly appear in state and federal courts on various matters.
4. As with all files, we create contemporaneous and detailed time entries in our law firm billing software.
5. The attached is the consolidated detailed time listing (for all Wills Massalon & Allen, LLC personnel) and costs report for this representation. (See Exhibit A -WMA Consolidated fee report) (Exhibit B - WMA cost report).
6. The Wills Massalon & Allen, LLC representation letter with Appellant is attached as Exhibit C).
7. I have personally reviewed all time and costs entries on the attached report, and believe it to be accurate and kept in the regular course of our business.
8. Due to the overlap and concurrent litigation in the related state court litigation, which is not part of this Administrative Law Court case, but was an effort by Appellant to obtain class relief for all other similarly situated state employees wrongfully denied diabetes education insurance claims, the total fees and costs sought have been reduced by 50%. I

believe that is a fair allocation as these cases were factually and legally intertwined, but procedurally distinct.

9. I believe that the rate of \$350.00 per hour is a reasonable and customary rate for this kind of litigation, especially considering the favorable outcome before the South Carolina Supreme Court.

10. As of the date of this Affidavit, the following is a summary of the hours worked for which fees are sought and corresponding hourly rate and costs, as set forth in detail in Exhibits A-B.

<u>Name</u>	<u>Type</u>	<u>Hours</u>	<u>Rate/Hr.</u>	<u>Total</u>
John A. Massalon	Attorney	15.35	350.00	5,372.50
Christy Ford Allen	Attorney	122.75	300.00	36,825.00
Krystal Parrish	Paralegal	11.8	75.00	885.00
Charline Barrasso	Paralegal	4.0	75.00	300.00
Faith Frink	Paralegal	5.65	75.00	423.75
Katie Macomson	Paralegal	1.7	75.00	<u>127.50</u>
TOTAL WMA ATTORNEYS FEES				\$43,930.75

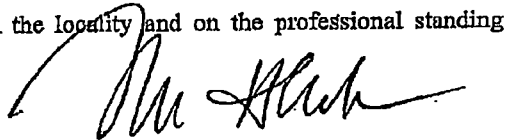
11. Similarly, the Wills Massalon & Allen costs incurred, reduced by 50% and less the expert fee related solely to the circuit court litigation, include the following:

Copies	1786.345
Postage	139.04
Service of Process	137.735
Phone Conference	17.955
Legal Research	446.85
Filing Fees	241.00
Travel/Mileage	154.105
Expert Fees	<u>0-</u> (expert fee related to circuit court case)
Total WMA Expenses	\$2,895.03

12. Wills Massalon & Allen, LLC associated as co-counsel the law firm of Richardson, Patrick, Westbrook & Brickman, LLC. I believe that the work performed by Terry Richardson and Matthew Hamrick of that firm, related to this ALC case, was necessary and appropriate, and was not duplicative of the work performed by personnel at Wills Massalon & Allen, LLC.

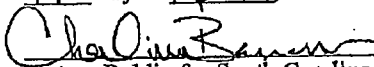
13. Attached is my current biographical information as it relates to my professional standing as counsel. (Exhibit D)

14. The undersigned is also submitting an Affidavit of Attorney M. Dawes Cooke, Jr. on the issue of fees customarily charged in the locality and on the professional standing of counsel.



John A. Massalon

SWORN TO before me this
17th day of April, 2015

 (seal)
Notary Public for South Carolina
My Commission Expires: 8/21/2023

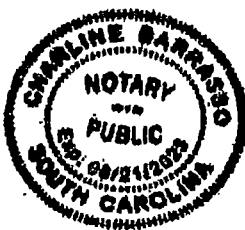


EXHIBIT "A"

CFA	Oct 5/2009	Review possible claims vs. SC / Insurance- Insurance- BCBS re health insurance lawsuit/class	4	
CFA	Oct 5/2009	Review possible claims vs. SC / Insurance- Insurance- BCBS re health insurance lawsuit/class	6.5	
CFA	Oct 13/2009	Research and prepare complaint	3	245.5
CFA	Oct 14/2009	Research and investigation,	5	
CFA	Oct 15/2009	Telephone conference with Attorney T Richardson re class action	0.5	
CFA	Oct 15/2009	Telephone conference with Attorney M Richardson re State Budget and Control Board	0.3	
CFA	Oct 15/2009	Legal research re ERISA exemption and state law structure	2.5	
CFA	Oct 16/2009	Office conference with RPWB law clerk re Insurance class action	1	
CFA	Oct 20/2009	Revise memo by RPWB re Issues and additional research	0.8	
CFA	Nov 6/2009	Office conference with Attorney Massalon re Insurance class action	1.5	
CFA	Nov 9/2009	Legal research and finalization of complaint	4	
CFA	Nov 9/2009	Telephone conference with Ernst Csiszar and Leslie Jones re 200 DOI regulation	0.5	
CFA	Nov 16/2009	Receipt and review of materials from Pam Arnold of MUSC and office conference with Att	1	
CFA	Nov 19/2009	Finalize complaint and prepare summons	2	
CFA	Nov 24/2009	Telephone conference with Attorney Hamrick	0.5	
CFA	Nov 25/2009	Finalize filing of complaint	0.4	
CFA	Dec 3/2009	Telephone conference with Chairman of Diabetes Initiative Group	0.4	
CFA	Dec 4/2009	Office conference with Attorney Hamrick re service and strategy	1	
CFA	Dec 28/2009	Prepare correspondence to E Csiszar re expert witness consultation	0.3	
CFA	Dec 28/2009	Prepare electronic correspondence to Dr. Lackland re lawsuit	0.1	
CFA	Dec 28/2009	Prepare request for MUSC billing records file	0.2	
CFA	Dec 28/2009	Prepare FOIA request to State Health Plan for Plan and Insurance- Insurance- BCBS Contra	0.3	
CFA	Jan 4/2010	Receipt and review of MUSC billing record files	0.9	
CFA	Jan 4/2010	Legal research ADA advocacy, and North Carolina Blue Cross class action	1	
CFA	Jan 5/2010	Research, gather statistical data re number of claims, financials on Blue Cross, North Carol	3	
CFA	Jan 5/2010	Prepare letter to Perry Woodside re expert	0.5	
CFA	Jan 5/2010	Prepare materials for Perry Woodside	0.5	
CFA	Jan 6/2010	Finalize correspondence to Perry Woodside, and exchange email correspondence with ADA	0.4	
CFA	Jan 6/2010	Receipt and review of defendant's motion to dismiss	0.5	
CFA	Jan 6/2010	Prepare detailed affidavit in response to motion to dismiss	2.2	
CFA	Jan 7/2010	Prepare affidavit J Allen in opposition to motion to dismiss	0.5	
CFA	Jan 7/2010	Finalize affidavit C Allen in opposition to motion to dismiss	1	
CFA	Jan 7/2010	Prepare email correspondence re motion and multi week	0.3	
CFA	Jan 8/2010	Prepare memo in opposition to motion to dismiss	5	
CFA	Jan 11/2010	Receipt and review of budget and control board minutes re elp	0.5	
CFA	Jan 11/2010	Review of State Plan Document appeals process	0.5	
CFA	Jan 11/2010	Continue memo in opposition to motion to dismiss	0.3	
CFA	Jan 12/2010	Continue to prepare memo in opposition to motion to dismiss	4.1	
CFA	Jan 12/2010	Continue to prepare memo in opposition to motion to dismiss	1	
CFA	Jan 13/2010	Receipt and review of Eva Allen medical records	0.3	
CFA	Jan 13/2010	Telephone conference with Attorney M Hamrick	0.5	
CFA	Jan 13/2010	Continue to prepare memo in opposition to motion to dismiss	5	
CFA	Jan 15/2010	Finalize draft of memo in opposition to motion to dismiss	0.6	
CFA	Jan 15/2010	Prepare affidavit of Dr. Lackland	0.3	
CFA	Jan 19/2010	Finalize memo in opposition to motion to dismiss	2.4	
CFA	Jan 19/2010	Legal research re attys fee counsel issue	0.5	
CFA	Jan 19/2010	Bluebook memo in opposition to motion to dismiss	1	
CFA	Jan 20/2010	Finalize draft and forward to co-counsel	1.2	
CFA	Jan 22/2010	Exchange electronic correspondence with Judge Dennis' law clerk re motion hearing	0.1	
CFA	Jan 22/2010	Electronic correspondence exchange with Dr. Lackland re affidavit	0.1	
CFA	Jan 25/2010	Exchange email correspondence re hearing dates and time	0.2	
CFA	Jan 27/2010	Exchange electronic correspondence re hearing on motion to dismiss	0.2	
CFA	Feb 1/2010	Telephone call from Perry Woodside re expert services	0.2	
CFA	Feb 5/2010	Revise affidavit	0.5	
CFA	Feb 8/2010	Update C Allen affidavit	0.2	
CFA	Feb 11/2010	Receipt and review of RCB minutes	1	
CFA	Feb 23/2010	Electronic correspondence exchange with attorneys hamrick and richardson re hearing pre	0.2	
CFA	Feb 23/2010	Research on diabetes supply issues, and costs	0.5	
CFA	Feb 24/2010	Finalize memo in opposition to motion to dismiss	0.4	
CFA	Feb 24/2010	Research on ownership and structure of blue cross blue shield of SC	1	
CFA	Feb 26/2010	Finalize filing of memo in opposition	1	
CFA	Mar 2/2010	Receipt and review of defendant's memo in support of motion to dismiss	0.2	
CFA	Mar 3/2010	Office conference with Attorney Hamrick and Massalon	2.5	
CFA	Mar 4/2010	Prepare for hearing	1	
CFA	Mar 4/2010	Attend hearing	0.5	
CFA	Mar 4/2010	Office conference with Attys after hearing	0.5	
CFA	Mar 10/2010	Legal research and telephone conference with Attorney J Hoefer re class action/ALJ	1	
irFA	Mar 23/2010	Receipt and review of denial of claims	0.1	

CFA	Apr 5/2010	Telephone conference with P Woodside re status	0.5	
CFA	Apr 13/2010	Receipt and review of draft discovery	0.5	
CFA	Apr 13/2010	Telephone conference with Perry Woodside and counsel re discovery	1.5	
CFA	Apr 21/2010	Telephone conference with D Lackland	0.4	
CFA	Apr 29/2010	Receipt and review of draft discovery	0.5	
CFA	May 5/2010	Telephone conference with Dr. Bruch re consulting expert	0.3	
CFA	Jun 23/2010	Exchange email with Matt Hamrick re motions strategy	0.2	
CFA	Jun 30/2010	Review EIP appeals deadlines, telephone conference with M Henrick, and prepare adminis	1.5	
CFA	Jul 1/2010	Exchange emails with M Hamrick re motions hearing schedule	0.2	
CFA	Jul 28/2010	Telephone conference with Attorney G Pollakoff re Drummond v.SCDOR	0.5	
CFA	Aug 5/2010	Telephone conference with Matt Hamrick re motion hearing	0.3	
CFA	Aug 23/2010	Revise plaintiffs memo in opposition	2.5	
CFA	Aug 23/2010	Electronic correspondence exchange with Adele Terry re potential plaintiffs	0.2	
CFA	Aug 25/2010	Receipt and review of appeals decision and defendants brief in support of summary judgment	1	
CFA	Aug 25/2010	Legal research re same	1.5	
CFA	Aug 25/2010	Prepare affidavit for E Calsnar re Dept on Ins jurisdiction	0.5	
CFA	Aug 26/2010	Attend SJ hearing	1	
CFA	Sep 3/2010	Prepare proposed order on SJ	3	
CFA	Sep 7/2010	Finalize and transmit proposed order	1	
CFA	Sep 28/2010	Electronic correspondence exchange with M Hamrick re supplemental filing with Judge on	0.1	
CFA	Oct 20/2010	Legal research on ALJ case and appeal options	3	
CFA	Oct 25/2010	Legal research	1	
CFA	Oct 27/2010	Receipt and review of entry of judgment	0.1	
CFA	Oct 28/2010	Office conference with Attorney Hamrick re 59 e and appeal	0.4	
CFA	Nov 5/2010	Prepare 59(e) motion and memo	2.5	
CFA	Nov 24/2010	Prepare reply to opposition to motion to alter or amend	1	
CFA	Nov 29/2010	Receipt and review of record of appeal	0.2	
CFA	Dec 2/2010	Review record on appeal, research, and telephone conference with M Hamrick re same	2	
CFA	Dec 7/2010	Prepare appellate brief to ALJ	5	
CFA	Dec 15/2010	Review issues with Record on Appeal	1	
CFA	Dec 15/2010	Prepare appellate brief	3.5	
CFA	Dec 15/2010	Telephone and email to Attorney Willard re same	0.3	
CFA	Dec 15/2010	Electronic correspondence exchange with Judge's office re extension	0.2	
CFA	Dec 16/2010	Continue to prepare appellate brief	2.5	
CFA	Dec 17/2010	Transmit and finalize supplemental record for appeal	0.5	
CFA	Dec 17/2010	Continue to work on brief	2.5	
CFA	Dec 28/2010	Revise appeal brief	2	
CFA	Dec 29/2010	Continue to prepare appeal brief	0.5	
CFA	Dec 29/2010	Receipt and review of electronic correspondence from Attorney Willard re record on appeal	0.1	
CFA	Jan 3/2011	Electronic correspondence exchange with Attorney Willard re supplemental record on appeal	0.2	
CFA	Jan 5/2011	Telephone conference with M Hamrick re class cert issue and SC appeals filings	1	
CFA	Jan 6/2011	Finalize ALJ appellate brief	2	
CFA	Jan 12/2011	Electronic correspondence exchange with attorneys re supplemental record to ALJ	0.2	
CFA	Jan 12/2011	Exchange email re volume 2 of record on appeal	0.3	
CFA	Jan 14/2011	Finalize appellant's brief to ALJ	3.3	
CFA	Jan 17/2011	Finalize appellant brief to ALJ	3	
CFA	Jan 31/2011	Follow up re appeal brief deadlines	0.2	
CFA	Feb 23/2011	Telephone conference with M Hamrick re filing appellate brief	0.7	
CFA	Feb 23/2011	Receipt and review of brief from state in ALJ appeal	0.4	
CFA	Feb 25/2011	Review respondent's brief in preparation of filing reply	1	
CFA	Mar 3/2011	Prepare reply to ALJ	4.4	
CFA	Mar 4/2011	Finalize reply brief	3.5	
CFA	Mar 30/2011	Discuss request for stay and consolidation of appeals	0.2	
CFA	Apr 1/2011	Telephone conference with M Hamrick	0.3	
CFA	Jun 27/2011	Receipt and review of respondent's brief on appeal	0.4	
CFA	Jul 8/2011	Prepare reply to brief	1	
CFA	Jul 8/2011	Telephone conference with M Hamrick re reply to SCCA	1	
CFA	Jul 11/2011	Prepare reply brief to SCCA appeal	5.3	
CFA	Jul 13/2011	Prepare reply to opposition brief in appeal	6	
CFA	Aug 8/2011	Telephone conference with T Gressette re appeal, and receipt and review of record on appeal	0.7	
CFA	Aug 9/2011	Receipt and review of record on appeal for filing	1.5	
CFA	Aug 10/2011	Receipt and review of final draft of record on appeal	0.9	
CFA	Aug 30/2011	Prepare and finalize final briefs in SC Court of Appeals case	3.5	
CFA	Aug 31/2011	Prepare final reply brief for filing	2	
CFA	Sep 20/2011	Deal with volume on appeal issue - resolved	0.5	
CFA	Nov 8/2011	Review SC Ct App and ALJ calendar for scheduling	0.5	
CFA	Dec 6/2011	Telephone call from T Gressette re status	0.2	
CFA	May 8/2012	Prepare timeline and review filings	1.5	

CFA	May 9/2012	Travel to and Columbia for appellate hearing	5.5	
CFA	May 9/2012	Attend hearing	1	
CFA	May 11/2012	Review 2012 SC cases on statutory interpretation as relates to supplemental brief to ALJ	0.5	
CFA	Jul 25/2012	Receipt and review of order, review appellate rules for deadlines	0.5	
CFA	Jul 31/2012	Prepare petition for rehearing	2	
CFA	Aug 1/2012	Prepare and finalize petition for rehearing en banc	3.5	
CFA	Sep 7/2012	Review appellate procedures for appeal from ALJ	0.5	
CFA	Sep 12/2012	Prepare notice of appeal from ALJ case	0.5	
CFA	Sep 13/2012	Legal research on transfer and certification to Supreme Court, prepare affidavit to Dr at M	3	
CFA	Oct 11/2012	Prepare appellate brief	4	
CFA	Oct 12/2012	Prepare appellate brief, designation on ALJ appeal	7	
CFA	Oct 15/2012	Finalize appeals brief from ALJ appeal, prepare petition for writ of cert, prepare motion to	5.5	
CFA	Oct 16/2012	Prepare pet for cert	0.5	
CFA	Oct 22/2012	Correct Supreme Court filings	1	
CFA	Nov 9/2012	Review State's Return to Motion to Certify, Pull out SC Diabetes initiative minutes from 20	2.5	
CFA	Nov 9/2012	Revise affidavit for reply to return on motion to certify	0.2	
CFA	Nov 12/2012	Revise affidavit for DSC	0.6	
CFA	Nov 12/2012	Revise reply to return on motion to certify	0.6	
CFA	Nov 15/2012	Receipt and review of order of extension, and filed return	0.2	
CFA	Nov 19/2012	Receipt and review of Respondent's Initial Brief to ALJ Appeal	0.6	
CFA	Nov 19/2012	Follow up on Affidavit for Reply to Cert Petition	0.1	
CFA	Nov 20/2012	Finalize reply to return, prepare appendix, other filings documents	2.5	
CFA	Nov 26/2012	Prepare two reply briefs, one reply to ALJ appeal, reply to return on motion to for writ of	3	
CFA	Dec 7/2012	Receipt and review of notice supreme court granted motion to certify for review	0.2	
CFA	Dec 10/2012	Research on state health insurance case just on appeal, telephone call to Attorney Allan N	1	
CFA	Dec 12/2012	Begin to prepare record on appeal for Supreme Court filing	0.5	
CFA	Dec 14/2012	Compile record on appeal for Supreme Court filing	1	
CFA	Dec 18/2012	Receipt telephone call from Supreme Court re Reply and record, prepare record on appeal	1.5	
CFA	Dec 19/2012	Compile record on appeal	4	
CFA	Dec 20/2012	Compile record on appeal and finalize paperwork	1	
CFA	Jan 7/2013	Convert Interim to final brief and change record citations	1	
CFA	Jan 11/2013	Prepare final briefs	2.5	
CFA	Nov 6/2013	Email exchange with Mr. Richardson re hearing preparation	0.5	
CFA	Dec 5/2013	Telephone conference with J Massalon re hearing in supreme court.	0.5	
CFA	Jun 2/2014	Review file, calendar, and electronic correspondence exchange with D Bruce at JDRF	0.5	
CFA	Mar 4/2015	Receipt and review of Order	0.5	
CFA	Mar 4/2015	Telephone conference with T Richardson, D Hattiwanger, research issue about supplement	2	
CFA	Mar 5/2015	Finalize motion to amend petition for cert. In state case	1	
CFA	Mar 5/2015	Receipt and review of Supreme Court Order	0.5	
CFA	Mar 5/2015	Telephone conference with T Richardson	0.5	
CFA	Mar 5/2015	Prepare motion to amend petition for cert to include supplemental authority	1.5	
CFA	Mar 6/2015	Legal research attorney fee petition under 15-77-300	1	
CFA	Mar 11/2015	Research on fee petition	0.5	
CFA	Mar 12/2015	Research on attys fee motion, legal memo review, and electronic correspondence exchange	1	
CFA	Mar 17/2015	Electronic correspondence to B Willard	0.2	
CFA	Mar 17/2015	Telephone conference with B O Willard	0.4	
CFA	Mar 19/2015	Prepare communication re case	0.5	
CFA	Mar 26/2015	Research attorneys fee issues	2	
CFA	Apr 7/2015	Telephone conference with C Washington	0.5	
CFA	Apr 14/2015	Prepare and arrange attorney fee affidavits for motion	2.5	
CL	Mar 5/2015	Scan and bates number Motion for Leave to Amend Writ of Certiorari and Include New Au	1.4	8
CL	Mar 6/2015	Legal research regarding attorney's fees	5.8	
CL	Mar 10/2015	Receipt of South Carolina Supreme Court Opinion No. 27504. Indexing of document	0.1	
CL	Mar 10/2015	Receipt of Order Denying Writ of Certiorari. Indexing of document	0.1	
CL	Mar 11/2015	Convert Order Denying Petition for Attorney's Fees from PDF to Word format	0.5	
CL	Mar 31/2015	Receipt of Remittitur. Indexing of the same	0.1	
FF	Feb 9/2010	Review and print relevant Budget and Control Board Meeting minutes for years 2006, 200	1.6	11.9
FF	Feb 10/2010	Review and print relevant sections of SC Budget and control Board Meeting Minutes for 2	0.4	
FF	Feb 24/2010	Begin scanning, marking and preparing exhibits for Plaintiff's Memorandum in Opposition	0.6	
FF	Feb 25/2010	Prepare, copy and mark exhibits for Plaintiff's Memorandum in Opposition to Def's Motion	1	
FF	Feb 26/2010	Telephone conference with Judge Dennis' law clerk re: hearing and delivery of Memorandu	0.1	
FF	Feb 26/2010	Prepare letter to Judge Dennis with Pl's Memorandum in Opposition to Def's Motion to Di	0.2	
FF	Feb 26/2010	Finalize Memorandum in Opposition and Exhibits for filing	0.4	
FF	Feb 26/2010	Prepare letter to Clerk of Court filing Memorandum in Opposition	0.2	
FF	Feb 26/2010	Prepare electronic correspondence to Theodore Willard and Kelly Bainsford	0.1	
FF	Apr 29/2010	Revise and create redline versions of Responses to Answers to Interrogatories and RFP of E	0.3	
FF	May 19/2010	Prepare letter to Perry Woodside re: discovery served on Defendants	0.2	
FF	Jul 16/2010	Prepare letter to Matt Hamrick	0.2	

FF	Nov 8/2010	Prepare letter to Clerk of Court with Motion to Alter or Amend; Prepare Motion Sillp; Email	0.4		
FF	Nov 23/2010	Prepare letter to Clerk of Court filing Plaintiff's Reply to Defendant's Opposition to Motion	0.2		
FF	Jan 17/2011	Revise/review Brief; telephone conference with ProCopy; Prepare Proof of Service	0.5		
FF	Jan 18/2011	Telephone conference with ProCopy re: Brief of Appellant; review and scan Brief; Review	0.5		
FF	Mar 4/2011	Prepare Proof of Service for Reply Brief; Prepare letter to Judge Robinson; telephone con	0.5		
FF	Jul 13/2011	Review, proof-read and revise Initial Reply Brief	1.7		
FF	Jul 14/2011	Revise and finalize Initial Brief; Prepare Proof of Service; Review SCRCF for proper filing pro	1.1		
FF	Sep 1/2011	Prepare Brief covers, 20 copies of each brief; telephone conference with ProCopy; Prepar	1.1		
JAM	Oct 14/2009	Office conference with Attorney Allen re potential suit against Blue Cross	0.5		
JAM	Nov 6/2009	Office conference with Ms. Allen re new suit against Blue Cross/Blue Shield	1		
JAM	Jan 5/2010	Receipt and review of correspondence from Theodore Willard reFOIA request	0.1		
JAM	Jan 7/2010	Receipt and review of email re motion to dismiss and prepare email to Mr. Richardson, Mr	0.2		
JAM	Jan 22/2010	Receipt and review of email re scheduling hearing on motion for summary judgment in All	0.1		
JAM	Mar 3/2010	Office conference with Mr. Hamrick and Ms. Allen to prepare for hearing on motion to dis	1.4		
JAM	Mar 4/2010	Complete preparation for hearing on motion to dismiss	1.6		30.7
JAM	Mar 4/2010	Participate in hearing and follow-up meeting with Mr. Richardson, Mr. Hamrick and Ms. Al	2		
JAM	Apr 5/2010	Telephone conference with Ms. Allen, Mr. Hamrick and Dr. Woodside re discovery	0.6		
JAM	Apr 13/2010	Telephone conference with Mr. Woodside, Ms. Allen and Mr. Hamrick re discovery reques	1.2		
JAM	Jun 7/2010	Telephone call to Mr. Willard re motion for summary judgment and motion to compel	0.2		
JAM	Sep 6/2010	Receipt and review of draft proposed order denying summary judgment	0.2		
JAM	Nov 8/2010	Review Rule 59 (e) motion	0.2		
JAM	Jan 17/2011	Review and edit final brief	0.6		
JAM	Feb 8/2011	Receipt and review of correspondence from Court of Appeals and prepare email to Ms. Al	0.2		
JAM	Feb 13/2012	Receipt and review of letter from Court of Appeals re scheduling	0.3		
JAM	Feb 14/2012	Electronic correspondence exchange with Mr. Richardson re scheduling; telephone call to	0.5		
JAM	May 1/2012	Begin preparing for oral argument	1		
JAM	May 8/2012	Prepare for oral argument	1		
JAM	May 9/2012	Finish preparing for oral argument; travel to Columbia, participate in oral argument and re	7		
JAM	Oct 22/2012	Telephone call from Ms. Linda Allen of Supreme Court re corrections to petition; office cor	0.5		
JAM	Oct 23/2012	Correct petition to Supreme Court	0.5		
JAM	Oct 24/2012	Electronic correspondence exchange with Mr. Willard re extension to respond to motion f	0.1		
JAM	Nov 13/2012	Electronic correspondence exchange with Mr. Willard re extension to file reply brief	0.1		
JAM	Nov 21/2012	Review memo from Mr. Willard and exchange email with Attorney Allen re same	0.2		
JAM	Dec 28/2012	Telephone call from Clerk of Supreme Court re status of service of record on appeal	0.2		
JAM	Sep 20/2013	Prepare electronic correspondence to Clerk of Court re hearing dates	0.2		
JAM	Oct 14/2013	Prepare electronic correspondence to Mr. Shearhouse re hearing dates	0.2		
JAM	Dec 4/2013	Prepare for oral argument	2		
JAM	Dec 5/2013	Finish preparing for oral argument, travel to Columbia, participate in hearing and return to	6		
JAM	Mar 15/2015	Office conference with Attorney Allen re petition for rehearing and attorneys' fee claim	0.5		
JAM	Apr 8/2015	Receipt and review of email re amending petition for writ of cert to include new authority	0.3		
KAP	Sep 25/2012	Letter & Copy of Court of Appeals Order to Terry Richardson	0.1		23.6
KAP	Oct 10/2012	Prepare ALJ Appeal Case No. 2012-212988 Caption	0.3		
KAP	Oct 15/2012	Prepare for filing and service; Letter to Clerk of Court Appeals Ms. Kitchings, re Appellant's	1.5		
KAP	Oct 17/2012	Prepare Filings for Supreme Court: Motion to Certify for Review by Supreme Court and Me	6.5		
KAP	Dec 19/2012	Prepare Documents for Filing Record on Appeal in Supreme Court. Copy and Increase Inde	5		
KAP	Dec 20/2012	Create Bates Labels for Record on Appeal, Label Documents, Create Title Pages and Indexe	5		
KAP	Dec 27/2012	Prepare letters to attorney Theodore Willard & Steven Van Camp regarding enclosed Reco	0.5		
KAP	Dec 27/2012	Prepare two copies of Record on Appeal, Vols. 1-3 for service to Attorneys Steven Van Cam	1.5		
KAP	Jan 14/2013	Prepare Clerk Letters & Attorney Letters, Final Brief, Final Reply, Record on Appeal Vol. 1-3	3		
KAP	Jan 14/2013	Contact Courier service; Dash set up time for delivery to Supreme Court	0.2		
KMM	Jan 12/2010	Review Minutes of State Budget & Control Meeting from 2008, 2007 & 2006 for Attorney	2		9.4
KMM	Jan 19/2010	Prepare West Law documents for Attorney Allen for filing.	1		
KMM	Jan 25/2010	Pick-up Affidavit of Dr. Lachlin from MUSC.	0.4		

EXHIBIT “B”

SALARY INFORMATION & BUDGETARY DATA To Mar/ 6/2013									
DATE	DESCRIPTION	CLIENT NAME	REGR Q/L AGGT	AMOUNT					
10/1/2009	Expense Recovery CEN	593-1	Allie	Esquire	Ch	722	820	- Client	8.32
264906	In-house photocopies (October 2009)		n.					EM	
	TOTAL for OCT/2009 : 8.32								
10/1/2009	Heat Payment Center CB	595-1	Allie	Esquire	Ch	12247	920	- Client	87.77
261449	Computerized legal research (CFA 10/14/10/)		n.					EM	
	TOTAL for OCT/2009 : 87.77								
10/23/2009	Charleston County Clerk's Office CB	595-1	Allie	Esquire	Ch	12207	020	- Client	100.00
261053	Willow Road Insurance and Complaints		n.					EM	
	TOTAL for OCT/2009 : 100.00								
10/30/2009	Expense Recovery CEN	595-1	Allie	Esquire	Ch	727	820	- Client	2.50
261347	In-house postage (November 2009)		n.					EM	
10/30/2009	Expense Recovery CEN	595-1	Allie	Esquire	Ch	720	820	- Client	38.08
261491	In-house photocopies (November 2009)		n.					EM	
	TOTAL for NOV/2009 : 40.58								
10/30/2009	Expense Recovery CEN	595-1	Allie	Esquire	Ch	731	820	- Client	5.70
261514	Postage - Certified Mail to d & M Process Co		n.					EM	
	TOTAL for NOV/2009 : 5.70								
10/31/2009	Expense Recovery CEN	595-1	Allie	Esquire	Ch	12213	820	- Client	113.48
261327	Process - Private Investigator (Marylin)		n.					EM	
	TOTAL for NOV/2009 : 113.48								
10/31/2009	Expense Recovery CEN	595-1	Allie	Esquire	Ch	737	820	- Client	12.24
270035	In-house photocopies (December 2009)		n.					EM	
10/31/2009	Expense Recovery CEN	595-1	Allie	Esquire	Ch	739	820	- Client	4.60
270082	In-house postage (December 2009)		n.					EM	
	TOTAL for DEC/2009 : 16.84								
11/14/2010	Heat Payment Center CB	595-1	Allie	Esquire	Ch	12412	820	- Client	12.35
270818	Computerized legal research (CFA 12/10/09)		n.					EM	
11/14/2010	Heat Payment Center CB	595-1	Allie	Esquire	Ch	12432	820	- Client	15.09
270828	Computerized legal research (CFA 12/10/09)		n.					EM	
	TOTAL for DEC/2009 : 27.44								
11/14/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	744	820	- Client	105.69
271843	In-house photocopies (January 2010)		n.					EM	
	TOTAL for JAN/2010 : 133.13								
11/14/2010	Heat Payment Center CB	595-1	Allie	Esquire	Ch	12443	820	- Client	107.78
272452	Computerized legal research (CFA 12/10/09)		n.					EM	
	TOTAL for FEB/2010 : 272.45								
11/23/2010	United States Postal Service CB	595-1	Allie	Esquire	Ch	12513	820	- Client	10.12
274013	Postage		n.					EM	
	TOTAL for FEB/2010 : 282.60								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	747	820	- Client	25.00
274241	In-house photocopies (February 2010)		n.					EM	
	TOTAL for FEB/2010 : 307.60								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	752	820	- Client	75.35
274263	In-house photocopies (March 2010)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	765	820	- Client	18.00
274264	In-house postage (March 2010)		n.					EM	
	TOTAL for MAR/2010 : 93.35								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	12707	820	- Client	35.91
274265	Computerized legal research (CFA 12/10/09)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	12714	820	- Client	29.14
274266	Computerized legal research (CFA 12/10/09)		n.					EM	
	TOTAL for APR/2010 : 65.05								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	766	820	- Client	4.23
274267	In-house postage (April 2010)		n.					EM	
	TOTAL for APR/2010 : 4.23								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	12735	820	- Client	2246.20
274268	Computerized legal research (CFA 12/10/09)		n.					EM	
	TOTAL for MAY/2010 : 2250.46								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	760	820	- Client	6.78
274269	In-house postage (May 2010)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	761	820	- Client	1.85
274270	In-house postage (May 2010)		n.					EM	
	TOTAL for MAY/2010 : 8.63								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	768	820	- Client	30.16
274271	In-house photocopies (June 2010)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	769	820	- Client	1.76
274272	In-house postage (June 2010)		n.					EM	
	TOTAL for JUN/2010 : 31.92								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	12980	820	- Client	13.04
274273	Computerized legal research (CFA 12/10/09)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	770	820	- Client	2.08
274274	In-house photocopies (July 2010)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	771	820	- Client	1.44
274275	In-house postage (July 2010)		n.					EM	
	TOTAL for JUL/2010 : 3.52								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	1062	820	- Client	101.12
274276	Computerized legal research (CFA 12/10/09)		n.					EM	
	TOTAL for AUG/2010 : 104.64								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	777	820	- Client	23.00
274277	In-house photocopies (August 2010)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	770	820	- Client	6.61
274278	In-house postage (September 2010)		n.					EM	
	TOTAL for SEP/2010 : 29.61								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	780	820	- Client	14.16
274279	In-house photocopies (October 2010)		n.					EM	
	TOTAL for OCT/2010 : 14.16								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	1182	820	- Client	25.00
274280	Computerized legal research (CFA 12/10/09)		n.					EM	
	TOTAL for NOV/2010 : 25.00								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	782	820	- Client	8.34
274281	In-house photocopies (November 2010)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	783	820	- Client	10.80
274282	In-house postage (November 2010)		n.					EM	
	TOTAL for NOV/2010 : 20.44								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	788	820	- Client	17.02
274283	In-house photocopies (December 2010)		n.					EM	
	TOTAL for DEC/2010 : 17.02								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	1309	820	- Client	38.85
274284	Computerized legal research (CFA 12/10/09)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	1308	820	- Client	172.29
274285	In-house postage (January 2011)		n.					EM	
	TOTAL for JAN/2011 : 226.14								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	788	820	- Client	12.18
274286	In-house photocopies (January 2011)		n.					EM	
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	789	820	- Client	69.20
274287	In-house postage (January 2011)		n.					EM	
	TOTAL for JAN/2011 : 75.71								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	1870	820	- Client	99.25
274288	Computerized legal research (CFA 12/10/09)		n.					EM	
	TOTAL for MAR/2011 : 95.21								
11/23/2010	Expense Recovery CEN	595-1	Allie	Esquire	Ch	792	820	- Client	8.16
274289	In-house postage (February and March 2011)		n.					EM	

01/31/2011	Expense Recovery CEN	595-1	Allen, Equile	Ch	793	820	- Client Ex	
02/02/2011	In-house photocopies (February and March 2011)							
	Total for Mar/31/2011 : 28.62	595-1	Allen, Equile	Ch	794	820	- Client Ex	6.60
02/29/2011	Expense Recovery CEN	595-1	Allen, Equile	Ch				
03/01/2011	In-house photocopies (April 2011)							
	Total for Apr/29/2011 : 4.60	595-1	Allen, Equile	Ch	800	820	- Client Ex	2.36
04/30/2011	Expense Recovery CEN	595-1	Allen, Equile	Ch				
05/01/2011	In-house photocopies (May 2011)							
	Total for May/31/2011 : 2.36	595-1	Allen, Equile	Ch	806	820	- Client Ex	22.60
06/30/2011	Expense Recovery CEN	595-1	Allen, Equile	Ch				
07/01/2011	In-house photocopies (July 2011)							
	Total for Jul/31/2011 : 22.68	595-1	Allen, Equile	Ch	1092	820	- Client Ex	67.74
08/12/2011	West Payment Center on	595-1	Allen, Equile	Ch				
08/12/2011	computerized legal research (CRA 7/13, 7/14)							
	Total for Aug/12/2011 : 87.74	595-1	Allen, Equile	Ch	2049	820	- Client Ex	82.46
09/04/2011	Pro-legal Copies, Inc. on	595-1	Allen, Equile	Ch				
09/04/2011	photocopies (Inv. 0120040)							
	Total for Sep/04/2011 : 82.46	595-1	Allen, Equile	Ch	810	820	- Client Ex	15.98
09/30/2011	Expense Recovery CEN	595-1	Allen, Equile	Ch				
10/01/2011	In-house photocopies (September 2011)							
	Total for Sep/30/2011 : 115.81	595-1	Allen, Equile	Ch	811	820	- Client Ex	103.06
10/24/2011	Federal Express on	595-1	Allen, Equile	Ch				
10/24/2011	Federal Express (Acct. 02349-1671-8, Inv. 8)							
	Total for Oct/24/2011 : 19.88	595-1	Allen, Equile	Ch	818	820	- Client Ex	1.72
10/31/2011	Expense Recovery CEN	595-1	Allen, Equile	Ch				
11/01/2011	In-house photocopies (October 2011)							
	Total for Oct/31/2011 : 1.72	595-1	Allen, Equile	Ch	833	820	- Client Ex	6.70
12/01/2011	Expense Recovery CEN	595-1	Allen, Equile	Ch				
12/01/2011	In-house photocopies (February 2012)							
	Total for Feb/29/2012 : 7.95	595-1	Allen, Equile	Ch	833	820	- Client Ex	3.20
02/29/2012	Expense Recovery CEN	595-1	Allen, Equile	Ch				
03/01/2012	In-house photocopies (March 2012)							
	Total for Apr/11/2012 : 3.88	595-1	Allen, Equile	Ch	2826	820	- Client Ex	129.21
04/11/2012	Chelity Ford Allen on	595-1	Allen, Equile	Ch				
04/11/2012	Travel to/from Columbia, South Carolina for							
	Total for Jun/1/2012 : 333.21	595-1	Allen, Equile	Ch	2991	820	- Client Ex	25.00
06/01/2012	South Carolina Court of Appeals on	595-1	Allen, Equile	Ch				
06/01/2012	Filing Fees (Petition for Rehearing on Rem)							
	Total for Aug/1/2012 : 25.00	595-1	Allen, Equile	Ch	855	820	- Client Ex	39.88
08/01/2012	Expense Recovery CEN	595-1	Allen, Equile	Ch				
08/01/2012	In-house photocopies (August 2012)							
	Total for Aug/31/2012 : 21.93	595-1	Allen, Equile	Ch	863	820	- Client Ex	2.95
08/31/2012	Expense Recovery CEN	595-1	Allen, Equile	Ch				
09/01/2012	In-house photocopies (September 2012)							
	Total for Sep/30/2012 : 40.58	595-1	Allen, Equile	Ch	3282	820	- Client Ex	100.00
09/30/2012	Expense Recovery CEN	595-1	Allen, Equile	Ch				
10/01/2012	In-house photocopies (October 2012)							
	Total for Oct/31/2012 : 15.57	595-1	Allen, Equile	Ch	3393	820	- Client Ex	28.80
10/31/2012	Expense Recovery CEN	595-1	Allen, Equile	Ch				
11/01/2012	In-house photocopies (November 2012)							
	Total for Nov/30/2012 : 114.38	595-1	Allen, Equile	Ch	3605	820	- Client Ex	83.94
11/30/2012	Expense Recovery CEN	595-1	Allen, Equile	Ch				
12/01/2012	In-house photocopies (December 2012)							
	Total for Dec/31/2012 : 675.51	595-1	Allen, Equile	Ch	3884	820	- Client Ex	1809.08
12/31/2012	Expense Recovery CEN	595-1	Allen, Equile	Ch				
01/01/2013	In-house photocopies (January 2013)							
	Total for Jan/31/2013 : 391.86	595-1	Allen, Equile	Ch	3944	820	- Client Ex	20.28
01/31/2013	Expense Recovery CEN	595-1	Allen, Equile	Ch				
02/01/2013	In-house photocopies (February 2013)							
	Total for Feb/29/2013 : 36.52	595-1	Allen, Equile	Ch	3788	820	- Client Ex	26.73
02/29/2013	Expense Recovery CEN	595-1	Allen, Equile	Ch				
03/01/2013	In-house photocopies (March 2013)							
	Total for Mar/31/2013 : 1805.05	595-1	Allen, Equile	Ch	3844	820	- Client Ex	120.89
03/31/2013	Expense Recovery CEN	595-1	Allen, Equile	Ch				
04/01/2013	In-house photocopies (April 2013)							
	Total for Apr/30/2013 : 35.52	595-1	Allen, Equile	Ch	3788	820	- Client Ex	49.34
04/30/2013	Expense Recovery CEN	595-1	Allen, Equile	Ch				
05/01/2013	In-house photocopies (May 2013)							
	Total for May/31/2013 : 36.52	595-1	Allen, Equile	Ch	3788	820	- Client Ex	26.73
05/31/2013	Expense Recovery CEN	595-1	Allen, Equile	Ch				
06/01/2013	In-house photocopies (June 2013)							
	Total for Jun/30/2013 : 391.86	595-1	Allen, Equile	Ch	3788	820	- Client Ex	120.89

01/ 5/2013	Bank Courier Service on 593-1	Alle	Esquil	Ch	3101820	- Client	
365482	Courier Service to SC Supreme Ct. on Jan. 16	Dr	Dr			EM	
	Total for Feb/ 5/2013 : 151.83						
Oct/31/2013	Expense Recovery CEN 591-1	Alle	Esquil	Ch	829920	- Client	2.64
352682	Postage (October 2013)	Dr	Dr			EM	
	Total for Oct/31/2013 : 2.64						
Nov/ 5/2013	Expense Recovery CEN 593-1	Alle	Esquil	Ch	929920	- Client	8.00
364682	Parking Charge in Columbia, SC on 12/05/2013	Dr	Dr			EM	
	Total for Dec/ 5/2013 : 5.00						
Dec/ 6/2013	South Carolina Supreme Court GU 596-1	Alle	Esquil	Ch	8052020	- Client	25.00
357513	Filing Fee Motion for Leave to Amend Petiti	Dr	Dr			EM	
	Total for Mar/ 6/2013 : 25.00						8138.61

EXHIBIT “C”

WILLS & MASSALON, LLC

ATTORNEYS AT LAW
Telephone: (843) 727-1144
Facsimile: (843) 727-7696

Post Office Box 859
Charleston, South Carolina 29402

134 Meeting Street, Suite 100
Charleston, South Carolina 29401

November 24, 2009

Mr. Jeffrey D. Allen
2610 Marsh Creek Drive
Charleston, South Carolina 29414

RE: Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees v. SC Budget & Control Board
Case No.: 09-CP-10-7404
File No.: 595-1

Dear Jeff:

We are pleased that you have decided to retain Wills & Massalon, LLC to file suit against SC Budget and Control Board and Blue Cross and Blue Shield of SC. This contract describes the basis on which we will represent you and charge for our services.

This Contract made and entered into this 25 day of November, 2009, by and between Jeffrey D. Allen hereinafter referred to as the "Client" and Wills & Massalon, LLC, hereinafter referred to as the "Attorney", is as follows:

Whereas, Client claims to have insurance claims related to the alleged failure of the Defendants to comply with statutory mandates for diabetes coverage and the Client desires to employ the Attorney to institute and prosecute such claim or suit as the Attorney, which in his sole discretion, deems desirable or necessary:

Wherefore, the parties agree as follows:

1. Client employs the Attorney to represent the Client's best interest, and if necessary, to institute and prosecute suit. As compensation for legal services, the Client agrees to pay and hereby assigns unto the Attorney thirty-three and one-third (33.33) percent fee of the gross recovery, to include all monies and things of value recovered in said claim. It is recognized that this fee will not be payable until the conclusion of the case or the appeal process. In the event that an award of Client's attorneys' fees is made against Defendants, such award may be applied pro rata as an offset against the thirty-three and one-third (33.33) percent fee for which Client is responsible based on the foregoing terms, but such award shall not otherwise modify the fee structure set forth herein.
2. To enable the Attorney to provide services more efficiently and expeditiously, the Client authorizes the Attorney to associate other attorneys and paralegals in his firm to assist in the work in this case. Additionally, the Attorney may use the services of attorneys who are independent contractors with

whom the Attorney has a contractual relationship in the course of this representation.

3. The Attorney has agreed to co-counsel with and divide fees and costs with Terry Richardson and Matthew Hamrick of the firm RPWB, LLC, and propose to do so equally. All lawyers assume joint responsibility for this representation. By signing this agreement, you are confirming your consent to this fee-splitting arrangement. Due to unforeseen circumstances, change in the fee division between the firms may be appropriate or the association of additional counsel may be necessary or beneficial for Client's representation. Any change in the fee division or association of additional counsel is subject to Client's written consent. Client understands that each co-counsel associated to assist with the handling of Client's claim(s) assumes joint responsibility for Client's representation.
4. If a judgment in your favor is obtained in the trial court and your adversary appeals, Attorney shall provide all appropriate services in opposition to the appeal, including review of the trial court's record, preparation of appropriate briefs, and oral argument in the reviewing courts. However, if the trial of the case should result in a judgment that is adverse to you, we shall not be obligated to appeal. In that event, we shall advise you of the opinion concerning the advisability of appeal and may undertake to provide services as appellate counsel under a new, separate and distinct fee agreement.
5. If settlement of this case is made by a structured settlement, Attorney's fees will be figured on the basis of the cost of the settlement. Further, the Attorney's fees will be paid out of the initial cash lump-sum payment.
6. In addition to the fee described in paragraph 1 above, the Client further authorizes and agrees that the Attorney may deduct from the proceeds of any recovery, whether by settlement, judgment, or otherwise, all actual expenses incurred by Attorney including court costs; deposition expenses, computerized legal research, in-house copying and postage, as well as copying expenses, postage and fees charged to Attorney by third-parties (such as expert witness fees). Additionally, Client further authorizes and agrees that the Attorney may charge an administrative fee not to exceed \$250.00 to cover costs such as long distance telephone calls which will not be itemized on the final settlement statement. If no recovery is made, Client will not owe the Attorneys or associated counsel for any litigation expenses advanced on Client's behalf.
7. If Client's case is settled individually, Client will have the authority to accept or reject any final settlement amount offered to Client after receiving the advice of the Attorneys and associated counsel. Client understands counsel may recommend a class action settlement to the court and/or that this suit may be handled as a part of a larger number of cases which may be aggregated for settlement and/or trial preparation. Client authorizes Attorneys and associated counsel to enter into aggregate settlement negotiations and to disclose the amount of the proposed settlement values to other clients whose cases are included in the aggregate of cases.
8. Client also understands that certain expenses will be incurred in a joint effort to handle all cases. Client authorizes the Attorneys and associated counsel to pro rate such expenses among all the cases in the settlement group.
9. The Attorney accepts employment on the condition that there appears to be a recoverable claim, and if it appears after an investigation of the case that the claim is non-meritorious, or the recovery of damages is unlikely, or that the amount likely to be recovered be too small, the Attorney may

withdraw from representation.

10. Clients understand that Client's damage arising from any claim may not be sufficient in magnitude to justify Attorneys' pursuit of Client's sole claim on a contingent fee basis. Accordingly, Attorneys anticipate that they will elect to pursue Client's claim through a class action as opposed to an individual lawsuit. Client also understands that in such event, Client may be asked to act as representative plaintiff in a class action. Client agrees and understands that in such event, client will undertake to fulfill the obligations of a class representative to keep fully informed of the class action and represent the interests of the class. In the event that for any reason the court in which an action is filed fails or refuses to certify a class, including Client's claim for purposes of bringing a class action against Defendants, the Client understands that the Attorneys may elect to terminate their representation of Client if they determine that the representation will result in an unreasonable financial burden on the Attorneys. Client further understands and agrees that, in the event Client's claim is resolved through a class action, class claims and any incentive award to Client will be governed by order of the court, including any fees or expenses awarded to Attorneys. Client further understands and agrees that Client may be given the opportunity to "opt out" of any class settlement and pursue Client's claim individually. In the event Client elects to "opt out" of any such class settlement, Client agrees that this Agreement shall remain in full force and effect.
11. Client understands that Client can terminate the Attorneys' representation of Client at any time by providing written notice to them at the addresses noted at the top of this Agreement. Should Client elect to terminate the Attorneys' representation prior to the full conclusion of their services under this contract, Client understands and agrees that the Attorneys and associated counsel shall have a contractual right to assert a charging lien which they may use to protect and advance their claim for expenses of litigation and unpaid attorneys' fees which will become due upon receipt by the Attorneys and associated counsel or any successor attorney of any proceeds for any remaining portion of Client's claim for expenses associated with Client's claim(s) and subsequent litigation. Client understands that the obligation for unpaid attorneys' fees will be calculated based upon the percentage of work-in-progress completed on the case at the time the Attorneys are released as Client's attorney(s).
12. Attorney may terminate this representation on any grounds or reason permissible under South Carolina Rules of Professional Conduct, provided Attorneys effect such termination in accordance with such rules.
13. Until the issues in this case are finally resolved, please take special care to preserve all evidence that may be relevant to this action. This request includes documents, data and tangible things in your possession, custody and control. Additionally, if you are aware of any employees, agents, contractors, carriers, bailees or others who are not parties to this lawsuit who may possess materials reasonably anticipated to be subject to discovery in this action, please identify them so that we may ask them to preserve any evidence in their possession.

For purposes of this request, "documents, data and tangible things" is to be interpreted broadly to include writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voice mail, e-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as tapes, disks and cards, printouts, document image files, web pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers, checks, statements, worksheets, summaries, compilations, computations, charts, diagrams, graphic presentations, drawings, films, digital or

chemical process photographs, video, phonographic, tape or digital recordings or transcripts thereof, drafts, jottings and notes. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices and metadata, is also included in this definition.

"Preservation" is to be interpreted broadly to accomplish the goal of maintaining the integrity of all documents, data and tangible things reasonably anticipated to be subject to discovery in this action. Preservation includes taking reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible.

If you have any routine business practices which involve the destruction of documents which may be expected to result in the destruction or damage of potential evidence, please stop that practice while this case is pending, segregate the materials relating to this case from the other records designated for destruction or make copies of the information pertaining to this case in a format suitable to preserve it for potential discovery at a later date.

Please review the foregoing and, if it meets with your approval, sign the extra copy of this contract and return it to me in the enclosed self-addressed, stamped envelope. If, at any time, you have questions, concerns, criticisms or suggestions, please feel free to contact me. We look forward to working with you.

With kind regards, I am

Very truly yours,

WILLS & MASSALON, LLC

John A. Massalon

Enclosures

Jeffrey D. Allen

EXHIBIT “D”

CURRICULUM VITAE

JOHN A. MASSALON

jmassalon@wmalawfirm.net
(843) 727-1144 (telephone)
(843) 727-7696 (facsimile)

Professional Experience

- 1999 - Present: Member, WILLS MASSALON & ALLEN, LLC, 97 Broad Street,
Charleston, South Carolina 29401
- 1990 - 1998: Associate (1990); Partner (1996), HOLMES & THOMSON, LLP, 200
Meeting Street, Suite 202, Charleston, South Carolina 29401
- 1988 - 1990: Law Clerk, United States District Judge Falcon B. Hawkins, Post Office
Box 853, Charleston, South Carolina
- 1987 - 1988: Law Clerk, United States Magistrate Judge Robert S. Carr, Post Office
Box 853, Charleston, South Carolina

Education

University of South Carolina School of Law
Juris Doctor Degree, 1987

College of Charleston
Bachelor of Arts Degree, 1984

Professional Memberships

Admitted to Practice: South Carolina; United States District Court for the District of South Carolina; United States Court of Appeals for the Fourth Circuit

American Bar Association

American Board of Trial Advocates

International Association of Defense Council

South Carolina Bar Association

Charleston County Bar Association

South Carolina Defense Trial Attorneys Association

AV rated (Martindale-Hubbell)

Bar Activities

Charleston County Bar Association: President 2011 -2012; Secretary 2008-2011; Board of Directors 2005-2013

South Carolina Bar: Member of the Alternative Dispute Resolution Section Council

South Carolina Defense Trial Attorneys Association: Board of Directors (1998-2004); Editor: *Defense Line* (1999-2004)

Publications

South Carolina Lawyer, "Right Without a Remedy: Setoff Under the South Carolina Workers' Compensation Act" (July/August, 1995)

Defense Line, Third Party Modification of Confidentiality Orders

Seminars

Adjunct Professor, Charleston School of Law, 2012 - 2013

"The Transition of Claims Investigation to Litigation", Forty-First Annual Joint Meeting of the South Carolina Defense Trial Attorneys Association and the Claims Management Association of South Carolina, July, 2008

Building Your Civil Trial Skills, National Business Institute, December 2006

Deposition Strategies and Techniques, National Business Institute, December, 2004

Managing the Attorney-Client Privilege and the Work-Product Doctrine in South Carolina, National Business Institute, March, 2002

Trying the Wrongful Death Case in South Carolina, National Business Institute, December, 1997

WILLS MASSALON & ALLEN, LLC
AFFIDAVIT OF CHRISTY FORD ALLEN

Christy Ford Allen, being duly sworn, gives the following Affidavit:

1. I am a lawyer in Charleston, South Carolina.
2. I am employed by Wills Massalon & Allen LLC, and my law practice is focused on civil litigation, including business litigation, professional liability, and real estate litigation.
3. I am a member of the South Carolina Bar, and have been in private practice in Charleston for 16 years. I regularly appear in state and federal courts on various matters.
4. As with all files, we create contemporaneous and detailed time entries in our law firm billing software.
5. The attached is the consolidated detailed time listing (for all Wills Massalon & Allen, LLC personnel) and costs report for this representation. (See Exhibit A -WMA Consolidated fee report) (Exhibit B - WMA cost report).
6. I have personally reviewed all time and costs entries on the attached report, and believe it to be accurate and kept in the regular course of our business.
7. Due to the overlap and concurrent litigation in the related state court litigation, which is not part of this Administrative Law Court case, but was an effort by Appellant to obtain class relief for all other similarly situated state employees wrongfully denied diabetes education insurance claims, the total fees and costs sought have been **reduced by 50%**. I believe that is a fair allocation as these cases were factually and legally intertwined, but procedurally distinct.

8. I believe that the rate of \$300.00 per hour is a reasonable and customary rate for this kind of litigation, especially considering the favorable outcome before the South Carolina Supreme Court.

9. As of the date of this Affidavit, the following is a summary of the hours worked for which fees are sought and corresponding hourly rate and costs, as set forth in detail in Exhibits A-B.

<u>Name</u>	<u>Type</u>	<u>Hours</u>	<u>Rate/Hr.</u>	<u>Total</u>
John A. Massalon	Attorney	15.35	350.00	5,372.50
Christy Ford Allen	Attorney	122.75	300.00	36,825.00
Krystal Parrish	Paralegal	11.8	75.00	885.00
Charline Barrasso	Paralegal	4.0	75.00	300.00
Faith Frink	Paralegal	5.65	75.00	423.75
Katie Macomson	Paralegal	1.7	75.00	127.50
TOTAL WMA ATTORNEYS FEES				\$43,930.75

10. Similarly, the Wills Massalon & Allen costs incurred, reduced by 50% and less the expert fee related solely to the circuit court litigation, include the following:

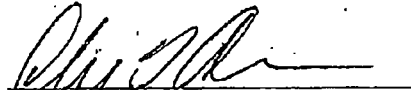
Copies	1786.345
Postage	139.04
Service of Process	137.735
Phone Conference	17.955
Legal Research	446.85
Filing Fees	241.00
Travel/Mileage	154.105
Expert Fees	-0- (expert fee related to circuit court case)
Total WMA Expenses	\$2,895.03

11. Wills Massalon & Allen, LLC associated as co-counsel the law firm of Richardson, Patrick, Westbrook & Brickman, LLC. I believe that the work performed by Terry

Richardson and Matthew Hamrick of that firm, related to this ALC case, was necessary and appropriate, and was not duplicative of the work performed by personnel at Wills Massalon & Allen, LLC.

12. Attached is my current biographical information as it relates to my professional standing as counsel. (Exhibit C)

13. The undersigned is also submitting an Affidavit of Attorney M. Dawes Cooke, Jr. on the issue of fees customarily charged in the locality and on the professional standing of counsel.


Christy Ford Allen

SWORN TO before me this
17th day of April, 2015

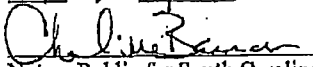
 (seal)
Notary Public for South Carolina
My Commission Expires: 8/21/2023



EXHIBIT “A”

CFA	Oct 5/2009	Review possible claims vs. SC / Insurance- Insurance- BCBS re health insurance lawsuit/class	4	
CFA	Oct 5/2009	Review possible claims vs. SC / Insurance- Insurance- BCBS re health insurance lawsuit/class	6.5	
CFA	Oct 13/2009	Research and prepare complaint	3	245.5
CFA	Oct 14/2009	Research and investigation,	5	
CFA	Oct 15/2009	Telephone conference with Attorney T Richardson re class action	0.5	
CFA	Oct 15/2009	Telephone conference with Attorney M Richardson re State Budget and Control Board	0.3	
CFA	Oct 15/2009	Legal research re ERISA exemption and state law structure	2.5	
CFA	Oct 16/2009	Office conference with RPWB law clerk re insurance class action	1	
CFA	Oct 20/2009	Revise memo by RPWB re issues and additional research	0.8	
CFA	Nov 6/2009	Office conference with Attorney Massalon re insurance class action	1.5	
CFA	Nov 9/2009	Legal research and finalization of complaint	4	
CFA	Nov 9/2009	Telephone conference with Ernst Csiszar and Leslie Jones re 200 DOI regulation	0.5	
CFA	Nov 16/2009	Receipt and review of materials from Pam Arnold of MUSC and office conference with Att	1	
CFA	Nov 19/2009	Finalize complaint and prepare summons	2	
CFA	Nov 24/2009	Telephone conference with Attorney Hamrick	0.5	
CFA	Nov 25/2009	Finalize filing of complaint	0.4	
CFA	Dec 3/2009	Telephone conference with Chairman of Diabetes Initiative Group	0.4	
CFA	Dec 4/2009	Office conference with Attorney Hamrick re service and strategy	1	
CFA	Dec 28/2009	Prepare correspondence to E Csiszar re expert witness consultation	0.3	
CFA	Dec 28/2009	Prepare electronic correspondence to Dr. Lackland re lawsuit	0.1	
CFA	Dec 28/2009	Prepare request for MUSC billing records file	0.2	
CFA	Dec 28/2009	Prepare FOIA request to State Health Plan for Plan and Insurance- Insurance- BCBS Contra	0.3	
CFA	Jan 4/2010	Receipt and review of MUSC billing record files	0.3	
CFA	Jan 4/2010	Legal research ADA advocacy, and North Carolina Blue Cross class action	1	
CFA	Jan 5/2010	Research, gather statistical data re number of claims, financials on Blue Cross, North Carol	3	
CFA	Jan 5/2010	Prepare letter to Perry Woodside re expert	0.5	
CFA	Jan 5/2010	Prepare materials for Perry Woodside	0.5	
CFA	Jan 6/2010	Finalize correspondence to Perry Woodside, and exchange email correspondence with ADA	0.4	
CFA	Jan 6/2010	Receipt and review of defendant's motion to dismiss	0.5	
CFA	Jan 6/2010	Prepare detailed affidavit in response to motion to dismiss	2.2	
CFA	Jan 7/2010	Prepare affidavit J Allen in opposition to motion to dismiss	0.5	
CFA	Jan 7/2010	Finalize affidavit C Allen in opposition to motion to dismiss	1	
CFA	Jan 7/2010	Prepare email correspondence re motion and multi week	0.8	
CFA	Jan 8/2010	Prepare memo in opposition to motion to dismiss	5	
CFA	Jan 11/2010	Receipt and review of budget and control board minutes re elp	0.5	
CFA	Jan 11/2010	Review of State Plan Document appeals process	0.5	
CFA	Jan 11/2010	Continue memo in opposition to motion to dismiss	0.3	
CFA	Jan 12/2010	Continue to prepare memo in opposition to motion to dismiss	4.1	
CFA	Jan 12/2010	Continue to prepare memo in opposition to motion to dismiss	1	
CFA	Jan 13/2010	Receipt and review of Eva Allen medical records	0.3	
CFA	Jan 13/2010	Telephone conference with Attorney M Hamrick	0.5	
CFA	Jan 13/2010	Continue to prepare memo in opposition to motion to dismiss	5	
CFA	Jan 15/2010	Finalize draft of memo in opposition to motion to dismiss	0.6	
CFA	Jan 15/2010	Prepare affidavit of Dr. Lackland	0.3	
CFA	Jan 19/2010	Finalize memo in opposition to motion to dismiss	2.4	
CFA	Jan 19/2010	Legal research re attys fee counsel issue	0.5	
CFA	Jan 19/2010	Bluebook memo in opposition to motion to dismiss	1	
CFA	Jan 20/2010	Finalize draft and forward to co-counsel	1.2	
CFA	Jan 22/2010	Exchange electronic correspondence with Judge Dennis' law clerk re motion hearing	0.1	
CFA	Jan 22/2010	Electronic correspondence exchange with Dr. Lackland re affidavit	0.1	
CFA	Jan 25/2010	Exchange email correspondence re hearing dates and time	0.2	
CFA	Jan 27/2010	Exchange electronic correspondence re hearing on motion to dismiss	0.2	
CFA	Feb 1/2010	Telephone call from Perry Woodside re expert services	0.2	
CFA	Feb 5/2010	Revise affidavit	0.5	
CFA	Feb 8/2010	Update C Allen affidavit	0.2	
CFA	Feb 11/2010	Receipt and review of BCB minutes	1	
CFA	Feb 23/2010	Electronic correspondence exchange with attorneys hamrick and richardson re hearing pre	0.2	
CFA	Feb 23/2010	Research on diabetes supply issues, and costs	0.5	
CFA	Feb 24/2010	Finalize memo in opposition to motion to dismiss	0.4	
CFA	Feb 24/2010	Research on ownership and structure of blue cross blue shield of SC	1	
CFA	Feb 26/2010	Finalize filing of memo in opposition	1	
CFA	Mar 2/2010	Receipt and review of defendant's memo in support of motion to dismiss	0.2	
CFA	Mar 3/2010	Office conference with Attorney Hamrick and Massalon	2.5	
CFA	Mar 4/2010	Prepare for hearing	1	
CFA	Mar 4/2010	Attend hearing	0.5	
CFA	Mar 4/2010	Office conference with Attys after hearing	0.5	
CFA	Mar 10/2010	Legal research and telephone conference with Attorney J Hoefar re class action/AJ	1	
CFA	Mar 23/2010	Receipt and review of denial of claims	0.1	

CFA	Apr 5/2010	Telephone conference with P Woodside re status	0.5	
CFA	Apr 13/2010	Receipt and review of draft discovery	0.5	
CFA	Apr 13/2010	Telephone conference with Perry Woodside and counsel re discovery	1.5	
CFA	Apr 21/2010	Telephone conference with D Lackland	0.4	
CFA	Apr 29/2010	Receipt and review of draft discovery	0.5	
CFA	May 5/2010	Telephone conference with Dr. Bruch re consulting expert	0.3	
CFA	Jun 23/2010	Exchange email with Matt Hamrick re motions strategy	0.2	
CFA	Jun 30/2010	Review EIP appeals deadlines, telephone conference with M Hamrick, and prepare adminis	1.5	
CFA	Jul 1/2010	Exchange emails with M Hamrick re motions hearing schedule	0.2	
CFA	Jul 28/2010	Telephone conference with Attorney G Pollakoff re Drummond v. SCDOR	0.5	
CFA	Aug 5/2010	Telephone conference with Matt Hamrick re motion hearing	0.3	
CFA	Aug 23/2010	Revise plaintiff's memo in opposition	2.5	
CFA	Aug 23/2010	Electronic correspondence exchange with Adela Terry re potential plaintiffs	0.2	
CFA	Aug 25/2010	Receipt and review of appeals decision and defendants brief in support of summary judgment	1	
CFA	Aug 25/2010	Legal research re same	1.5	
CFA	Aug 25/2010	Prepare affidavit for E Csisnar re Dept on Ins Jurisdiction	0.5	
CFA	Aug 26/2010	Attend SJ hearing	1	
CFA	Sep 3/2010	Prepare proposed order on SJ	3	
CFA	Sep 7/2010	Finalize and transmit proposed order	1	
CFA	Sep 28/2010	Electronic correspondence exchange with M Hamrick re supplemental filing with Judge on	0.1	
CFA	Oct 20/2010	Legal research on ALJ case and appeal options	3	
CFA	Oct 25/2010	Legal research	1	
CFA	Oct 27/2010	Receipt and review of entry of judgment	0.1	
CFA	Oct 28/2010	Office conference with Attorney Hamrick re 59 a and appeal	0.4	
CFA	Nov 5/2010	Prepare 59(e) motion and memo	2.5	
CFA	Nov 24/2010	Prepare reply to opposition to motion to alter or amend	1	
CFA	Nov 29/2010	Receipt and review of record of appeal	0.2	
CFA	Dec 2/2010	Review record on appeal, research, and telephone conference with M Hamrick re same	2	
CFA	Dec 7/2010	Prepare appellate brief to ALJ	5	
CFA	Dec 15/2010	Review Issues with Record on Appeal	1	
CFA	Dec 15/2010	Prepare appellate brief	3.5	
CFA	Dec 15/2010	Telephone and email to Attorney Willard re same	0.3	
CFA	Dec 15/2010	Electronic correspondence exchange with Judge's office re extension	0.2	
CFA	Dec 16/2010	Continue to prepare appellate brief	2.5	
CFA	Dec 17/2010	Transmit and finalize supplemental record for appeal	0.5	
CFA	Dec 17/2010	Continue to work on brief	2.5	
CFA	Dec 23/2010	Revise appeal brief	2	
CFA	Dec 29/2010	Continue to prepare appeal brief	0.5	
CFA	Dec 29/2010	Receipt and review of electronic correspondence from Attorney Willard re record on appeal	0.1	
CFA	Jan 3/2011	Electronic correspondence exchange with Attorney Willard re supplemental record on appeal	0.2	
CFA	Jan 5/2011	Telephone conference with M Hamrick re class cert issue and SC appeals filings	1	
CFA	Jan 6/2011	Finalize ALJ appellate brief	2	
CFA	Jan 12/2011	Electronic correspondence exchange with attorneys re supplemental record to ALJ	0.2	
CFA	Jan 12/2011	Exchange email re volume 2 of record on appeal	0.3	
CFA	Jan 14/2011	Finalize appellant's brief to ALJ	3.5	
CFA	Jan 17/2011	Finalize appellant brief to ALJ	3	
CFA	Jan 31/2011	Follow up re appeal brief deadlines	0.2	
CFA	Feb 23/2011	Telephone conference with M Hamrick re filign appellate brief	0.7	
CFA	Feb 23/2011	Receipt and review of brief from state in ALJ appeal	0.4	
CFA	Feb 25/2011	Review respondent's brief in preparation of filing reply	1	
CFA	Mar 3/2011	Prepare reply to ALJ	4.4	
CFA	Mar 4/2011	Finalize reply brief	3.5	
CFA	Mar 30/2011	Discuss request for stay and consolidation of appeals	0.2	
CFA	Apr 1/2011	Telephone conference with M Hamrick	0.3	
CFA	Jun 27/2011	Receipt and review of respondent's brief on appeal	0.4	
CFA	Jul 8/2011	Prepare reply to brief	1	
CFA	Jul 8/2011	Telephone conference with M Hamrick re reply to SCCA	1	
CFA	Jul 11/2011	Prepare reply brief to SCCA appeal	5.3	
CFA	Jul 19/2011	Prepare reply to opposition brief in appeal	6	
CFA	Aug 8/2011	Telephone conference with T Gressette re appeal, and receipt and review of record on appeal	0.7	
CFA	Aug 9/2011	Receipt and review of record on appeal for filing	1.5	
CFA	Aug 10/2011	Receipt and review of final draft of record on appeal	0.9	
CFA	Aug 30/2011	Prepare and finalize final briefs in SC Court of Appeals case	3.5	
CFA	Aug 31/2011	Prepare final reply brief for filing	2	
CFA	Sep 20/2011	Deal with volume on appeal issue - resolved	0.5	
CFA	Nov 8/2011	Review SC Ct App and ALJ calendar for scheduling	0.5	
CFA	Dec 6/2011	Telephone call from T Gressette re status	0.2	
CFA	May 8/2012	Prepare timeline and review filings	1.5	

CFA	May 9/2012	Travel to and from Columbia for appellate hearing	5.5	
CFA	May 9/2012	Attend hearing	1	
CFA	May 11/2012	Review 2012 SC cases on statutory interpretation as relates to supplemental brief to ALJ	0.5	
CFA	Jul 29/2012	Receipt and review of order, review appellate rules for deadlines	0.5	
CFA	Jul 31/2012	Prepare petition for rehearing	2	
CFA	Aug 1/2012	Prepare and finalize petition for rehearing on banc	3.5	
CFA	Sep 7/2012	Review appellate procedures for appeal from ALJ	0.3	
CFA	Sep 12/2012	Prepare notice of appeal from ALJ case	0.5	
CFA	Sep 13/2012	Legal research on transfer and certification to Supreme Court, prepare affidavit to Dr at N	3	
CFA	Oct 11/2012	Prepare appellate brief	4	
CFA	Oct 12/2012	Prepare appellate brief, designation on ALJ appeal	7	
CFA	Oct 15/2012	Finalize appeals brief from ALJ appeal, prepare petition for writ of cert, prepare motion to	5.5	
CFA	Oct 16/2012	Prepare pet for cert	0.5	
CFA	Oct 22/2012	Correct Supreme Court filings	1	
CFA	Nov 9/2012	Review State's Return to Motion to Certify, Pull out SC Diabetes Initiative minutes from 20	2.5	
CFA	Nov 9/2012	Revise affidavit for reply to return on motion to certify	0.2	
CFA	Nov 12/2012	Revise affidavit for DSC	0.6	
CFA	Nov 12/2012	Revise reply to return on motion to certify	0.6	
CFA	Nov 15/2012	Receipt and review of order of extension, and filed return	0.2	
CFA	Nov 19/2012	Receipt and review of Respondent's Initial Brief to ALJ Appeal	0.6	
CFA	Nov 19/2012	Follow up on Affidavit for Reply to Cert Petition	0.1	
CFA	Nov 20/2012	Finalize reply to return, prepare appendix, other filings documents	2.5	
CFA	Nov 26/2012	Prepare two reply briefs, one reply to ALJ appeal, reply to return on motion to for writ of	3	
CFA	Dec 7/2012	Receipt and review of notice supreme court granted motion to certify for review	0.2	
CFA	Dec 10/2012	Research on state health insurance case just on appeal, telephone call to Attorney Allen N	1	
CFA	Dec 12/2012	Begin to prepare record on appeal for Supreme Court filing	0.5	
CFA	Dec 14/2012	Compile record on appeal for Supreme Court filing	1	
CFA	Dec 18/2012	Receipt telephone call from Supreme Court re Reply and record, prepare record on appeal	1.5	
CFA	Dec 19/2012	Compile record on appeal	4	
CFA	Dec 20/2012	Compile record on appeal and finalize paperwork	1	
CFA	Jan 7/2013	Convert Interim to final brief and change record citations	1	
CFA	Jan 11/2013	Prepare final briefs	2.5	
CFA	Nov 6/2013	Email exchange with Mr. Richardson re hearing preparation	0.3	
CFA	Dec 5/2013	Telephone conference with J Massalon re hearing in supreme court	0.5	
CFA	Jun 2/2014	Review file, calendar, and electronic correspondence exchange with D Bruce at JDRF	0.5	
CFA	Mar 4/2015	Receipt and review of Order	0.5	
CFA	Mar 4/2015	Telephone conference with T Richardson, D Hattiwanger, research issue about supplement	2	
CFA	Mar 5/2015	Finalize motion to amend petition for cert in state case	1	
CFA	Mar 5/2015	Receipt and review of Supreme Court Order	0.5	
CFA	Mar 5/2015	Telephone conference with T Richardson	0.5	
CFA	Mar 5/2015	Prepare motion to amend petition for cert to include supplemental authority	1.5	
CFA	Mar 6/2015	Legal research attorney fee petition under 15-77-300	1	
CFA	Mar 11/2015	Research on fee petition	0.5	
CFA	Mar 12/2015	Research on attys fee motion, legal memo review, and electronic correspondence exchange	1	
CFA	Mar 17/2015	Electronic correspondence to B Willard	0.2	
CFA	Mar 17/2015	Telephone conference with B O Willard	0.4	
CFA	Mar 19/2015	Prepare communication re case	0.5	
CFA	Mar 26/2015	Research attorneys fee issues	2	
CFA	Apr 7/2015	Telephone conference with C Washington	0.5	
CFA	Apr 14/2015	Prepare and arrange attorney fee affidavits for motion	2.5	
CL	Mar 5/2015	Scan and bates number Motion for Leave to Amend Writ of Certiorari and Include New Av	1.4	8
CL	Mar 6/2015	Legal research regarding attorney's fees	5.8	
CL	Mar 10/2015	Receipt of South Carolina Supreme Court Opinion No. 27504, Indexing of document	0.1	
CL	Mar 10/2015	Receipt of Order Denying Writ of Certiorari, Indexing of document	0.1	
CL	Mar 11/2015	Convert Order Denying Petition for Attorney's Fees from PDF to Word format	0.5	
CL	Mar 31/2015	Receipt of Remittitur, Indexing of the same	0.2	
FF	Feb 9/2010	Review and print relevant Budget and Control Board Meeting minutes for years 2006, 200	1.6	11.3
FF	Feb 10/2010	Review and print relevant sections of SC Budget and control Board Meeting Minutes for 2	0.4	
FF	Feb 24/2010	Begin scanning, marking and preparing exhibits for Plaintiff's Memorandum in Opposition	0.6	
FF	Feb 25/2010	Prepare, copy and mark exhibits for Plaintiff's Memorandum in Opposition to Def's Motion	1	
FF	Feb 26/2010	Telephone conference with Judge Dennis' law clerk re: hearing and delivery of Memorandu	0.1	
FF	Feb 26/2010	Prepare letter to Judge Dennis with Pl's Memorandum in Opposition to Def's Motion to Di	0.2	
FF	Feb 26/2010	Finalize Memorandum in Opposition and Exhibits for filing	0.4	
FF	Feb 26/2010	Prepare letter to Clerk of Court filing Memorandum in Opposition	0.2	
FF	Feb 26/2010	Prepare electronic correspondence to Theodore Willard and Kelly Rainsford	0.1	
FF	Apr 29/2010	Revisé and create redline versions of Responses to Answers to Interrogatories and RFP of E	0.3	
FF	May 19/2010	Prepare letter to Perry Woodsdale re: discovery served on Defendants	0.2	
FF	Jul 16/2010	Prepare letter to Matt Hamrick	0.2	

FF	Nov 8/2010	Prepare letter to Clerk of court with Motion to Alter or Amend; Prepare Motion Slip; Ema	0.4		
FF	Nov 23/2010	Prepare letter to Clerk of Court filing Plaintiff's Reply to Defendant's Opposition to Motion	0.2		
FF	Jan 17/2011	Revise/review Brief; telephone conference with ProCopy; Prepare Proof of Service	0.5		
FF	Jan 18/2011	Telephone conference with ProCopy re: Brief of Appellant; review and scan Brief; Review	0.5		
FF	Mar 4/2011	Prepare Proof of Service for Reply Brief; Prepare letter to Judge Robinson; telephone con	0.5		
FF	Jul 13/2011	Review, proof-read and revise Initial Reply Brief	1.7		
FF	Jul 14/2011	Revise and finalize Initial Brief; Prepare Proof of Service; Review SCRCF for proper filing pro	1.1		
FF	Sep 1/2011	Prepare Brief covers, 20 copies of each brief; telephone conference with ProCopy; Prepar	1.1		
JAM	Oct 14/2009	Office conference with Attorney Allen re potential suit against Blue Cross	0.5		
JAM	Nov 5/2009	Office conference with Ms. Allen re new suit against Blue Cross/Blue Shield	1		
JAM	Jan 5/2010	Receipt and review of correspondence from Theodore Willard reFOIA request	0.1		
JAM	Jan 7/2010	Receipt and review of email re motion to dismiss and prepare email to Mr. Richardson, Mr	0.2		
JAM	Jan 22/2010	Receipt and review of email re scheduling hearing on motion for summary judgment in All	0.1		
JAM	Mar 9/2010	Office conference with Mr. Hamrick and Ms. Allen to prepare for hearing on motion to dis	1.4		
JAM	Mar 4/2010	Complete preparation for hearing on motion to dismiss	1.6		30.7
JAM	Mar 4/2010	Participate in hearing and follow-up meeting with Mr. Richardson, Mr. Hamrick and Ms. Al	2		
JAM	Apr 5/2010	Telephone conference with Ms. Allen, Mr. Hamrick and Dr. Woodside re discovery	0.6		
JAM	Apr 13/2010	Telephone conference with Mr. Woodside, Ms. Allen and Mr. Hamrick re discovery reques	1.2		
JAM	Jun 7/2010	Telephone call to Mr. Willard re motion for summary judgment and motion to compel	0.2		
JAM	Sep 6/2010	Receipt and review of draft proposed order denying summary judgment	0.2		
JAM	Nov 8/2010	Review Rule 59 (e) motion	0.2		
JAM	Jan 17/2011	Review and edit final brief	0.6		
JAM	Feb 8/2011	Receipt and review of correspondence from Court of Appeals and prepare email to Ms. Al	0.2		
JAM	Feb 13/2012	Receipt and review of letter from Court of Appeals re scheduling	0.3		
JAM	Feb 14/2012	Electronic correspondence exchange with Mr. Richardson re scheduling; telephone call to	0.5		
JAM	May 1/2012	Begin preparing for oral argument	1		
JAM	May 8/2012	Prepare for oral argument	1		
JAM	May 9/2012	Finish preparing for oral argument; travel to Columbia, participate in oral argument and re	7		
JAM	Oct 22/2012	Telephone call from Ms. Unda Allen of Supreme Court re corrections to petition; office con	0.5		
JAM	Oct 23/2012	Correct petition to Supreme Court	0.5		
JAM	Oct 24/2012	Electronic correspondence exchange with Mr. Willard re extension to respond to motion f	0.1		
JAM	Nov 13/2012	Electronic correspondence exchange with Mr. Willard re extension to file reply brief	0.1		
JAM	Nov 21/2012	Review memo from Mr. Willard and exchange email with Attorney Allen re same	0.2		
JAM	Dec 28/2012	Telephone call from Clerk of Supreme Court re status of service of record on appeal	0.2		
JAM	Sep 20/2013	Prepare electronic correspondence to Clerk of Court re hearing dates	0.2		
JAM	Oct 14/2013	Prepare electronic correspondence to Mr. Shearhouse re hearing dates	0.2		
JAM	Dec 4/2013	Prepare for oral argument	2		
JAM	Dec 5/2013	Finish preparing for oral argument; travel to Columbia, participate in hearing and return to	6		
JAM	Mar 16/2015	Office conference with Attorney Allen re petition for rehearing and attorneys' fee claim	0.5		
JAM	Apr 8/2015	Receipt and review of email re amending petition for writ of cert to include new authority	0.3		
KAP	Sep 25/2012	Letter & Copy of Court of Appeals Order to Terry Richardson	0.1		23.6
KAP	Oct 10/2012	Prepare ALJ Appeal Case No. 2012-212988 Caption	0.3		
KAP	Oct 15/2012	Prepare for filing and service: Letter to Clerk of Court Appeals Ms. Kitchings, re Appellant's	1.5		
KAP	Oct 17/2012	Prepare Filings for Supreme Court: Motion to Certify for Review by Supreme Court and Me	6.5		
KAP	Dec 19/2012	Prepare Documents for Filing Record on Appeal in Supreme Court. Copy and increase Inde	5		
KAP	Dec 20/2012	Create Bates Labels for Record on Appeal, Label Documents, Create Title Pages and Index	5		
KAP	Dec 27/2012	Prepare letters to attorney Theodora Willard & Steven Van Camp regarding enclosed Reco	0.5		
KAP	Dec 27/2012	Prepare two copies of Record on Appeal, Vols. 1-3 for service to Attorneys Steven Van Cam	1.5		
KAP	Jan 14/2013	Prepare Clerk Letters & Attorney Letters, Final Brief, Final Reply, Record on Appeal Vol. 1-3	3		
KAP	Jan 14/2013	Contact Courier service: Dash set up time for delivery to Supreme Court	0.2		
KMM	Jan 12/2010	Review Minutes of State Budget & Control Meeting from 2008, 2007 & 2006 for Attorney	2		3.4
KMM	Jan 19/2010	Prepare West Law documents for Attorney Allen for filing.	1		
KMM	Jan 25/2010	Pick-up Affidavit of Dr. Lachlin from MUSC.	0.4		

2/31/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	793	820	- Client Ex	
303782	In-house photocopies (February and March 2011)								
	Total for Mar/31/2011 : 28.02								
4/29/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	794	820	- Client Ex	4.60
304500	In-house photocopies (April 2011)								
	Total for Apr/29/2011 : 4.60								
5/31/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	800	820	- Client Ex	2.36
308910	In-house photocopies (May 2011)								
	Total for May/31/2011 : 2.36								
7/31/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	856	820	- Client Ex	22.44
313246	In-house photocopies (July 2011)								
	Total for Jul/31/2011 : 22.68								
7/12/2011	Heat Payment Center GS	895-1	Allen,	Esquivel,	Ch	1892	820	- Client Ex	47.74
312524	Computerized legal research (GA 7/11/ 7/11/								
	Total for Aug/12/2011 : 67.74								
8/4/2011	Pro-legal Copies, Inc. GS	895-1	Allen,	Esquivel,	Ch	2049	820	- Client Ex	82.40
313703	Photocopies (Inv. #120045)								
	Total for Sep/4/2011 : 82.46								
8/15/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	810	820	- Client Ex	16.88
315845	In-house postage (September 2011)								
9/30/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	811	820	- Client Ex	103.86
315846	In-house photocopies (September 2011)								
	Total for Sep/30/2011 : 118.81								
10/24/2011	Federal Express GS	895-1	Allen,	Esquivel,	Ch	2183	820	- Client Ex	19.88
321177	Federal Express (Invt. #2363-4571-8, Inv. 8								
	Total for Oct/24/2011 : 19.88								
10/31/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	818	820	- Client Ex	1.72
321907	In-house photocopies (October 2011)								
	Total for Oct/31/2011 : 1.72								
11/19/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	827	820	- Client Ex	4.79
324902	In-house photocopies (February 2012)								
11/19/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	833	820	- Client Ex	3.20
324943	In-house postage (February 2012)								
	Total for Feb/19/2012 : 7.99								
12/11/2011	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	816	820	- Client Ex	3.88
324901	In-house photocopies (March 2012)								
	Total for Apr/11/2012 : 3.88								
1/1/2012	Charley Fox Allen, GS	895-1	Allen,	Esquivel,	Ch	2920	820	- Client Ex	123.21
331462	Travel to/from Columbia, South Carolina for								
	Total for Jan/1/2012 : 123.21								
2/2/2012	South Carolina Court of Appeals GS	895-1	Allen,	Esquivel,	Ch	2938	820	- Client Ex	25.80
334979	Filing Fees (Petition for Rehearing on Ban								
	Total for Aug/2/2012 : 25.00								
3/31/2012	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	854	820	- Client Ex	16.98
334932	In-house photocopies (August 2012)								
3/31/2012	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	853	820	- Client Ex	1.95
334932	In-house postage								
	Total for Aug/31/2012 : 21.93								
4/19/2012	South Carolina Court of Appeals GS	895-1	Allen,	Esquivel,	Ch	3145	820	- Client Ex	100.00
337491	Filing Fees (Notice of Appeal)								
	Total for Sep/19/2012 : 100.00								
4/30/2012	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	860	820	- Client Ex	31.46
337786	In-house photocopies (September 2012)								
4/30/2012	Expense Recovery CER	895-1	Allen,	Esquivel,	Ch	863	820	- Client Ex	9.10
338718	In-house postage (September 2012)								
	Total for Sep/30/2012 : 40.56								
10/16/2012	The South Carolina Court of Appeals GS	895-1	Allen,	Esquivel,	Ch	3262	820	- Client Ex	7.60
339731	Filing Fees on 10/15/2012 of a								
	Total for Oct/16/2012 : 7.00								
10/17/2012	The South Carolina Supreme Court on 895-1		Allen,	Esquivel,	Ch	3264920		- Client Ex	100.00
339805	Filing Fees Petition for Writ of Certiorari								
10/17/2012	The South Carolina Supreme Court on 895-1		Allen,	Esquivel,	Ch	3267820		- Client Ex	25.00
339807	Filing Fees Motion to Certify for Review by								
	Total for Oct/17/2012 : 125.00								
10/19/2012	Billotte Deliveries GS 895-1		Allen,	Esquivel,	Ch	3273920		- Client Ex	188.00
339866	Travel to/from Columbia, SC (Court of Appeal								
	Total for Oct/19/2012 : 189.00								
10/31/2012	Expense Recovery CER 895-1		Allen,	Esquivel,	Ch	863920		- Client Ex	18.37
340440	In-house postage (October 2012)								
	Total for Oct/31/2012 : 15.57								
10/14/2012	South Carolina Supreme Court on 895-1		Allen,	Esquivel,	Ch	3333020		- Client Ex	26.00
341114	Filing Fees (Motion for Extension of Time)								
	Total for Nov/14/2012 : 25.00								
10/30/2012	Expense Recovery CER 895-1		Allen,	Esquivel,	Ch	864920		- Client Ex	17.34
342102	In-house postage (November 2012)								
10/30/2012	Expense Recovery CER 895-1		Allen,	Esquivel,	Ch	867920		- Client Ex	97.02
342320	In-house photocopies (November 2012)								
	Total for Nov/30/2012 : 114.36								
10/31/2012	Expense Recovery CER 895-1		Allen,	Esquivel,	Ch	868920		- Client Ex	61.36
343440	In-house photocopies (December 2012)								
10/31/2012	Expense Recovery CER 895-1		Allen,	Esquivel,	Ch	869920		- Client Ex	23.66
343470	In-house postage (December 2012)								
	Total for Dec/31/2012 : 675.51								
10/15/2013	Pro-legal Copies, Inc. GS 898-1		Allen,	Esquivel,	Ch	3524920		- Client Ex	1086.03
344970	Photocopies (Invoice #120972) Legal Relief								
	Total for Jan/15/2013 : 1805.05								
10/22/2013	Federal Express GS 898-1		Allen,	Esquivel,	Ch	3544920		- Client Ex	20.20
345860	Federal Express (Invt. #2363-4571-8, Inv. 2-								
10/22/2013	Federal Express GS 898-1		Allen,	Esquivel,	Ch	3544920		- Client Ex	16.24
345860	Federal Express (Invt. #2363-4571-8, Inv. 2-								
	Total for Jan/22/2013 : 36.52								
10/30/2013	Expense Recovery CER 895-1		Allen,	Esquivel,	Ch	878920		- Client Ex	49.18
346340	In-house photocopies (January 2013)								
10/30/2013	Expense Recovery CER 895-1		Allen,	Esquivel,	Ch	879920		- Client Ex	29.73
346860	In-house postage (January 2013)								
10/30/2013	Expense Recovery CER 895-1		Allen,	Esquivel,	Ch	879920		- Client Ex	120.95
346860	In-house photocopies (January 2013)								
	Total for Jan/30/2013 : 191.86								

5/ 5/2013	RAM Courier Service on 595-1	Alle	Requie	Ch	1601220	- client	30
364492	Courier Service to SC Supreme Ct. on 2nd. 15	Dr	Dr			EM	
	Total for Feb/ 5/2013 : 168.00						
7/31/2013	Expense Recovery CDR 595-1	Alle	Requie	Ch	1208220	- Client	2.04
362582	Postage (October 2013)	Dr	Dr			EM	
	Total for Oct/31/2013 : 2.04						
0/ 3/2013	Expense Recovery CDR 595-1	Alle	Requie	Ch	1258220	- Client	5.00
364683	Parking Charge in Columbia, SC on 12/05.2012	Dr	Dr			EM	
	Total for Dec/ 3/2013 : 5.00						
7/ 6/2013	South Carolina Supreme Court on 595-1	Alle	Requie	Ch	1012220	- Client	25.00
371919	Filing Fee Motion for leave to amend Petition	Dr	Dr			EM	
	Total for Mar/ 6/2013 : 25.00						8133.61

EXHIBIT “C”

CHRISTY FORD ALLEN
Wills Massalon & Allen, LLC

Legal Practice Areas in Federal and State Courts

Commercial and Real Estate Litigation, Professional Business Liability and Litigation,
Construction Litigation, Negligence, and Alternative Dispute Resolution (certified
mediator)

Wills Massalon & Allen, LLC, Attorney, 2000 to present

**United States District Court, District of South Carolina, Law Clerk to Honorable Patrick
Michael Duffy, 1998-2000**

Education

USC School of Law, J.D., 1998, *Cum Laude*
Clemson University, B.A., 1995, *Magna Cum Laude*

Honors and Awards

South Carolina Super Lawyers	2013, 2014
South Carolina Super Lawyers Rising Stars	2012
FBA Chapter Activity Presidential Achievement Award	2011
Lowcountry Volunteer of the Year	1991

Professional and Community Involvement

American Bar Association
Federal Bar Association, South Carolina Chapter, Past President 2010-2011
South Carolina Women Lawyers Association
Charleston County Bar Association
James M. Petrigu American Inn of Court
South Carolina Law Review, Editorial Board, 1996-1998
Editor's Award for Extraordinary Service and Commitment
Order of Wig and Robe

Juvenile Diabetes Research Foundation (JDRF) Advocate
MUSC Children's Hospital Family Advisory Council
Lowcountry Local First, Board Member

Publications/Speaking Engagements

SC Courts Presentation, Law School for Non-Lawyers, SCBAR Pro Bono Program
Charleston, SC March 2014

Christy F. Allen, *Intentional Infliction of Emotional Distress, in SOUTH CAROLINA*

DAMAGES (Edward Westbrook & Jay Ward eds., 2nd ed., SC Bar 2009)

Underground Utilities and Liability, South Carolina Utility Coordination Committee,
June 2009

*Admitted to practice in U.S. Supreme Court, Supreme Court of South Carolina, Fourth Circuit Court of
Appeals, and U.S. District Court of South Carolina*

RICHARDSON PATRICK WESTBROOK & BRICKMAN, LLC

AFFIDAVIT OF TERRY E. RICHARDSON

I, Terry E. Richardson, being duly sworn, gives the following Affidavit:

1. I am a member of the South Carolina Bar, and have been in private practice in Barnwell and Charleston for over 40 years. I regularly appear in state and federal courts on various matters.
2. I am an owner in the law firm of Richardson Patrick Westbrook & Brickman LLC, (RPWB) and my law practice is focused on many types of complex civil litigation, including burn injury cases, business and complex litigation, class actions, personal injury, products liability, railroad accidents, securities fraud, vehicle defects, and qui tam.
3. At RPWB, LLC we maintain detailed time entries in our law firm billing software.
4. The attached is the consolidated detailed time listing (for all RPWB, LLC personnel) and costs report for this representation. (See Exhibit A -RPWB Consolidated fee report) (Exhibit B -RPWB cost report).
5. I have personally reviewed all time and costs entries on the attached report, and believe it to be accurate and kept in the regular course of our business.
6. Due to the overlap and concurrent litigation in the related state court litigation, which is not part of this Administrative Law Court case, but was an effort by Appellant to obtain class relief for all other similarly situated state employees wrongfully denied diabetes education insurance claims, the total fees and costs sought have been reduced by 50%. I

believe that is a fair allocation as these cases were factually and legally intertwined, but procedurally distinct.

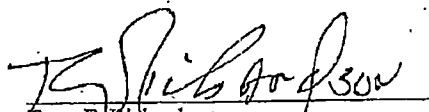
7. I believe that the rate of \$600.00 per hour is a reasonable and customary rate for this kind of litigation, especially considering the favorable outcome before the South Carolina Supreme Court.
8. Attorney Matthew Hamrick was an attorney employed by RPWB, LLC, but is no longer employed at RPWB, LLC. I believe that \$300 per hour is reasonable and customary for Mr. Hamrick's work on this matter.
9. As of the date of this Affidavit, the following is a summary of the hours worked for which fees are sought and corresponding hourly rate and costs, as set forth in detail in Exhibits A-B.

<u>Name</u>	<u>Type</u>	<u>Hours</u>	<u>Rate/Hr.</u>	<u>Total</u>
Terry E. Richardson	Attorney	16.75	600.00	10,050.00
Matthew Hamrick	Attorney	10.0	300.00	3,000.00
TOTAL RPWB ATTORNEYS FEES				\$13,050.00

Similarly, the RPWB, LLC expenses incurred, reduced by 50%, include the following:

Copies	258.57	
Fax	4.00	
Postage	17.63	
Scanned Images	14.96	
Legal Research	19.32	
Filing Fees	137.5	
Transcripts	902.65	
Mileage	<u>114.56</u>	
TOTAL RPWB EXPENSES		1469.19

10. Wills Massalon & Allen, LLC associated me as co-counsel in this matter. I believe that the work performed as co-counsel, related to this ALC case, was necessary and appropriate, and was not duplicative of the work performed by personnel at Wills Massalon & Allen, LLC.
11. Attached is my current biographical information as it relates to my professional standing as counsel. (Exhibit C)
12. The undersigned is also submitting an Affidavit of Attorney Mark Tanenbaum and Thomas P. Gressette, Jr. on the issue of fees customarily charged in the locality and on the professional standing of counsel.


Terry E. Richardson

SWORN TO before me this
17 day of April, 2015

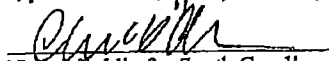
 (seal)
Notary Public for South Carolina
My Commission Expires: 11/2017

EXHIBIT “A”

Matter #	Matter Name	Transaction Date	Timekeeper	Description	Hours
219093	Allen, Jeffrey D.	10/15/09	trichardson	Conference call with co-counsel; e-mails, etc.	1
219093	Allen, Jeffrey D.	10/20/09	trichardson	Review memorandum re: ERISA; e-mails.	1.5
219093	Allen, Jeffrey D.	11/16/09	trichardson	Met with John Massalon and Christy Ford Allen and Matt Hamrick to discuss case.	1.3
219093	Allen, Jeffrey D.	11/17/09	trichardson	Researching case.	0.8
219093	Allen, Jeffrey D.	3/4/10	trichardson	Hearing; travel time from Barnwell to Charleston and back to Barnwell.	8
219093	Allen, Jeffrey D.	4/7/10	trichardson	Travel to Charleston; Hearing; travel back to Barnwell.	6
219093	Allen, Jeffrey D.	5/22/12	trichardson	Travel to Columbia; Hearing; travel back to Barnwell.	4
219093	Allen, Jeffrey D.	10/18/12	trichardson	Review Initial Brief to Court of Appeals; e-mails.	1
219093	Allen, Jeffrey D.	10/19/12	trichardson	Review Petition for Cert.	0.8
219093	Allen, Jeffrey D.	11/8/12	trichardson	Review Respondent's Return to Petitioner's Motion to Certify Pursuant to SCACR 204(b).	0.5
219093	Allen, Jeffrey D.	11/19/12	trichardson	Review Respondents' Return to Petitioner's Writ of Cert.	0.8
219093	Allen, Jeffrey D.	11/27/12	trichardson	Review Initial Reply Brief of Appellant.	0.5
219093	Allen, Jeffrey D.	12/31/12	trichardson	Review of Record on Appeal.	0.8
219093	Allen, Jeffrey D.	1/16/13	trichardson	Review of Final Brief and Final Reply to Supreme Court.	1
219093	Allen, Jeffrey D.	12/8/13	trichardson	Travel to Columbia; Hearing; travel back to Barnwell.	4
219093	Allen, Jeffrey D.	3/4/15	trichardson	Reviewing Supreme Court Opinion; phone calls.	1.5
					33.5
219093	Allen, Jeffrey D.	4/13/10	mhamrick	Meeting with Perry Woodside to discuss case and formulate discovery requests; draft discovery requests.	3.3
219093	Allen, Jeffrey D.	5/5/10	mhamrick	Draft discovery requests.	1.5
219093	Allen, Jeffrey D.	5/21/10	mhamrick	Draft motion for class certification.	0.3
219093	Allen, Jeffrey D.	6/3/10	mhamrick	Review defendants' motion for protective order; e-mail to Christy Ford Allen regarding defendants' motion for protective order.	0.8
219093	Allen, Jeffrey D.	6/7/10	mhamrick	E-Mail from John Massalon regarding motion to compel discovery responses.	0.1
219093	Allen, Jeffrey D.	6/15/10	mhamrick	Draft motion to compel discovery responses.	0.4
219093	Allen, Jeffrey D.	6/23/10	mhamrick	E-Mail to Christy Ford Allen and John Massalon regarding pending motions.	0.1
219093	Allen, Jeffrey D.	6/24/10	mhamrick	E-Mail from Christy Ford Allen regarding pending motions.	0.1
219093	Allen, Jeffrey D.	6/30/10	mhamrick	E-Mail to Don Michel regarding scheduling of pending motions.	0.2
219093	Allen, Jeffrey D.	7/1/10	mhamrick	E-Mail correspondence from and to Don Michel regarding scheduling of pending motions.	0.2
219093	Allen, Jeffrey D.	7/28/10	mhamrick	E-Mail to Don Michel regarding scheduling of pending motions.	0.1
219093	Allen, Jeffrey D.	7/30/10	mhamrick	E-Mail correspondence from and to Don Michel regarding scheduling of pending motions.	0.1
219093	Allen, Jeffrey D.	8/22/10	mhamrick	Draft memorandum of law in support of motion to compel and in opposition to motion for summary judgment; draft affidavit of Matthew D. Hamrick	3.2
219093	Allen, Jeffrey D.	8/23/10	mhamrick	E-Mail correspondence from and to Christy Ford Allen regarding motion for summary judgment.	0.2
219093	Allen, Jeffrey D.	8/25/10	mhamrick	Review memorandum of law in support of motion for summary judgment; e-mail to Christy Ford Allen and John Massalon regarding motion for summary judgment.	0.6
219093	Allen, Jeffrey D.	8/25/10	mhamrick	E-mail from Christy Ford Allen regarding motion for summary judgment; appear for hearing on motion to compel and motion for summary judgment.	1.5
219093	Allen, Jeffrey D.	9/1/10	mhamrick	E-mails from and to Christy Ford Allen regarding proposed order.	0.2
219093	Allen, Jeffrey D.	9/5/10	mhamrick	Review draft proposed order.	0.5
219093	Allen, Jeffrey D.	9/21/10	mhamrick	Draft appeal of Employee Insurance Panel to Administrative Law Court.	0.4
219093	Allen, Jeffrey D.	9/28/10	mhamrick	Review Bo Willard's correspondence to Judge Burch regarding Administration Law Court appeal; E-mail correspondence to Judge Burch regarding Administrative Law Court appeal.	0.5
219093	Allen, Jeffrey D.	10/8/10	mhamrick	Draft letter to Christy Ford Allen and John Massalon regarding Administrative Law Court appeal.	0.1

219093	Allen, Jeffrey D.	10/13/10	mhamrick	Draft letter to Christy Ford Allen and John Massalon regarding Administrative Law Court appeal; Draft request for hearing transcript.	0.2	
219093	Allen, Jeffrey D.	10/19/10	mhamrick	E-mail from Christy Ford Allen regarding request for hearing transcript; Administrative Law Court appeal.	0.1	
219093	Allen, Jeffrey D.	10/27/10	mhamrick	Review order granting summary judgment.	0.3	
219093	Allen, Jeffrey D.	11/8/10	mhamrick	Review draft motion to alter or amend summary judgment order.	0.3	
219093	Allen, Jeffrey D.	11/23/10	mhamrick	Review Record on Appeal; Review final motion to alter or amend summary judgment order.	0.4	
219093	Allen, Jeffrey D.	12/15/10	mhamrick	Review draft brief to Administrative Law Court.	0.8	
219093	Allen, Jeffrey D.	12/16/10	mhamrick	Review revised brief to Administrative Law Court.	0.4	
219093	Allen, Jeffrey D.	2/23/11	mhamrick	Draft, file and serve motion for extension to file initial appellate brief.	0.4	
219093	Allen, Jeffrey D.	3/15/11	mhamrick	Telephone call from SC Court of Appeals regarding extension to file initial brief.	0.1	
219093	Allen, Jeffrey D.	4/1/11	mhamrick	Telephone conference with Christy Ford Allen regarding status conference call with Judge Few.	0.3	
219093	Allen, Jeffrey D.	4/4/11	mhamrick	Telephone status conference call with Judge Few.	0.3	
219093	Allen, Jeffrey D.	7/8/11	mhamrick	Review Respondent's initial brief.	0.6	
219093	Allen, Jeffrey D.	7/8/11	mhamrick	Review and revise reply brief.	0.7	
219093	Allen, Jeffrey D.	7/12/11	mhamrick	Review and revise reply brief.	0.7	
219093	Allen, Jeffrey D.	7/14/11	mhamrick	Review final reply brief.	0.5	
						20

EXHIBIT “B”

Internal Charges Ask Code Description Internal Charges Copies / Prints	Bill Date	Charge and Type Description	Bill Quantity	Bill Rate	Bill Amount	
	26-Apr-11	Internal Charges Copies/Prints	82.00	0.15	12.30	
	03-Aug-11	Internal Charges Copies/Prints	48.00	0.15	7.20	
	04-Aug-11	Internal Charges Copies/Prints	1.00	0.15	0.15	
	05-Aug-11	Internal Charges Copies/Prints	694.00	0.15	104.10	
	08-Aug-11	Internal Charges Copies/Prints	3.00	0.15	0.45	
	09-Aug-11	Internal Charges Copies/Prints	10.00	0.15	1.50	
	10-Aug-11	Internal Charges Copies/Prints	719.00	0.15	107.70	
	12-Aug-11	Internal Charges Copies/Prints	14.00	0.15	2.10	
	15-Aug-11	Internal Charges Copies/Prints	2.00	0.15	0.30	
	22-Aug-11	Internal Charges Copies/Prints	25.00	0.15	3.75	
	23-Aug-11	Internal Charges Copies/Prints	19.00	0.15	2.85	
	30-Aug-11	Internal Charges Copies/Prints	7.00	0.15	1.05	
	31-Aug-11	Internal Charges Copies/Prints	13.00	0.15	1.95	
	19-Sep-11	Internal Charges Copies/Prints	2.00	0.15	0.30	
	03-Oct-11	Internal Charges Copies/Prints	2.00	0.15	0.30	
	17-Nov-11	Internal Charges Copies/Prints	2.00	0.15	0.30	
	16-Apr-12	Internal Charges Copies/Prints	2.00	0.15	0.30	
	17-Apr-12	Internal Charges Copies/Prints	8.00	0.15	1.20	
	15-May-12	Internal Charges Copies/Prints	2.00	0.15	0.30	
	17-Jan-13	Internal Charges Copies/Prints	1.00	0.15	0.15	
			1,649.00		Total Type Amount:	247.35
Internal Charges Copies / Prints						
	23-Mar-10	Internal Charges Copies/Prints	1.00	0.20	0.20	
	23-Mar-10	Internal Charges Copies/Prints	1.00	0.20	0.20	
	24-Mar-10	Internal Charges Copies/Prints	1.00	0.20	0.20	
	24-Mar-10	Internal Charges Copies/Prints	1.00	0.20	0.20	
	30-Mar-10	Internal Charges Copies/Prints	1.00	0.20	0.20	
	07-Apr-10	Internal Charges Copies/Prints	1.00	0.20	0.20	
	07-Apr-10	Internal Charges Copies/Prints	15.00	0.20	3.00	
	07-Apr-10	Internal Charges Copies/Prints	60.00	0.20	12.00	
	07-Apr-10	Internal Charges Copies/Prints	2.00	0.20	0.40	
	07-Apr-10	Internal Charges Copies/Prints	4.00	0.20	0.80	
	07-Apr-10	Internal Charges Copies/Prints	3.00	0.20	0.60	
	07-Apr-10	Internal Charges Copies/Prints	1.00	0.20	0.20	
	07-Apr-10	Internal Charges Copies/Prints	4.00	0.20	0.80	
	08-Apr-10	Internal Charges Copies/Prints	3.00	0.20	0.60	
	08-Apr-10	Internal Charges Copies/Prints	5.00	0.20	1.00	
	08-Apr-10	Internal Charges Copies/Prints	4.00	0.20	0.80	
	05-May-10	Internal Charges Copies/Prints	61.00	0.20	12.20	
	02-Jun-10	Internal Charges Copies/Prints	9.00	0.20	1.80	
	03-Jun-10	Internal Charges Copies/Prints	19.00	0.20	3.80	
	15-Jun-10	Internal Charges Copies/Prints	6.00	0.20	1.20	
	17-Jun-10	Internal Charges Copies/Prints	173.00	0.20	34.60	
	12-Jul-10	Internal Charges Copies/Prints	5.00	0.20	1.00	
	23-Aug-10	Internal Charges Copies/Prints	95.00	0.20	19.00	
	21-Sep-10	Internal Charges Copies/Prints	8.00	0.20	1.60	
	22-Sep-10	Internal Charges Copies/Prints	212.00	0.20	42.40	
	08-Oct-10	Internal Charges Copies/Prints	5.00	0.20	1.00	
	13-Oct-10	Internal Charges Copies/Prints	13.00	0.20	2.60	
	23-Nov-10	Internal Charges Copies/Prints	338.00	0.20	67.60	
	07-Jan-11	Internal Charges Copies/Prints	12.00	0.20	2.40	
	14-Jan-11	Internal Charges Copies/Prints	132.00	0.20	26.40	
	27-Jan-11	Internal Charges Copies/Prints	1.00	0.20	0.20	
	28-Jan-11	Internal Charges Copies/Prints	5.00	0.20	1.00	
	31-Jan-11	Internal Charges Copies/Prints	14.00	0.20	2.80	
	08-Feb-11	Internal Charges Copies/Prints	17.00	0.20	3.40	
	09-Feb-11	Internal Charges Copies/Prints	12.00	0.20	2.40	
	10-Feb-11	Internal Charges Copies/Prints	2.00	0.20	0.40	
	24-Feb-11	Internal Charges Copies/Prints	52.00	0.20	10.40	
	25-Feb-11	Internal Charges Copies/Prints	10.00	0.20	2.00	
	10-Mar-11	Internal Charges Copies/Prints	41.00	0.20	8.20	
			1,349.00		Total Type Amount:	269.80
Internal Charges Fax						
	02-Sep-11	Internal Charges Fax	0.00	0.00	0.00	
			0.00		Total Type Amount:	0.00

Internal Charges Postage					
	20-May-10	Internal Charges Postage	0.00	0.00	2.64
	21-Jun-10	Internal Charges Postage	0.00	0.00	0.44
	06-Jul-10	Internal Charges Postage	0.00	0.00	2.64
	07-Sep-10	Internal Charges Postage	0.00	0.00	2.64
	20-Oct-10	Internal Charges Postage	0.00	0.00	0.44
	20-Oct-10	Internal Charges Postage	0.00	0.00	2.64
	06-Dec-10	Internal Charges Postage	0.00	0.00	0.88
	07-Feb-11	Internal Charges Postage	0.00	0.00	0.88
	21-Feb-11	Internal Charges Postage	0.00	0.00	2.64
	21-Feb-11	Internal Charges Postage	0.00	0.00	2.64
	07-Mar-11	Internal Charges Postage	0.00	0.00	1.32
	21-Mar-11	Internal Charges Postage	0.00	0.00	1.76
	09-May-11	Internal Charges Postage	0.00	0.00	2.64
	24-Aug-11	Internal Charges Postage	0.00	0.00	8.36
	02-May-12	Internal Charges Postage	0.00	0.00	2.70
			0.00		Total Type Amount: 35.26
Internal Charges Scanned Images					
	22-Jan-10	Internal Charges Scanned Images	105.00	0.01	1.05
	22-Jan-10	Internal Charges Scanned Images	3.00	0.01	0.03
	18-Feb-10	Internal Charges Scanned Images	1.00	0.01	0.01
	18-Feb-10	Internal Charges Scanned Images	4.00	0.01	0.04
	18-Feb-10	Internal Charges Scanned Images	2.00	0.01	0.02
	18-Feb-10	Internal Charges Scanned Images	3.00	0.01	0.03
	18-Feb-10	Internal Charges Scanned Images	3.00	0.01	0.03
	18-Feb-10	Internal Charges Scanned Images	5.00	0.01	0.05
	04-Jun-10	Internal Charges Scanned Images	6.00	0.01	0.06
	08-Jun-10	Internal Charges Scanned Images	2.00	0.01	0.02
	21-Jun-10	Internal Charges Scanned Images	26.00	0.01	0.26
	23-Aug-10	Internal Charges Scanned Images	17.00	0.01	0.17
	13-Oct-10	Internal Charges Scanned Images	9.00	0.01	0.09
	19-Oct-10	Internal Charges Scanned Images	13.00	0.01	0.13
	23-Nov-10	Internal Charges Scanned Images	6.00	0.01	0.06
	07-Jan-11	Internal Charges Scanned Images	3.00	0.01	0.03
	14-Jan-11	Internal Charges Scanned Images	20.00	0.01	0.20
	10-Feb-11	Internal Charges Scanned Images	45.00	0.01	0.45
	24-Feb-11	Internal Charges Scanned Images	39.00	0.01	0.39
	10-Mar-11	Internal Charges Scanned Images	7.00	0.01	0.07
	26-Apr-11	Internal Charges Scanned Images	23.00	0.01	0.23
	11-Jul-11	Internal Charges Scanned Images	39.00	0.01	0.39
	03-Aug-11	Internal Charges Scanned Images	12.00	0.01	0.12
	03-Aug-11	Internal Charges Scanned Images	518.00	0.01	5.18
	08-Aug-11	Internal Charges Scanned Images	700.00	0.01	7.00
	10-Aug-11	Internal Charges Scanned Images	1,297.00	0.01	12.97
	02-Sep-11	Internal Charges Scanned Images	26.00	0.01	0.26
	06-Sep-11	Internal Charges Scanned Images	37.00	0.01	0.37
	17-Oct-13	Internal Charges Scanned Images	2.00	0.01	0.02
	06-Mar-15	Internal Charges Scanned Images	16.00	0.01	0.16
	16-Mar-15	Internal Charges Scanned Images	1.00	0.01	0.01
	23-Mar-15	Internal Charges Scanned Images	2.00	0.01	0.02
			2,992.00		Total Type Amount: 29.92
Internal Charges UPS					
	08-Sep-11	UPS Overnight Mail	0.00	0.00	25.72
			0.00		Total Type Amount: 25.72
Online Research Lexis Nexis					
	17-May-10	Online Research Lexis Nexis	0.00	0.00	38.63
			0.00		Total Type Amount: 38.63
Internal Charge Total					
					Bill Amount Total: 654.68
Payables					
Task Code Description	Bill Date	AP Distribution Description	AP Check Number	Bill Amount	
Billing Fees					
	02-Jun-10	Clerk of Court, Charleston County- Motion Filing Fee	115248	25.00	
	15-Jun-10	Clerk of Court, Charleston County- Motion Filing Fee	115411	25.00	
	22-Sep-10	Clerk of Court- Filing Fee- administrative appeal	116809	100.00	

	14-Jan-11	South Carolina Court of Appeals- Filing Fee- Appeal	118369	100.00		
	24-Feb-11	South Carolina Court of Appeals	118973	25.00		
Transcripts						
	28-Jan-11	H. Eugene Buckner, CVR- Hearing Transcript	118529	131.75		
	09-Feb-11	Deborah Gardner- Hearing Transcript	118737	84.25		
	22-Aug-11	Pro- Legal Copies, Inc.- Copies of Record on Appeal	121629	1,589.31		
Travel/Meeting Expense						
	07-Apr-10	Terry H. Richardson, Jr.- Travel to Charleston for hearing, 3/4/10. Meals and mileage.	114451	162.52		
	22-May-12	Terry H. Richardson, Jr.- 5/8/12 mileage to Columbia for hearing	125037	66.60		
		Payables Total:		2,309.43		

EXHIBIT “C”

Terry E. Richardson, Jr.
1730 Jackson Street
Post Office Box 1368
Barnwell, SC 29812
(803) 541-7860 (direct)
Fax (803) 541-9625
trichardson@rpwb.com

PERSONAL:

DOB: November 11, 1945
Married; Three Children
Martindale-Hubbell Rating: AV

EDUCATION:

J.D., May, 1974
University of South Carolina
School of Law

M.S., Dec. 1967
Clemson University
Major: Business Management
Minor: Operations Research

B.A., May 1967
Clemson University
Major: Economics

EMPLOYMENT:

February 2002 – Pres. Richardson, Patrick, Westbrook & Brickman, LLC
Post Office Box 1368
Barnwell, SC 29812
(Managing Partner 2002-2003)

1974 – February 2002 Ness, Motley, Loadholt, Richardson & Poole, P.A.
f/k/a Blatt & Fales, P.A.
Post Office Box 365
Barnwell, SC 29812
(Shareholder, President, Former Managing Partner)

1970 - 1971 Economic Consultant
Wilbur Smith & Associates
New Haven, CT

1968 - 1970 1st Lieutenant, U. S. Army
Assigned to: IBM Computer Center, Thailand; Oakland, CA;
Brooklyn, NY; Ft. Belvoir, VA (Two Army Commendation Medals)

1967 - 1968 Systems Engineer, IBM Corporation

Summer 1966 Management Trainee, John Hancock Insurance Company

PUBLICATIONS:

Editor-in-Chief, USC Law Review	1973 – 1974
Treatise on South Carolina Law and Damages Editor and Author	2003
Treatise on South Carolina Law and Damages, 2 nd Edition – Co-Author, Chapter 1, Damages in General	2009

LAW RELATED ACTIVITIES:

South Carolina Bar	1974 – Present
South Carolina Association for Justice	1974 – Present
American Association for Justice	1974 - Present
Executive Committee of the SC Trial Lawyers Association	1974 - 1976
Society of Wig & Robe, USC Law School	
South Carolina Alliance for Legislative Education	1975 - 1980
Chairman, USC Law School Association	1977 - 1978
Chairman, Section on Negligence, Insurance and Compensation of the SC Bar	1976 - 1977
S. C. Commission on Grievances	1980 – 1982
South Carolina Chairman, Trial Lawyers for Public Justice	1990 - 1993
Civil Justice Reform Act Advisory Group for the District of South Carolina	1991
Consultant, George Washington University Center for Health Policy Research, Washington, D.C.	1992
Judiciary Committee, S.C. Bar Association	1992 - 1993
Chairman, SCTLA Auto Torts Seminar	1993

Judicial Qualification Committee of the South Carolina Bar Association	1993
Program Chairman, South Carolina Trial Lawyers Convention	1994
Received President's Award for service to the South Carolina Trial Lawyers	1994
Foundation of the American Board of Trial Advocates	1997 - Present
American Board of Trial Advocates, Charleston Chapter	
Treasurer	1998 - 1999
Secretary	1999 - 2000
Vice President	2000 - 2001
President	2001 - 2002
Received Fritz Hollings Public Service Award from the Student Chapter of the South Carolina Trial Lawyers Association	1999
South Carolina Trial Lawyers Capitol Committee	1999
South Carolina Trial Lawyers Legislative Steering Committee	2000
South Carolina Trial Lawyers Product Liability Legislative Committee	2001
Adjunct Professor, Tulane University Toxic Tort / Spring Semester	2001
Compleat Lawyer Award South Carolina Bar Association	2003
Outstanding Lawyers of America	2003
Who's Who in American Law	
Chief Justice's Commission on the Profession	2004-2005
Chairman of the United States District Court Magistrate Screening Committee	2006
Member - Access to Justice Commission (Established by SC Supreme Court)	2007

Honorary Doctorate of Laws from Charleston School of Law	May 2008
Chairman, Dean Search Committee for Charleston School of Law	2008
Founders Award from SC Association for Justice	August 9, 2008
SC Bar - Bridge the Gap Panel	March 10, 2009 August 4, 2009 2012
The Best Lawyers in America	2002, 2004, 2009, 2010, 2011
American College of Trial Lawyers, Member Complex Litigation Committee	October 2009 2012-2013 2014-2015
Supreme Court Historical Society, Member	2010
Sy Pres Committee - SC Bar Foundation	2011
Charleston School of Law, Advisory Committee	2011
South Carolina Super Lawyers	2012
State Committee of SC Chapter of ACTL	2013
Best Lawyers - Lawyer of the Year - Top 25	2013
SC Lawyers Weekly - Leadership in Law award	2014
Super Lawyers - Top Ten	2014

OTHER ACTIVITIES:

Commander of Sigma Nu Clemson University	1967
Tiger Brotherhood, Clemson University	
Blue Key, Clemson University	
Member of Barnwell School District #45 Board of Trustees:	1974 - 1976
State of South Carolina, Governor's School for Science and Mathematics, Foundation Board	1989 - 1994

Rotary Club	1991 - 1998
Director, Hugh O'Brian Youth Leadership Foundation, South Carolina Chapter	1992
President, Hugh O'Brian Youth Leadership Foundation, South Carolina Chapter	1993 - 1994
Humanitarian of the Year Aiken/Barnwell Head Start Program	1993 - 1994
Chairman, Leukemia Society, Barnwell	1994
Recognized by the South Carolina Department of Education for contribution to public education	1994
Board of Directors, South Carolina Institute on Poverty and Deprivation	1995 - 2002
Community Youth Council Aiken, Bamberg and Barnwell Counties Governor's Juvenile Justice Task Force	1996 - 1999
Commission on the Future of Clemson University	1997 - 1998
Board of Directors Voices for South Carolina's Children	1997 - 2005
USC Law School Bicentennial Campaign Executive Committee	1997 - 1998
Clemson University Foundation Board of Directors	1999 - 2003
Board of Trustees for S.C. First Steps	1999 - 2002
Chairman, Governmental Affairs Committee Of South Carolina First Steps	2000
Campaign Steering Committee Richard W. Riley Institute of Government, Politics and Public Leadership	1999
Success By 6 Special Leadership Committee Trident United Way	1999
Charleston Education Network Founding Member, Board of Directors	2000 - 2002

Richard Riley Award From the National Dropout Prevention Center	2003
Barnwell Library Development Board	2002 – 2003
Nature Conservancy Board of Directors	2004 – Present
Chairman	2012
Board of Directors	2014-2017
Chairman, Committee on Government Relations Nature Conservancy, South Carolina Chapter	2006 – Present
Early Childhood Advisory Council	2010
Blue Ribbon Committee Member on Shoreline Management	2010 - 2013
Institute for Child Success Advisory Committee	2012
Appleseed Award – Advocate of the Year	2014

CURRENTLY OR PREVIOUSLY ADMITTED TO PRACTICE IN:

U.S. Supreme Court
 Fourth Circuit Court of Appeals
 U.S. District Court, District of South Carolina
 U. S. District Court, District of New Hampshire
 U. S. District Court, District of Virgin Islands
 U. S. District Court, Southern District of Georgia
 U. S. Tax Court
 U. S. District Court, District of Colorado
 U. S. District Court, North Carolina
 State Court, North Carolina
 U.S. District Court, District of Louisiana
 U.S. District Court, Rhode Island
 State Court, Alabama
 U. S. District Court, Middle District of Georgia

PERMANENT MEMBER:

Fourth Circuit Judicial Conference

SAMPLING OF LAW-RELATED SPEAKING ENGAGEMENTS

"Depositions & Discovery"
Bridge the Gap Program; 1984 - 1992 (twice a year)

"School - Asbestos Litigation"
South Carolina Association of School Business Officials
February 7, 1985

Bench Bar Conference on Civil Trial Advocacy
July, 1984

"Structured Settlements"
South Carolina Bar Seminar
June 22, 1984

"Employment Discrimination"
South Carolina Bar Convention
May 4, 1984

"Railroad Litigation"
SCTLA Auto Tort Seminar
December 1990

Conduct Moot Courts:
Barnwell and Blackville Public Schools

"Future and the Courts"
Judicial Continuing Legal Education
South Carolina, April 4, 1991

"Workshop on Scientific Validity
for the Courts"
Georgetown University Law School
November 1-2, 1991

Design of Health Surveillance Remedies and
Medical Monitoring in Toxic Exposure Cases"
Federal Judges Science Seminar
Georgetown University Law School
May 8, 1992

Guest Lecturer at USC Law School
"Products Liability and Discovery"
"Trial Advocacy"
Spring, 1982; Spring, 1983;
Fall, 1983; Spring, 1990

"Development in Torts - Product Liability"
South Carolina Bar
September 16, 1983

"Stacking Insurance Coverage"
Insurance Law Seminar
January 14, 1982

"Mass Tort Litigation"
American Judicature Society seminar
"Future and the Courts"
May 18-21, 1990

"Trial Techniques, Evidentiary Issues and Objections"
S.C. Bar; S.C. Trial Lawyers Association
April 16, 1993

State Justice Institute
"Increasing the State Justice System Nationwide"
September 10, 199

"Punitive Damages"
South Carolina Trial Lawyers Seminar
May 20, 1994

"The Drudges of Our Profession"
Mass Tort and Complex Litigation Seminar
Philadelphia
October 20, 1994

"Successful Civil Litigation: Hot Tips From The Experts"
S.C. Bar; S.C. Trial Lawyers Association
October 21, 1994

Participating in Mass Settlements
University of South Carolina School of Law
January 16, 1977

Speech - Governor's School for Science and Math - May
201

Dangers of Participating in Mass Settlements
Wake Forest University School of Law
February 20, 1997

Due Diligence: Case Selection and Resolution
North Carolina Trial Lawyers
October 30, 1998

S.C. Bar Appellate & Trial Advocacy Seminar
January 26, 2001

"Questions and Answers"
Torts & Negligence Seminar
SCTLA 2002 Annual Convention
August 2, 2002

"Mobilizing the Masses:
Complex Tort Litigation"
South Carolina Bar
November 7, 2003

"Mass Disaster Litigation"
South Carolina Circuit Judges' Conference
May 17, 2007

Trial Team Participant in "Masters in Trial"
Seminar -- Sponsored by ABOTA in Columbia, SC
November 16, 2007

Bridge the Gap Presentation - March 2009 thru 2012
South Carolina Law School

South Carolina Bar Seminar, Myrtle Beach, SC
January 25, 2013 - Complex Litigation

Charleston School of Law, Charleston, SC - Speech
Promoting Justice, Fairness and Morality in One's Own
Daily Practice - January 30, 2013

THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

Shirley C. Robinson, Administrative Law Judge

Case No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,
.....Appellant,

v.

South Carolina Public Employee Benefit Association
.....Respondent.

AFFIDAVIT IN SUPPORT OF ATTORNEYS' FEE PETITION

1 of 2
mde

I, M. Dawes Cooke, Jr., being duly sworn, give the following Affidavit:

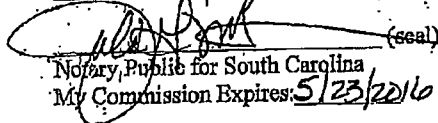
1. I am a lawyer in the Charleston area of South Carolina.
2. My practice includes complex civil litigation, professional liability, healthcare law, and personal injury law, which has included several cases ultimately heard in the South Carolina Supreme Court.
3. I am a member of the South Carolina Bar, and have practiced law in South Carolina for over 30 years.
4. I have been involved in a number of cases involving challenges to actions of public bodies, and I am familiar with the fees charged in such cases.

5. I have known and worked with John A. Massalon and Christy Ford Allen, separately, in different types of litigation, and I believe that they both have reputations of providing their clients a high quality of legal advice and that they both are regarded as effective advocates for their clients.

6. Based on my knowledge and experience, I believe that an hourly rate of \$350.00/\$300.00, respectively, in a matter such as this one is reasonable and customary in this locale.

James G. G. G.

SWORN TO before me this
14th day of April, 2015

 (seal)
Notary Public for South Carolina
My Commission Expires 5/23/2016

THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

Shirley C. Robinson, Administrative Law Judge

Case No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,
.....Appellant,

v.

South Carolina Public Employee Benefit Association
.....Respondent.

AFFIDAVIT IN SUPPORT OF ATTORNEYS' FEE PETITION

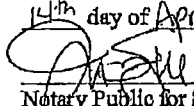
I, Thomas P. Gressette, Jr., being duly sworn, give the following Affidavit:

1. I am a lawyer in the Charleston area of South Carolina.
2. My practice includes complex civil litigation, professional liability, healthcare law, and personal injury law.
3. I am a member of the South Carolina Bar, and have practiced law in South Carolina for over 15 years.
4. I have been involved in multiple complex litigation cases where governmental entities were a party to the action, and I am familiar with the fees charged in such cases.

5. I have known and worked with Matthew D. Hamrick, and I believe that he has a reputation of providing high quality legal advice and that he is regarded as an effective advocate for clients.

6. Based on my knowledge and experience working with Mr. Hamrick, I believe that an hourly rate of \$300.00 for work performed in a matter such as this one is reasonable and is consistent with the rates charged by similarly qualified counsel handle similar cases in this locale.


Thomas P. Gressette, Jr.

SWORN TO before me this
14th day of April, 2015
 (seal)
Notary Public for South Carolina
My Commission Expires: 7/23/2023

THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

Shirley C. Robinson, Administrative Law Judge

Case No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,
.....Appellant,

v.

South Carolina Public Employee Benefit
.....Respondent.

AFFIDAVIT IN SUPPORT OF ATTORNEYS' FEE PETITION

I, Mark C. Tanenbaum, being duly sworn, give the following Affidavit:

1. I am a lawyer in the Charleston area of South Carolina.
2. My practice includes all types of complex litigation, which has included many cases ultimately heard in the South Carolina Supreme Court.
3. I am a member of the South Carolina Bar, and have practiced law in South Carolina for over 40 years.
4. I have been involved in a number of cases involving challenges to actions of public bodies, and I am familiar with the fees charged in such cases.
5. I have known and worked with Terry B. Richardson, in different types of litigation, and I believe that he has a reputation of providing his clients an extremely high quality of legal

advice and that he is widely regarded as an effective advocate for his clients and for public justice. He received the Founders Award from the S.C. Trial Lawyers Association in 2008, and the Compleat Lawyer Award from the S.C. Bar in 2003.

6. Based on my knowledge and experience, I believe that an hourly rate of \$600.00 in a matter such as this one is reasonable and customary in this locale for an attorney of comparable experience.

hux

SWORN TO before me this
14th day of April, 2015

Doris J. Holloman (seal)
Notary Public for South Carolina
My Commission Expires: 3/24/18

THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

FILED

APR 17 2015

Case No. 10-ALJ-30-0710-AP

SC ADMIN. LAW COURT

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees, .
.....Appellant,

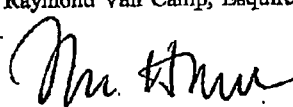
v.

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

PROOF OF SERVICE

I certify that I have served Appellant's Motion for Attorneys' Fees on Respondent of
record by depositing a copy of it in the United State Mail, postage prepaid, on April 17, 2015,
addressed to their attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O.
Box 11886, Columbia, SC 29211 and Stephen Raymond Van Camp, Esquire, 202 Arbor Lake
Drive, Columbia, SC 29223.

April 17, 2015


John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812

ATTORNEYS FOR APPELLANT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DOCKET NO. 10-ALJ-30-0710-AP

Jeffrey D. Allen, on behalf of Eva Allen.....Appellant,

vs.

South Carolina Budget and Control Board,

Employee Insurance Program.....Respondent.

RESPONDENT'S RESPONSE TO APPELLANT'S
MOTION FOR ATTORNEY'S FEES AND COSTS

Respondent South Carolina Budget and Control Board Employee Insurance Program
("BIP") responds to Appellant's motion for attorney's fees and costs as follows:

I. BACKGROUND

The above-captioned matter was before the Administrative Law Court pursuant to S.C.
Code Ann. § 1-11-710(C) (2008) and 1-23-600(D) and (B) for an administrative appeal. In this
matter, Appellant Jeffrey D. Allen ("Appellant"), on behalf of his dependent child ("Dependent")
sought a review of a decision by Respondent the South Carolina Budget and Control Board,
Employee Insurance Program ("BIP")¹ denying coverage for diabetes education through the Group

FILED

MAY 07 2015

SC ADMIN. LAW COURT

¹Effective July 1, 2012, BIP, a division of the South Carolina Budget and Control Board ("Board"),
was transferred from the Board to a newly created agency, The South Carolina Public Employee
Benefit Authority pursuant to Act 278 of 2012.

Health Benefits Plan of the Employees of the State of South Carolina; the Public School Districts, and Participating Entities (the "Plan").

Appellant was an employee of Dorchester County School District Two and participated in the state insurance benefit program offered through EIP. Appellant and Dependent had been covered by one of the health plan options offered through EIP since 2005. Specifically, Appellant and Dependent were covered under the Medical University of South Carolina ("MUSC") Options from September 1, 2005, to December 31, 2006. Beginning January 1, 2007, Appellant and Dependent were covered by the Standard Plan.

Appellant was diagnosed with Type I diabetes in November 2007. On August 5, 2008, Appellant, Appellant's spouse, Dependent's grandparents and two daycare nurses attended a diabetes management educational session in relation to Dependent's new insulin pump. The total cost of the session was \$560.00. On August 27, 2008, BlueCross BlueShield of South Carolina ("BCBSSC"), the third-party claims administrator for the State Health Plan, sent Appellant an Explanation of Benefits ("EOB") showing the claim was denied. The explanatory note read, "[y]our benefit plan does not cover education and/or training for this condition," in accordance with the terms of the Plan. On February 25, 2009, Appellant's spouse wrote a letter of appeal to BCBSSC.

On April 20, 2009, BCBSSC sent Appellant an adjusted EOB. This EOB had no changes except for an explanatory note: rather than "your benefit plan does not cover education and/or training, for this condition," the new EOB indicated that BCBSSC had requested additional medical information from the provider. BCBSSC subsequently received Dependent's medical records from MUSC. After receipt of the medical records, on March 15, 2010, Ashby Jordan,

M.D., a board certified pediatrician and the Medical Director and Vice President of Medical Affairs for BCBSSC, reviewed Dependent's file in its entirety. Dr. Jordan noted the services referenced were specifically excluded by the Plan under Article 9, Paragraph 0. Dr. Jordan stated Exclusion BB in Article 9 also applied, as there was no mention of these services in the Article 7, Schedule of Benefits section of the Plan. Finally, Dr. Jordan noted that S.C. Code Ann. § 38-71-46 did not apply to the Plan.

On March 19, 2010, BCBSSC sent Appellant a letter indicating the Medical Director had denied Appellant's appeal for the reasons stated above. Because the Medical Director did not approve the appeal, the appeal was sent for consideration to the BCBSSC appeals committee. On April 2, 2010, BCBSSC sent Appellant a letter denying Appellant's appeal for additional benefits for the August 5, 2008 educational session. The letter stated the BCBSSC appeals committee concluded that the Plan specifically excluded educational services in Article 9, Paragraph 0, and Article 7 excluded services not specifically covered. BCBSSC also noted that S.C. Code Ann. § 38-71-46 did not apply to the Plan.

On June 30, 2010, Appellant's attorney appealed the denial to the EIP Health Appeals Committee. On August 24, 2010, EIP wrote Appellant's counsel that the EIP Health Appeals Committee had denied the request for reimbursement for Dependent's diabetes education. Appellant subsequently appealed this denial to the ALC on September 22, 2010.

By order dated August 13, 2012, the ALC upheld EIP Health Appeals Committee's denial of Appellant's claim.

On September 14, 2012, Appellant filed a notice appeal with the South Carolina Court of Appeals. On December 6, 2012, the South Carolina Supreme Court granted Appellant's motion to certify this appeal from the Court of Appeals to the South Carolina Supreme Court.

On March 5, 2015, the South Carolina Supreme Court, in a 4-1 decision, reversed the ALC's finding that S.C. Code Ann. § 38-71-46 did not apply to the Plan, but found that Appellant's request for a class action pending before the ALC fails as a matter of law.

II. DISCUSSION

A. Appellant Improperly Argues That The Prior Version of S.C. Code Ann. § 15-77-300 Applies To Appellant's Motion.

Appellant's motion for attorney's fees and costs improperly argues that the prior version of S.C. Code Ann. § 15-77-300² applies to Appellant's motion because Plaintiff filed his administrative appeal with the state Health Plan claims administrator on September 30, 2009 and § 15-77-300 was amended on February 24, 2010.³ However, any alleged right Appellant has or

² The previous version of § 15-77-300 did not contain the requirements contained in § 15-77-300(B)(2014).

³ The post-February 24, 2010 version of § 15-77-300 states:

(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.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not

may have to fees and costs under § 15-77-300 did not arise until the S.C. Supreme Court issued its opinion on March 4, 2015. In the absence of legislative intent to the contrary, entitlement to attorney's fees should be determined pursuant to the statute in effect at the time final judgment is entered. Irwin v. Brooks, 19 S.C. 96 (1883) (holding that entitlement to costs is to be determined by the statute in effect at the time the suit is decided and the costs, if any, are to be awarded). Therefore, the post-February 24, 2010 version of § 15-77-300 is the applicable version of the statute that should be reviewed to decide Appellant's motion for fees and costs.

Additionally, because the post-February 24, 2010 version of § 15-77-300 is procedural in nature, it should be applied retrospectively. The general rule is that "statutory enactments are to be considered prospective rather than retroactive unless there is a specific provision in the enactment or clear legislative intent to the contrary. However, statutes which are remedial or procedural in

been invalidated by a court of competent jurisdiction.

(B) Attorney's fees allowed pursuant to subsection (A) must be limited to a reasonable time expended at a reasonable rate. Factors to be applied in determining a reasonable rate include:

- (1) the nature, extent, and difficulty of the case;
- (2) the time devoted;
- (3) the professional standing of counsel;
- (4) the beneficial results obtained; and
- (5) the customary legal fees for similar services.

The judge must make specific written findings regarding each factor listed above in making the award of attorney's fees. However, in no event shall a prevailing party be allowed to shift attorney's fees pursuant to this section that exceed the fees the party has contracted to pay counsel personally for work on the litigation.

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post-conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

nature are generally held to operate retrospectively." South Carolina Dep't of Rev. v. Rosemary Coin Machines, Inc., 339 S.C. 25, 528 S.E.2d 416 (2000); see also Allen v. S.C. Public Benefit Authority, Employee Insurance Program, ___ S.C. ___, 769 S.E.2d 666 (2015) (where the Supreme Court in this current case found that Rule 68, SCRPA LC, which was amended during the pendency of the case, would apply to any further proceedings before the ALC, including any remand, because it relates to procedure). The only constitutional limit on retroactivity in a civil context derives from due process guarantees, and from S.C. Const. art. I, § 4, prohibiting the passage of a law that "has the effect of impairing the obligation of contract or divesting vested rights of property." E.g., Schumacher v. Chapin, 228 S.C. 77, 88 S.E.2d 874 (1955).

As the United States Supreme Court and other jurisdictions have held, attorney's fees provisions are procedural in nature and should be applied retroactively. Landcraft v. USI Film Products, 511 U.S. 244 (1994); White v. New Hampshire Fire Department of Employment Security, 455 U.S. 445 (1982); Hutto v. Finney, 437 U.S. 678, 695 n. 24 (1978); McCormack v. Town of Granite, 913 P.2d 282, 285 (Okla. 1996) ("statutes relating to the award of fees to a prevailing party are procedural, and subject to retrospective operation."); In re: Marriage of Shima, 360 N.W. 2d 827 (Iowa 1985); Maplefield Homeowners Ass'n v. Basham, 35 Va. Cir. 311 (1994) ("the attorney's fees provision of the Virginia Property Owners' Association Act is procedural in nature and thus may be applied retro actively...").

Because the post-February 24, 2010 version of § 15-77-300 is procedural in nature, creates no new rights and/or remedies and is merely an improvement of a previously existing statute, the post-February 24, 2010 version of § 15-77-300 should apply to the Court's analysis of Appellant's motion.

B. S.C. Code Ann. § 15-77-300 Applies Only to a "Civil Action."

Regardless of which version of S.C. Code Ann. §15-77-300 applies, the threshold requirement for an award of attorney's fees is that the action in question must be a "civil action." Because this action was before the ALC as part of an administrative process and not before a circuit court, it was not a "civil action" under § 15-77-300.

At least two ALC decisions have held that § 15-77-300 had no application to actions before the ALC. In S.T.A.R. Services v. S.C. Dept. of Revenue, 96-ALJ-17-0446-CC (Mar. 17, 1997), the ALJ found:

Pursuant to this section, the threshold requirement for an award of costs is that the action in question must be a "civil action." Generally, an "action" is defined as "a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." Black's Law Dictionary 28 (6th ed. 1990). Proceedings before the Division differ from "actions" brought in courts, in that the Division is an agency of the executive branch of government rather than a part of the judiciary. See S.C. Code Ann. § 1-23-500(A) (Supp. 1996).

This conclusion is further supported by the fact that there is presently pending before the General Assembly a bill which would amend §15-77-300 to allow an Administrative Law Judge to award attorney's fees to a prevailing party (other than the State or a political subdivision of the State) in "any contested administrative proceeding under the Administrative Procedures Act that is initiated by the State, a political subdivision of the State, or a party contesting such action." H. 3383, 112th Leg., 1st Sess. (1997). "It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law." Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964); 82 C.J.S. Statutes §384(b)(2) (1953). The fact that the Legislature is considering an amendment to § 15-77-300 which would bring proceedings before the Division within the coverage of that section is a further indication that the statute, as presently written, does not allow an award of attorney's fees in such proceedings. Therefore, the Petitioner's Motion for Costs is hereby DENIED.

Id. As can be seen by the text of §15-77-300, the statute was never amended to apply to administrative proceedings.

In Caprood v. S.C. Dept. of Corrections, 01-ALJ-04-00019-AP (Jun. 20, 2002), the ALJ also found that § 15-77-300 did not apply to actions before the ALJ because the ALJ was still an administrative decision-maker and not a circuit court. See also, Vitaris v. South Carolina Budget and Control Board, Employee Insurance Program, 11-ALJ-30-0232 --AP (June 15, 2012) (where the ALJ refused to assume that § 15-77-300 would apply to actions before the ALC).

Additionally, the conclusion that a "civil action" can only be brought in circuit court is further bolstered by the holding in S.C. Dept. of Consumer Affairs v. Foreclosure Specialists, Inc., 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010). This case held that for the purposes of the S.C. Consumer Protection Code, which allowed the department to bring both administrative actions and civil actions, a civil action could only be brought in circuit court.

Because § 15-77-300 applies to only civil actions in circuit court and not to actions before the ALC, Appellant's motion for attorney's fees should be denied.

B. Respondent Had Substantial Justification In Finding That S.C. Code Ann. § 38-71-46 Did Not Apply to The State Health Plan.

Even assuming § 15-77-300 applies to Appellant's claim, which it does not, the Respondent's decision was substantially justified. The Supreme Court of South Carolina has held that "[s]ubstantial justification for purposes of the state action statute means justified to a degree that could satisfy a reasonable person." Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325 (2008) (internal quotation marks and citations omitted). Stated differently, "the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and in fact." Id. at 445, 658 S.E.2d at 326. The Court in Layman further recognized that "an agency's loss on the merits does not create a presumption that its position was not substantially justified. . . ." Id. Similarly, in Pierce v. Underwood, 487 U.S. 552 (1988), which was cited in Layman, the U.S. Supreme Court noted that "a position can be justified even though it is not correct, and we believe

It can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." 487 U.S. at 566 n.2. "In other words, §15-77-300 is not a statute that provides for an award of attorneys' fees in every instance in which the government agency loses the case; to so hold would convert the statute into a 'loser pays' statute. Rather, §15-77-300 provides for the payment of fees only when the agency loses while taking a position for which there was not a reasonable basis in law and fact." R.P. v. S.C. Dept. of Health and Human Services, 06-ALJ-08-0605-AP (April 14, 2014).

Prior Acceptance By Multiple Decision Makers

Respondent's decision that S.C. Code Ann. § 38-71-46 did not apply to the Plan was substantially justified in that EIP's position had been accepted by multiple prior decision makers. The claims administrator, the EIP Health Appeals Committee, the ALC and Justice Pleicones of the Supreme Court all held that § 38-71-46 did not apply to the Plan. This fact alone strongly suggests that the issue was one over which reasonable minds could differ. As Chief Administrative Law Judge Ralph King Anderson, III found in R.P. v. S.C. Dept. of Health and Human Services, 06-ALJ-08-0605-AP (April 14, 2014):

In the present case, as already noted, a DHHS Hearing Officer, an ALJ, and two of five Justices of the South Carolina Supreme Court held that R. 88-210 was inapplicable to eligibility decisions. The contrary view ultimately prevailed, but it was adopted only by a 3-2 decision in the Supreme Court. That fact alone strongly suggests the issue was one over which reasonable minds could differ. Moreover, in this instance, the dissenting opinion was amply detailed and well-reasoned. Accordingly, the agency's position was substantial justified.

Id. at *5.

A number of cases have held that when an agency's litigation position has met with some degree of success in the courts, even if it does not prevail in the end, the agency's position should

be regarded as reasonable and supported by substantial justification. In U.S. v. Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 382 (7th Cir. 2010) it was held that “there is a presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified.” See also, e.g., U.S. Commodity Futures Trading Com’n v. WeCorp, Inc., 878 F. Supp. 2d 1160, 1164-65 (D. Hawaii 2012). Similarly, in Wyandotte Sav. Bank v. N.L.R.B., 682 F.2d 119, 120 (6th Cir. 1982), the court held that when the government’s position had been adopted by dissenting or concurring judges in appellate decisions, then “[c]learly, the Board had a reasonable basis for [its position].”

The same reasoning has been applied in several federal cases in South Carolina in which the District Judge declined to accept the Magistrate Judge’s Report and Recommendations, but still held that the government’s unsuccessful position was substantially justified. In Levine v. Astrue, 2010 WL 3522383, *2 (D.S.C. 2010), the Court held that while “reasonable minds disagreed about the Commissioner’s final decision,” and the government did not ultimately prevail, the “substantially justified” standard of Pierce, supra, is satisfied because “there is a genuine dispute [or] reasonable people could differ as to the appropriateness of the contested action.” 2010 WL 3522383, at *1. Accord, McKoy v. Colvin, 2013 WL 6780585, * 3 (D.S.C. 2013) (“the fact that the Magistrate Judge recommended that the Commissioner’s decision be affirmed suggests that the Commissioner’s position was substantially justified....,” even though “ultimately not convincing.”).

Because the claims administrator, the EIP Health Appeals Committee, the ALC and Justice Pleicones of the Supreme Court in a lengthy, detailed, well-reasoned dissent all held that § 38-71-46 did not apply to the Plan., EIP’s position was substantially justified.

EIP's Interpretation of The Statute was Substantially Justified By the Language of The Statute and Its legislative Intent.

§ 38-71-46(D), defines what "health insurance policies" are covered under the diabetes education mandate in section 38-71-46(A). Since the Plan is a group health plan, section 38-71-46(D) requires the use of S.C. Code Ann. § 38-71-840(A)(14) (2002) to determine whether the Plan provides "health insurance coverage," so as to be a "health insurance policy" covered by the diabetes education mandate.

Section 38-71-840(A)(14) provides:

"Health insurance coverage" means benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer..

Ultimately, whether the Plan qualifies as "health insurance coverage" depends on what the phrase "offered by a health insurance issuer" modifies in S.C. Code Ann. § 38-71-840(A)(14) (2002). The claims administrator, the BIP health Appeals Committee, ALJ and Justice Pleicones read "[b]enefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care" as describing what types of provided benefits qualify as "health insurance coverage." They also read the next section "under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer" as describing what types of insuring agreements offer "health insurance coverage." The term "offered by health insurance issuer" modifies the three types of insurance agreements in the statute, that is, (1) a hospital or medical service policy or certificate, (2) a hospital or medical service plan contract, or

(3) a health maintenance organization contract. Accordingly, to qualify as "health insurance coverage" the policy, certificate, or contract must be issued by a "health insurance issuer."

The prior decision makers all took the position that EIP was not a "health insurance issuer" as this term is defined in S.C. Code Ann. § 38-71-840(A)(16) (2002), which stated:

"Health insurance issuer" or "issuer" means any entity that provides health insurance coverage in this State. For purposes of this section, "issuer" includes an insurance company, a health maintenance organization, and any other entity providing health insurance coverage which is licensed to engage in the business of insurance in this State and which is subject to state insurance regulation.

EIP was not a "health insurance issuer" because the EIP was not licensed to engage in the business of insurance in this State and not subject to State insurance regulation. See S.C. Code Ann. § 1-11-780 (Supp. 2013) ("[t]he State Employee Insurance Program. . . is not under the jurisdiction of the Department of Insurance"). Since the EIP is not a "health insurance issuer" under section 38-71-840(A)(16), the Plan did not provide "health insurance coverage" as defined in section 38-71-840(A)(14). Further, since section 38-71-46 only mandates diabetes education coverage for a "health insurance policy" that provides "health insurance coverage" as defined by section 38-71-840(A)(14), EIP and the prior decision makers all found that Appellant's claim was properly denied.

EIP's position that its interpretation was also supported by the legislative intent of the statute was also substantially justified. If the language of a statute gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the statute itself. Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). The General Assembly has chosen to separate the Plan from general insurance regulation by placing the Plan's governing statutes in Title 1, Chapter 11 of the S.C. Code, rather than in Title 38,

Chapter 71 (General Insurance Statutes). Since the General Assembly separated the Plan from the General Insurance Statutes, it has included an express reference to the Plan in the General Insurance Statutes when those statutes are to apply to the Plan. See S.C. Code Ann. § 38-71-785(B) (Supp. 2013) ("This section applies. . .including the state health plan. . ."); S.C. Code Ann. § 38-71-243(B) (Supp. 2013) ("This section applies. . .including the state health plan. . ."). Furthermore, in the context of coverage mandates, the General Assembly has made a direct reference to the Plan when it intends for a mandate found in the General Insurance Statutes to apply to the Plan. See S.C. Code Ann. § 38-71-280 (Supp. 2013) (mandating coverage for autism spectrum disorder, "[i]t includes the State Health Plan. . . 'State Health Plan' means the employee and retirees insurance program provided for in Article 5, Chapter 11, Title 1"). The diabetes education mandate, however, contains no reference to the Plan either in the text or the enacting legislation.

As Justice Pleicones stated in his dissent:

If a General Insurance Statute applies to the Plan even when the Plan is not mentioned, then there would have been no reason to include the express reference to the Plan in any General Insurance Statute... In construing a statute, we are to assume the General Assembly was aware of past statutes, and we are to give effect to all the words in a statute... The majority's reading renders the references in the later statutes superfluous and leads to the absurd result that all General Insurance Statutes apply to the Plan unless the Plan is expressly excluded. (Citations omitted).

Allen v. S.C. Public Benefit Authority, Employee Insurance Program, ___ S.C. ___, 769 S.E.2d 666 (2015).

Interestingly, the majority in Allen recognized its decision could be perceived as being inconsistent with prevailing law when it noted in footnote 10 of the decision that, "[a]lthough section 38-71-46 indicates that the General Assembly intended for the diabetes mandate to apply to the State Health Plan, we do not conclude that the canon of construction 'expression unius est exclusion alterius' applies here, or that the State Health Plan is governed by every general

insurance statute where the General Assembly failed to expressly exclude the State Health Plan.”

Id. Despite this footnote, the majority failed to provide any guidance to determine which Title 38 mandates apply to State Health Plan and which ones do not.

Additionally, EIP was substantially justified in not taking into account the prevalence of diabetes in South Carolina as a factor in interpreting the statute in that: (1) this information was irrelevant in determining whether a coverage mandate found in a general insurance statute applied to the Plan, (2) the study relied on by the majority of the Supreme Court entitled S.C Dep’t of Health & Envtl. Control, Fact Sheet: Diabetes in South Carolina, SCDHEC.gov, 1 (Nov. 1, 2013), available at <http://www.scdhec.gov/administration/library/ML-025328.pdf> was not even in existence at the time § 38-71-46 was enacted, nor when the EIP Health Appeals Committee and ALC decisions were rendered and (3) the Fact Sheet’s statistics that “South Carolina ranks seventh in the nation for the percentage of its adult population with diabetes” clearly applies to adult type 2 diabetes which was completely unrelated to the pediatric type 1 diabetes suffered by Dependent. Therefore, EIP’s position that the statute did not apply to the state health plan was reasonably justified.

The Interpretation of § 38-71-46 Had Never Been Previously Litigated

Appellant’s own motion for fees concedes that the interpretation of § 38-71-46 had never been previously litigated, when it stated on page 7 of the motion that the Supreme Court agreed to hear the case because “[t]he Court indicated that [the] issue was a novel issue of law.” (Appellant’s Motion, p. 7). Because the interpretation of § 38-71-46 had never been previously litigated, EIP’s decision that it did not apply to the Plan was substantially justified. See R.P. v. S.C. Dept. of Health and Human Services, at *7 (holding that the fact that an issue had never been previously litigated was a reason courts have held a position was substantially justified); Cody v. Caterisano, 631 F.3d

136, 142 (4th Cir. 2011) ("litigating cases of first impression is generally justifiable"); Southern Dredging Co., Inc. v. U.S., 1996 WL 516158, 3 (4th Cir. 1996) ("In lawsuits involving first-impression interpretations of statutes, many circuits, including ours, have found that the United States is presumptively substantially justified within the meaning of the BAJA if its position is a reasonable legal position and the question is being addressed for the first time in the circuit"). Because the interpretation of § 38-71-46 had never been litigated in any context, EIP was substantially justified in challenging its application to the Plan.

C. Special Circumstances Would Make An Award of Attorney's Fees Unjust

First, while Appellant technically prevailed on the issue of whether § 38-71-46 applied to the State Health Plan, it lost on the second issue on the appeal, whether or not the ALC erred in failing to address the availability of class action relief before the ALC. All five Justices agreed that class action relief was not available before the ALC ruling that:

The present case was an appeal before the ALC. Therefore, the SCRCP, including Rule 23 relating to class actions, is simply inapplicable. Neither the SCRCPALC nor the South Carolina Appellate Court Rules provide for a class action to be commenced during an appeal. Therefore, Appellant's request for a class action proceeding before the ALC fails as a matter of law.

Further, since the filing of the appeal with this Court, the ALC has amended Rule 68, SCRCPALC...The revised rule contains even a more direct statement that the SCRCP is inapplicable to appeals before the ALC. Since this amendment relates to procedure, it is fully applicable to any further proceedings before the ALC, including any remand by this Court.

Allen. Therefore, Respondent, and not Appellant was the prevailing party on the class action issue.

Accordingly, rather than dealing with the rights of a potential class and any potential windfall that may result, Appellant's case was reduced to dealing with one claim for \$560. Stated another way, Appellant may have won the battle, but lost the war as evidenced by Paragraph 10 of the engagement letter which stated:

Clients understand that Client's damage arising from any claim may not be sufficient in magnitude to justify Attorneys' pursuit of Client's sole claim on a contingent fee basis. Accordingly, Attorneys anticipate that they will elect to pursue Client's claim through a class action as opposed to an individual law suit... In the event that for any reason the court in which an action is filed fails or refuses to certify a class including Client's claim for purposes of bringing a class action against Defendants, the Client understand that the Attorneys may elect to terminate their representation of Client if they determine that the representation will result in an unreasonable financial burden on the Attorneys.

(Exhibit C to Affidavit of John Massalon).

Additionally, Appellant should not be awarded fees and costs for unnecessarily inserting class action issues that complicated the case and resulted in the parties incurring additional time and expense in dealing with these issues.

Second, although the Supreme Court's decision held that § 38-71-46 applied to the State Health Plan, the Court did not reach a decision on whether or not Appellant's claim should have been paid under § 38-71-46. Based on the language of § 38-71-46 (B), in all likelihood, Appellant's claim would not be covered by § 38-71-46. § 38-71-46 (B) states:

(B) Services and payment for diabetes education programs shall conform to regulations of the Health Care Financing Administration, US Department of Health and Human Services, pursuant to Section 4105 of the Balanced Budget Act of 1997. Diabetes outpatient self-management training and education shall be provided by a registered or licensed health care professional with certification in diabetes by the National Certification Board of Diabetes Educators, or other accredited program approved by the Diabetes Initiative of South Carolina, or by the Diabetes Control Program of the SC Department of Health and Environmental Control in order to meet the needs of rural communities wherein certified health care professionals providing this service are not available.

Id.

As can be seen by an official publication regarding diabetes education issued by the U.S. Department of Health and Human Services, the training covered by Medicare (Diabetes self-

management training) and apparently the state mandated training as well, is far more general than insulin pump training and includes the following:

- General information about diabetes, the benefits of blood sugar control, and the risks of poor blood sugar control;
- Nutrition and how to manage your diet;
- Options to manage and improve blood sugar control;
- Exercise and why it's important to your health;
- How to take your medications properly;
- Blood sugar testing and how to use the information to improve your diabetes control;
- How to prevent, recognize, and treat acute and chronic complications from your diabetes;
- Foot, skin, and dental care;
- How diet, exercise, and medication affect blood sugar;
- Behavior changes, goal setting, risk reduction, and problem solving;
- How to adjust emotionally to having diabetes;
- Family involvement and support; and
- The use of the health care system and community resources.

See <http://www.medicare.gov/Pubs/pdf/11022.pdf>.⁴ Because Medicare does not list insulin pump training as part of the diabetes self-management training, Appellant's claim should not be covered under § 38-71-46 (B).

⁴ This publication also states: "[c]lasses are taught by health care providers who have special training in diabetes education. You're covered to get a total of 10 hours of initial training within a continuous 12-month period and 2 hours of follow-up training each year after that. One of the hours can be given on a one-on-one basis. The other 9 hours of training are given in a group class. The initial training must be completed no more than 12 months from the time you start the training. Important: Your doctor may prescribe 10 hours of individual training if you're blind or deaf, have language limitations, or if no group classes have been available within 2 months of your doctor's order. To be eligible for 2 more hours of follow-up training each year after the year you

Third, as was previously argued, one basis used by the majority of the Supreme Court to justify its holding that § 38-71-46 applied to the State Health Plan was the prevalence of diabetes in South Carolina based on a study entitled S.C. Dep't of Health & Envtl. Control, Fact Sheet: Diabetes in South Carolina, SCDHEC.gov, 1 (Nov. 1, 2013), available at <http://www.scdhec.gov/administration/library/ML-025328.pdf>. However, this study was not in existence in 1999 when § 38-71-46 was enacted, nor when the BIP Health Appeals Committee and ALC decisions were rendered. Additionally, the Fact Sheet's statistics that "South Carolina ranks seventh in the nation for the percentage of its adult population with diabetes" clearly applies to adult type 2 diabetes which was completely unrelated to the pediatric type 1 diabetes suffered by Dependent. Therefore, part of the Court's decision was based on after acquired evidence that was not contained in the administrative record, nor the record on appeal. Accordingly, Respondent had no way to take this evidence into account when it rendered its decision.

D. Because Appellant Has No Written Fee Agreement With His Counsel For This Case, And Submitted No Evidence That Appellant Actually Incurred Fees In This Case, An Award Of Attorney's Fees Is Improper.

Appellant is not entitled to attorney's fees and costs in this case in that Appellant has no written fee agreement with his counsel for this case, and there is no evidence that the client actually incurred fees for this case. On the first page of the fee agreement attached to the Affidavit of John Massalon as Exhibit C, it states that the agreement is regarding the case entitled "Jeffrey Allen Individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated

received initial training, you must get another written order from your doctor. The 2 hours of follow-up training can be with a group, or you may have one-on-one sessions. Remember, your doctor must prescribe this follow-up training each year for Medicare to cover it." <http://www.medicare.gov/Pubs/pdf/11022.pdf>

State of South Carolina employees v. S.C. Budget & Control Board,” “Case No.: 09-CP-10-7407”.

This circuit court case is a different case than the one at issue here. Appellant’s own motion states that, “it is undisputed that this ALC case was ongoing while Appellant attempted to, institute and maintain a circuit court case seeking a class action.” (Appellant’s Motion, p. 8).

On November 25, 2009, Appellant filed a putative class action suit against the South Carolina Budget and Control Board, EIP, and BCBSSC in the Court of Common Pleas for the Ninth Judicial Circuit in Charleston, Case No.: 09-CP-10-7407. By order dated October 15, 2010, the Circuit Court granted EIP’s and BCBSSC’s motion for summary judgment dismissing Appellant’s case with prejudice. This decision was upheld by the South Carolina Court of Appeals on July 18, 2012. Allen v. South Carolina Budget and Control Board, Employee Insurance Program, Opinion No. 2012-UP-433 (S.C. Ct. App. filed July 18, 2012). The South Carolina Supreme Court denied Appellant’s petition for cert. in that case on March 4, 2015. Appellate Case No. 2012-213206.

Although the Appellant and his counsel could have broadened the litigation covered by the fee agreement, they failed to do so. Nowhere in the fee agreement is there a mention that the agreement covers any other litigation other than the purported circuit court class action specifically named in the agreement. Additionally, there is no evidence that in the absence of some class action recovery, which the Court denied, any of Appellant’s counsel were looking to Appellant for the payment of any fees and costs. As discussed below, the conclusion that Appellant’s counsel did not actually incur any fees is emphasized by the fact that the litigation and/or fee agreement was not an arms-length transaction, but involved a mother representing her husband/child’s interest.

Because Appellant has submitted no written fee agreement in this case, nor any evidence that Appellant had actually incurred any fees in this case, no attorney's fees can be awarded under §15-77-300. See Rule 1.5(c), RPC, Rule 407, SCACR ("a contingent fee agreement shall be in a writing signed by the client . . ."); See generally S.C. Dep't of Soc. Servs. v. Mary C., 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011); Williamson v. Middleton, 383 S.C. 490, 495-96, 681 S.E.2d 867, 870-71 (2009) (finding attorney could not recover attorney's fees when attorney presented no evidence that client actually incurred fees and when no fee agreement existed between the client and attorney).

E. Because Attorney Christy Allen Was Representing Her Spouse and/or Her Daughter, And Her Interests Were Identical To Her Spouse and/or Daughter, Attorney Allen Was In Fact Acting Pro Se. Accordingly, Attorney's Fees Are Inappropriate.

Appellant is the spouse of, and Dependent is the daughter of, Christy Allen, the Partner at Wills & Mazzalon who spent the majority of the time working on this case. Because Ms. Allen was representing her spouse, who was acting on behalf of their minor daughter, and Ms. Allen's interests were identical to those of Appellant and Dependent, Ms. Allen actually was acting as a pro se party and not as an attorney. In Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000), the South Carolina Supreme Court found that a pro se litigant, whether an attorney or layperson, does not become "liable for or subject to fees charged by an attorney." In Hopkins v. Hopkins, 343 S.C. 301; 540 S.E.2d 454 (2000), the Court expanded its rule to apply to cases where an attorney was representing a family member. In Hopkins, a father in a child support case was being represented by his second wife who was an attorney. The father argued that he was entitled to recover attorney's fees for his attorney/wife's service. The Supreme Court disagreed holding:

Similarly, here, we find no evidence Father actually became "liable for or subject to" attorneys' fees for his attorney/wife's service. There is no contract or fee

agreement in the record,⁵ nor is there any indication or testimony that Father's wife/attorney has attempted or intends to collect the fees from Father. Accordingly, Father did not prove that he became liable for the fees, such that the family court properly denied Father's request. Cf. Lisa v. Strom, 183 Ariz. 415, 904 P.2d 1239, 1242 (Ariz. 1995) (finding award of attorneys' fees has an "indispensable requirement . . . [there] be a genuine financial obligation on the part of the litigants to pay such fees," and that wife represented by her attorney/husband had no such genuine obligation).

Hopkins, at 457. The general rule against awarding fees to attorney-litigants is based upon a perception that such awards are windfalls to persons who have spent no money and incurred no debt for legal representation. See, e.g., Lisa v. Strom, 904 P.2d 1239 (Ariz. 1995) (cited by the S.C. Supreme Court in Hopkins). Accordingly, because Attorney Allen was acting pro se, an award of attorney's fees would be improper.⁶

F. If The Court Finds Appellant Is Entitled To Attorney's Fees, Those Attorney's Fees Should Be Limited To The Amount of Fees Appellant Agreed To Pay His Counsel Under The Fee Agreement.

Assuming for the sake of argument that the fee agreement attached to the Affidavit of John Massalon as Exhibit C does apply to this case, Appellant can only recover the amount of attorney's fees agreed to under the fee agreement. S.C. Code Ann. §15-77-300 (B) states, "however, in no event shall a prevailing party be allowed to shift attorney's fees pursuant to this section that exceed

⁵ As was previously discussed, Appellant has no fee agreement in place for the current action.

⁶ It should be noted that even if Appellant was allowed class action recovery that the firm of Wills and Massalon could not act as class counsel due to a conflict of interest created by the Appellant being the spouse and/or dependent of Attorney Allen. Eubank v. Pella Corp., 753 F.3d 718, 721, 728-729 (7th Cir. 2014) (court of appeals disapproved settlement as "inequitable—even scandalous" when settlement disproportionately favored defendant and because of "fatal conflicts of interest" that resulted when class representative was father-in-law of class attorney); Petrovic v. AMOCO Oil Co., 200 F.3d 1140, 1155 (8th Cir. 1999) (district court properly granted motion for disqualification when there was close family relationship between class counsel and class representative); Kirby v. Cullinet Software, Inc., 116 F.R.D. 303, 309-310 (D. Mass. 1987) (named plaintiff was inadequate representative because his son was partner in law firm representing plaintiff class).

the fees the party has contracted to pay counsel personally for work on the litigation.” As can be seen by Paragraph 1 of the fee agreement, Appellant’s counsel contracted to handle the matter on a 33.33% contingency basis. As can be seen by Supreme Court decision, the amount of the claim at issue was \$560. Therefore, the most Appellant could recover as an attorney fee would be \$186.65.

G. Appellant’s Request For Fees Is Excessive and Not Supported By The Record.

First, as was previously discussed, Plaintiff cannot recover attorney’s fees and costs for an administrative appeal as a matter of law in that such appeals are not “civil actions” under §15-77-300. Therefore, Appellant is entitled to no fees and costs. Assuming for the sake of argument that Appellant could recover fees and costs for his appeal of the ALJ’s order to the Supreme Court, those fees and costs would not have been incurred until September 14, 2012, when Appellant filed his notice of appeal. Accordingly, Appellant could recover no fees and costs incurred before that date as a matter of law.

Second, Appellant’s attorney’s fee and cost estimate has a fatal flaw in that its methodology is based entirely on speculation. See Woodson v. DLI Props, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014) (damage calculations cannot be based on speculation). Appellant states at page 8 of his brief that:

Appellants have submitted Affidavits of counsel, along with detailed time and expense records. See Affidavits of John A Massalon, Christy Ford Allen, and Terry B Richardson. It is undisputed that this ALC case was ongoing while Appellant attempted to institute and maintain a circuit court case seeking a class action. According to the Affidavits submitted, the time kept did not differentiate between the circuit court case and this administrative case. In order to address this complexity, Appellants have reduced the total time and expenses sought by 50%. (See Summary of Fees and Costs, *infra*.)

(Appellant's Motion, p. 8). However, a review of the time and expense records⁷ contain multiple entries that only were related to the circuit court case, and not the present case.

The following entries are examples of time entries and expenses that were incurred on or after September 14, 2012 that were related to circuit court case only:

Wills and Massalon Time and Expense Records

KAP	Sep 25/2012	Letter & Copy of Court of Appeals order to Terry Richardson	0.1
CFA	Oct 15/2012	Prepare pet for cert.	0.5
JAM	Oct 22, 2012	Telephone call from Ms. Linda Allen of Supreme Court re corrections to petition; office cor..	0.5
CFA	Oct 22/2012	Correct Supreme Court filings	1
JAM	Oct 23/2012	Correct petition to Supreme Court	0.5
JAM	Oct 24/2012	Electronic correspondence exchange with Mr. Willard re extension to respond to motion fo..	0.1
JAM	Nov 13/2012	Electronic correspondence exchange with Mr. Willard Re extension to file reply brief	0.1
CFA	Nov. 15/2012	Receipt and review of order of extension, and filed return	0.2
CFA	Nov. 19/2012	Follow up on Affidavit for Reply to Cert. Petition	0.1
CFA	Nov. 20/212	Finalize reply to return, prepare appendix, other filing documents	2.5
CFA	Mar 4/2015	Telephone conference with T. Richardson, D. Haltiwanger, reseach issue about supplemen...	2

⁷ In some instances the billing records attached to Appellant's motion are unclear and/or are incomplete due to the work descriptions being cut off. Because Appellant has the burden of proving entitlement to and the amount of fees and costs, these unclear and/or incomplete records fail to carry Appellant's burden.

CFA	Mar 5/2015	Finalize motion to amend petition for cert in state case	1
CFA	Mar 5/2015	Prepare motion to amend petition for cert to include supplemental authority	1.5
CL	Mar 5, 2015	Scan and bates number motion for leave to amend writ of Certiorari and include new authority	1.4
JAM	Apr 8/2015	Receipt and review of email re amending petition for writ of cert to include new authority	0.3
Oct/17/2012		The South Carolina Supreme Court GB 595-1 Filing fees for Writ of Certiorari	\$100

RPWB Time and Expense Records

10/19/12	trichardson	Review Petition for Cert.	0.8
11/19/12	trichardson	Review Respondent's Return to Petitioner's Writ of Cert.	0.8

Because the above fees and costs were incurred in the appeal of the circuit court case and not the current case, these fees and costs are not recoverable.

Third, the nature, extent and difficulty of the case does not support an award of attorney's fees and costs in the amount requested by Appellant. As was previously discussed, while Appellant technically prevailed on the issue of whether § 38-71-46 applied to the State Health Plan, Appellant lost on the second issue on the appeal, whether or not the ALC erred in failing to address the availability of class action relief before the ALC. Appellant's interjection of these class action issues complicated the case and resulted in the parties incurring additional time and expense in dealing with these issues. It would be improper for Appellant to benefit from its own unsuccessful efforts to further complicate what otherwise would have been a routine administrative appeal. As a result of the Supreme Court's ruling, this case involved a routine administrative appeal for \$560

of benefits from the State Health Plan. It strains credulity to suggest that in the absence of the unsuccessful class action issue, Appellant's case reasonably would require the participation of two law firms, four attorneys at \$300 to \$600 per hour and four paralegals at \$75 per hour. A reduction of attorney's fees is appropriate where the case has been overstaffed. Sparrow v. McDaniel, 852 F.2d 762 (4th Cir. 1998); Goodwin v. Metts, 973 F.2d 378 (4th Cir. 1992); see also, Thomas v. Peacock, 39 F.3d 493 (4th Cir. 1994) rev'd on other grounds, 516 U.S. 349 (1996). (Assessing attorney's fees in a suit on ERISA to recover payments to pension fund, the district judge should have examined instances where fees were awarded to recover the presence of both of Plaintiff's attorneys even though the presence of only one would have sufficed). Here, Appellant's case clearly was overstaffed. Accordingly, if the Court finds that an award of fees is appropriate, which respondent denies, that reward should be significantly reduced to reflect an amount of fees and costs one attorney reasonably would incur to handle an appeal of a \$560 benefit claim.

Fourth, contrary to Appellant's assertion, the beneficial result obtained was extremely limited. As was previously discussed, Appellant's request for class action relief was rejected, leaving only Plaintiff's claim for \$560. Additionally, there is a real question that the relief requested by Appellant, coverage for insulin pump training, would have been covered under general diabetes training contemplated by § 38-71-46 (B) and the Medicare regulations in that the Medicare regulations make no mention of insulin pump training. Also, Appellant's statement that "[t]he State Health Plan has been denying its insureds, all South Carolina state or county employees, an insurance benefit they were entitled to by law since 2000"⁸ has no basis in fact. Appellant points to no prior cases where the application of § 38-71-46 to the State Health Plan has been litigated. Obviously, if the application of § 38-71-46 to the State Health Plan was such an

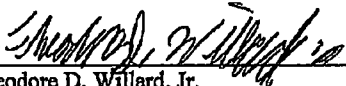
⁸ Appellant's Motion, p. 6.

important issue to all of the state and county employees as Appellant suggests, it would have been litigated within the nine years before Appellant initiated his claim. Because the beneficial results obtained by Appellant were extremely limited, an award of attorney's fees and costs is not appropriate and/or should be minimal.

Finally, the cases relied upon by Appellant as evidence of customary legal fees for similar cases are easily distinguished and do not support the amount of attorney's fees requested in this case. Layman v. State, 378 S.C. 434, 658 S.E.2d 320 (2008) is easily distinguished in that the Appellant in Layman was actually the prevailing party in a certified class action involving millions of dollars. Likewise, Saunders v. South Carolina Public Service Authority d/b/a Santee Cooper, C/A No. 2:93-3077-23 (D.S.C. 1993) also involved multiple plaintiff's and millions of dollars in recovery. Unlike Layman and Saunders, here the Appellant did not prevail on the class action issue and the case was severely overstaffed, therefore fees based on \$300 to \$600 per hour would be unreasonable based on a \$560 recovery.

III. CONCLUSION

For the foregoing reasons, Appellant's motion for attorney's fees and costs under S.C. Code Ann. §15-77-300 should be denied.


Theodore D. Willard, Jr.
S.C. Bar No.: 012816
Montgomery Willard, LLC
1002 Calhoun Street
Post Office Box 11886
Columbia, South Carolina 29211-1886
Telephone: (803) 779-3500
Fax: (803) 799-2755

Stephen R. Van Camp
S.C. Bar No. 7461
SOUTH CAROLINA PUBLIC EMPLOYEE BENEFIT
AUTHORITY

202 Arbor Lake Drive
Columbia, South Carolina 29223
Telephone: (803) 734-2375

ATTORNEYS FOR RESPONDENT

May 7, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DOCKET NO. 10-ALJ-30-0710-AP

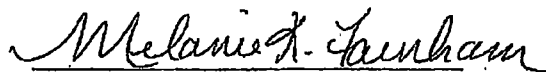
Jeffrey D. Allen, on behalf of Eva Allen.....Appellant,

vs.

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

CERTIFICATE OF SERVICE

I, Melanie K. Farnham, Legal Assistant at Montgomery Willard, LLC, certify that I have served a copy of Respondent's Response to Appellant's Motion for Attorney's Fees and Costs on Jeffrey D. Allen by depositing one copy of it in the United States Mail, postage prepaid on May 7, 2015, addressed to his attorney of record, John Massalon, Post Office Box 859, Charleston, South Carolina 29402.


Melanie K. Farnham

May 7, 2015

FILED
MAY 07 2015
SC ADMIN. LAW COURT

FILED

MAY 18 2015

SC ADMIN. LAW COURT

THE STATE OF SOUTH CAROLINA

IN THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,

Appellant,

v.

South Carolina Budget and Control Board,
Employee Insurance Program

Respondent.

APPELLANT'S REPLY TO OPPOSITION TO MOTION FOR ATTORNEYS' FEES

Appellant submits the following Reply regarding the Memorandum in Opposition to
Motion for Attorneys' Fees.

A. THIS CASE IS A CIVIL ACTION WITHIN SECTION 15-77-300

The state action attorneys' fee statute section 15-77-300 does not prohibit an award of
attorneys' fees just because the case originated in the administrative court on appeal from a state
agency decision. The statute was originally enacted in 1985, and amended in 2010. There is no
language in either version of the statute which distinguishes a circuit court action from that of an
administrative court appeal. No judicial (as opposed to administrative one) court has held that
attorneys' fees under the state action statute at issue are not available when a person successfully
challenges both the agency and the administrative law court decision in the appellate courts.

The legislature, however, did include a provision in section 15-77-300 to expressly protect the state agency in situations where it is following a statutory mandate. Here, however, PEBA did the opposite. Instead of following a plain statutory mandate enacted into law in 2000, it decided unilaterally to disregard that mandate based only on its opinion that the "General Assembly have[sic] historically acknowledged the Department [of Insurance] has no jurisdiction over EIP." (Record at 111). That explanation, which was first made on August 24, 2010, nearly two (2) years after the initial claim denial, contained a single footnote referencing a mental health insurance mandate enacted in 2005. When PEBA took and maintained what the Supreme Court described as an "inconceivable" position, it also took the risk of having to pay Appellant's attorneys' fees should he ultimately prevail.

Furthermore, subsection (C) of section 15-77-300 expressly excludes several categories of actions: civils actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided herein, and child abuse and neglect actions. The statute does not exclude appeals from administrative agencies. And, its express exclusion of disciplinary actions by state licensing boards -- clearly a proceeding subject to administrative law court jurisdiction - counsels against Respondent's narrow reading of "civil action" within the context of the statute.

The EIP relies on the case of SC Dept of Consumer Affairs v. Foreclosure Specialists, Inc., 390 S.C. 182, 700 S.E.2d (Ct. App. 2000) as authority for the proposition that the term "civil action" necessarily excludes proceedings which originate in the administrative law court. However, Foreclosure Specialists does not stand for that proposition. First, that case did not address the state action attorneys' fee statute. Secondly, the statute at issue that case, the Consumer Protection Code, included reference to both the power of the agency to bring a civil action in circuit court and available remedies and the detailed remedies available to the agency in

administrative court. See S.C. Code Ann. § 37-6-113(c) (“the administrator may bring a civil action or an administrative action . . .”). There, the court was tasked with interpreting the differing treatment of authority granted to the state agency under that statute, and determined that the remedies the state agency had sought to impose within the administrative court were only available to it in circuit court. *Id.* This case does not stand for the proposition that any time the word “civil action” is used in a statute that it means circuit court only.

Furthermore, the ALJ cases cited by the Respondent do not support the denial of the motion for attorneys’ fees on this basis. In Caprood v. SC Dept of Corrections, 01-ALJ-04-00019 (2002) (unpublished) (see Exhibit 1) the ALJ held that a case where the appeal from the DOC to the ALJ resulted in a remand to the DOC for a new hearing due to procedural errors was not “one seeking judicial review of an agency decision,” but was simply the ALJ functioning as an administrative decision-maker, and that remand did not render the petitioner in that case a prevailing party. However, that court recognized that “one seeking judicial review of an agency decision is one who is bringing a ‘civil action’ for the purposes of § 15-77-300.” *Id.*

Clearly, Respondent in this case sought “judicial review of” the agency decision. The South Carolina Supreme Court agreed to remove this case from the South Carolina Court Appeals’ review, and squarely reversed the agency’s decision. There is no higher “judicial review” one can seek, barring a federal question, than what was sought in this action.

The premise of the holding of S.T.A.R. Services v. SC Department of Revenue, 96-ALJ-19-0446 (1997) – that because the legislature had in 1997 a pending amendment to the state action attorneys’ fee statute which expressly included the administrative law court proceedings, therefore the statute as written did not apply to those type of actions -- was expressly rejected by the South Carolina Supreme Court in Allen v. PEBA, 2015 Lexis 100, 769 S.E2d 666 (2015). A court cannot use future enacted, much less pending, legislation to interpret a previously enacted

statute. PEBA attempted that same argument related to the merits of whether the diabetes mandate applied to the State Health Plan based on legislation that was enacted years subsequent to the enactment of the diabetes mandate which expressly included the state health plan in other insurance-related mandates. The Court held that subsequent legislation (2007 and 2010 insurance mandates) cannot support a conclusion about the intent of the General Assembly when passing the diabetes mandate in 2000. "Because these provisions (express inclusion of the state health plan in 2007 and 2010 insurance mandate legislation) should be viewed in light of when they were enacted, they do not support the ALC's conclusion that the General Assembly did not intend for section 38-70-43's mandate (as passed in 2000) to apply to the State Health Plan. Allen v. PEBA, 769 S.E.2d at 670-71. This argument and other ALC authority relying on this ground is no longer good law in South Carolina.

Furthermore, just as in Caprood, the S.T.A.R. case never made it out of the ALC – it was dismissed in the ALC without prejudice with an agreement for the parties to resolve by way of amended tax returns. (See Exhibit 2 and 3 (Order and Decision)). Respondent also cites to an unpublished Order in Vitaris v. EIP, 2011-ALJ-30-0232 (2012). (See Exhibit 4). That order, however, did not rule that the administrative appeal from the EIP was not a "civil action" within the meaning of the statute. Instead, the court specifically did not decide that issue. It assumed that section §15-77-300 applied to the claim and held that the EIP's decision to impose the "maternity management penalty" was reasonable, and therefore denied the motion for fees.

None of these cases is similar to the case at bar where the Appellant obtained reversal on the merits by way of judicial review of the agency decision in the South Carolina Supreme Court. The motion should be granted.

B. THE SUPREME COURT'S HOLDING ILLUSTRATES THAT THE STATE AGENCY'S DECISION WAS NOT SUBSTANTIALLY JUSTIFIED.

Appellant previously addressed this ground in detail in the pending Motion, and relies on the argument made. The state's effort to reargue the merits of its failed statutory interpretation should be rejected. Regardless of PEBA's opinion or disagreement with the majority of the South Carolina Supreme Court, the Court concluded:

[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. SC Pub. Empl. Benefit Auth., 2015 SC LEXIS 100, *8, 769 S.E.2d 666, 670 (2015). Inconceivable" is defined as "impossible to comprehend" or "unbelievable". See Miriam Webster Dictionary (2014). This choice of words does not easily translate into "substantially justified."

To state that those involved in the decision to deny the application of the diabetes mandate to the state statute established prior acceptance by multiple decision makers would allow that qualification to swallow the state action statute in its entirety. If there were no disagreement — meaning a petitioner challenging state agency's prior decision— here the unjustified conclusion that the diabetes mandate did not apply to the State Health Plan—there would no dispute. One dissenting judge on the Supreme Court does not stand for the proposition that the state position was substantially justified. Here, the majority of the Supreme Court adopted (almost in its entirety) the legal analysis of the Appellant, and rejected that of the state agency.

C. SPECIAL CIRCUMSTANCES WOULD MAKE A DENIAL OF ATTORNEYS' FEES
UNJUST

The Appellant did not seek review of this case in order to recover \$560. Very few individual persons can afford to litigate a case for five (5) years, through a morass of administrative delays, which were set forth in detail in the record, varying levels of review (without hearing), and to the South Carolina Supreme Court over \$560. It is indisputable that Appellant sought to require the State of South Carolina (to whom all South Carolinians pay taxes) to comply with the diabetes insurance mandate, and to compensate all persons who were illegally denied insurance benefits to which they were otherwise entitled. While counsel for PEBA may believe his client has "lost the battle, but won the war," such is not the role of the administrative law court. The administrative law court is, like other courts in South Carolina, to follow the law and do justice. See SCRCF, Rule 1 (stating that the rules of civil procedure are intended to be construed to secure the just, speedy, and inexpensive determination of every action). The undersigned respectfully submits that justice would be best served in this case by granting the motion.

PEBA also attempts to insert some new argument that the Appellant's claim was not entitled to be paid, even under § 38-71-46. (Opp. Memo. At 16-18). This is the very first time, in over five (5) years that the state has raised such an issue. It is not preserved for review under any possible circumstance. In fact, PEBA has already sent a check for the claim. (See Exhibit 5). That argument should be disregarded.

PEBA argues that because the minor child who made this claim for insurance benefits is the child of an attorney at Wills Massalon & Allen, LLC, and that because that attorney performed a substantial amount of legal work on this matter, that somehow justifies denying the motion for attorneys' fees. Appellant Allen retained the law firms of Wills & Massalon, LLC

and agreed to associate the law firm of Richardson, Patrick, Westbrook & Brickman, LLC. [At that time of the initiation of the action, Attorney Christy Allen was an associate at Wills & Massalon, LLC]. Attorneys, other than Mrs. Allen, including John Massalon, Terry Richardson, and Matthew Hamrick performed work on these cases. Mrs. Allen did not even attend the arguments in the South Carolina Supreme Court. This is not a pro se representation, but was originally documented as a contingency representation for the lawsuit. PEBA moved to dismiss the circuit court class action claiming Appellant was required to exhaust his administrative remedies prior to seeking further review. Such was not the choice of Appellant or his counsel.

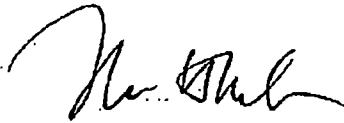
Unlike that in Hopkins v. Hopkins, a divorce case with one party using a lawyer spouse to represent himself against his wife, this is a case where the General Assembly provided a statutory basis for a person who successfully challenges the state to recover its reasonable attorneys' fees and costs. The state action statute section 15-77-300 is not a simple prevailing party attorneys' fees statute like in Hopkins or the other pro se attorney cases referenced by the Respondent. It does not allow the state to recover its fees against a person if the state is the prevailing party. Instead, it only allows a person fees if he prevails against illegal state action. This type of attorneys' fee statute is of the "private attorney general" type. See Rowe, Thomas D. Jr. The Legal Theory of Attorney Fee Shifting: A Critical Overview, Duke Law Journal at pp. 662-664 (1982) (Cases raising this concern - where governmental authority or resources do not suffice to ensure adequate public enforcement of state law - often seek to enforce a right deemed to have special social importance.) This distinction is important because it illustrates a different purpose for allowing the award of attorneys' fees- that of the public purpose of ensuring a system of checks and balances to ensure that South Carolina state agencies are acting in compliance with state law. As referenced by the Supreme Court in Layman, 658 S.E.2d 320, the Court explained that "the overriding principle of the state action statute is that as a state agency, the Retirement

System, is obligated to carry out the instructions of the State.” *Id.* at 443. The state action attorneys’ fee statute is not a compensatory prevailing party fee provision, but designed to support a public purpose. Without the possibility of recovering reasonable attorneys’ fees, no private person (other than wealthy individuals) would be able to help ensure state agencies were complying with state law. Those state agencies use taxpayer money to litigate these cases, and as such this challenging litigation furthers the public interest.

**D. THE ATTORNEYS’ FEE AFFIDAVITS, DETAILED TIME SHEETS, AND
PROPOSED 50 PERCENT REDUCTION ARE REASONABLE**

Recognizing the interplay between this action challenging the state agency’s position that the diabetes mandate did not apply to the State Health Plan and the efforts to obtain class action status and relief, Appellant disclosed all time entries and costs, and then proposed a 50% reduction (and removed the expert fee related solely to the circuit case). Considering that deduction, the support provided for the total amount sought, the length and difficulty of prevailing on this matter, Appellant requests that the court grant the Motion for Attorneys’ Fees in this matter.

Respectfully submitted,



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144
SC Bar Number: 010279

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812

EXHIBIT “1”

SC Administrative Law Court Decisions

CAPTION:
Robert Caprood # 199227 vs. SCDOC

AGENCY:
South Carolina Department of Corrections

PARTIES:
Appellant:
Robert Caprood # 199227

Respondent:
South Carolina Department of Corrections

DOCKET NUMBER:
01-ALJ-04-00010-AP

APPEARANCES:
n/a

ORDERS:

ORDER DENYING ATTORNEY FEES

I. Introduction

Robert Caprood # 199227 (Caprood) seeks reasonable attorney's fees under S.C. Code Ann. § 16-77-300 since he believes he is a prevailing party in a civil action. I disagree.

II. Analysis

S.C. Code Ann. §16-77-300 provides, in pertinent part, the following:

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.

ALC Rules
Decisions
Judges
Organizational
Listing
Location
Forms
Transparency
Links
FAQs
Disclaimer
Home

Among others, the statute at least requires that the party seeking the fees must be the "prevailing party" in a "civil action." *Jasper County Bd. of Educ. v. Jasper County Grand Jury* 303 S.C. 49, 388 S.E.2d 488 (1990). Here, no "civil action" is involved, and Caprood is not a "prevailing party."

As to the lack of a "civil action," it is certainly true enough that one seeking judicial review of an agency decision is one who is bringing a "civil action" for purposes of §16-77-300. *McDowell v. S.C. Dept. of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991). However, an equally true conclusion is that attorney's fees cannot be awarded for proceedings before a State agency since at such a stage the agency is functioning as an "administrative decision-maker" and not as an adjudicator in a "civil action." *McDowell*, 405 S.E.2d at 833. For the matter here under review, both DOC and the ALJ were functioning as administrative decision-makers. See *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). Thus, attorney's fees are unavailable.

Further, such fees are not available in any event since Caprood cannot establish that he is a "prevailing party." Rather, the term "envisions a victory to some degree on the merits." *Jasper County Bd. of Educ. v. Jasper County Grand Jury* 303 S.C. 49, 388 S.E.2d 488 (1990). Here, the ALJ simply remanded the matter to DOC for a new hearing due to procedural errors which occurred below. Thus, no victory on the merits has been achieved. Accordingly, Caprood cannot demonstrate he is a "prevailing party."

III. Order

The request for attorney's fees is DENIED and this case is ended.

AND IT IS SO ORDERED

RAY N. STEVENS

Administrative Law Judge

Post Office Box 11667

Columbia, South Carolina 29211-1667

Dated: June 20, 2002

Columbia, South Carolina

EXHIBIT “2”

Search: Go

SC Administrative Law Court Decisions

CAPTION:

S.T.A.R. Services vs. SCDOR

AGENCY:

South Carolina Department of Revenue

PARTIES:

Petitioners:

S.T.A.R. Services

Respondents:

South Carolina Department of Revenue

DOCKET NUMBER:

98-ALJ-17-0448-CC

APPEARANCES:

n/a

ORDERS:

ORDER

This matter is before me pursuant to the motion of the Petitioner, S.T.A.R. Services, for an award of costs pursuant to S.C. Code Ann. §15-77-300 (Supp. 1996). I have carefully reviewed the Motion and the response submitted by the Department of Revenue, as well as the pertinent statutes and case law. For the following reasons, I conclude that the motion must be denied.

S.C. Code Ann. §15-77-300 provides, in pertinent part, as follows:

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.

Pursuant to this section, the threshold requirement for an award of costs is that the action in question must be a "civil action." Generally, an "action" is defined as "a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." *Black's Law Dictionary* 28 (8th ed. 1990). Proceedings before the Division differ from "actions" brought in courts, in that the Division is an agency of the executive branch of government rather than a part of the judiciary. See S.C. Code Ann. §1-23-500(A) (Supp. 1996). Most of the "contested cases" heard by an Administrative Law Judge under the Administrative Procedures Act are the final administrative step prior to judicial review. See S.C. Code Ann. §1-23-600(B); §1-23-610(B) (Supp. 1996). In *McDowell v. S.C. Dept. of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991), a case which predated the establishment of the Division, the Supreme Court held that an action in Circuit Court for judicial review of an agency decision was a "civil action" for

ALC Rules
Decisions
Judges
Organizational
Listing
Location
Forms
Transparency
Links
FAQs
Disclaimer
Home

purposes of § 15-77-300. However, the Court further held that the Plaintiff was not entitled to recover attorney's fees for the proceedings before the agency, since at that point the agency was functioning as an "administrative decision-maker." 405 S.E.2d at 833. A reading of *McDowall* indicates that within the context of the APA, an "action" arises only after the conclusion of a contested case and only when the aggrieved party seeks judicial review in the circuit court. Accordingly, §15-77-300 is not applicable to proceedings before the Division.

This conclusion is further supported by the fact that there is presently pending before the General Assembly a bill which would amend §15-77-300 to allow an Administrative Law Judge to award attorney's fees to a prevailing party (other than the State or a political subdivision of the State) in "any contested administrative proceeding under the Administrative Procedures Act that is initiated by the State, a political subdivision of the State, or a party contesting such action." H. 3383, 112th Leg., 1st Sess. (1997). "It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law." *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 162, 135 S.E.2d 841 (1964); 82 C.J.S. *Statutes* §384(b)(2) (1953). The fact that the Legislature is considering an amendment to §15-77-300 which would bring proceedings before the Division within the coverage of that section is a further indication that the statute, as presently written, does not allow an award of attorney's fees in such proceedings. Therefore, the Petitioner's Motion for Costs is hereby DENIED.

AND IT IS SO ORDERED.

ALISON RENEE LEE

Administrative Law Judge

March 17, 1997

Columbia, South Carolina.

Copyright © 2014 South Carolina Administrative Law Court

EXHIBIT “3”

SC Administrative Law Court Decisions

CAPTION:
S.T.A.R. Services vs. SCDOR

AGENCY:
South Carolina Department of Revenue

PARTIES:
Petitioners:
S.T.A.R. Services

Respondents:
South Carolina Department of Revenue

DOCKET NUMBER:
86-ALJ-17-0446-CC

APPEARANCES:
n/a

ORDERS:

ORDER AND DECISION

This Order represents the final disposition of an Interlocutory Order issued by the Administrative Law Judge Division ("Division") on November 27, 1996. Petitioner filed a request for a contested case hearing on October 24, 1996. The request was for the Department to provide written procedures for submitting amended property tax returns, and to timely process certain amended returns pending before the Department. Subsequently, Petitioner filed a Motion for Injunctive Relief to stay the Department from processing certain amended returns. The Department then filed a Motion

to Dismiss on the basis of lack of personal and subject matter jurisdiction. The Interlocutory Order was the result of a combined hearing to consider the Motion for Injunctive Relief, and the Motion for Dismissal. The Interlocutory Order denied the Motion to Dismiss and granted the Motion for Injunctive Relief. Further, the Interlocutory Order found that a contested case hearing was not the appropriate form of relief, and characterized the requested relief as equitable and within the jurisdiction of the Division pursuant to S.C. Code Ann. Section 1-23-630 (Supp. 1995).

In subsequent negotiations between the parties, the Department agreed to provide written instructions for filing original and amended business personal property returns (Form PT100). Such was provided to the Petitioner on December 20, 1996. The parties agree that these instructions, which are attached hereto and expressly incorporated herein, are applicable to all taxpayers filing Form PT100 with the Department. The parties further agree that they will make every effort to resolve any questions arising from the aforementioned

instructions. If such resolution is not possible, however, the parties agree to avail themselves of the appeals procedure identified in Title 12, Chapter 80 of the Code of Laws of South Carolina (Supp. 1996) for matters involving specific amended tax returns. For resolution of matters not involving specific taxpayers, the Petitioner may seek relief under any remedy, if such remedy is allowable under the South Carolina Code of Laws.

Based on the consent of the parties after consultation with their attorneys, as evidenced by the signatures of the attorneys below, it is the order of this Court that the temporary injunction is dissolved and the matter is dismissed without prejudice to any party to this suit.

ALC Rules
Decisions
Judges
Organizational
Listing
Location
Forms
Transparency
Links
FAQs
Disclaimer
Home

ALISON RENEE LEE
Administrative Law Judge

January ____, 1987
Columbia, South Carolina.

WE CONSENT:

Malane S. Pike
Attorney for Respondent

David C. Alford
Attorney for Petitioner

Copyright © 2014 South Carolina Administrative Law Court

EXHIBIT “4”

FILED

JUN 15 2012

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

SC ADMIN. LAW COURT

Heather Vitaris,

Appellant,

vs.

South Carolina Budget and Control Board,
Employee Insurance Program,

Respondent.

DOCKET NO. 11-ALJ-30-0232-AP

**ORDER DENYING APPELLANT'S
MOTION FOR FEES AND COSTS**

The above-captioned case was decided by the undersigned judge on April 24, 2012. On May 9, 2012, the Appellant filed a Motion and Petition for Fees and Costs in connection with the case pursuant to S.C. Code Ann. §15-77-300. The Respondent filed a Response on May 18, 2012.

This code section allows for the allowance of fees in "civil actions" if "the court finds that the agency acted without substantial justification in pressing its claim against the party." S.C. Code Ann. §15-77-300(a). Even assuming that this code section applies to the Appellant's claim, which this Court is not, the Respondent's decision to impose the Maternity Management Penalty was had a reasonable basis in law and fact. Therefore,

IT IS THEREFORE ORDERED that Appellant's Motion for Fees and Costs is **DENIED.**

AND IT IS SO ORDERED.


CAROLYN C. MATTHEWS
Administrative Law Judge

June 15, 2012
Columbia, South Carolina.

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

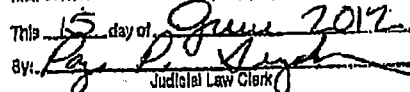
This 15 day of June 2012.
By: 
Judicial Law Clerk

EXHIBIT “5”

0.0055

THE BACKGROUND OF THIS CHECK IS BLUE.

Bank of America Customer Connection
Bank of America, N.A.
Atlanta, DeKalb County, Georgia

THE SC STATE EMPLOYEES HEALTH BENEFIT PLAN
A SELF-INSURED PLAN
Administered by Blue Cross Blue Shield of South Carolina
An Independent Licensee of the Blue Cross and Blue Shield Association.
COLUMBIA, S.C. 29216
(800) 288-2227



84-1228
011

No. 0080093770

DATE
03-19-15

SC6

AMOUNT
*****560.00

FIVE HUNDRED SIXTY DOLLARS AND ZERO CENTS

PAY TO THE ORDER OF:

JEFFREY D ALLEN
ON BEHALF EVA ALLEN AND WILLS
1368 EMORY AVE
CHARLESTON, SC 29407-7622



BlueCross BlueShield of South Carolina

M. M. M.

VOID SIX MONTHS FROM DATE OF ISSUE

204723 000058

AS TREASURER

⑈0080093770⑈ ⑆061112788⑆ 329 911 5792⑈

THE STATE OF SOUTH CAROLINA
In the Administrative Law Court

FILED

MAY 18 2015

SC ADMIN. LAW COURT

Case No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative
of other similarly situated State of South Carolina employees or retirees,
.....Appellant,

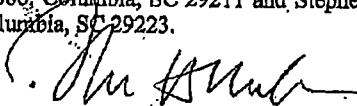
v.

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

PROOF OF SERVICE

I certify that I have served Appellant's Reply to Opposition to Motion for Attorneys' Fees on Respondent of record by depositing a copy of it in the United State Mail, postage prepaid, on May 18, 2015, addressed to their attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886, Columbia, SC 29211 and Stephen Raymond Van Camp, Esquire, 202 Arbor Lake Drive, Columbia, SC 29223.

May 18, 2015



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812

ATTORNEYS FOR APPELLANT

congenital anomaly (as opposed to familial characteristics or aging phenomenon), occurred after the Covered Person's Effective Date of Coverage under this Plan or a Predecessor Plan;

- K. Hospital and Physician services for dental procedures, including those related to tooth structures, extractions, gingival tissue, alveolar process, dental X-rays, or other procedures of dental origin, which are principally for the preserving of teeth or the preparation of the mouth for dentures, except as specified under 7.3.O.
- L. Physician's charges for medicine, drugs, appliances, supplies, blood and blood derivatives, unless these items are Covered Medical Expenses under the Plan, and then only to the extent that the charges do not exceed the usual charge for such items from other providers;
- M. Eyeglasses, contact lenses, hearing aids and examination for the prescription or fitting thereof and any hospital or physician's charges related to refractive surgery such as radial keratotomy, keratomileusis, or lamellar keratoplasty and any other procedure the purpose of which is to alter the refractive properties of the cornea, except for the treatment of keratoconus;
- N. Travel, whether or not recommended by a Physician, unless related to a human organ transplant specified under 7.3.P.6;
- O. Any medical social services (except for those provided under the Hospice program and Home Health Care Program upon recommendation of the Utilization Review Agency) or vocational, visual, recreational, educational, or milieu therapy;
- P. Diet treatments, and all weight loss surgery, including, but not limited to the following: gastric bypass or stapling; intestinal bypass and any related procedures; the reversal of such procedures; and conditions and complications as a result of such procedures or treatment.
- Q. Any service or supply rendered by a member of the Covered Person's immediate family (parent, child, spouse, grandparent or in-law);
- R. Room and Board charges for elective non-emergency Hospital admissions for certain surgical procedures that can safely be performed on an outpatient basis. Benefits will be provided when Pre-certification of coverage is requested and it is determined that the Covered Person's medical condition warrants hospitalization. If Pre-certification is not obtained and upon subsequent review, it is determined that the admission was Medically Necessary, Room and Board benefits will be provided, subject to the Deductible and Co-payment requirements in 7.1.A and B and 16.8.
- S. Charges for chronic pain management programs or any program developed by centers with multidisciplinary staffs intended to provide the interventions necessary to allow the patient to develop pain coping skills and freedom from dependence on

1-11-720.²¹ The Board is required to "make available to active and retired employees of this State and its public school districts and their eligible dependents group health, dental, life, accidental death and dismemberment, and disability insurance plans and benefits in an equitable manner and of maximum benefit to those covered within the available resources." The available resources consist of employee contributions, employer contributions (i.e., public funds), and investment income on those contributions. The Board provides coverage to approximately 400,000 lives in South Carolina, and the Plan rules are developed with the purpose of providing affordable quality coverage to all those covered.

EIP is the part of the Budget and Control Board that is responsible for administering the State Health Plan as well as other benefit programs offered to public employees. BCBSSC is a third party claims processor procured by EIP, to provide medical reviews, claims processing, and claims payment services for the State Health Plan. With that in mind, the Committee considered the terms of the 2008 Plan applicable to this appeal.

Article 9, Paragraph O of the 2008 Plan excludes educational services, outside of certain programmatically-offered situations. Paragraph BB states those services not enumerated in Article 7 are not covered; diabetes education, as a stand-alone claim, is not covered. Therefore, no more benefits are payable for the educational services received by Claimant, Claimant's spouse, Dependent's grandparents, and two nurses on Dependent's behalf in relation to Dependent's insulin pump on August 5, 2008, under the terms of the Plan. The Plan covered the insulin pump and accessories without issue, but the group's separately-billed educational instruction is not included.

The Committee also observed that, in the Standard Plan, while those diabetes educational services are not covered as a stand-alone claim, wellness and educational programs for chronic diseases including diabetes are available if pursued through EIP's Prevention Partners and other available BCBSSC programs. The Committee noted Claimant's spouse made no mention of having pursued these other avenues, except to state in a footnote someone from BCBSSC had called her regarding one such program.

The Committee also noted other health insurance coverage options were available to Dependent and Claimant which would have covered the in-office, separately-billed educational services they sought. While differences in coverage do exist among the Standard Plan and the FMO options and every subscriber must weigh these options while selecting coverage, if Claimant and his family had decided office-setting, independently-billed educational services were a priority, they could have remained covered under the MUSE Options plan or selected BlueChoice HealthPlan when changing coverage at the beginning of the 2008 Plan year. However, Claimant selected different health insurance coverage for himself and Dependent, and he selected an option that does not cover the desired educational services outside of the wellness programs described above.

Lastly, the Committee noted the repeated assertions regarding S.C. Code Ann. § 38-71-46 and Claimant's attorney's assertion no one has explained why it does not apply to the State Health Plan. While the Committee noted the alternative methods for obtaining diabetes

²¹ S.C. Code Ann. § 1-11-710(A).

education noted above, the Committee also observed the Department of Insurance and the General Assembly historically have acknowledged the Department has no jurisdiction over EIP.²² EIP is not a health insurance issuer under the Code. In the areas in 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.

The Committee hopes the best for Dependent's well-being in the future. While the particularities regarding Dependent's young age and the severity of her disease are compelling, the Committee must make decisions within the terms of the Plan. The Plan does not cover educational services as a separately billed claim. Therefore, no further benefits are payable for the August 5, 2008, educational session.

Conclusion

Based on all of the evidence in the record, the Committee concluded no benefits are payable for the \$560.00 claim filed for diabetes educational training on August 5, 2008, for Dependent's family and caregivers in conjunction with her covered insulin pump.

²² See, e.g., S.C. Code Ann. § 1-11-780:

The State Employee Insurance Program shall continue to provide mental health parity in the same manner and with the same management practices as included in the plan beginning in 2002, and is not under the jurisdiction of the Department of Insurance. The continuation by the State Employee Insurance Program of providing mental health parity in accordance with the plan set forth in 2002 constitutes compliance with this act.

MEDICAL AFFAIRS REVIEW COORDINATOR'S RESPONSE

Patient Name: M. Allen
 Patient ID: 1184 002
 Claim Number(s): 8826512500000
 Date(s) of Service: 08/05/2008
 Effective Date: 01/01/2007
 Issue: Denial of Diabetic Education

(continued) regimen. Discussed insulin pump management and gave education material on various pumps. Mother to make appointment with Sharon Schwarz to discuss insulin pumps in more detail and consider trying a saline insulin pump.

Patient's Medtronic Minimed insulin pump was MD approved under TNAV certification # 0819123215998. Submitted documentation for the Minimed pump is in the file for review.

8/5/08; Education documentation- Peds Endo. 3 yr old female. Learning needs/Content taught: Patient's plan of care, medications nutrition, food/drug interaction, health promotion, patient safety, medical equipment. Person(s) taught: Parent, family member (grandmother), school nurse and nursing supervisor, other. Readiness to learn: No barriers. Department: Nursing. Teaching/learning method: Written and verbal, demonstration. Outcome/Comprehension: Able to state understanding and/or return demonstration. Comments: Met with [redacted] parents, grandparents, and school nurses to instruct them on the Medtronic Paradigm insulin pump. They were instructed on trouble shooting hyper/hypoglycemia on the insulin pump, importance of monitoring, ketone testing and site rotation. Instructed on all mechanics of pump therapy and demonstrated good understanding. Encouraged to practice with pump w/ saline until [redacted] started on the pump next week. School nurse given a practice pump and NS to review and she will return pump next week. Discussed school needs and plan. To be started on pump next week. Signed: Sharon Schwarz, RN.

Also included in the file are the MD guidelines/orders for the insulin pump. It appears the records submitted are incomplete. Appears only pages 2 and 3 were submitted. Please see file for the submitted documentation.

A copy of the 2009 State Health Plan Contract and South Carolina statute 38-71-46 are in the file for review.

Please advise if the Diabetic Education Services rendered on 8/5/08 are payable under this members contract.

Shelly M Jackson, RN
 Medical Affairs Review Coordinator
 3/15/2010

Shelly M Jackson
 3/15/2010

MEDICAL DIRECTOR RESPONSE

3/15/2010 The services referenced in this appeal are specifically excluded in the plan Article 9 paragraph D. Exclusion B3 in Article 9 also applies as there is no mention of this service in the Benefit section of the plan. The statute referenced in the appeal document does not apply to the State Health plan.
 Page 4 of 4
Chris M. Jordan MD
V.P. Medical Affairs

WILLS & MASSALON, LLC

ATTORNEYS AT LAW
Telephone: (843) 727-1144
Facsimile: (843) 727-7696

Post Office Box 859
Charleston, South Carolina 29402

134 Meeting Street, Suite 100
Charleston, South Carolina 29401

September 30, 2009

Blue Cross Blue Shield of South Carolina
State Health Plan - Appeal
P.O. Box 100605
Columbia, SC 29260-0605

Re: Appeal and Review / SC State Health Plan
Plan No: ZCS36961363
EOB Claim No: 8B2631250-00-00/Pending Appeal

To whom it may concern:

This letter is in regard to the pending appeal of the above referenced claim, which has been pending since February 2009. Due to a lack of contact by you or apparent resolution of the appeal, I called BCBS on August 14, 2009 and was informed that you had not received requested medical records, which your telephone representative was unable to specify, from MUSC. I contacted the records department at MUSC that same day and was informed that it had sent the records once and that it would send the records a second time.

On September 30, 2009, I called BCBS again to inquire about the status of this appeal and was informed that you were still waiting on the requested records from MUSC. I was informed that you needed "outpatient ER records" (despite there being no ER involved in the date of service). I have received no direct request by BC/BS, other than what I initiated through my telephone contacts, for the records or even that I complete a HIPAA form.

I have now received the complete set of records from MUSC for the diabetes mellitus insulin pump training session for my daughter who was 3 years old at the time, and enclose these records for your consideration.

I am also enclosing a copy the South Carolina statute which requires Diabetes Mellitus coverage in health insurance policies. I have highlighted the provision which requires coverage for "outpatient self-management training and education for the treatment of people with diabetes mellitus (or commonly called Type I).

Thank you, and if there is any other information you require in order to resolve this

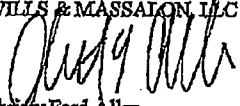
525

405

appeal, please let me know.

Sincerely,

WILLS & MASSALON, LLC


Christy Ford Allen

Enclosures

526

406



MUSC Health

Medical University of South Carolina
Charleston, SC
843-782-2123

Practice Partner Note

Patient: [REDACTED]

Attending: [REDACTED]

MRN: 002585257

Date: 8/5/08 3:41 PM

Status: INITIAL

Record all glucose monitoring and diabetes medications on Pediatric Diabetes Pump Flow Sheet.

6.

Check urine for ketones if blood glucose is greater than 280 mg/dL.

7.

If urine tests positive for ketones, call fellow/attending. Do not use pump to bolus. Change pump access site and give insulin via syringe injection subcutaneously (use high blood glucose insulin amount for pump).

8.

Exercise guidelines: 30 minutes before exercise begins

A. If blood glucose is less than 150 mg/dL prior to exercise, turn insulin pump off and restart after exercise stops.

B. If blood glucose is greater than 150 mg/dL prior to exercise, leave pump on with 50% basal rate reduction and return to ordered basal rate 30 minutes after exercise stops.

C. If blood glucose is greater than 300 mg/dL or if patient is positive for ketones, do not exercise.

Call Pediatric Endocrinology Fellow or Attending if blood glucose is: less than 70 mg/dL two times in a row, less than 50 mg/dL once, or greater than 240 mg/dL two times in a row; or if urine tests positive for ketones.

Weight: 14.3 kg

Patient/Parent may use home glucose meter, meter strips, lancing device, lancets, new unopened vial of insulin, glucose tabs, glucose gel, and glucagon, and may administer insulin.

Medications:

Insulin Pump

1.

Novolog insulin 100 units per ml for pump - use new vial

2.

Set basal rates at 0.1 units per hour

3.

Bolus all meals/snacks one unit insulin for every 30 grams carbohydrate.

4.

For high blood glucose greater than 175 mg/dL before meals or greater than 3 hours after meals from 6 AM to 9 PM, use 1 unit insulin for every 260 mg/dL (sensitivity factor) greater than 175 mg/dL (target).

5.

For high blood glucose greater than 200 mg/dL before meals or greater than 3 hours after meals from 9 PM to 6 AM, use 1 unit insulin for every 280 mg/dL (sensitivity factor) greater than 200 mg/dL (target).

This document should not be filed in the paper medical record and should be confidentially destroyed when it is no longer needed.

Printed by: MITCHELL, VERNESSA

Date Printed: 08/30/2009

407

527

Page 2



Medical University of South Carolina
Charleston, SC
843-782-2123

Practice Partner Note

Patient: [REDACTED]

MRN: 002585257

Attending: [REDACTED]

Date: 8/5/08 3:41 PM

Status: INITIAL

6.
If pump has bolus wizard/calculator option, enter blood glucose reading only when reading is greater than 176 mg/dL from 6 AM to 8 PM or greater than 200 mg/dL from 9 PM to 6 AM (Pump will calculate bolus amount to cover hyperglycemia.)
Glucose tablets: 4 or 6 grams per tab—Administer as directed per hypoglycemia protocol.
Glucose gel: 31 gram tube—Administer as directed per hypoglycemia protocol.
Glucagon 0.5 mg IM (0.5 mg for patients less than 20 kg; 1 mg for patients 20 kg or greater)—
Administer for unconscious hypoglycemia.
Hypoglycemia Protocol
1.
Call physician for 2 consecutive blood glucose levels below 70 mg/dL or 1 blood glucose level below 60 mg/dL.
2.
Give three glucose tabs (4 or 6 grams per tab) or 4 ounces unsweetened juice (16 grams carbohydrate). Recheck blood glucose level in 15 minutes and repeat above treatment until blood glucose is greater than 70 mg/dL.
3.
If patient is unable to chew or drink juice, place 16 grams carbohydrate of glucose gel in patient's cheek (use 1/2 of 31 gram weight tube).
Unconscious Hypoglycemia - If patient is unconscious, give glucagon as ordered above.
Discharge Appointment: Please schedule return appointment (878-0444) with Pediatric Endocrine Diabetes Educator for 2-3 weeks after discharge.
Ordering Physician: Deborah Bowlby, MD pager id 14535
SIGNED BY DEBORAH BOWLBY, MD (ATTENDING) (DB1) 08/08/2008 09:35AM

528

This document should not be filed in the paper medical record and should be confidentially destroyed when it is no longer needed.

Printed by: MITCHELL, VERNESSA
Date Printed: 08/30/2008

408

Page3

38-71-46

TITLE 38 - INSURANCE

CHAPTER 71. ACCIDENT AND HEALTH INSURANCE

38-71-840(14).

38-71-46. Diabetes Mellitus coverage in health insurance policies; diabetes education.

ARTICLE I. GENERAL PROVISIONS

(A) On or after January 1, 2000, every health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State must provide coverage for the equipment, supplies, Food and Drug Administration-approved medication indicated for the treatment of diabetes, and outpatient self-management training and education for the treatment of people with diabetes mellitus, if medically necessary, and prescribed by a health care professional who is legally authorized to prescribe such items and who demonstrates adherence to minimum standards of care for diabetes mellitus as adopted and published by the Diabetes Initiative of South Carolina. This subsection does not prohibit a health maintenance organization or an individual or a group health insurance policy from providing coverage for medication according to formulary or using network providers. Coverage must not be denied unless the health care professional demonstrates a persistent pattern of failure to adhere to the minimal standards of care and unless the health maintenance organization or insurer has first provided written notice to the health care professional that coverage will be denied if the health care professional fails to adhere to the minimal standards of care.

(B) Services and payment for diabetes education programs shall conform to regulations of the Health Care Financing Administration, US Department of Health and Human Services, pursuant to Section 4105 of the Balanced Budget Act of 1997. Diabetes outpatient self-management training and education shall be provided by a registered or licensed health care professional with certification in diabetes by the National Certification Board of Diabetes Educators, or other accredited program approved by the Diabetes Initiative of South Carolina, or by the Diabetes Control Program of the SC Department of Health and Environmental Control in order to meet the needs of rural communities wherein certified health care professionals providing this service are not available.

(C) Nothing contained in this section may be construed to affect in any way the ability of a managed care plan to credential or re-credential a provider.

(D) For purposes of this section "Health insurance policy" means a health benefit plan, contract, or evidence of coverage providing health insurance coverage as defined in Section 38-71-670(6) and Section

10/05/2009 09:48 FAX 843 727 7896

Wills & Messalco

00001

** TX REPORT **

TRANSMISSION OK

TX/RX NO	0782
RECIPIENT ADDRESS	18082844268
DESTINATION ID	
ST. TIME	10/05 09:48
TIME USE	01'24
PAGES SENT	7
RESULT	OK

Pages: 7

DATE: October 5, 2009

FILE NO.

RE: Appeal - ZCS 36961363

FROM: Christy Allen

580

410

THE STATE OF SOUTH CAROLINA
In The 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,

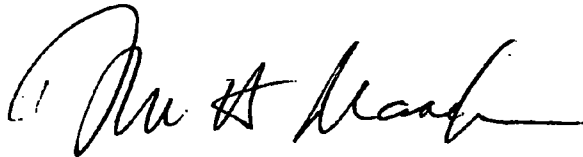
v.

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

CERTIFICATE OF COUNSEL

I certify that The Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

November 30, 2015



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812 5951
Attorneys for Appellant

RECEIVED

NOV 30 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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,

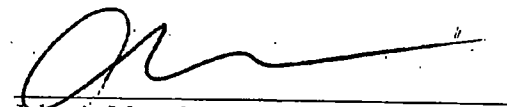
v.

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

PROOF OF SERVICE

I certify that the Record on Appeal was filed with the South Carolina Court of Appeals Clerk of Court, 1015 Sumter Street, Columbia, South Carolina 29201 on November 30, 2015 via hand delivery.

November 30, 2015


John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman,
LLC
1730 Jackson Street
Barnwell, SC 29812
ATTORNEYS FOR APPELLANT

RECEIVED

NOV 30 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 30 2015

APPEAL FROM THE ADMINISTRATIVE LAW COURT
SC Court of Appeals

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.

APPELLANT'S FINAL BRIEF

November 24, 2015

John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman,
LLC
1730 Jackson Street
P.O. Box 1368
Bamwell, SC 29812 5951
Attorneys for Appellant

Other Counsel of Record:

Theodore D. Williard, Jr., Esquire
Montgomery Willard, LLC
P.O. Box 11886
Columbia, SC 29211

and

Stephen Raymond Van Camp, Esquire
202 Arbor Lake Drive
Columbia, SC 29223
Attorneys for Respondent

The Honorable Shirley C. Robinson
Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

TABLE OF CONTENTS

Statement of Issues on Appeal	1
Statement of the Case	1
Standard of Review	2
Factual Background.....	3
Argument.....	5
A. The ALC abused its discretion in finding that the state health plan's actions were substantially justified.	5
B. This Court should exercise its discretion and award reasonable attorneys' fees and costs to the Appellant.....	11
Conclusion	16

TABLE OF AUTHORITIES

CASES

<u>Allen v. S.C. Pub. Empl. Benefit Auth.</u> , 2015 S.C. LEXIS 107 (Mar. 4, 2015)	7
<u>Catawba Indian Tribe v. State</u> , 372 S.C. 519, 642 S.E.2d 751 (2007)	3
<u>Cornelius v. Oconee County</u> , 369 S.C. 531, 633 S.E.2d 92 (2006)	9
<u>Heath v. County of Aiken</u> , 302 S.C. 178, 394 S.E.2d 709 (1990)	5, 11
<u>Jackson v. Speed</u> , 326 S.C. 289, 486 S.E.2d 750 (1997)	12
<u>Layman v. State</u> , 376 S.C. 434, 658 S.E.2d 320 (2008)	2, 6, 11, 14
<u>McDowell v. S.C. Dep't of Soc. Servs.</u> , 304 S.C. 539, 405 S.E.2d 830 (1991)	6
<u>Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue</u> , 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004)	10
<u>Sauders v. S.C. Pub. Serv. Auth.</u> , 2011 U.S. Dist. Lexis 33994 (U.S. Dist. S.C. 3/30/2011) (unpublished)	14
<u>Zabinski v. Bright Acres Assocs.</u> , 346 S.C. 580, 553 S.E.2d 110 (2001)	2

STATE STATUTES

S.C. Code Ann. § 38-71-46 (Supp. 2009)	1, 3, 6
S.C. Code Ann. § 15-77-300 (Supp. 2009)	1, 5
S.C. Code Ann. § 38-71-43 (Supp. 2009)	8
S.C. Code Ann. § 38-71-46(A) (Supp. 2009)	10
S.C. Code Ann. § 1-11-780	3

STATEMENT OF ISSUES ON APPEAL

1. Did the Administrative Law Court ("ALC") err in concluding that the agency's position was substantially justified, resulting in denial of Appellant's motion for attorneys' fees?
2. If the answer to Issue No. 1 is "yes," the court should award reasonable fees and costs in the amount of \$61,802.97.

STATEMENT OF THE CASE

Appellant originally appealed the State Health Plan's denial of a claim for diabetes education to the Administrative Law Court and sought class relief. The Administrative Law Court upheld the agency's position that the diabetes education 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. The question was one a statutory interpretation. Appellant appealed the ALC denial, and the Supreme Court agreed to certify the appeal for review. On March 4, 2015, the South Carolina Supreme Court reversed the finding the ALC and held that the South Carolina diabetes mandate statute did in fact apply to the State Health Plan as a matter of law. Thereafter, Appellant 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. On June 17, 2015, the ALC denied the Motion for Attorneys' Fees. This appeal follows.¹

¹ Appellant has traversed a procedural labyrinth in this matter that is worth noting. Appellant first sought explanation of the denial of the insurance claim from Blue Cross Blue Shield, the State Health Plan's third party claims administrator, and inquired why the diabetes mandate statute at issue did not provide coverage on or about February 25, 2009. Appellant received no response. Therefore, on November 25, 2009 (which was just prior to the two year mark from the Appellant's child's diagnosis of diabetes), Appellant filed a putative class action complaint in the court of common pleas seeking

STANDARD OF REVIEW

The decision to award or deny attorney's fees under the state action statute is subject to the abuse of discretion standard of review in considering the applicable factors set forth in the statute. Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008) (citing McMillan v. S.C. Dept. of Agric., 364 S.C. 60, 76, 611 S.E.2d 323, 331 (Ct. App. 2005)). An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). In this case, the decision

declaratory judgment, reformation of the State Health Plan, disgorgement, injunctive relief, and attorneys' fees against Blue Cross Blue Shield and the State Health Plan. The Defendants in the state court case moved to dismiss on failure to exhaust administrative remedies, and said motion was denied on March 4, 2010.

Three weeks later, Blue Cross Blue Shield denied the claim and sent it to the Blue Cross Appeals Review Committee. The Blue Cross Blue Shield Appeals Committee on April 2, 2010 denied the claim and stated, without explanation, that the diabetes mandate statute does not apply to the State Health Plan. Appellant then appealed that "administrative decision" by sending a copy of his pleadings in the state court case attached to the notice of appeal and incorporating said pleadings therein. On May 6, 2010, Appellant served written discovery on the defendants in the state court case. In response, the defendants filed a Motion for Protective Order and a Motion for Summary Judgment. Appellant filed a Motion to Compel and Motion to Stay the Motion for Summary Judgment, and a hearing was scheduled for August 26, 2010. On August 24, 2010, the State Health Plan Committee wrote that it was denying the claim and again stated the statute does not apply. The state court hearing was held on August 26, wherein the defendants again argued the case should be dismissed because Appellant was required to exhaust administrative remedies. The circuit court granted the defendants motion for summary judgment and dismissed the case "with prejudice" for failure to exhaust administrative remedies, not mentioning the class action and other non-insurance claim remedies sought. The circuit court made no ruling on the merits of the applicability of the diabetes mandate to the State Health Plan. Appellant filed an appeal to the SC Court of Appeals from the circuit court dismissal on January 7, 2011, at which time the appeal to the ALC on the merits of the statute's applicability remained pending. The SC Court of Appeals affirmed the dismissal with prejudice based on failure to exhaust on July 18, 2012. It was not until August 13, 2012 that the ALC ruled on the appeal from the "administrative appeal" and erroneously upheld the agency's decision. No court – not circuit court, the Court of Appeals, the ALC, nor the Supreme Court permitted any kind of class-wide relief, despite efforts to raise those claims in both the judicial and administrative branches at every turn.

to deny the motion hinges the ALC's interpretation of "substantial justification" as contained in the state action statute. The interpretation of a statute is a question of law, which this Court reviews *de novo*. Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

FACTUAL BACKGROUND

The facts leading up to this controversy are fully set forth in the Court's opinion of Allen v. Public Employee Benefit Association of South Carolina, 2015 LEXIS 107 (S.C. 2015). In 2009, Appellant sought an explanation from the State Health Plan of the denial of a claim made for his minor child for diabetes education related to a physician-ordered insulin pump training session which took place in 2008. 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). Eventually on August 24, 2010, the agency opined for the first time:

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. 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). That explanation contained a single footnote which referenced S.C. Code Ann. §1-11-780 -- a statute addressing mental health coverage -- presumably as the

legal justification for the proposition that the South Carolina Department of Insurance has no jurisdiction over the State Health Plan— an insurance program which admittedly insures over 400,000 South Carolinians. . 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).

Allen appealed that determination to the ALC. Without hearing or trial, the ALC affirmed the State Health Plan's decision on nearly identical statutory interpretation reasoning as that set forth by the agency. (R. pp. 15-26). Allen appealed the ALC decision, and sought transfer to the Supreme Court. The Supreme Court agreed to hear the appeal, and reversed the ALC holding that the diabetes mandate statute applied to the State Health Plan. Thereafter, Appellant filed a motion for attorneys' fees before the ALC. The motion was denied by Order dated June 17, 2015.

In this appeal, Appellant relies on the findings of the Supreme Court that the statute was unambiguous and that the plain language of the statute subjected the State Health Plan to the insurance mandate. The Supreme Court rejected the statutory interpretation advocated by the State Health Plan, and rejected the State Health Plan's efforts to use legislation enacted subsequent to the enactment of the diabetes mandate to inform legislative intent. In denying the Motion for Attorneys' Fees, the ALC concludes that the statute was ambiguous (a finding contrary to the Supreme Court's prior determination) and recounts the previously relied upon arguments of the underlying order affirming the State Health Plan's position that the statute did not apply to it as grounds to

find that the State Health Plan's position was "substantially justified," thus, denying the motion for attorneys' fees.

ARGUMENT

A. THE ALC ABUSED ITS DISCRETION IN FINDING THAT THE STATE HEALTH PLAN'S ACTIONS WERE SUBSTANTIALLY JUSTIFIED

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 attorney's 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). The ALC agreed that the Appellant was the prevailing party in an action contesting state action. The ALC based the denial of the motion on the conclusion that the State's claims were not without substantial justification. Appellant submits this conclusion was an abuse of discretion in the light of the law of this case, and findings by the Supreme Court in the underlying opinion.

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.

While the fact of a defeat of the state agency does not create a presumption that its position was not substantially justified, the court must look to the substance and outcome of the matter litigated in making its determination under the statute. Layman, 658 S.E.2d at 445. In this case, the South Carolina General Assembly enacted a diabetes insurance coverage mandate in 1999. S.C. Code Ann. § 38-71-46. It mandated broad insurance coverage for claims related to diabetes treatment, diabetes medications, diabetes supplies,

and diabetes management education services. Nonetheless, the State Health Plan, as administered by the state agency Public Employees Benefit Authority, excluded from its plan coverage for educational/medical social services, which admittedly excluded diabetes management education claims. (R. p. 175; R. p.178).

In 2008, the State Health Plan refused to pay Appellant's claim for diabetes management education services provided at MUSC related to training family and caretakers how to use a prescribed (and covered) insulin pump for Appellant's two-year old dependent daughter. This claim and appeals followed. The State Health Plan took the position it was not required to comply with the diabetes insurance mandate statute as a matter of law. There were no disputed facts regarding Appellant's claim. The issue decided by the South Carolina Supreme Court was an issue statutory interpretation. The Supreme Court wholly rejected the State Health Plan's legal analysis, and adopted the Appellant's analysis, on most points.

[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 Appellant 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 position that the court should consider the General Assembly's subsequent alleged "method" for identifying whether a general insurance statute applies to the State Health Plan by choosing whether or not to reference the State Health Plan specifically in the insurance mandate in question. Id. at *10-11. The Court stated 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.

The Court held simply, "as a matter of law, that section 38-71-43 applies to the State Health Plan." Id.

In finding that the State Health Plan acted with substantial justification, the ALC gave very light shrift to the Supreme Court's interpretation of the diabetes mandate state. Instead, the ALC found that 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)². 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

² Curiously, despite holding that the diabetes mandate statute was ambiguous for purposes of denying Appellant'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).

Respondent.” (R. p. 32). First, neither the Supreme Court’s Order (nor the Appellant’s position) on reading the grammatical structure was particularly complicated. The Court 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, Appellant is unaware of any evidence in the record, other than maybe lawyer argument, that the State Health Plan had a “longstanding agency practice denying similar claims without contest.” In fact, the State Health Plan refused in all proceedings related to this case to provide Appellant any information about other claimants and other denials. However, it can be presumed that since the State Health Plan contended the diabetes mandate statute did not apply to it at all, that it in fact denied all claims made by its members since 2000. The State Health Plan cannot be found to have acted with substantial justification simply because no one had ever complained about it before.

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. “The fact that novel issues were raised does not mean [the state agency] was substantially justified, ...” 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 backstrap 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.

If one were to follow the logic of the ALC, no prevailing party in a state action case would ever qualify for an award of attorneys' fees when on appeal from the ALC, the ALC is found to have erred as a matter of law. 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 were no factual disputes at play, and the Supreme Court rejected all of the legal positions propounded by the 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.

Under the state action statute and cases interpreting it, a state agency that enforces a preexisting statutory mandate, which is only later determined to be unconstitutional, 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 has 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.

While the ALC did not reach the question as to whether there were *special circumstances* which would make an award of attorneys' fee in this case unjust, there are

none. To the contrary, it would be unjust to deny this request. The State Health Plan has been denying its insureds, all South Carolina state and local employees, an insurance benefit they were entitled to by law since 2000. The State Health Plan was not required to even identify the number of claims, which should have been paid, but were in fact refused over the last fifteen (15) years. The State Health Plan was not required to reimburse (other than to the Appellant) all previously illegally denied benefits. The State Health Plan insisted on pursuing a legal strategy, which had no reasonable legal basis. The result of this litigation has enured to the benefit of all South Carolina employees/retirees insured under the State Health Plan. See Heath, 394 S.E.2d at 711 (“... it would obviously be unfair for Sheriff Heath to bear the costs of litigation which benefitted all the citizens of Aiken County.”). Lastly, the State Health Plan, like all other State agencies, is funded by taxpayer dollars, and the possibility of having to pay the attorneys’ fees of a prevailing party within the parameters of the state action attorneys’ fees statute is also intended to discourage the unreasonable use of taxpayer money to maintain unsupportable legal positions.

The Order should be reversed.

B. THIS COURT SHOULD EXERCISE ITS DISCRETION AND AWARD REASONABLE ATTORNEYS’ FEES AND COSTS TO THE APPELLANT

Appellant submitted full and complete briefing and evidence regarding its motion for attorneys’ fees before the ALC, and those submissions and response of the Respondent is part of this Record. (R. p. 52-123; R. p. 124-151; R. p. 152-174).

The state action statute requires that the attorneys’ fees awarded be “reasonable.” Id. When determining reasonableness, courts, both state and federal case law consistently utilizes a lodestar analysis. See Layman v. State (utilizing lodestar analysis

under state action statute). Factors to be applied in determining a reasonable rate include: (1) the nature, extent, and difficulty of the case; (2) the time devoted; (3) the professional standing of counsel; (4) the beneficial results obtained; and (5) the customary legal fees for similar services. Id. at 458, 595 S.E.2d 890. See also Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).

A. Nature, Extent and Difficulty of Case:

Appellant initiated this action first commencing the internal State Health Plan appeals process in 2009. This task was a rather difficult task in that required navigation through several levels of appeals with the State Health Plans' Third Party Claims Administrator, Blue Cross and Blue Shield of South Carolina, the ALJ, and Supreme Court of South Carolina and took over five (5) years. Despite having received the first inquiry about the applicability of the diabetes mandate statute in August 2009, The State Health Plan did not issue any substantive explanation of its legal opinion until August 24, 2010 (which happened to be a couple days prior to an important procedural hearing in the circuit court action). Appellant immediately instituted this Appeal to the ALJ of the State Health Plan's August 24, 2010 decision. The matter was briefed in the ALC. However, the ALC scheduled no hearing, and issued its decision adopting the State Health Plan's position generally on August 13, 2012. Appellant then sought review of the ALJ decision directly in the South Carolina Supreme Court through SCRAP, Rule 204(b) for cases which involved "an issue of significant public interest or a legal principle of major importance." The Supreme Court agreed to hear the appeal directly from the ALC, and finally on March 4, 2015, the Supreme Court agreed with Appellant that the statute applied to the State Health Plan. The Court indicated that issue was a novel issue of law. This case was

a difficult case to undertake; Appellant met resistance at many levels of the judicial process, but was ultimately able to succeed on the law after many years of litigation. This factor supports the award of an attorneys' fee in this case.

B. The Time Involved:

Appellants have submitted Affidavits of counsel, along with detailed time and expense records. See Affidavits of John A Massalon, Christy Ford Allen, and Terry E Richardson. It is undisputed that this ALC case was ongoing while Appellant attempted to institute and maintain a circuit court case seeking a class action. According to the Affidavits submitted, the time kept did not differentiate between the circuit court case and this administrative case. In order to address this complexity, Appellants have reduced the total time and expenses sought by 50%. (See Summary of Fees and Costs, infra.)

C. The Professional Standing of Counsel.

Appellant has submitted along with the Affidavits, evidence of their experience and professional standing. This factor also supports an award of fees in this matter.

D. The beneficial results obtained.

Despite having lost at each stage of the administrative process, including appeal to the ALJ, the South Carolina Supreme Court agreed with Appellant that the diabetes mandate statute applies to the State Health Plan. This Order provides the grounds for which all persons insured by the State Health Plan, an insurance plan provided to the largest employer in the State of South Carolina, will receive insurance coverage for future diabetes education claims. These claims may include training of minor dependents on how to administer insulin, instruction on how to count carbohydrates when calculating appropriate insulin dosage, and instruction on nutritional analysis to

include effects of fast, protein, and different types of carbohydrates on one's blood sugar levels. These are beneficial results, and results which will benefit a very large number of South Carolinians.

E. Customary Legal Fees for Similar Services

Counsel for Appellant has submitted four (4) Affidavits of counsel with personal knowledge of each lawyer and this area of legal practice which evidences that the hourly rates set forth below are customary in addition, to the Affidavits submitted in support of this Motion regarding the amount of time, nature of work performed, and customary hourly rates. The Supreme Court of South Carolina and US District Court of South Carolina have recently approved of hourly rates in the range on the hourly rates proposed by the counsel involved herein. See Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008) (allowing \$600 hourly rate for A. Cameron Lewis, as a premium hourly rate for difficult cases, and \$350.00 per hour rate for Keith M. Babcock); see also Sauders v. S.C. Pub. Serv. Auth., 2011 U.S. Dist. Lexis 33994 (U.S. Dist. S.C. 3/30/2011) (unpublished) (\$600.00 per hour for J. Edward Bell).³

Appellant submits the following summary of the information provided in the corresponding Affidavits:

³ This case is very different than the recently decided case on R.P. v SC DHHS, 06-ALJ-08-0605 (currently pending on appeal) where the ALC denied fee petition on finding of substantial justification. That case had involved at least 2 multi day evidentiary hearings, and other appeals. Appellant in this case was never provided the opportunity to argue at a hearing or make any kind of presentation, in the initial "internal agency review" or before the ALC. This case is not one involving disputed facts. Furthermore, unlike the R.P. case, the South Carolina Supreme Court specifically adopted the vast majority of the Appellant's arguments on the issue of statutory interpretation, and rejected each argument made by the state agency. The facts of that case distinguish it from this case, and this case should be decided on its own merits.

TOTAL ATTORNEYS' FEES:

	Total Hours	Net 50%	Hourly Rate	Totals
Terry E. Richardson	33.50	16.75	600.00	10,050.00
John A. Massalon	30.70	15.35	350.00	5,372.50
Christy Ford Allen	245.50	122.75	300.00	36,825.00
Matthew Hamrick	20.00	10.0	300.00	3,000.00
Krystal Parrish	23.6	11.8	75.00	885.00
Charline Barrasso	8.0	4.0	75.00	300.00
Faith Frink	11.3	5.65	75.00	423.75
Katie Macomson	3.4	1.7	75.00	<u>127.50</u>
TOTAL FEES				\$57,438.75

TOTAL EXPENSES:

<u>Wills Massalon & Allen, LLC :</u>	<u>Total</u>	<u>Net 50%</u>
Copies	3572.69	1786.345
Postage	278.07	139.04
Service of Process	275.47	137.735
Phone Conference	35.91	17.955
Legal Research	893.70	446.85
Filing Fees	482.00	241.00
Travel/Mileage	308.21	154.105
Expert Fees	2246.25	-0- (expert fee related to circuit court case)
Total WMA Expenses		\$2,895.03

<u>RPWB, LLC</u>	<u>Total</u>	<u>Net 50%</u>
Copies	517.15	258.57
Fax	8.00	4.00
Postage	35.26	17.63
Scanned Images	29.92	14.96
Legal Research	38.63	19.32
Filing Fees	275.00	137.5

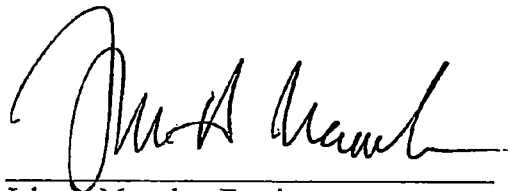
Transcripts	1805.31	902.65
Mileage	229.12	<u>114.56</u>
		\$1,469.19
TOTAL EXPENSES:		\$4,364.22

GRAND TOTAL ATTORNEYS FEES AND COSTS: \$61,802.97

CONCLUSION

The court should reverse the ALC's denial of the motion for attorneys' fees, and Order that the Respondent pay Appellant a total of \$61,803.97 in attorneys' fees and costs.

Respectfully submitted,



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144
SC Bar Number: 010279

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook
& Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The 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,

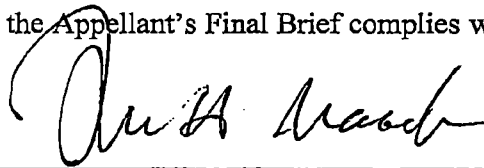
v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211 (b), SCACR.

November 24, 2015



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812 5951
Attorneys for Appellant

RECEIVED
NOV 30 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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.

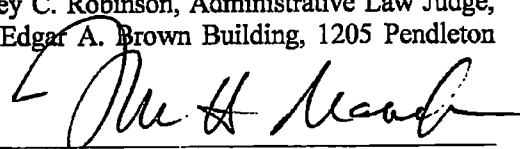
South Carolina Budget and Control Board,
Employee Insurance Program.....Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on November 30, 2015 addressed to its attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886, Columbia, SC, 29211 and Stephen Raymond Van Camp, Esquire, 202 Arbor Lake Drive, Columbia, SC 29223.

I certify that I have served the Appellant's Final Brief on the Administrative Law Court by depositing a copy of it in the United States Mail, postage prepaid, on November 30, 2015, addressed to The Honorable Shirley C. Robinson, Administrative Law Judge, South Carolina Administrative Law Court, Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, SC 29201.

November 30, 2015


John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman,
LLC
1730 Jackson Street
Barnwell, SC 29812
ATTORNEYS FOR APPELLANT

RECEIVED
NOV 30 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 30 2015

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.

APPELLANT'S FINAL REPLY BRIEF TO INITIAL BRIEF

November 24, 2015

John A. Massalon, Esquire
Wills-Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman,
LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812 5951
Attorneys for Appellant

Other Counsel of Record:

Theodore D. Williard, Jr., Esquire
Montgomery Willard, LLC
P.O. Box 11886
Columbia, SC 29211

and

Stephen Raymond Van Camp, Esquire
202 Arbor Lake Drive
Columbia, SC 29223
Attorneys for Respondent

The Honorable Shirley C. Robinson
Administrative Law Judge
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

TABLE OF CONTENTS

APPELLANT'S REPLY TO RESPONDENT'S INITIAL BRIEF 1

1. The Court should find that the ALJ erred in concluding that the State
Health Plan was substantially justified 1

2. The Court should award the Attorneys' Fees requested 2

TABLE OF AUTHORITIES

CASES

<u>Allen v. S.C. Pub. Emple. Benefit Auth.,(PEBA)</u> , 411 S.C. 611, 769 S.E.2d 666 (2015)...	1
<u>Calhoun v. Calhoun</u> , 339 S.C. 96, 592 S.E.2d 14 (2000).....	3
<u>Hall v. Laroya</u> , 238 P.2d 714, 722 (Haw. Ct. App. 2010)	4
<u>Hopkins v. Hopkins</u> , 343 S.C. 301, 540 S.E.2d 454 (2000)	3

STATE STATUTES

S.C. Code Ann. § 38-71-46 (A).....	1
S.C. Code Ann. § 20-3-130 (H).....	3
S.C. Code Ann. § 15-77-300 (Law Co-op 2005).....	3,4

Appellant submits this Reply to the Respondent's Initial Brief.

1. The Court should find that the ALJ erred in concluding that the State Health Plan was substantially justified.

Respondent argues that the state action attorneys' fee status is not "loser pays" but requires something more. Appellant does not disagree. However, the characterization of this statutory interpretation matter as the State's reasonable reading of a statute ignores the reality of the State's position in this case. The State Health Plan's first explanation for why it was refusing to comply with a statute that, 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), neither relied on case law nor statutory law, but 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). Later, the State Health Plan attempted to bolster that position with reference to what it now describes as "complicated grammatical structure" and future legislative "history" -- both positions which were plainly rejected by the South Carolina Supreme Court. The only thing complicated about the "grammatical structure" of the statute was the State Health Plan's effort to fit a square peg into a round hole.

This is an instance where the State Health Plan initially took a 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 little support in case law or statute. The myriad attempts to locate support for that erroneous and unreasonable position failed. ERISA had

no application. 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.

Further, Respondent's argument that multiple decision makers agreed with its unsupported position cannot be the basis to deny a motion for attorneys' fees, or no motion for attorneys' fees under the state action statute would ever be granted. The only way a dispute such as this one gets upon on appeal is because decision makers in the lower courts disagree.

The State also inexplicably makes reference on pages 23-24 of its Initial Brief to Medicare requirements and an alleged interpretation of the same. Appellant submits that this argument should be ignored, as it appears irrelevant and is unsupported speculation about an issue not previously raised.

Despite the State's characterization that this only affected a single \$560 claim, such is not accurate. The State Supreme Court's decision clearly applies to any and all claims under the State Health Plan, and therefore the impact of the Appellant prevailing is much larger than the single claim. Lastly, the State Health Plan, like all other State agencies, is funded by taxpayer dollars, and the possibility of having to pay the attorneys' fees of a prevailing party within the parameters of the state action attorneys' fees statute is also intended to discourage the unreasonable use of taxpayer money to maintain unsupportable legal positions.

2. The Court should award the Attorneys' Fees requested.

The State Health Plan's argument that there was no fee agreement should be disregarded. It is undisputed that this ALJ action arose directly out of the Circuit Court Case, which was dismissed on the grounds that the claim should be litigated within the

ALC. Further, Appellant's Motion for Attorneys' Fees addressed the intertwined nature of the two cases, and proposed 50% reduction in the total amount of fees based on the time actually contemporaneously recorded.

The record does not support the State Health Plan's argument the Appellant should be treated as *pro se*. While Christy Allen was employed as an attorney at the firm of Wills & Massalon, LLC when this case began, and did substantial work on the matter, the case was originally taken on both by the law firm of Wills & Massalon, LLC and Richardson, Patrick, Westbrook & Brickman, LLC as a contingency case. It is without dispute that other attorneys worked on the cases. The award of attorneys' under a statute providing for attorneys' fees is not barred because the fee agreement was contingent.

Even if a portion of the fee request were deemed *pro se*, the cases of Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d 454 (2000) and Calhoun v. Calhoun, 339 S.C. 96, 592 S.E.2d 14 (2000) are distinguishable, and do not bar the award of attorneys' in this instance. Both cases are family court cases for which S.C. Code Ann. § 20-3-130 (H) provides the statutory basis for the court to order a reasonable amount of attorneys' fees "incurred." The court in Calhoun specifically based its holding not to allow *pro se* attorneys' fees under section 20-3-130 (H) on the inclusion of the word "incurred" in the family court statute.

The authority for the court award attorneys' fees in this case arises not from section 20-3-130(h), but from section 15-77-300 which does not include reference to any language indicating that the legislative intent was that the attorneys' fees be actually "incurred." The version of section 15-77-300 in effect at the time this action was commenced 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

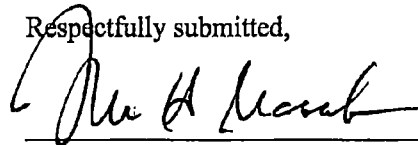
(2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

(emphasis added). Id. (Law Co-op 2005). See also Hall v. Laroya, 238 P.2d 714, 722 (Haw. Ct. App. 2010) (addressing similar issue in context of statute without the term “incurred,” and commenting that to the extent there is a concern that the recovery of attorneys’ fees in these types of situations will be subject to abuse, the limitation to a “fee that the court determines to be reasonable” addresses that concern).

Appellant has submitted adequate support for the award of attorneys’ fees sought in this matter, and has addressed all elements as required by the statute in question in support of his request for an award of reasonable attorneys’ fees.

The Order should be reversed.

Respectfully submitted,



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144
SC Bar Number: 010279

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook
& Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812

THE STATE OF SOUTH CAROLINA
In The 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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Reply Brief to Initial Brief
complies with Rule 211 (b), SCACR.

November 24, 2015



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

RECEIVED

NOV 30 2015

SC Court of Appeals

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812 5951
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The 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.

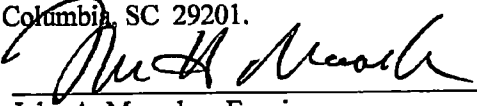
South Carolina Budget and Control Board,
Employee Insurance Program.....Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Final Reply Brief to Initial Brief on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on November 30, 2015 addressed to its attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886, Columbia, SC, 29211 and Stephen Raymond Van Camp, Esquire, 202 Arbor Lake Drive, Columbia, SC 29223.

I certify that I have served the Appellant's Final Reply Brief to Initial Brief on the Administrative Law Court by depositing a copy of it in the United States Mail, postage prepaid, on November 30, 2015, addressed to The Honorable Shirley C. Robinson, Administrative Law Judge, South Carolina Administrative Law Court, Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, SC 29201.

November 30, 2015


John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman,
LLC
1730 Jackson Street
Barnwell, SC 29812
ATTORNEYS FOR APPELLANT

RECEIVED

NOV 18 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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.

BRIEF OF RESPONDENT

Theodore D. Willard, Jr.
MONTGOMERY WILLARD, LLC
1002 Calhoun Street
Post Office Box 11886
Columbia, South Carolina 29211-1886
Telephone: (803) 779-3500

Stephen Van Camp
**SOUTH CAROLINA PUBLIC EMPLOYEE
BENEFIT EMPLOYEE INSURANCE PROGRAM**
202 Arbor Lake Drive
Columbia, South Carolina 29223
Telephone: (803) 734-1228
ATTORNEYS FOR THE RESPONDENT

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal.....	1
Statement of the Case	1
Statement of Facts.....	2
Argument	
I. THE ALC DID NOT ABUSE ITS DISCRETION IN FINDING THAT RESPONDENT'S POSITION THAT S.C. CODE ANN. §38-71-46 DID NOT APPLY TO THE STATE HEALTH PLAN WAS SUBSTANTIALLY JUSTIFIED.....	6
A. Standard of Review.....	6
B. The ALC Did Not Abuse Its Discretion In Finding That EIP's Interpretation of The Statute was Substantially Justified By the Complicated Grammatical Structure of The Statute, The Legislative Treatment of The State Health Plan and The Unique Nature of The State Health Plan.....	6
C. The ALC Did Not Abuse Its Discretion By Finding That EIP's Position Was Substantially Justified Because The interpretation of § 38-71-46 Was A Novel Question of Law.....	10
D. The ALC Did Not Abuse Its Discretion By Finding That EIP's Position Was Substantially Justified Based On EIP'S Longstanding Agency Practice of Enforcing The Terms of The State Health Plan As Written.....	11
E. As An Additional Sustaining Ground The ALC Did Not Abuse Its Discretion By Finding That EIP's Position Was Substantially Justified Because Prior Multiple Decision Makers Came To The Same Conclusion.....	11
II. APPELLANT IS NOT ENTITLED TO \$61,802.97 IN ATTORNEY'S FEES AND COSTS.....	13
A. Because Appellant Has No Written Fee Agreement With His Counsel For This Case, And Submitted No Evidence That Appellant Actually Incurred Fees In This Case, An Award Of Attorney's Fees Is Improper.....	13

B.	Because Attorney Christy Allen Was Representing Her Spouse and/or Her Daughter, And Her Interests Were Identical To Her Spouse and/or Daughter, Attorney Allen Was In Fact Acting Pro Se. Accordingly, Attorney's Fees Are Inappropriate.....	15
C.	Appellant's Request For Fees Is Excessive and Not Supported By The Record.....	16
Conclusion		25

TABLE OF AUTHORITIES

CASES

<u>Allen v. SC Pub. Employee Benefit Authority (PEBA)</u> , 411 S.C. 611, 769 S.E.2d 666 (2015).....	3, 5, 10, 11
<u>Calhoun v. Calhoun</u> , 339 S.C. 96, 529 S.E.2d 14 (2000).....	15
<u>Cody v. Caterisano</u> , 631 F.3d 136, 142 (4th Cir. 2011).....	5, 11
<u>Eubank v. Pella Corp.</u> , 753 F.3d 718, 721, 728-729 (7th Cir.2014).....	16
<u>Goodwin v. Metts</u> , 973 F.2d 378 (4 th Cir. 1992).....	22
<u>Hopkins v. Hopkins</u> , 343 S.C. 301; 540 S.E.2d 454 (2000).....	15
<u>Kirby v. Cullinet Software, Inc.</u> , 116 F.R.D. 303, 309-310 (D. Mass. 1987).....	16
<u>Layman v. State</u> , 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).....	6, 7, 24
<u>Levine v. Astrue</u> , 2010 WL 3522383, *2 (D.S.C. 2010).....	13
<u>Lisa v. Strom</u> , 183 Ariz. 415, 904 P.2d 1239, 1242 (Ariz. 1995).....	16
<u>McKoy v. Colvin</u> , 2013 WL 6780585, * 3 (D.S.C. 2013).....	13
<u>Petrovic v. AMOCO Oil Co.</u> , 200 F.3d 1140, 1155 (8th Cir. 1999).....	16
<u>Pierce v. Underwood</u> , 487 U.S. 552 (1988).....	7, 13
<u>R.P. v. S.C. Dept. of Health and Human Services</u> , 06-ALJ-08-0605-AP (April 14, 2014).....	7, 10, 12
<u>S.C. Dep't of Soc. Servs. v. Mary C.</u> , 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011).....	15
<u>Saunders v. South Carolina Public Service Authority d/b/a Santee Cooper</u> , C/A No. 2:93-3077-23 (D.S.C. 1993).....	24

<u>Southern Dredging Co., Inc. v. U.S.</u> , 1996 WL 516158, 3 (4 th Cir. 1996).....	11
<u>Sparrow v. McDaniel</u> , 852 F.2d 762 (4 th Cir. 1998).....	22
<u>Thomas v. Peacock</u> , 39 F.3d 493 (4 th Cir. 1994) <u>rev'd on other grounds</u> , 516 U.S. 349 (1996).....	22
<u>U.S. Commodity Futures Trading Com'n v. WeCorp, Inc.</u> , 878 F. Supp. 2d 1160, 1164-65 (D. Hawaii 2012).....	12
<u>U.S. v. Thouvenot, Wade & Moerschen, Inc.</u> , 596 F.3d 378, 382 (7th Cir. 2010).....	12
<u>Wade v. Berkeley County</u> , 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002).....	9
<u>Williamson v. Middleton</u> , 383 S.C. 490, 495-96, 681 S.E.2d 867, 870-71 (2009).....	15
<u>Woodson v. DLI Props, LLC</u> , 406 S.C. 517, 753 S.E.2d 428 (2014).....	17
<u>Wyandotte Sav. Bank v. N.L.R.B.</u> , 682 F.2d 119, 120 (6th Cir. 1982).....	12
<u>Zabinski v. Bright Acres Assocs.</u> , 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001).....	6

STATUTES

S.C. Code Ann. § 1-11-710(C) (2005).....	2
S.C. Code Ann. § 1-11-780 (Supp. 2013).....	8
S.C. Code Ann. § 15-77-300 (Supp. 2009).....	1, 5, 7
S.C. Code Ann. § 38-71-46 (A) (Supp. 2009).....	2, 3, 7, 10, 12, 13, 21, 23
S.C. Code Ann. § 38-71-243(B) (Supp. 2013).....	9
S.C. Code Ann. § 38-71-280 (Supp. 2013).....	3, 4, 9
S.C. Code Ann. § 38-71-280(A)(4)-(5) (Supp. 2013).....	9
S.C. Code Ann. § 38-71-785(B) (Supp. 2013).....	9
S.C. Code Ann. § 38-71-840(14) (2002).....	4, 5, 7, 9
S.C. Code Ann. § 38-71-840(16)(2002).....	3, 4, 8

OTHER AUTHORITIES

Rule 1.5(c), RPC, Rule 407, SCACR.....	15
http://www.medicare.gov/Pubs/pdf/11022.pdf	24

STATEMENT OF ISSUES ON APPEAL

1. Did the Administrative Law Court abuse its discretion in finding the South Carolina Public Employee Benefit Authority, Employee Insurance Program's position that the Diabetes Education Mandate Statute did not apply to the State Health Plan was substantially justified, resulting in a denial of appellant's motion for attorney's fees?
2. Should this Court award \$61,802.97 in attorney's Fees and Costs to the Appellant?

II. STATEMENT OF THE CASE

Jeffrey Allen ("Appellant") appeals the Administrative Law Court's ("ALC") decision denying Appellant's Motion For Attorney's Fees pursuant to S.C. Code Ann. § 15-77-300 (Supp. 2009). The current appeal arises out of a previous appeal wherein Appellant appealed the decision of the ALC upholding the denial of \$560 in benefits for separately-billed diabetes education training under the Group Health Benefits Plan of the Employees of the State of South Carolina, the Public School Districts, and Participating Entities ("State Health Plan"). (R. pp. 15-26). As an employee of Dorchester County School District Two, Appellant participated in the state health benefit program offered through the State of South Carolina Budget and Control Board Employee Insurance Program ("EIP").¹ (R. p. 15). Appellant specifically covered his daughter ("Dependent") on his health coverage through the State Health Plan.

On August 24, 2010, the EIP Appeals Committee issued a decision denying coverage

¹ Effective July 1, 2012, EIP, a division of the South Carolina Budget and Control Board ("Board"), was transferred from the Board to a newly created agency, The South Carolina Public Employee Benefit Authority pursuant to Act 278 of 2012.

for diabetes education on the basis it was not covered as a separately-billed claim under the State Health Plan. Pursuant to S.C. Code Ann. § 1-11-710(C) (2005), Appellant appealed the final determination of the EIP Appeals Committee to the ALC on September 22, 2010. In this appeal, Appellant also alleged entitlement to class action relief. By order dated August 13, 2012, the ALC upheld EIP's denial of Appellant's claim and found that it did not need to address the class action allegations. (R. pp. 15-26).

On September 14, 2012, Appellant filed a notice of appeal with the South Carolina Court of Appeals. On December 6, 2012, the South Carolina Supreme Court granted Appellant's motion to certify the appeal from the Court of Appeals to the South Carolina Supreme Court.

On March 5, 2015, the South Carolina Supreme Court, in a 4-1 decision, reversed the ALC's finding that S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan, but found that Appellant's request for class action relief before the ALC failed as a matter of law. (R. pp. 34-48).

On remittitur, Appellant moved for an award of attorney's fees pursuant to the state action statute, S.C. Code Ann. § 15-77-300 (2015). (R. pp. 52-123, 124-150). On June 17, 2014, the ALC issued an Order denying the Motion for Attorney's Fees. (R. pp. 28-33). This appeal followed.

III. STATEMENT OF THE FACTS

On March 4, 2015, the South Carolina Supreme Court, in a 4 to 1 decision, reversed the ALC on the matter of statutory interpretation related to whether or not S.C. Code Ann. § 38-71-46 applied to insurance benefits under the State Health Plan. The Supreme Court also found that Appellant was not entitled to class action relief against the State Health

Plan. See Allen v. SC Pub. Employee Benefit Auth. (PEBA), 411 S.C. 611, 769 S.E.2d 666 (2015); (R. pp.34-48).

The issue in the underlying case was whether the State Health Plan was subject to the diabetes mandate of 38-71-46 of the South Carolina Code, which requires “every health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State” to provide coverage for “outpatient self-management training and education for the treatment of people with diabetes mellitus...” S.C. Code Ann § 38-71-46(A). The parties disagreed as to whether the State Health Plan qualified as group policy “health insurance coverage” under section 38-71-840(14) of the South Carolina Code, which defined “health insurance coverage” as:

benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer.

S.C. Code Ann. § 38-71-840(14).

Respondent argued the phrase “health insurance issuer” modified the entire statutory section. Respondent further argued that the State Health Plan clearly was not a “health insurance issuer” as defined in section 38-71-840(16) and, therefore, the State Health Plan was not subject to the diabetes mandate. Respondent also cited to the terms of the State Health Plan showing diabetes education was excluded from coverage and it cited to several statutory instances where the Legislature specifically made it clear mandates otherwise restricted to health insurers were to apply to the State Health Plan.² Appellant

² Specifically, Respondent pointed out that in the 1990s and into the 2000s, the Legislature passed a series of health insurance coverage mandates in Title 38, Chapter 71, Article 1. With the exception of § 38-71-280, regarding autism spectrum disorder, none of these laws

argued “health insurance issuer” only modified “health maintenance organization,” and, without the restriction as argued by Respondent, the State Health Plan clearly fell within the definition of “health insurance coverage” and the diabetes mandate statute.

The Administrative Law Court agreed with the Respondent, finding “health insurance issuer” modified section 38-71-840(16) in its entirety and determining the State Health Plan did not qualify as a “health insurance issuer.” (R. pp. 15-26). However, on appeal, the South Carolina Supreme Court in a 4-1 decision agreed with Appellant. (R. pp. 34-48).

In the dissenting opinion, Justice Pleicones noted:

I agree with the ALC’s conclusion that the EIP is not a “health insurance issuer” because the EIP is not licensed to engage in the business of insurance in this State and not subject to State insurance regulation. See S.C. Code Ann. § 1-11-780 (Supp. 2013) (“[t]he State Employee Insurance Program. . . is not under the jurisdiction of the Department of Insurance”). Since the EIP is not a “health insurance issuer” under section 38-71-840(A)(16), the Plan does not provide “health insurance coverage” as defined in section 38-71-840(A)(14). Further, since section 38-71-46 only mandates diabetes education coverage for a “health insurance policy” that provides “health insurance coverage” as defined by section 38-71-840(A)(14), I agree with the ALC that Appellant’s claim was properly denied.

or their preceding bills mentioned EIP, the State Health Plan, or the Budget and Control Board. Then in 2007, the Legislature passed § 38-71-280, mandating coverage for autism spectrum disorder care. In § 38-71-280, the Legislature specifically stated it desired the statute apply to EIP: “It includes the State Health Plan. . . . ‘State Health Plan’ means the employee and retiree insurance program provided for in Article 5, Chapter 11, Title 1.” S.C. Code Ann. § 38-71-280(A)(4)-(5). The statute made specific reference to EIP’s governing Code sections, again underscoring the General Assembly’s knowledge that EIP is governed differently. Accordingly, the Legislature deliberately referenced the State Health Plan and EIP’s enabling statutes to make the Legislature’s intent clear that § 38-71-280 applied to EIP because simply passing a statute in Title 38, Chapter 71, without a special reference or cross-reference would not do so. The Legislature made it very clear when mandates otherwise restricted to health insurers were to apply to the State Health Plan. When EIP was to be included, the Legislature either: (1) amended EIP’s governing statutes in Title 1, Chapter 11, Article 5; (2) made a direct reference to those statutes in its legislation; or (3) at a minimum, identified EIP by name in its legislation.

If a General Insurance Statute applies to the Plan even when the Plan is not mentioned, then there would have been no reason to include the express reference to the Plan in any General Insurance Statute... In construing a statute, we are to assume the General Assembly was aware of past statutes, and we are to give effect to all the words in a statute... The majority's reading renders the references in the later statutes superfluous and leads to the absurd result that all General Insurance Statutes apply to the Plan unless the Plan is expressly excluded. (Citations omitted).

411 S.C. at 624; 769 S.E.2d at 673; (R. pp. 46-47).

On remittitur, Petitioner moved for an award of attorney's fees pursuant to the state action statute, S.C. Code Ann. § 15-77-300 (Supp. 2009), which provides for an award of reasonable attorney's 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 attorney's fee award unjust. (R. pp. 52-123, 124-150).

On June 17, 2014, the ALC issued an Order denying the Motion for Attorney's Fees. (R. pp. 28-33). The ALC found:

... I do not find section 38-71-840(14) and the related statutes analyzed in the case to be clear and unambiguous. Here, I find section 38-71-840(14) was ambiguous to an extent that justified Respondent in pressing the claim, particularly in light of its 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. While the Supreme Court ultimately found its interpretation of section 38-71-840(14) to be controlling, I find it was reasonable for Respondent to take these additional factors into consideration when dealing with an ambiguous statute, and it was not unreasonable to come to the conclusion that the mandate did not apply to the State Health Plan. McDowell, 304 S.C. at 542, 405 S.E.2d at 832. Moreover, this was a case of first impression, which the Fourth Circuit Court of Appeals has generally held to be justified. See Cody v. Catterisano, 631 F.3d 136, 142 (4th Cir. 2011) (noting "litigating cases of first impression is generally justifiable"). Accordingly, I find Respondent's position had a basis in law and fact and it was substantially justified in pressing its claim. See id.; S.C. Code Ann. § 15-77-300.

Order at 5-6; (R. pp. 32-33).

ARGUMENTS

I. **THE ALC DID NOT ABUSE ITS DISCRETION IN FINDING THAT RESPONDENT'S POSITION THAT S.C. CODE ANN. §38-71-46 DID NOT APPLY TO THE STATE HEALTH PLAN WAS SUBSTANTIALLY JUSTIFIED.**

A. **Standard of Review**

The decision to award or deny attorney's fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Id. (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001)).

B. **The ALC Did Not Abuse Its Discretion In Finding That EIP's Interpretation of The Statute was Substantially Justified By the Complicated Grammatical Structure of The Statute, The Legislative Treatment of The State Health Plan and The Unique Nature of The State Health Plan.**

The ALC did not abuse its discretion in finding that EIP's interpretation of the statute was substantially justified by the complicated grammatical structure of the statute, its legislative treatment of the State Health Plan and the unique nature of the State Health Plan. The Supreme Court of South Carolina has held that "[s]ubstantial justification for purposes of the state action statute means justified to a degree that could satisfy a reasonable person." Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325 (2008) (internal quotation marks and citations omitted). Stated differently, "the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and in fact." Id. at 445, 658 S.E.2d at 326. The Court in Layman further recognized that "an

agency's loss on the merits does not create a presumption that its position was not substantially justified. . . ." Id. Similarly, in Pierce v. Underwood, 487 U.S. 552 (1988), which was cited in Layman, the U.S. Supreme Court noted that "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." 487 U.S. at 566 n.2. "In other words, §15-77-300 is not a statute that provides for an award of attorneys' fees in every instance in which the government agency loses the case; to so hold would convert the statute into a 'loser pays' statute. Rather, §15-77-300 provides for the payment of fees only when the agency loses while taking a position for which there was not a reasonable basis in law and fact." R.P. v. S.C. Dept. of Health and Human Services, 06-ALJ-08-0605-AP (April 14, 2014).

§ 38-71-46(D), defines what "health insurance polic[ies]" are covered under the diabetes education mandate in section 38-71-46(A). Since the Plan is a group health plan, section 38-71-46(D) requires the use of S.C. Code Ann. § 38-71-840(A)(14) (2002) to determine whether the Plan provides "health insurance coverage," so as to be a "health insurance policy" covered by the diabetes education mandate.

Section 38-71-840 (14) provides:

"Health insurance coverage" means benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer...

Ultimately, whether the Plan qualifies as "health insurance coverage" depends on what the phrase "offered by a health insurance issuer" modifies in S.C. Code Ann. § 38-71-840(14) (2002). The claims administrator, the EIP Health Appeals Committee, ALC,

and Justice Pleicones read “[b]enefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care” as describing what types of provided benefits qualify as “health insurance coverage.” They also read the next section “under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer” as describing what types of insuring agreements offer “health insurance coverage.” The term “offered by health insurance issuer” modifies the three types of insurance agreements in the statute, that is, (1) a hospital or medical service policy or certificate, (2) a hospital or medical service plan contract, or (3) a health maintenance organization contract. Accordingly, to qualify as “health insurance coverage” the policy, certificate, or contract must be issued by a “health insurance issuer.”

Multiple prior decision makers all took the position that EIP was not a “health insurance issuer” as this term is defined in S.C. Code Ann. § 38-71-840(16) (2002), which stated:

“Health insurance issuer” or “issuer” means any entity that provides health insurance coverage in this State. For purposes of this section, “issuer” includes an insurance company, a health maintenance organization, and any other entity providing health insurance coverage which is licensed to engage in the business of insurance in this State and which is subject to state insurance regulation.

EIP was not a “health insurance issuer” because EIP was not licensed to engage in the business of insurance in this State and not subject to State insurance regulation. See S.C. Code Ann. § 1-11-780 (Supp. 2013) (“[t]he State Employee Insurance Program. . . is not under the jurisdiction of the Department of Insurance”). Since EIP is not a “health insurance issuer” under section 38-71-840(16), the Plan did not provide “health insurance

coverage” as defined in section 38-71-840(14). Further, since section 38-71-46 only mandates diabetes education coverage for a “health insurance policy” that provides “health insurance coverage” as defined by section 38-71-840(14), EIP and the prior decision makers all found that Appellant's claim was properly denied.

EIP's position that its interpretation was also supported by the legislative intent of the statute was also substantially justified. If the language of a statute gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the statute itself. Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). The General Assembly has chosen to separate the State Health Plan from general insurance regulation by placing the State Health Plan's governing statutes in Title 1, Chapter 11 of the S.C. Code, rather than in Title 38, Chapter 71 (General Insurance Statutes). Since the General Assembly separated the Plan from the General Insurance Statutes, it has included an express reference to the Plan in the General Insurance Statutes when those statutes are to apply to the State Health Plan. See S.C. Code Ann. § 38-71-785(B) (Supp. 2013) (“This section applies. . .including the state health plan. . .”); S.C. Code Ann. § 38-71-243(B) (Supp. 2013) (“This section applies. . .including the state health plan. . .”). Furthermore, in the context of coverage mandates, the General Assembly has made a direct reference to the State Health Plan when it intends for a mandate found in the General Insurance Statutes to apply to the Plan. See S.C. Code Ann. § 38-71-280 (Supp. 2013) (mandating coverage for autism spectrum disorder, “[i]t includes the State Health Plan. . . ‘State Health Plan’ means the employee and retirees insurance program provided for in Article 5, Chapter 11, Title 1”).

The diabetes education mandate, however, contained no reference to the Plan either

in the text or the enacting legislation. As Justice Pleicones stated in his dissent, “[i]f a General Insurance Statute applies to the Plan even when the Plan is not mentioned, then there would have been no reason to include the express reference to the Plan in any General Insurance Statute...”Allen, 411 S.C. at 624; 769 S.E.2d at 673; (R. p. 47).

Interestingly, the majority in Allen recognized its decision could be perceived as being inconsistent with prevailing law when it noted in footnote 10 of the decision that, “[a]lthough section 38-71-46 indicates that the General Assembly intended for the diabetes mandate to apply to the State Health Plan, we do not conclude that the canon of construction ‘expression unius est exclusion alterius’ applies here, or that the State Health Plan is governed by every general insurance statute where the General Assembly failed to expressly exclude the State Health Plan.” Id. Despite this footnote, the majority failed to provide any guidance to determine which Title 38 mandates apply to the State Health Plan and which ones do not.

C. The ALC Did Not Abuse Its Discretion By Finding That EIP’s Position Was Substantially Justified Because The Interpretation of § 38-71-46 Was A Novel Question of Law.

The ALC also did not abuse its discretion by finding that EIP’s position was substantially justified because the interpretation of § 38-71-46 was a novel question of law that had never been litigated. Appellant’s own brief conceded that the interpretation of § 38-71-46 had never been previously litigated, when it stated on page 12 of its brief that the Supreme Court agreed to hear the case because “[t]he Court indicated that [the] issue was a novel issue of law.” (Appellant’s Brief, p. 12). Because the interpretation of § 38-71-46 had never been previously litigated, EIP’s decision that it did not apply to the Plan was substantially justified. See R.P. v. S.C. Dept. of Health and Human Services, at *7 (holding

that the fact that an issue had never been previously litigated was a reason courts have held a position was substantially justified); Cody v. Caterisano, 631 F.3d 136, 142 (4th Cir. 2011) (“litigating cases of first impression is generally justifiable”); Southern Dredging Co., Inc. v. U.S., 1996 WL 516158, 3 (4th Cir. 1996) (“In lawsuits involving first-impression interpretations of statutes, many circuits, including ours, have found that the United States is presumptively substantially justified within the meaning of the EAJA if its position is a reasonable legal position and the question is being addressed for the first time in the circuit”). Because the interpretation of § 38-71-46 had never been litigated in any context, the ALC did not abuse its discretion by finding EIP was substantially justified in challenging its application to the Plan.

D. The ALC Did Not Abuse Its Discretion By Finding That EIP’s Position Was Substantially Justified Based On EIP’S Longstanding Agency Practice of Enforcing The Terms of The State Health Plan As Written.

The ALC did not abuse its discretion in finding that EIP’s position was substantially justified based on EIP’s longstanding agency practice of enforcing the terms of the State Health Plan as written. It is undisputed that under the terms of the State Health Plan as written that services for diabetes education were excluded. During Appellant’s Supreme Court appeal, Plaintiff conceded this point when it abandoned any argument that diabetes educational training was covered under the language of the State Health Plan. Allen, 411 S.C. at 613 n7, 769 S.E.2d at 668 n7; (R. p. 36). Because EIP was merely enforcing the terms of the State Health Plan as written, EIP’s position was substantially justified.

E. As An Additional Sustaining Ground The ALC Did Not Abuse Its Discretion By Finding That EIP’s Position Was Substantially Justified Because Prior Multiple Decision Makers Came To The Same Conclusion.

Respondent's decision that S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan was substantially justified in that EIP's position had been accepted by multiple prior decision makers. The claims administrator, the EIP Health Appeals Committee, the ALC and Justice Pleicones of the Supreme Court all held that § 38-71-46 did not apply to the Plan. This fact alone strongly suggests that the issue was one over which reasonable minds could differ. As Chief Administrative Law Judge Ralph King Anderson, III found in R.P. v. S.C. Dept. of Health and Human Services, 06-ALJ-08-0605-AP (April 14, 2014):

In the present case, as already noted, a DHHS Hearing Officer, an ALJ, and two of five Justices of the South Carolina Supreme Court held that R. 88-210 was inapplicable to eligibility decisions. The contrary view ultimately prevailed, but it was adopted only by a 3-2 decision in the Supreme Court. That fact alone strongly suggests the issue was one over which reasonable minds could differ. Moreover, in this instance, the dissenting opinion was amply detailed and well-reasoned. Accordingly, the agency's position was substantially justified.

Id. at *5.

A number of cases have held that when an agency's litigation position has met with some degree of success in the courts, even if it does not prevail in the end, the agency's position should be regarded as reasonable and supported by substantial justification. In U.S. v. Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 382 (7th Cir. 2010) it was held that "there is a presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified." See also, e.g., U.S. Commodity Futures Trading Com'n v. WeCorp, Inc., 878 F. Supp. 2d 1160, 1164-65 (D. Hawaii 2012). Similarly, in Wyandotte Sav. Bank v. N.L.R.B., 682 F.2d 119, 120 (6th Cir. 1982), the court held that when the government's position had been adopted by dissenting or concurring judges in appellate decisions, then "[c]learly, the Board had a reasonable basis for [its position]."

The same reasoning has been applied in several federal cases in South Carolina in which the District Judge declined to accept the Magistrate Judge's Report and Recommendations, but still held that the government's unsuccessful position was substantially justified. In Levine v. Astrue, 2010 WL 3522383, *2 (D.S.C. 2010), the Court held that while "reasonable minds disagreed about the Commissioner's final decision," and the government did not ultimately prevail, the "substantially justified" standard of Pierce, supra, is satisfied because "there is a genuine dispute [or] reasonable people could differ as to the appropriateness of the contested action." 2010 WL 3522383, at *1. Accord, McKoy v. Colvin, 2013 WL 6780585, * 3 (D.S.C. 2013) ("the fact that the Magistrate Judge recommended that the Commissioner's decision be affirmed suggests that the Commissioner's position was substantially justified..." even though "ultimately not convincing.").

Because the claims administrator, the EIP Health Appeals Committee, the ALC and Justice Pleicones of the Supreme Court, in a lengthy, detailed, well-reasoned dissent, all held that § 38-71-46 did not apply to the Plan, EIP's position was substantially justified.

II. APPELLANT IS NOT ENTITLED TO \$61,802.97 IN ATTORNEY'S FEES AND COSTS.

A. Because Appellant Has No Written Fee Agreement With His Counsel For This Case, And Submitted No Evidence That Appellant Actually Incurred Fees In This Case, An Award Of Attorney's Fees Is Improper.

Appellant is not entitled to attorney's fees and costs in this case in that Appellant has no written fee agreement with his counsel for this case, and there is no evidence that the client actually incurred fees for this case. On the first page of the fee agreement attached to the Affidavit of John Massalon as Exhibit C, it states that the agreement is regarding the

case entitled “Jeffrey Allen, Individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees v. S.C. Budget & Control Board,” “Case No.: 09-CP-10-7407”. (R. p. 76). This circuit court case is a different case than the one at issue here. Appellant’s own brief states that, “it is undisputed that this ALC case was ongoing while Appellant attempted to, institute and maintain a circuit court case seeking a class action.” (Appellant’s Brief, p. 13).

On November 25, 2009, Appellant filed a putative class action suit against the South Carolina Budget and Control Board, EIP, and BCBSSC in the Court of Common Pleas for the Ninth Judicial Circuit in Charleston, Case No.: 09-CP-10-7407. By order dated October 15, 2010, the Circuit Court granted EIP’s and BCBSSC’s motion for summary judgment dismissing Appellant’s case with prejudice. (R. pp. 5-14). This decision was upheld by the South Carolina Court of Appeals on July 18, 2012. Allen v. South Carolina Budget and Control Board, Employee Insurance Program, Opinion No. 2012-UP-433 (S.C. Ct. App. filed July 18, 2012). (R. pp. 49-51). The South Carolina Supreme Court denied Appellant’s petition for cert. in that case on March 4, 2015 in Appellate Case No. 2012-213206. (R. p. 27).

Although the Appellant and his counsel could have broadened the litigation covered by the fee agreement, they failed to do so. Nowhere in the fee agreement is there a mention that the agreement covers any litigation other than the purported circuit court class action specifically named in the agreement. Additionally, there is no evidence that in the absence of some class action recovery, which the Court denied, any of Appellant’s counsel were looking to Appellant for the payment of any fees and costs. As discussed below, the conclusion that Appellant’s counsel did not actually incur any fees is emphasized by the

fact that the litigation and/or fee agreement was not an arms-length transaction, but involved a mother representing her husband/child's interest.

Because Appellant has submitted no written fee agreement in this case, nor any evidence that Appellant had actually incurred any fees in this case, no attorney's fees can be awarded under §15-77-300. See Rule 1.5(c), RPC, Rule 407, SCACR ("a contingent fee agreement shall be in a writing signed by the client . . ."); See generally S.C. Dep't of Soc. Servs. v. Mary C., 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011); Williamson v. Middleton, 383 S.C. 490, 495-96, 681 S.E.2d 867, 870-71 (2009) (finding attorney could not recover attorney's fees when attorney presented no evidence that client actually incurred fees and when no fee agreement existed between the client and attorney).

B. Because Attorney Christy Allen Was Representing Her Spouse and/or Her Daughter, And Her Interests Were Identical To Her Spouse and/or Daughter, Attorney Allen Was In Fact Acting Pro Se. Accordingly, Attorney's Fees Are Inappropriate.

Appellant is the spouse of, and Dependent is the daughter of, Christy Allen, the Partner at Wills, Massalon, & Allen who spent the majority of the time working on this case. Because Ms. Allen was representing her spouse, who was acting on behalf of their minor daughter, and Ms. Allen's interests were identical to those of Appellant and Dependent, Ms. Allen actually was acting as a pro se party and not as an attorney. In Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000), the South Carolina Supreme Court found that a pro se litigant, whether an attorney or layperson, does not become "liable for or subject to fees charged by an attorney." In Hopkins v. Hopkins, 343 S.C. 301; 540 S.E.2d 454 (2000), the Court expanded its rule to apply to cases where an attorney was representing a family member. In Hopkins, a father in a child support case was being represented by his second wife who was an attorney. The father argued that he was entitled

to recover attorney's fees for his attorney/wife's service. The Supreme Court disagreed holding:

Similarly, here, we find no evidence Father actually became "liable for or subject to" attorneys' fees for his attorney/wife's service. There is no contract or fee agreement in the record,³ nor is there any indication or testimony that Father's wife/attorney has attempted or intends to collect the fees from Father. Accordingly, Father did not prove that he became liable for the fees, such that the family court properly denied Father's request. Cf. Lisa v. Strom, 183 Ariz. 415, 904 P.2d 1239, 1242 (Ariz. 1995) (finding award of attorneys' fees has an "indispensable requirement . . . [there] be a genuine financial obligation on the part of the litigants to pay such fees," and that wife represented by her attorney/husband had no such genuine obligation).

Hopkins, at 457. The general rule against awarding fees to attorney-litigants is based upon a perception that such awards are windfalls to persons who have spent no money and incurred no debt for legal representation. See, e.g., Lisa v. Strom, 904 P.2d 1239 (Ariz. 1995) (cited by the S.C. Supreme Court in Hopkins). Accordingly, because Attorney Allen was acting pro se, an award of attorney's fees would be improper.⁴

C. Appellant's Request For Fees Is Excessive and Not Supported By The Record.

Assuming for the sake of argument that Appellant could recover fees and costs for his ALC appeal, Appellant did not file his ALC appeal until September 22, 2010.

³ As was previously discussed, Appellant has no fee agreement in place for the current action.

⁴ It should be noted that even if Appellant was allowed class action recovery that the firm of Wills, Massalon, & Allen could not act as class counsel due to a conflict of interest created by the Appellant being the spouse and/or dependent of Attorney Allen. Eubank v. Pella Corp., 753 F.3d 718, 721, 728-729 (7th Cir.2014) (court of appeals disapproved settlement as "inequitable--even scandalous" when settlement disproportionately favored defendant and because of "fatal conflicts of interest" that resulted when class representative was father-in-law of class attorney); Petrovic v. AMOCO Oil Co., 200 F.3d 1140, 1155 (8th Cir. 1999) (district court properly granted motion for disqualification when there was close family relationship between class counsel and class representative); Kirby v. Cullinet Software, Inc., 116 F.R.D. 303, 309-310 (D. Mass. 1987) (named plaintiff was inadequate representative because his son was partner in law firm representing plaintiff class).

Therefore, Appellant cannot recover fees and costs incurred before that date as a matter of law.

Additionally, Appellant's attorney's fee and cost estimate has a fatal flaw in that its methodology is based entirely on speculation. See Woodson v. DLI Props, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014) (damage calculations cannot be based on speculation).

Appellant states at page 13 of his brief that:

Appellants have submitted Affidavits of counsel, along with detailed time and expense records. See Affidavits of John A Massalon, Christy Ford Allen, and Terry B Richardson. It is undisputed that this ALC case was ongoing while Appellant attempted to institute and maintain a circuit court case seeking a class action. According to the Affidavits submitted, the time kept did not differentiate between the circuit court case and this administrative case. In order to address this complexity, Appellants have reduced the total time and expenses sought by 50%. (See Summary of Fees and Costs, *infra*.)

(Appellant's Brief, p. 13). However, a review of the time and expense records⁵ contain multiple entries that only were related to the circuit court case, and not the present case.

The following entries are examples of time entries and expenses that were incurred on or after September 22, 2010 that were related to circuit court case only:

Wills, Massalon, & Allen Time and Expense Records

CFA	Oct 27/2010	Receipt and review of entry judgment	0.1
CFA	Oct 28/2010	Office conference with Attorney Hamrick re: 59e and appeal	0.4
CFA	Nov 5/2010	Prepare 59e motion and memo	2.5
CFA	Nov 24/2010	Prepare reply to opposition to motion to alter or amend	1
CFA	Nov 29/2010	Receipt and review of record on appeal	0.2
CFA	Dec 2/2010	Review record on appeal, research, and telephone conference with M Hamrick re same	2

⁵ In some instances the billing records attached to Appellant's motion are unclear and/or are incomplete due to the work descriptions being cut off. Because Appellant has the burden of proving entitlement to and the amount of fees and costs, these unclear and/or incomplete records fail to carry Appellant's burden.

CFA	Dec 15/2010	Review issues with Record on Appeal	1
CFA	Dec 15/2010	Prepare appellate brief	3.5
CFA	Dec 15/2010	Telephone and email to attorney Willard re same	0.3
CFA	Dec 15/2010	Electronic correspondence exchange with Judge's office re extension	0.2
CFA	Dec 16/2010	Continue to prepare appellate brief	2.5
CFA	Dec 17/2010	Transmit and finalize supplemental record for appeal	0.5
CFA	Dec 17/2010	Continue to work on brief	2.5
CFA	Dec 28/2010	Revise appeal brief	2
CFA	Dec 29/2010	Continue to prepare appeal brief	0.5
CFA	Dec 29/2010	Receipt and review of electronic correspondence from Attorney Willard re record on appeal	0.1
CFA	Jan 3/2011	Electronic correspondence exchange with Attorney Willard re supplemental record on appeal	0.2
CFA	Jan 5/2011	Telephone conference with M Hamrick re class cert issue and SC appeals filings	1
CFA	Jan 31/2011	Follow up re appeal brief deadlines	0.2
CFA	Feb 23/2011	Telephone conference with M Hamrick re filing appellate brief	0.7
CFA	Jun 27/2011	Receipt and review of respondent's brief on appeal	0.4
CFA	Jul 8/2011	Prepare reply to brief	1
CFA	Jul 8/2011	Telephone conference with M Hamrick re reply to SCCA	1
CFA	Jul 11/2011	Prepare reply brief to SCCA appeal	5.3
CFA	Jul 13/2011	Prepare reply to opposition brief in appeal	6
CFA	Aug 8/2011	Telephone conference with T Gressette re appeal, and receipt and review of record on appeal	0.7
CFA	Aug 9/2011	Receipt and review of record on appeal for filing	1.5
CFA	Aug 10/2011	Receipt and review of Final draft of record on appeal	0.9
CFA	Aug 30/2011	Prepare and finalize final briefs in SC Court of Appeals case	3.5
CFA	Aug 31/2011	Prepare final reply brief for filing	2
CFA	Sep 20/2011	Deal with volume on appeal issue -resolved	0.5
CFA	May 9/2012	Travel to and from Columbia for appellate hearing	5.5
CFA	May 9/2012	Attend hearing	1
CFA	Mar 4/2015	Receipt and review of Order	0.5
CFA	Mar 4/2015	Telephone conference with T Richardson, D Haltiwanger, research issue about supplement.	2
CFA	Mar 5/2015	Finalize motion to amend petition for cert in state case	1
CFA	Mar 5/2015	Receipt and review of Supreme Court Order	0.5
CFA	Mar 5/2015	Telephone conference with T Richardson	0.5
CFA	Mar 5/2015	Prepare motion to amend petition for cert to include supplemental authority	1.5
FF	Feb 9/2010	Review and print relevant Budget and Control Board Meeting minutes for years 2006,200...	1.6
FF	Feb 10/2010	Review and print relevant sections of SC Budget and	

		control Board Meeting Minutes for 2...	0.4
FF	Feb 24/2010	Begin scanning, marking and preparing exhibits for Plaintiff's Memorandum in Opposition	0.6
FF	Feb 25/2010	Prepare, copy and mark exhibits for Plaintiff's Memorandum in Opposition to Def's Motion	1
FF	Feb 26/2010	Telephone conference with Judge Dennis' law clerk re: hearing and delivery of Memorandum.	0.1
FF	Feb 26/2010	Prepare letter to Judge Dennis with Pl's Memorandum in Opposition to Def's Motion to Di..	0.2
FF	Feb 26/2010	Finalize Memorandum in Opposition and Exhibits for filing	0.4
FF	Feb 26/2010	Prepare letter to Clerk of Court filing Memorandum in Opposition	0.2
FF	Feb 26/2010	Prepare electronic correspondence to Theodore Willard and Kelly Rainsford	0.1
FF	Apr 29/2010	Revise and create redline versions of Responses to Answers to interrogatories and RFP of E.,	0.3
FF	May 19/2010	Prepare letter to Perry Woodside re: discovery served on Defendants	0.2
FF	Jul 16/2010	Prepare letter to Matt Hamrick	0.2
FF	Nov 8/2010	Prepare letter to Clerk of court with Motion to Alter or Amend; Prepare Motion Slip; Ema..	0.4
FF	Nov 23/2010	Prepare letter to Clerk of Court filing Plaintiff's Reply to Defendant's Opposition to Motion	0.2
FF	Jan 17/2011	Revise/review Brief; telephone conference with Procopy; Prepare Proof of Service	0.5
FF	Jan 18/2011	Telephone conference with ProCopy re: Brief of Appellant; review and scan Brief; Review	0.5
FF	Jul 14/2011	Revise and finalize Initial Brief; Prepare Proof of Service; Review SCRCF for proper filing pro..	1.1
FF	Sep 1/2011	Prepare Brief covers, 20 copies of each brief; telephone conference with ProCopy; Prepare..	1.1
JAM	Oct 14/2009	Office conference with Attorney Allen re potential suit against Blue Cross	0.5
JAM	Nov 6/2009	Office conference with Ms. Allen re new suit against Blue Cross/Blue Shield	1
JAM	Jan 5/2010	Receipt and review of correspondence from Theodore Willard reFOIA request	0.1
JAM	Jan 7/2010	Receipt and review of email re motion to dismiss and prepare email to Mr. Richardson, Mr...	0.2
JAM	Jan 22/2010	Receipt and review of email re scheduling hearing on motion for summary judgment in All..	0.1
JAM	Mar 3/2010	Office conference with Mr. Hamrick and Ms. Allen to prepare for hearing on motion to dis..	1.4
JAM	Mar 4/2010	Complete preparation for hearing on motion to dismiss	1.6

JAM	Mar 4/2010	Participate in hearing and follow-up meeting with Mr. Richardson, Mr. Hamrick and Ms. All...	2
JAM	Apr 5/2010	Telephone conference with Ms. Allen, Mr. Hamrick and Dr. Woodside re discovery	0.6
JAM	Apr 13/2010	Telephone conference with Mr. Woodside, Ms. Allen and Mr. Hamrick re discovery reques...	1.2
JAM	Jun 7/2010	Telephone call to Mr. Willard re motion for summary judgment and motion to compel	0.2
JAM	Sep 6/2010	Receipt and review of draft proposed order denying summary judgment	0.2
JAM	Nov 8/2010	Review Rule 59 (e) motion	0.2
JAM	Feb 8/2010	Receipt and review of correspondence from Court of Appeals and prepare email to Ms. All...	0.2
JAM	Feb 13/2012	Receipt and review of letter from Court of Appeals re scheduling	0.3
JAM	Feb 14/2012	Electronic correspondence exchange with Mr. Richardson re scheduling; telephone call to...	0.5
JAM	May 1/2012	Begin preparing for oral argument	1
JAM	May 8/2012	Prepare for oral argument	1
JAM	May 9/2012	Finish preparing for oral argument; travel to Columbia, participate in oral argument and re..	7
KAP	Jan 14/2013	Contact Courier service: Dash set up time for delivery to Supreme Court	0.2
KMM	Jan 12/2010	Review Minutes of State Budget & Control Meeting from 2008, 2007 & 2006 for Attorney...	2
KMM	Jan 19/2010	Prepare West Law documents for Attorney Allen for filing	1
KMM	Jan 25/2010	Pick-up Affidavit of Dr. Lachlin from MUSC.	0.4
Allen	Nov 8/2010	Charleston County Clerk of Court GB; Filing Fees - Motion to Alter or Amend	\$25
Allen	Jun 1/2012	Christy Ford Allen GB; Travel to/from Columbia, SC for...	\$123.21
Allen	Aug 2/2012	South Carolina Court of Appeals GB; Filing Fees (Petition for Rehearing on Ban...	\$25
Allen	Oct 17/2012	The South Carolina Supreme Court GB 595-1; Filing Fees Petition for Writ of Certiorari	\$100
Allen	Oct 17/2012	The South Carolina Supreme Court on GB 595-1; Filing Fees Motion to Certify for Review by..	\$25
Allen	Oct 19/2012	Bullett Deliveries GB 595-1; Travel to/from Columbia, SC (Court of Appeal...	\$180

(R. pp. 67-74, 88-94).

RPWB Time and Expense Records

trichardson	5/22/2012	Travel to Columbia, Hearing; travel back to Barnwell.	4
trichardson	10/18/2012	Review Initial Brief to Court of Appeals; emails.	1
trichardson	10/19/2012	Review Petition for Cert.	0.8
mhamrick	9/28/2010	Review Bo Willard's correspondence to Judge Burch regarding Administration Law Court appeal. E-mail correspondence to Judge Burch regarding Administrative Law Court appeal.	0.5
mhamrick	10/27/2010	Review order granting summary judgment.	0.3
mhamrick	11/8/2010	Review draft motion to alter or amend summary judgment order.	0.3
mhamrick	11/23/2010	Review Record on Appeal; Review final motion to alter or amend summary judgment order.	0.4
mhamrick	2/23/2011	Draft, file and serve motion for extension to file initial appellate brief.	0.4
mhamrick	3/16/2011	Telephone call from SC Court of Appeals regarding extension to file initial brief.	0.1
mhamrick	4/1/2011	Telephone conference with Christy Ford Allen regarding status conference call with Judge Few.	0.3
mhamrick	4/4/2011	Telephone status conference call with Judge Few.	0.3
mhamrick	7/8/2011	Review Respondent's initial brief.	0.6
mhamrick	7/8/2011	Review and revise reply brief.	0.7
mhamrick	7/12/2011	Review and revise reply brief.	0.7
mhamrick	7/14/2011	Review final reply brief.	0.5
2-Jun-10	Clerk of Court, Charleston County - Motion Filing fee		\$25
15-Jun-10	Clerk of Court, Charleston County - Motion Filing fee		\$25

(R. pp. 102-107).

Because the above fees and costs were incurred in the circuit court case and circuit court appeal, and not the current case, these fees and costs are not recoverable.

Also, the nature, extent and difficulty of the case does not support an award of attorney's fees and costs in the amount requested by Appellant. As was previously discussed, while Appellant technically prevailed on the issue of whether § 38-71-46 applied to the State Health Plan, Appellant lost on the second issue on the appeal, whether or not

the ALC erred in failing to address the availability of class action relief before the ALC. Appellant's interjection of these class action issues complicated the case and resulted in the parties incurring additional time and expense in dealing with these issues. It would be improper for Appellant to benefit from its own unsuccessful efforts to further complicate what otherwise would have been a routine administrative appeal. As a result of the Supreme Court's ruling, this case involved a routine administrative appeal for \$560 of benefits from the State Health Plan. It strains credulity to suggest that in the absence of the unsuccessful class action issue, Appellant's case reasonably would require the participation of two law firms, four attorneys at \$300 to \$600 per hour, and four paralegals at \$75 per hour. A reduction of attorney's fees is appropriate where a case has been overstaffed. Sparrow v. McDaniel, 852 F.2d 762 (4th Cir. 1998); Goodwin v. Metts, 973 F.2d 378 (4th Cir. 1992); see also, Thomas v. Peacock, 39 F.3d 493 (4th Cir. 1994) rev'd on other grounds, 516 U.S. 349 (1996). (Assessing attorney's fees in a suit on ERISA to recover payments to pension fund, the district judge should have examined instances where fees were awarded for the presence of both of Plaintiff's attorneys even though the presence of only one would have sufficed). Here, Appellant's case clearly was overstaffed. Accordingly, if the Court finds that an award of fees is appropriate, which Respondent denies, that reward should be significantly reduced to reflect an amount of fees and costs one attorney reasonably would incur to handle an appeal of a \$560 benefit claim.

Contrary to Appellant's assertion, the beneficial result obtained was extremely limited. As was previously discussed, Appellant's request for class action relief was rejected, leaving only Plaintiff's claim for \$560. Additionally, there is a real question that the relief requested by Appellant, coverage for insulin pump training, would have been

covered under the general diabetes training contemplated by § 38-71-46 (B) and Medicare regulations. Medicare regulations make no mention of coverage for insulin pump training. Because the beneficial results obtained by Appellant were extremely limited, an award of attorney's fees and costs is not appropriate and/or should be minimal.

Although the Supreme Court's decision held that § 38-71-46 applied to the State Health Plan, the Court did not reach a decision on whether or not Appellant's claim should have been paid under § 38-71-46. Based on the language of § 38-71-46 (B), in all likelihood, Appellant's claim would not be covered by § 38-71-46. § 38-71-46 (B) states:

(B) Services and payment for diabetes education programs shall conform to regulations of the Health Care Financing Administration, US Department of Health and Human Services, pursuant to Section 4105 of the Balanced Budget Act of 1997. Diabetes outpatient self-management training and education shall be provided by a registered or licensed health care professional with certification in diabetes by the National Certification Board of Diabetes Educators, or other accredited program approved by the Diabetes Initiative of South Carolina, or by the Diabetes Control Program of the SC Department of Health and Environmental Control in order to meet the needs of rural communities wherein certified health care professionals providing this service are not available.

Id.

As can be seen by an official publication regarding diabetes education issued by the U.S. Department of Health and Human Services, the training covered by Medicare (Diabetes self-management training) and the state-mandated training as well, is far more general than insulin pump training. This training includes the following:

- General information about diabetes, the benefits of blood sugar control, and the risks of poor blood sugar control;
- Nutrition and how to manage your diet;
- Options to manage and improve blood sugar control;
- Exercise and why it's important to your health;
- How to take your medications properly;
- Blood sugar testing and how to use the information to improve your diabetes control;
- How to prevent, recognize, and treat acute and chronic complications from your diabetes;

- Foot, skin, and dental care;
- How diet, exercise, and medication affect blood sugar;
- Behavior changes, goal setting, risk reduction, and problem solving;
- How to adjust emotionally to having diabetes;
- Family involvement and support; and
- The use of the health care system and community resources.

See <http://www.medicare.gov/Pubs/pdf/11022.pdf>.⁶ Because Medicare does not list insulin pump training as part of the diabetes self-management training, Appellant's claim would not have been covered under § 38-71-46 (B).

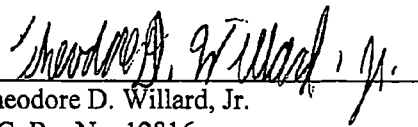
Finally, the cases relied upon by Appellant as evidence of customary legal fees for similar cases are easily distinguished and do not support the amount of attorney's fees requested in this case. Layman v. State, 378 S.C. 434, 658 S.E.2d 320 (2008) is easily distinguished in that the Appellant in Layman was the prevailing party in a certified class action involving millions of dollars. Likewise, Saunders v. South Carolina Public Service Authority d/b/a Santee Cooper, C/A No. 2:93-3077-23 (D.S.C. 1993) also involved multiple plaintiffs and millions of dollars in recovery. Unlike Layman and Saunders, here the Appellant did not prevail on the class action issue and the case was severely overstaffed, therefore fees based on \$300 to \$600 per hour would be unreasonable based on a \$560

⁶ This publication also states: "[c]lasses are taught by health care providers who have special training in diabetes education. You're covered to get a total of 10 hours of initial training within a continuous 12-month period and 2 hours of follow-up training each year after that. One of the hours can be given on a one-on-one basis. The other 9 hours of training are given in a group class. The initial training must be completed no more than 12 months from the time you start the training. Important: Your doctor may prescribe 10 hours of individual training if you're blind or deaf, have language limitations, or if no group classes have been available within 2 months of your doctor's order. To be eligible for 2 more hours of follow-up training each year after the year you received initial training, you must get another written order from your doctor. The 2 hours of follow-up training can be with a group, or you may have one-on-one sessions. Remember, your doctor must prescribe this follow-up training each year for Medicare to cover it." <http://www.medicare.gov/Pubs/pdf/11022.pdf>

recovery.

IV. CONCLUSION

For the foregoing reasons, the decision of the ALC should be affirmed.



Theodore D. Willard, Jr.

S.C. Bar No. 12816

MONTGOMERY WILLARD, LLC

1002 Calhoun Street

Post Office Box 11886

Columbia, South Carolina 29211-1886

Telephone: (803) 779-3500

Stephen R. Van Camp

S.C. Bar No. 7461

SOUTH CAROLINA PUBLIC EMPLOYEE

BENEFIT AUTHORITY

202 Arbor Lake Drive

Columbia, South Carolina 29223

Telephone: (803) 734-2375

ATTORNEYS FOR THE RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 18 2015

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.

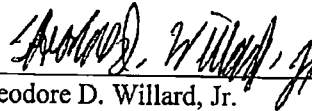
v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR.

November 16, 2015



Theodore D. Willard, Jr.

MONTGOMERY WILLARD, LLC

1002 Calhoun Street

Post Office Box 11886

Columbia, South Carolina 29211-1886

Telephone: (803) 779-3500

E-Mail: tdw@montgomerywillard.com

ATTORNEYS FOR THE RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 18 2015

APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Shirley Robinson, Administrative Law Judge

Case No. 2015-001561

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

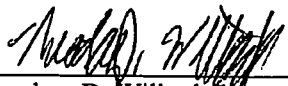
vs.

South Carolina Public Employee Benefit Authority,
Employee Insurance Program.....Respondent.

PROOF OF SERVICE

I certify that I have served the Brief of Respondent by depositing a copy of the same in the United States mail, postage prepaid, on November 18, 2015, addressed to the attorneys of record, John A. Massalon, Wills Massalon & Allen, LLC, Post Office Box 859, Charleston, South Carolina 29402 and Terry E. Richardson, Jr., Richardson Patrick Westbrook & Brickman, LLC, Post Office Box 1368, Barnwell, South Carolina 29812.

November 18, 2015



Theodore D. Willard, Jr.
S.C. Bar No. 12816
MONTGOMERY WILLARD, LLC
1002 Calhoun Street
Post Office Box 11886
Columbia, South Carolina 29211-1886
Telephone: (803) 779-3500

Stephen R. Van Camp
S.C. Bar No. 7461
**SOUTH CAROLINA PUBLIC EMPLOYEE
BENEFIT AUTHORITY**
202 Arbor Lake Drive
Columbia, South Carolina 29223
Telephone: (803) 734-1228
ATTORNEYS FOR THE RESPONDENT

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

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

Appellate Case No. 2015-001561

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Unpublished Opinion No. 2017-UP-358
Heard April 11, 2017 – Filed September 20, 2017

AFFIRMED

Terry E. Richardson, Jr, of Richardson Patrick
Westbrook & Brickman, LLC, of Barnwell, and John A.
Massalon, of Wills Massalon & Allen LLC, of
Charleston, for Appellant.

Theodore DuBose Willard, Jr., of Montgomery Willard,
LLC, and Stephen Raymond Van Camp, both of
Columbia, for Respondents.

PER CURIAM: Jeffrey D. Allen, on behalf of Jane Doe, appeals the Administrative Law Court's (ALC's) denial of his request for attorney's fees pursuant to the state action statute, section 15-77-300 of the South Carolina Code (Supp. 2016). We affirm.

We disagree with Allen's argument he was entitled to attorney's fees because the ALC erred in finding Respondents were substantially justified in asserting the diabetes mandate in section 38-71-46 of the South Carolina Code (2015) did not apply to the State Health Plan. *See Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) ("The decision to award or deny attorney's fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions."); S.C. Code Ann. § 15-77-300(A) (Supp. 2016) (providing for an award of attorney's fees against the State to a prevailing party 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"); *Heath v. Cty. of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (stating substantial justification means "justified to a degree that could satisfy a reasonable person" (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988))); *Layman*, 376 S.C. at 445, 658 S.E.2d at 326 ("[I]n deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and in fact."); *id.* ("Although an agency's loss on the merits does not create a presumption that its position was not substantially justified, the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim." (citation omitted)); *United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir. 1992) (stating merits decisions and their rationales "are the most powerful available indicators of the strength, hence reasonableness, of the ultimately rejected position"); *id.* ("As such, they obviously must be taken into account . . . in deciding whether the Government's position, though ultimately rejected on the merits, was substantially justified . . ."). During the underlying litigation, the ALC and a supreme court justice in a well-reasoned dissent agreed with Respondents' position the diabetes

mandate did not apply to the State Health Plan.¹ The State Health Plan is a unique creation, found in a different section of the South Carolina Code from the general insurance statutes. Even the majority in *Allen* acknowledged not all general insurance statutes apply to the State Health Plan. *Allen*, 411 S.C. at 618 n.10, 769 S.E.2d at 670 n10. Thus, while Respondents' position in the litigation was not the prevailing view ultimately, it was sufficiently justified to "satisfy a reasonable person." Accordingly, we find the ALC did not abuse its discretion in denying Appellant's request for attorney's fees.² The ALC's order is

AFFIRMED.

LOCKEMY, C.J., and HUFF and THOMAS, JJ., concur.

¹ *Allen v. S.C. Pub. Emp. Benefit Auth.*, 411 S.C. 611, 623, 769 S.E.2d 666, 673 (2015) (Pleicones, J., dissenting).

² Because we find Appellant was not entitled to attorney's fees, we need not address his remaining issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address additional issues when the disposition of the first issue is dispositive).

84745

THE STATE OF SOUTH CAROLINA
In The 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
Wills Massalon & Allen, LLC
Post Office Box 859
Charleston, SC 29402
(843) 727-1144

-and-

Terry E. Richardson, Jr.
Richardson, Patrick, Westbrook &
Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812
(843) 727-6500
ATTORNEYS FOR APPELLANT

RECEIVED
OCT 05 2017
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	2
Statement of Issues on Appeal	2
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

<u>Allen v. S.C. Pub. Empl. Benefit Auth. (PEBA)</u> , 411 S.C. 611, 769 S.E.2d 666 (2015)	3, 4
<u>United States v. Paisley</u> , 957 F.2d 1161, 1167 (4 th Cir. 1992)	5
S.C. Code Ann. § 38-71-46.....	2, 3
S.C. Code Ann. § 15-77-300.....	4

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 statute 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.

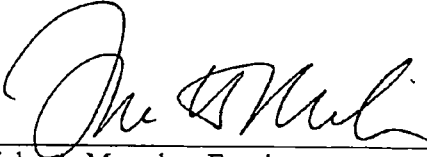
There is nothing in the language of the majority opinion that indicates the four majority justices thought the issue a close question, and there were no separate concurring opinions. While Appellant does not question that the ALJ and the dissenting justice are reasonable people and jurists, as referenced 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



John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401
(843) 727-1144

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman, LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812 5951
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

RECEIVED

Shirley C. Robinson, Administrative Law Judge

OCT 05 2017

SC Court of Appeals

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.

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

John A. Massalon, Esquire
Wills Massalon & Allen LLC
P.O. Box 859
Charleston, South Carolina 29401

Terry E. Richardson, Jr., Esquire
Richardson Patrick Westbrook & Brickman,
LLC
1730 Jackson Street
Barnwell, SC 29812
ATTORNEYS FOR APPELLANT

The South Carolina Court of Appeals

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

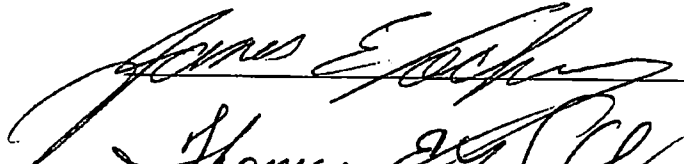
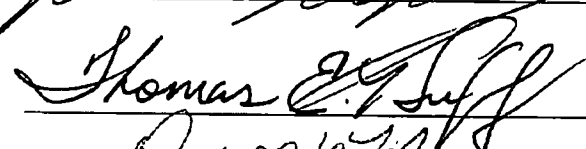
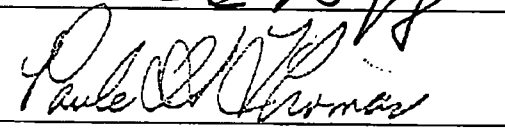
v.

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

Appellate Case No. 2015-001561

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

John A. Massalon, Esquire

Terry E. Richardson, Jr., Esquire

Theodore DuBose Willard, Jr., Esquire

FILED

January 5, 2018

Stephen Raymond Van Camp, Esquire
The Honorable Shirley C. Robinson