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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

Supreme Court Case No. 2023-000402
Appellate Case No. 2019-001159 – 438 S.C. 391
Case No. 18-ALJ-07-0100-CC

Trident Medical Center, LLC, d/b/a Trident Medical Center, Petitioner / Respondent,

v.

South Carolina Department of Health and Environmental Control and Medical University
Hospital Authority d/b/a MUSC Radiation Therapy Center - Berkeley County,
..... Respondents.

Of Which, Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center –
Berkeley Center is the Appellant.

**RESPONDENT SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL CONTROL’S
RETURN TO PETITION FOR WRIT OF CERTIORARI**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- (1) Did the Court of Appeals correctly hold that the Administrative Law Court (“ALC”) erred in ruling on the constitutionality of a legal entity listed in a certificate of need (“CON”) application?
- (2) Did the Court of Appeals correctly hold that the ALC erred in ruling on an issue not presented to or considered by the S.C. Department of Health and Environmental Control (“DHEC”)?

COUNTER-STATEMENT OF THE CASE

This Petition arises from a CON application submitted by the Medical University Hospital Authority (“MUHA”) to DHEC to expand its radiation therapy services by adding a sixth linear accelerator to be placed at a new facility in Berkeley County. (R. p. 1595). During DHEC staff’s review of the application, Trident Medical Center, LLC (“Trident”) notified DHEC that it was an affected person to and opposed MUHA’s project. (R. p. 1818). In accordance with the *State Certification of Need and Health Facility Licensure Act* (“CON Act”), S.C. Code Ann. Sections 44-7-110 *et seq.*, and *Certification of Need for Health Facilities and Services* (“CON Regulation”), Regulation 61-15, DHEC reviewed the application to determine compliance with the South Carolina Health Plan (“Plan”), project review criteria (“PRC”), and other regulations. *See* S.C. Code Ann. § 44-7-210(B) and S.C. Code Ann. Regs. 61-15 § 307.1.

MUHA’s CON application lists MUHA as the licensee for the project. (R. p. 1597). Further, MUSC Health Center Cancer Care Network, LLC (“the Network”) is listed as the management company. (R. pp. 1599-1600). The application explains Alliance Oncology, LLC (“Alliance”) is the majority owner of the Network and MUSC Strategic Ventures (“MSV”) is the minority owner of the Network. (*Id.*). Alliance is a for-profit limited liability company that

partners with hospitals, physicians, and other providers to offer oncology services. (*Id.*). MSV is a nonprofit corporation established at the direction, and for the support and benefit of Medical University of South Carolina (“MUSC”). (R. p. 1603). MUSC established MSV to help accomplish certain strategic objectives. (*Id.*). During its review, DHEC did not consider the constitutionality or legality of the Network or MSV. Similarly, Trident did not present any arguments during the DHEC review that challenged the constitutionality or legality of the Network or MSV. Instead and in accordance with the CON Act and Regulation, the issues considered and presented during DHEC’s review involved compliance with the Plan and PRC. Ultimately, DHEC staff issued a decision approving MUHA’s CON application because it complied with the applicable Plan standards and PRC. (R. pp. 1969-1972). Trident requested the Board of Health and Environmental Control (“the Board”) conduct a final review conference regarding DHEC staff’s decision. (R. pp. 68-72). Trident’s request for final review did not include arguments challenging the constitutionality or legality of the Network or MSV. (*Id.*). The Board declined to conduct a final review conference. (R. pp. 54-55).

Thereafter, Trident filed a request for contested case hearing with the ALC. (R. pp. 37-89). In such filing, Trident does not make arguments regarding the constitutionality or legality of the Network or MSV. Instead, the focus of said filing was purported noncompliance with the Plan and PRC. Further, Trident’s prehearing statement apprising the ALC of, among other things, the issues presented for determination makes no reference to the constitutionality or legality of the Network or MSV. (R. p. 1979-1980). After discovery, the ALC conducted a five-day contested case hearing. (R. p. 90). During its opening statement, Trident presented arguments about MUHA’s alleged noncompliance with the Plan and applicable PRC, but nothing about the constitutionality or legality of the Network or MSV. (R. pp. 106-134). At the close of evidence,

Trident filed a motion for judgment as a matter of law arguing MUHA's project involves an unlawful and unconstitutional joint venture. (R. p. 1297, line 17 – p. 1310, line 13; R. pp. 1999-2030). The ALC granted Trident's motion. (R. pp. 1-35). The ALC found that MSV and the Network are illegal or *ultra vires*. (R. p. 22). Further, the ALC found MUSC's use of MSV to create and jointly own an interest in the Network, a private, for-profit entity, violates the S.C. Constitution, Article X, Section 11. (R. p. 26). Based upon these findings, the ALC determined the necessary dissolution of these entities substantially alters the project such that it can no longer be approved. (R. pp. 27-29).

MUHA filed a Notice of Appeal with the Court of Appeals requesting reversal of the ALC decision. MUHA argued the ALC erred: by ruling on legal and constitutional issues that are not within its limited statutory authority; by considering issues not raised to DHEC nor timely raised in the contested case proceedings; by concluding MSV is an *ultra vires* entity and that the Network is an unlawful and unconstitutional joint venture; and by finding MUHA is not the proper licensee of the project. The Court of Appeals reversed the ALC's decision finding the ALC: lacked statutory authority to rule on the constitutionality or legality of MSV and the Network; and erred by ruling on an issue not presented to or considered by DHEC. *Trident Med. Ctr., LLC v. S.C. Dep't of Health & Env't'l Control*, 438 S.C. 391, 882 S.E.2d 878 (Ct. App. 2022), *reh'g denied* (Feb. 10, 2023). Trident filed a petition for rehearing. The Court of Appeals denied that petition. Thereafter, Trident filed its Petition for Writ of Certiorari with the South Carolina Supreme Court.

ARGUMENT

I. THE PETITION PRESENTS NO SPECIAL AND IMPORTANT REASONS THAT MERIT A WRIT OF CERTIORARI.

The Petition fails to present any valid reason for this Court to issue a writ of certiorari. Rule 242(b), SCACR, states, in part, "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.” Rule 242(b) then identifies five factors this Court reviews when determining whether to grant a petition: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision of the Court of Appeals is inconsistent with a prior decision of the Supreme Court; (4) there are substantial constitutional issues; and (5) there is a federal question and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. This Court has held it will grant certiorari to the court of appeals only where special reasons justify the exercise of that discretion. *S.C. Dep’t of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373, 373 (2020) (citing *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170, 170 (2008) and *In re Exhaustion of State Remedies in Criminal Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454, 454 (1990)). In its Petition, Trident failed to identify any “special and important reasons” warranting exercise of this Court’s discretion.

II. THE COURT OF APPEALS DID NOT ERR.

A. The Court of Appeals correctly held the ALC erred by ruling upon the constitutionality or legality of an entity.

The Court of Appeals correctly held the “ALC did not have the statutory authority to rule on the constitutionality of MSV and the Network.” *Trident Med. Ctr., LLC*, 438 S.C. at 397. The ALC is a legislative creation and “an agency and a court of record within the executive branch of the government of this State.” S.C. Code Ann. § 1-23-500. “The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC’s powers.” *Amisub of South Carolina, Inc. v. S.C. Dep’t of Health & Env’tl. Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013); *see also S.C. Dep’t of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010) (observing the ALC does not have the authority to exceed its statutorily granted powers).

The CON Act and Regulation address the scope of DHEC’s review of a CON application. The CON application “must address all applicable standards and requirements set forth in departmental regulations, Project Review Criteria of the department, and the South Carolina Health Plan.” S.C. Code Ann. § 44-7-200(A). “On the basis of staff review of the application, the staff shall make a staff decision to grant or deny the Certificate of Need.” *Id.* § 44-7-210(C). “On the basis of staff review of the record established by the Department, including but not limited to, the application, comments from affected persons and other persons concerning the application, data, studies, literature and other information available to the Department, the staff of the Department shall make a proposed decision to grant or deny the Certificate of Need.” S.C. Code Ann. Regs. 61-15 § 308.

The department may not issue a Certificate of Need unless an application complies with the South Carolina Health Plan, Project Review Criteria, and other regulations. Based on project review criteria and other regulations, which must be identified by the department, the department may refuse to issue a Certificate of Need even if an application complies with the South Carolina Health Plan.

S.C. Code Ann. § 44-7-210(B); *see also* S.C. Code Ann. Regs. 61-15 § 307.1.

Nothing in the CON Act, CON Regulation, or South Carolina Health Plan authorizes DHEC to rule upon the constitutionality of a legal entity listed in a CON application. DHEC’s review of MUHA’s CON application was limited to whether it complied with the State Health Plan and regulatory criteria. While the identity of the proposed licensee and proposed management company, and the identities of individuals and/or legal entities with ownership interest in them, are relevant to the CON application, questions regarding the constitutionality or legality of such entities are not a legitimate part of the CON review process. *See SGM-Moonglo, Inc. v. S.C. Dep’t of Revenue*, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008) (The ALC properly declined to consider a restrictive covenant prohibiting the sale of alcoholic beverages on the property where

a proposed business would be located in granting a beer and wine permit; administrative agencies only have the powers conferred on them by law, and restrictions in the chain of title of a proposed location “are not a legitimate concern of the ALC in determining whether the location is suitable” for a permit under the Alcohol and Beverage Control laws.). The Court of Appeals correctly found “the ALC’s jurisdiction was limited to whether the application met the criteria established by the governing law.” *Trident Med. Ctr., LLC*, 438 S.C. at 398.

B. The Court of Appeals correctly held the ALC erred by ruling on an issue not presented to or considered by DHEC.

The Court of Appeals correctly concluded that “the ALC erred in ruling on an issue not presented to or considered by DHEC.” *Id.* The CON Act sets forth the procedures to be used in the DHEC review of a CON application and in a contested case before the ALC challenging a decision on a CON application. S.C. Code Ann. § 44-7-210. Per statute, “a person may not file a request for final review in opposition to the staff decision on a Certificate of Need unless the person provided written notice to the department during the staff review that he is an affected person and *specifically states his opposition to the application under review.*” S.C. Code Ann. § 44-7-210(C) (emphasis added). Further, [t]he issues considered at the contested case hearing considering a Certificate of Need are *limited to those presented or considered during the staff review.*” S.C. Code Ann. § 44-7-210(E) (emphasis added); *see also* SCALC Rule 21(B) (“Discovery in Certificate of Need (CON) contested cases is limited to the issues presented or considered during the staff review.”).

Trident did not raise the legality or constitutionality of MSV or the Network to staff as part of its specific opposition to MUHA’s CON application. DHEC did not consider the legality or constitutionality of either entity during staff review of the CON application. For these reasons, the Court of Appeals properly held that pursuant to Section 44-7-210(E), the ALC erred by ruling

on an issue that was neither presented to nor considered by DHEC. *See Trident Med. Ctr., LLC*, 438 S.C. at 400.

CONCLUSION

There are no special and important reasons to grant a Writ of Certiorari. Petitioner essentially seeks reconsideration of a decision by the Court of Appeals that was correctly decided. Therefore, DHEC respectfully requests this Court deny the Petition.

Respectfully submitted,

s/ Vito Wicevic

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Of Which, Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center –
Berkeley Center is the Appellant.

PROOF OF SERVICE

I, the undersigned Paralegal with South Carolina Department of Health and Environmental
Control, do hereby certify that I have served all counsel in this action with a copy of South
Carolina Department of Health and Environmental Control’s Return to Petition for Writ of
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May 1, 2023

Trident Medical Center vs. SCDHEC and MUSC Radiation Therapy Center-Berkeley County;
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📎 1 attachments (379 KB)

2023.05.01 DHEC's Return to Petition and POS.pdf;

Good afternoon. In connection with the referenced matter, please find attached for filing with the Court, **Respondent South Carolina Department of Health and Environmental Control's Return to Petition for Writ of Certiorari**. As evidenced in the accompanying **Proof of Service**, all counsel of record is being served with the same. Should you have any questions relating to the attached, please do not hesitate to contact me.

Kindest regards,



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