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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 2011-ALJ-07-0575-CC
Appellate Case No. 2015-000056

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is..... Appellant.

RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S RETURN TO APPELLANT'S MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS

Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System ("Carolinas") filed the above-captioned appeal challenging the final order of the Administrative Law Court ("ALC") on competing Certificate of Need ("CON") applications to construct a new hospital in York County. The ALC reversed the decision of Respondent South Carolina Department of Health and Environmental Control ("Department") and awarded the CON to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"), denying Carolinas' competing application. Upon the filing of its appeal, Carolinas posted a bond

with the Court of Appeals in the amount of $1,500,000, pursuant to the requirements of S.C. Code Ann. § 44-7-220(b).[1]

Carolinas filed a two-part motion with the Court of Appeals. First, Carolinas moves the Court of Appeals for relief from the bond, challenging the constitutionality of the bond on three grounds: (a) the separation of powers doctrine; (b) the equal protection clause; and (c) due process requirements. Second, Carolinas petitions the Court of Appeals to exercise its equitable power to stay the underlying action (grant of the CON to Piedmont) until the appeal process is resolved, arguing: (a) without such relief it will suffer irreparable harm; (b) it has a likelihood of success on the merits, and (c) there is no adequate remedy at law. The Department submits the below response to the three constitutional challenges to the bond provision raised in Carolinas' motion for relief from the stay. The Department takes no position with respect to Carolinas' petition for supersedeas to maintain the status quo pending resolution of the appeal.

SEPARATION OF POWERS

The South Carolina Constitution requires the legislative, executive, and judicial powers of state government "be forever separate and distinct from each other" and mandates "no person or persons exercising the functions of one of said department shall

[1] S.C. Code Ann. § 44-7-220(b) provides in pertinent part: "If the relief requested in the appeal is the reversal of the Administrative Law Court's decision to approve the Certificate of Need application ..., the party filing the appeal shall deposit a bond with the Clerk of the Court of Appeals within five calendar days after filing the petition to appeal. The bond must be secured by cash or a surety authorized to do business in this State in an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond and also may award reasonable attorney's fees and costs incurred in the appeal. If a party appeals the denial of its own Certificate of Need application ... and there is no competing application involved in the appeal, the party filing the appeal is not required to deposit a bond with the Court of Appeals."

assume or discharge the duties of any other." S.C. Const. art. I, § 8. Carolinas contends the bond provision violates the separation of powers and creates a statutory barrier to appeals of CON cases.

A panel of the Court of Appeals recently considered and rejected a similar argument in Grand Strand Regional Medical Center v. South Carolina Department of Health and Environmental Control, App. Case No. 2014-000973 (S.C.Ct. App. filed March 15, 2015). While not a final published opinion, the order in Grand Strand is directly relevant because, as in this case, the appellant raised separation of powers, equal protection, and due process arguments regarding the bond provision as a basis petitioning the Court of Appeals to stay the ALC's award of a CON to another entity pending the outcome of the appeal. In its order denying the petition for supersedeas, the Court of Appeals held "because Appellant will receive its judicial review, we decline to find that the legislature's decision to impose the appeal bond violated the separation of powers doctrine by attempting to curtail judicial review and make the ALC, an executive branch agency, the final arbiter in CON cases." Id. at p. 4.

Carolinas distinguishes its motion from Grand Strand's by focusing the issue on promulgation of rules of judicial practice and procedure. Carolinas cites Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992) as an example of the Court finding invalid a statute that limits the court's appellate scope of review. Carolinas cites Rutherford as standing for the proposition that "judiciary – not legislature – had authority to make rules for the court's practice and procedure." App.'s Supp. Brief, p. 6. However, the Court in Rutherford noted that "[t]he legislative authority to enact legislation governing the practice and procedure in the state courts simply cannot be read as an unlimited power contrary to

other constitutional limitations on that power." Id. at 204, 414 S.E.2d at 160 (Emphasis added). Impliedly, then, the legislature may enact legislation governing procedure in state courts, within constitutional limits. The statute at issue in Rutherford exceeded constitutional limits by portending to limit the Supreme Court's scope of review in domestic cases, in direct conflict with the jurisdiction granted to the Supreme Court in the South Carolina Constitution. Id. at 203-04, 414 S.E2d at 159-60. While the bond provision imposes an additional requirement on CON appellants not found in Court rules, it does not curtail the appellate courts' authority to provide judicial review. There is no constitutional violation with respect to separation of powers.

EQUAL PROTECTION

The constitutions of the United States and of South Carolina guarantee that no person shall be denied equal protection of the laws. U.S. Const.. Amend. XIV, 1; S.C. Const. art. I, 3. "To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis." Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 480-81, 636 S.E.2d 598, 613 (2006). As the party asserting an equal protection challenge, Carolinas bears the burden of showing that the bond provision does not meet this test. Samson v. Greenville Hosp. Sys., 295 S.C. 359, 367, 368 S.E.2d 665, 669 (1988). "When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." Gold v. S.C. Bd. of Chiropractic Examiners, 271 S.C. 74, 78, 245 S.E.2d 117, 119–20 (1978). A

"legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Joytime Distribs. and Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999).

"A crucial step in the analysis of any equal protection issue is the identification of the pertinent class, *i.e.*, exactly who is included in the group of persons allegedly being treated differently under similar circumstances without any rational basis." Sloan at 481, 636 S.E.2d at 613. Carolinas alleges the group of persons being treated differently consists of those persons who may wish to appeal a final order of the ALC granting a CON to another person. Unlike appellants challenging final orders of the ALC in other types of cases, appellants in Carolinas' class must deposit a bond with the Court of Appeals secured by cash or surety in an amount equal to five percent of the total cost of the project being appealed, or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. See S.C. Code Ann. § 44-7-220(b).

The Legislature identified the purposes of the Certificate of Need laws in statute: to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State. S.C. Code Ann. § 44-7-120. The Legislature also identified a potential purpose in requiring the posting of a bond by appellants challenging another person's grant of a CON. In the event the Court of Appeals determines the appeal to have been frivolous, it may award damages incurred as a result of the delay, as well as reasonable attorney's fees and costs, to the party whose CON project was the subject of the appeal. S.C. Code Ann. § 44-7-220(c)(1).

The bond is automatically awarded to the CON applicant if the person challenging the CON approval loses their appeal. S.C. Code Ann. § 44-7-220(b). It is reasonable to conclude that the purposes for requiring the bond are to compensate the CON applicant for any costs incurred in the delay of implementing their project due to an unsuccessful legal challenge to the project, and to discourage frivolous appeals of needed healthcare projects. See Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 429, 593 S.E.2d 462, 469 (2004) ("A legislative enactment will be sustained against constitutional attack if there is any reasonable hypothesis to support it."); see also Foster v. S. Carolina Dep't of Highways & Pub. Transp., 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992) ("The classification does not need to completely accomplish the legislative purpose with delicate precision in order to survive a constitutional challenge."). The Court of Appeals agreed in Grand Strand, holding "[a]s we read the statute, the legislature imposed the appeal bond on CON appellants to reserve some funds to compensate a respondent harmed by the delay of its approved project during the pendency of the appeal." Grand Strand, App. Case No. 2014-000973, p. 4 (S.C.Ct. App. filed March 15, 2015). "We believe that is a legitimate government purpose." Id. Thus, the bond provision is constitutional.

DUE PROCESS

The South Carolina Constitution provides that "no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due noticeand an opportunity to be heard . . . and he shall have in all such instances the right to judicial review." S.C. Const. art. I, § 22. "The requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, generally include adequate notice, the

opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review." Sloan at 484-85, 636 S.E.2d at 615.

Carolinas was party to a contested case hearing at the ALC, following adequate notice, where it introduced evidence and cross-examined witnesses. Carolinas then filed its appeal this appeal of the ALC's final order and posted the bond required by S.C. Code Ann. § 44-7-220(b). Should Carolinas prevail in its appeal, the bond will be returned to it. If Carolinas loses its appeal, Section 44-7-220(b) provides that the bond will be awarded to Piedmont. Either way, Carolinas will receive judicial review. Carolinas has failed to present any evidence that it has been denied procedural due process. See also Grand Strand, App. Case No. 2014-000973, pp. 3-4 (S.C.Ct. App. filed March 15, 2015) (finding no procedural due process violation with the bond requirement, citing the facts that: the appellant had successfully initiated its appeal of the ALC's decision; the Court of Appeals would soon give appellant judicial its judicial review; and the appellant had never claimed it was unable to afford the appeal bond or that the appeal bond otherwise deterred it from filing its appeal).

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court of Appeals deny Carolinas' motion for relief from the bond. The Department takes no position on Carolinas' petition for a stay of the ALC's final order pending the appeals process.

[Signature on following page]

Respectfully submitted,

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April 13, 2015

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

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Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
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v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill,
is..... Appellant.

PROOF OF SERVICE

I, Jaimie Presley Jones, with the South Carolina Department of Health and Environmental Control, do hereby certify that I have on this **13th day of April, 2015**, served a copy of ***RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S RETURN TO APPELLANT'S MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS*** upon all parties and counsel of record in the above-captioned case, via Electronic Mail and United States Mail, First Class, postage prepaid, addressed as follows:

Parties of Record

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SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

By: Jaimie Presley Jones
Jaimie Presley Jones

Date: April 13th, 2015

D H E C
PROMOTE PROTECT PROSPER
W. Marshall Taylor Jr., Acting Director
Promoting and protecting the health of the public and the environment

April 13, 2015

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center v. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill
Appellant No. : 2015-000056
OGC# 21301.1

Dear Ms. Kitchings:

Enclosed for filing with your office are the originals and seven (7) copies of the following:

1. ***Respondent South Carolina Department of Health and Environmental Control's Return to Appellant's Motion for Relief from Bond and Petition for Supersedeas***
2. ***Proof of Service***

Please return a clocked copy to the courier. By copy of this letter to all parties of record, I am enclosing the above for service.

Thank you for your assistance.

Very truly yours,

Jaimie Presley Jones
Office of General Counsel

cc: Daniel J. Westbrook, Esquire
Stuart M. Andrews, Esquire
Douglas M. Muller, Esquire
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