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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No.: 2018-000167

Jeffrey D. Allen, on behalf of Jane DoePetitioner,

v.

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

RETURN TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do the special and important reasons authorizing a grant of certiorari pursuant to SCACR 242 exist in the present case?
2. Did the Court of Appeals err in upholding the Administrative Law Court's decision that Respondent was substantially justified in asserting that the diabetes mandate in S.C. Code §38-71-46 (2015) did not apply to the State Health Plan where the ALC and a Supreme Court justice in a well-reasoned dissent agreed with Respondent's position?
3. Did the Court of Appeals err in upholding the Administrative Law Court's decision finding that Respondent was substantially justified in asserting that the diabetes mandate in S.C. Code §38-71-46 (2015) did not apply to the State Health Plan because the State Health Plan is a unique creation founded in a different S.C. Code from the general insurance sections, and even the majority of the S.C. Supreme Court acknowledged that not all general insurance statutes apply to the State Health Plan?
4. Did the Court of Appeals' decision create an impossible standard for any appellant to meet to recover attorney's fees under S.C. Code §15-77-300 (Supp. 2016)?

I. STATEMENT OF THE CASE

Jeffrey Allen (“Petitioner”) appealed the Administrative Law Court’s (“ALC”) decision denying Petitioner’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 Petitioner 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”). (Appx. pp. 15-26). As an employee of Dorchester County School District Two, Petitioner participated in the state health benefit program offered through the State of South Carolina Budget and Control Board Employee Insurance Program (“EIP”).¹ (Appx. p. 15). Petitioner 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 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), Petitioner appealed the final determination of the EIP Appeals Committee to the ALC on September 22, 2010. In this appeal, Petitioner also alleged entitlement to class action relief. By order dated August 13, 2012, the ALC upheld EIP’s denial of Petitioner’s claim and found that it did not need to address the class action allegations. (Appx. pp. 15-26).

On September 14, 2012, Petitioner filed a notice of appeal with the South Carolina

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.

Court of Appeals. On December 6, 2012, the South Carolina Supreme Court granted Petitioner'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 Petitioner's request for class action relief before the ALC failed as a matter of law. (Appx. pp. 34-48).

On remittitur, Petitioner moved for an award of attorney's fees pursuant to the state action statute, S.C. Code Ann. § 15-77-300 (2015). (Appx. pp. 52-123, 124-150). On June 17, 2014, the ALC issued an Order denying the Motion for Attorney's Fees. (Appx. pp. 28-33).

On July 16, 2015, Petitioner appealed the ALC's order denying attorney's fees to the S.C. Court of Appeals. Petitioner additionally moved that the S.C. Supreme Court to certify the case pursuant to SCACR 204(b) on the grounds that the denial of Petitioner's claim for attorney fees was a case of significant public interest or a legal principle of major importance. On September 3, 2015, the Supreme Court denied Petitioner's motion to certify. Allen v. S.C. Budget and Control Board, Employee Insurance Program, Appellate Case No. 2015-001578 (Sept. 3, 2015).

On September 20, 2017, in a unanimous decision, the S.C. Court of Appeals affirmed the ALC's denial of Petitioner's motion for attorney's fees. Petitioner petitioned for rehearing and Petitioner's petition for rehearing was denied on January 5, 2018.

II. STATEMENT OF THE FACTS

On March 4, 2105, 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 Petitioner 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); (Appx. 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 § 38-71-840(14), 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 Petitioner argued “health insurance issuer” only modified “health maintenance organization,” and, without the restriction as argued by Respondent, the State Health Plan 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.” (Appx. pp. 15-26). However, on appeal, the South Carolina Supreme Court in a 4-1 decision agreed with Petitioner. (Appx. pp. 34-48).

In a well-reasoned 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.

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,

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 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.

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; (Appx. 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). (Appx. pp. 52-123, 124-150).

On June 17, 2014, the ALC issued an order denying the motion for attorney's fees. (Appx. pp. 28-33).

Petitioner appealed and on September 20, 2017, the S.C. Court of Appeals unanimously upheld the ALC's denial of attorney's fees. The Court held:

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... 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.³ 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.

Allen v. S.C. Budget and Control Board, Employee Insurance Program, Unpublished Opinion No. 2017-UP-358 (Sept. 20, 2017).

III. ARGUMENTS

³ Allen v. S.C. Pub. Emp. Benefit Auth., 411 S.C. 611, 623, 769 S.E.2d 666, 673 (2015) (Pleicones, J., dissenting).

I. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE ALC HOLDING 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)). 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.

Pursuant to SCACR 242 (b), "a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." In deciding to grant review, the Supreme Court may take into account among other factors: (1) if there are novel questions of law, (2) if there was a dissent in the decision of the Court of Appeals, (3) if the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, (4) if substantial constitutional issues are directly involved, and (5) if a federal question is included and the decision of the Court of Appeals

conflicts with a decision of the U.S. Supreme Court. Id.

B. The Special and Important Reasons Authorizing a Grant of Certiorari Pursuant to SCACR 242 Do Not Exist In The Present Case.

The special and important reasons authorizing a grant of certiorari are not present in this case. The determination of whether an award of attorney's fees pursuant to §15-77-300 is appropriate is not a novel question of law and already has been addressed by the Supreme Court and the Court of Appeals on multiple occasions. The Court of Appeals decision was unanimous having no dissents and was not in conflict with a prior decision of the Supreme Court. Additionally, the Court of Appeals' decision involved no substantial constitutional issues or federal questions. Finally, as evidenced by the Supreme Court's previous denial of Petitioner's motion to certify the appeal pursuant to SCACR 204(b), Petitioner's attorney's fee appeal was not identified as a case of significant public interest or a legal principle of major importance.⁴ Because no special and important reasons authorizing a grant of certiorari are present in this case, Petitioner's petition should be denied.

C. The Court of Appeals Correctly Found That Respondent Was Substantially Justified In Asserting That The Diabetes Mandate In S.C. Code §38-71-46 (2015) Did Not Apply To The State Health Plan Because The ALC And A Supreme Court Justice In A Well-Reasoned Dissent Agreed With Respondents' Position.

The Court of Appeals correctly found that Respondent's position that S.C. Code Ann. § 38-71-46 did not apply to the State Health Plan was substantially justified because Respondent's position was accepted by the ALC and a Supreme Court Justice.⁵ As the

⁴ Allen v. S.C. Budget and Control Board, Employee Insurance Program, Appellate Case No. 2015-001578 (Sept. 3, 2015)

⁵ Contrary to Petitioner's argument, the Court of Appeal's analysis did address the

Court of Appeals correctly found, the ALC and Justice Pleicones of the Supreme Court in well-reasoned opinions agreed with Respondent and held that § 38-71-46 did not apply to the Plan.⁶ The fact that learned judges in well-reasoned opinions adopted the position taken by Respondent strongly suggests that the issue was one over which reasonable minds could differ. See R.P. v. S.C. Dept. of Health and Human Services, 06-ALJ-08-0605-AP (April 14, 2014) (holding that where a Supreme Court dissenting opinion supporting the agency's decision was amply detailed and well-reasoned, it is evidence that the agency's position was substantially justified). 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. See U.S. v.

justifications used by the State in denying Petitioner's claim.

⁶ § 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. 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). Respondent argued and the 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." Respondent argued and the ALC and Justice Pleicones found that EIP was not a "health insurance issuer" as this term is defined in S.C. Code Ann. § 38-71-840(16) (2002) because EIP was not "an insurance company, a health maintenance organization, and any other entity providing health insurance coverage" licensed to engage in the business of insurance in this State and was not subject to State insurance regulation. See S.C. Code Ann. § 1-11-780 (Supp. 2013).

Thouvenot, Wade & Moerschen, Inc., 596 F.3d 378, 382 (7th Cir. 2010) (“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.”); U.S. Commodity Futures Trading Com’n v. WeCorp, Inc., 878 F. Supp. 2d 1160, 1164-65 (D. Hawaii 2012); Wyandotte Sav. Bank v. N.L.R.B., 682 F.2d 119, 120 (6th Cir. 1982) (where 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].”).

Because the ALC and Justice Pleicones of the Supreme Court, in a detailed, well-reasoned dissent, agreed with Respondent that § 38-71-46 did not apply to the Plan, the Court of Appeals correctly found Respondent’s position was substantially justified. Accordingly, Petitioner’s Petition For Certiorari should be denied.

D. The Court of Appeals Did Not Err in Finding That EIP’s Interpretation of The Statute was Substantially Justified Because The State Health Plan Is A Unique Creation Founded In A Different S.C. Code From The General Insurance Sections, And Even The Majority Of The S.C. Supreme Court Acknowledged That Not All General Insurance Statutes Apply To The State Health Plan.

The Court of Appeals did not err in holding that EIP’s interpretation of the statute was substantially justified because the State Health Plan is a unique creation founded in a different S.C. Code from the general insurance sections, and even the majority of the S.C. Supreme Court acknowledged that not all general insurance statutes apply to the State Health Plan. The State Health Plan is a unique statutory creation. The General Assembly chose 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). Because 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; (Appx. p. 47).

As the Court of Appeals noted, 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.

The Court of Appeals correctly found that EIP's position was substantially justified because reasonable minds could differ on the application of 38-71-46 to the State Health Plan because the State Health Plan is a unique creation founded in a different S.C. Code from the general insurance sections, and even the majority of the S.C. Supreme Court acknowledged that not all general insurance statutes apply to the State Health Plan. Accordingly, Petitioner's Petition For Certiorari should be denied.

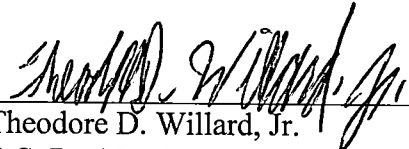
E. The Court Of Appeals' Decision Does Not Create An Impossible Standard For Any Appellant To Meet To Recover Attorney's Fees Under S.C. Code §15-77-300 (Supp. 2016).

Contrary to Petitioner's argument, the Court of Appeals' decision does not create an impossible standard for any appellant to meet to recover attorney's fees under S.C. Code §15-77-300 (Supp. 2016). Petitioner's argument fails to recognize that the test for whether an agency's position is sufficiently justified is whether it would satisfy a reasonable person. The fact that EIP was able to convince two learned judges, including the former Chief Justice of the Supreme Court, who by any definition are reasonable persons, to agree with its position underscores that reasonable minds could differ on the application of §38-71-46 to the State Health Plan. Contrary to Petitioner's argument, and has been previously discussed, the circumstances of this case are unique and do not exist in every appeal involving state action. Most appellate decisions do not have dissenting opinions, much less detailed, well-reasoned dissenting opinions by a Supreme Court Justice. Additionally, most appeals involving state action will not involve unique statutory creations like the State Health Plan, nor will they involve a situation where an appellate court felt the need to add a footnote because the Court's holding could be perceived as being inconsistent with

prevailing law.⁷ Simply put, the Court of Appeals' decision finding that reasonable minds can differ on this issue does not create an impossible standard for an appellant to be awarded benefits under S.C. Code §15-77-300 (Supp. 2016).

IV. CONCLUSION

For the foregoing reasons, the decision Petitioner's Petition For Certiorari should be denied.



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⁷ Allen, 411 S.C. at 618 n.10, 769 S.E.2d at 670 n10.

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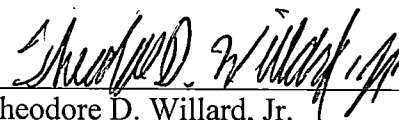
v.

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

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for Certiorari on Appellant by depositing a copy of the same in the United States mail, postage prepaid, on March 5, 2018, addressed to his 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.

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