THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Casey L. Manning, Circuit Court Judge

Case No. 2016-CP-40-00818
Appellant Case No. 2016-000631

Amedisys SC, LLC..... Appellant,

v.

South Carolina Department of Health and Environmental Control.....Defendant,

and

National Healthcare Corporation, Pruitthealth Corporation, In-Care Home Health, Inc., Tri-County Home Health Care & Services, Inc., M&C Group, LLC d/b/a Home Helpers of Bluffton, Tidewater Home Health, PA, and Hedgemark Brentwood Medical Services Inc. d/b/a PHC Home Health..... Intervenor-Defendants,

Of Whom South Carolina Department of Health and Environmental Control, National Healthcare Corporation, Pruitthealth Corporation, In-Care Home Health, Inc., Tri-County Home Health Care & Services, Inc., M&C Group, LLC d/b/a Home Helpers of Bluffton, Tidewater Home Health, PA, and Hedgemark Brentwood Medical Services Inc. d/b/a PHC Home Health are .....Respondents.

BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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STATEMENT OF ISSUE ON APPEAL

Did the Circuit Court abuse its discretion in denying the motion for preliminary injunction?

STATEMENT OF THE CASE

This action was initiated by Amedisys SC, LLC, ("Amedisys") and South Carolina Home Care & Hospice Association ("Association") by the filing of a Summons and Complaint in the Court of Common Pleas in Richland County on February 8, 2016, pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10, *et seq*, naming the South Carolina Department of Health and Environmental Control ("Department") as a defendant. The Association filed a notice of dismissal under Rule 41(a)(1), SCRCP, on February 16, 2016, leaving Amedisys as the sole plaintiff in the case.

The underlying lawsuit involves the Certificate of Need ("CON") program administered by the Department, in particular the home health section of the South Carolina Health Plan adopted by the Board of Health and Environmental Control ("Board") on August 13, 2015 ("Current Plan"). In its Complaint, Amedisys seeks declarations that (1) a valid State Health Plan must be adopted before the Department may consider an application or issue a CON for home health services, and (2) the Current Plan's home health section does not comply with statutory and regulatory provisions regarding the required contents of the State Health Plan. (R. pp. 26-27). Amedisys' Complaint also requests an order enjoining the Department from accepting, reviewing, and issuing decisions on CON applications for home health services until a valid State Health Plan related to home health is adopted by the Board; alternatively, it requests the Circuit Court order that the Department may only issue CON decisions for home health services pursuant to the 2012-2013 South Carolina Health Plan ("2012-13 Plan") as updated with population and

services-inventory information until such time as a valid State Health Plan is adopted. (R. p. 27). The Department filed an Answer to the Complaint on February 10, 2016, denying Amedisys' allegations as to the sufficiency of the Current Plan's home health section and requesting that the Circuit Court deny the relief requested by Amedisys in its Complaint. (R. pp. 120-127).

Simultaneously with the filing of its Summons and Complaint, Amedisys filed a motion for a temporary restraining order ("TRO") and preliminary injunction to enjoin the Department from accepting, reviewing, and issuing staff decisions on CON applications for new home health services pending resolution of the lawsuit. (R. pp. 85-105). Amedisys requested that the TRO or preliminary injunction order allow the Department, in its discretion, to accept, consider, and act upon CON applications for home health services only under the 2012-13 Plan as updated with population and services-inventory information, pending resolution of the lawsuit. (R. pp. 104-105). The Department filed a memorandum in opposition to the motion on February 19, 2016. (R. pp. 114-119).

The following entities filed motions to intervene in the lawsuit, on the basis that Amedisys' suit seeks relief that would impact their pending CON applications for home health services: National Healthcare Corporation, Pruitthealth Corporation, In-Care Home Health, Inc., Tri-County Home Health Care & Services, M&C Group, LLC, d/b/a Home Helpers of Bluffton, Tidewater Home Health, PA, and Hedgemark Brentwood Medical Services, Inc., d/b/a PHC Home Health ("Intervenors"). The Circuit Court held a hearing on February 22, 2016, on Amedisys' motion for a preliminary injunction, at which time it granted the motions to intervene. After hearing arguments from counsel for all parties, the Circuit Court requested proposed orders on Amedisys' motion.

By order dated February 23, 2016, the Circuit Court denied Amedisys' motion for preliminary injunction. (R. pp. 1-13). The Circuit Court stated in its Order: "In reaching this decision, the Court expresses no final opinion or determination regarding the merits of Plaintiff's claims. The Court simply finds that Amedisys has not established the threshold requirements for obtaining a preliminary injunction." (R. p. 13).

On March 21, 2016, Amedisys filed a Notice of Appeal of the Circuit Court's order denying preliminary injunction. On April 1, 2016, Amedisys filed a motion in the Supreme Court requesting that it certify and transfer the case from the Court of Appeals for expedited consideration. The Department and the Intervenors filed separate returns to the Motion to Certify on April 21, 2016.

FACTS

The Department is the sole state agency charged with administering the *State Certification of Need and Health Facility Licensure Act*, S.C. Code Ann. §§ 44-7-110, *et seq.* ("CON Act"). S.C. Code Ann. § 44-7-140. The purposes of the CON Act are 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. To achieve these purposes, the CON Act requires the issuance of a CON before undertaking certain projects, the adoption of procedures and criteria for submittal of an application and appropriate review before issuance of a CON, the preparation and publication of a State Health Plan ("Plan"), and the licensure of facilities rendering medical, nursing, and other health care. *Id.*

The CON Act sets forth a detailed process for the preparation and publication of a State Health Plan to be utilized in the review of CON applications. S.C. Code Ann. § 44-7-180. The Department is charged with preparing the State Health Plan with the advice of the Health Planning Committee ("Committee"). *Id.* § 44-7-180(B). The Committee consists of fourteen members, twelve of whom are appointed by the Governor. *Id.* § 44-7-180(A). The Board appoints one member to the Committee, and the South Carolina Consumer Advocate or his designee serves as an ex officio non-voting member of the Committee. *Id.* The State Health Plan promulgation process includes public notice, an opportunity for public comments, and regional public hearings prior to presentation of the final draft document to the Board. *Id.* § 44-7-180(C). The Plan is to be presented to the Board for final revision and adoption at least once every two years. *Id.* Pursuant to Section 44-7-180(B), the Plan must include at a minimum the following:

> (1) an inventory of existing health care facilities, beds, specified health services, and equipment;
>
> (2) projections of need for additional health care facilities, beds, health services, and equipment;
>
> (3) standards for distribution of health care facilities, beds, specified health services, and equipment including scope of services to be provided, utilization, and occupancy rates, travel time, regionalization, other factors relating to proper placement of services, and proper planning of health care facilities; and
>
> (4) a general statement as to the project review criteria considered most important in evaluating Certificate of Need applications for each type of facility, service, and equipment, including a finding as to whether the benefits of improved accessibility to each such type of facility, service, and equipment may outweigh the adverse [e]ffects caused by the duplication of any existing facility, service, or equipment.

The Current Plan was adopted by the Board on August 13, 2015. (R. pp. 6, 299). The promulgation process for the Current Plan complied with the requirements of the CON

Act. The Committee reviewed and discussed proposed revisions to the Current Plan at publicly noticed meetings. An opportunity for public comments on the proposed draft was provided. Comments received from the public were provided to the Committee for its consideration. Regional public hearings were conducted across the state to allow for additional public comments. The Committee spent a significant amount of time at its public meetings deliberating proposed revisions to the home health section, in particular regarding the method for projecting need for additional home health services. The Committee voted on the final revisions to the home health section, which were then presented to the Board by the Chair of the Committee for the Board's consideration. The Board approved and adopted the revisions to the home health section of the State Health Plan as proposed by the Committee.

The standards for home health services in the Current Plan, adopted pursuant to the above-described process, are:

> 1. An applicant must propose home health services to cover the geographic area of an entire county and agree to serve residents throughout the entire county.
>
> 2. A separate application is required for each county in which services are to be provided.
>
> 3. A new home health agency may be approved if an applicant can demonstrate it will serve 50 or more patients projected to be in need in non-rural counties, or 25 or more patients projected to be in need in rural counties, through evidence that may include, but would not be limited to, the following:
>
> a. Letters of support that identify need for additional home health services from physicians and other referral sources.
>
> b. Evidence of underutilization of home health services.
>
> c. Evidence of limited scope home health agency service including skilled nursing, physical therapy, occupational

therapy, speech therapy, home health aides, and medical social workers.

d. Evidence of the denial or delay in the provision of home health services, including but not limited to long waiting lists or delays which exceed industry standards.

4. For the purposes of this Section, a rural county shall mean a county with a population of less than 50,000, according to the most recent projections of the South Carolina Revenue and Fiscal Affairs office as of the time the current Plan was adopted.

5. All home health agency services (Skilled Nursing, Physical Therapy, Occupational Therapy, Speech Therapy, Home Health Aide, and Medical Social Worker) should be available within a county. If there is no hospital in a county and the existing licensed home health agencies between them do not provide all of the services identified above, this may be cited as potential justification for the approval of an additional agency that intends to offer these services.

6. Specialty home health providers are exempt from the need calculation applicable to full-service home health agencies, but are otherwise subject to Certificate of Need.

7. The applicant should have a track record that demonstrates a commitment to quality services. There should be no history of prosecution, consent order, abandonment of patients in other business operations, or loss of license. However, any consent orders or loss of licenses related to licenses that were obtained from the Department between July 1, 2013 and May 22, 2014 without a Certificate of Need shall not be grounds for denial of a Certificate of Need application pursuant to this Section. The applicant must provide a list of all licensed home health agencies it operates and the state(s) where it operates them.

8. The applicant must document that it can serve at least 25 patients annually in each rural county for which it is licensed and 50 patients annually in each non-rural county for which it is licensed within two years of initiation of services. The applicant must assure the Department that, should it fail to reach this threshold number two years after initiation of services in a county, it will voluntarily relinquish its license for that county.

9. Nothing in this Section is intended to restrict the ability of the Department to approve more than one new Home Health Agency in a county at any given time.

August 13, 2015 South Carolina Health Plan, pp. XII-7 through XII-8. (R. pp. 320-321).

In addition to the above CON standards regarding need for new home health agencies, the Current Plan includes an inventory of existing home health agencies and utilization data for home health agencies. *Id.* at pp. XIII-46 through XIII-51. (R. pp. 325–330). The Current Plan also lists the project review criteria deemed most relevant for consideration of home health CON applications. *Id.* at p. XII-8. (R. p. 321).

STANDARD OF REVIEW

An order denying an injunction is reviewed for abuse of discretion. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). An abuse of discretion occurs if the lower court's decision is unsupported by the evidence or is controlled by an error of law. *Id.*

ARGUMENT

The Circuit Court did not abuse its discretion by denying the motion for preliminary injunction.

An injunction is a drastic remedy that ought to be applied with caution. *Id.* A party seeking an injunction has the burden of demonstrating irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. *Scratch Golf Co. v. Dunes West Residential Gold Properties*, Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004).

A. Amedisys failed to establish likelihood of success on the merits of the underlying lawsuit.

The Circuit Court considered the merits of the case to the extent necessary to determine whether an injunction was appropriate. (R. p. 10). The Circuit Court concluded that Amedisys had not shown it is likely to succeed on the merits of the case. (R. p. 12).

In considering the likelihood of success on the merits, the Circuit Court relied in part upon the Supreme Court's opinion in *MRI at Belfair v. South Carolina Department of Health and Environmental Control*, 379 S.C. 1, 664 S.E.2d 471 (2008). In *MRI at Belfair*, an affected person contesting a Department decision to grant a CON to a hospital for MRI services argued that the applicable State Health Plan standards for MRI services did not comply with S.C. Code Ann. § 44-7-180. *Id.* at 4–5, 664 S.E.2d at 473. In particular, the affected person claimed the State Health Plan MRI section lacked projections of need and standards for distribution for MRI services. *Id.* The applicable State Health Plan contained the following standards for MRI services:

> (1) Each hospital should have at least one MRI unit available for diagnosis of emergency patients, inpatients and outpatients.
>
> (2) In order to promote cost-effectiveness, the use of shared mobile MRI units should be considered.
>
> (3) The applicant agrees in writing to provide the Department utilization data on the operation of the MRI service.

Id. at 6–7, 664 S.E.2d at 474. The Supreme Court held that "[a]lthough the Plan does not give specific projections of need or standards of distribution in terms that track the exact statutory language, the Plan does not violate § 44-7-180." *Id.* at 7, 664 S.E.2d at 474. The Court found that the first standard, that each hospital should have at least one MRI unit available to it, satisfied the statutory requirement for projections of need. *Id.* The Court further found that the second standard, encouraging the consideration of shared mobile MRI units, satisfied the statutory requirement for standards for distribution of MRI services. *Id.*

The home health standards in the Current Plan are more detailed, specific, and objective than the MRI standards upheld by the Supreme Court in *MRI at Belair*. In particular, Standard 3 in the home health section provides:

> A new home health agency may be approved if an applicant can demonstrate it will serve 50 or more patients projected to be in need in non-rural counties, or 25 or more patients projected to be in need in rural counties, through evidence that may include, but would not be limited to, the following:
>
> a. Letters of support that identify need for additional home health services from physicians and other referral sources.
>
> b. Evidence of underutilization of home health services.
>
> c. Evidence of limited scope home health agency service including skilled nursing, physical therapy, occupational therapy, speech therapy, home health aides, and medical social workers.
>
> d. Evidence of the denial or delay in the provision of home health services, including but not limited to long waiting lists or delays which exceed industry standards.

August 13, 2015 South Carolina Health Plan, p. XII-7. (R. p. 320).

Amedisys argues the above standard is insufficient because it does not provide guidelines as to how the 50-patient or 25-patient need will be "calculated, demonstrated, or tested." (R. p. 25). However, there is no requirement in S.C. Code Ann. § 44-7-180 for the State Health Plan to include guidelines as to how need projections are to be "calculated, demonstrated, or tested."

The MRI services standards at issue in *MRI at Belfair* did not provide guidelines regarding how to demonstrate or determine whether a hospital has an MRI unit "available" to it, particularly in light of the standard encouraging shared use of MRI units. 379 S.C. at 6–8, 664 S.E.2d at 474–475. In the order on appeal in *MRI at Belfair*, the Administrative

Law Court ("ALC") concluded that for MRI services to be "sufficiently available" to the CON applicant, it "would need a fixed, in-house MRI unit that would be accessible twenty-four hours a day, seven days a week." *Id.* at 5, 664 S.E.2d at 473. Even though the State Health Plan standards did not articulate in a numeric or formulaic manner what it means to have "available" MRI services, the Supreme Court found the standards satisfied the statutory requirement for a projection of need for MRI services. *Id.* at 7, 664 S.E.2d at 474. The home health standards in the Current Plan provide more detailed standards addressing how an applicant may demonstrate need than the MRI standards at issue in *MRI at Belfair.*

Other services addressed in the Current Plan also set forth standards and projections of need that do not utilize a formula for projecting need. For instance, the standards for ambulatory surgical facilities ("ASF") in the Current Plan require an applicant to "document the need for the expansion of or the addition of an ASF, based on the most current utilization data available." *August 13, 2015 South Carolina Health Plan*, p. XI-2. (R. p. 316). The ASF standards do not project a minimum number of surgeries an applicant should perform or a minimum number of patients an applicant should serve in order to demonstrate need. *Id.* Additionally, the standards for inpatient hospice facilities in the Current Plan provide that the applicant "must document the need for the facility and justify the number of inpatient beds that are being requested." *Id.* at p. XII-6. (R. p. 319). The projection of need for home health is more specific than the projection of need for either ASFs or inpatient hospice facilities in that it provides a specific number of patients an applicant must project it will serve in order to demonstrate the need.

Given the Supreme Court's decision upholding the MRI standards in *MRI at Belfair,* and given that there is no statutory requirement for the use of a formula to project

need for services included in the State Health Plan, it is unlikely Amedisys will be successful in its underlying challenge to the sufficiency of the home health standards in the Current Plan. The Circuit Court therefore did not abuse its discretion in denying the motion for preliminary injunction.

B. Amedisys failed to establish the absence of an adequate remedy at law.

The Circuit Court found Amedisys has an adequate remedy at law because it can request a contested case hearing at the ALC challenging any decision granting a CON application for a home health agency in a county in which Amedisys is an affected person with standing. (R. pp. 12–13). The Circuit Court's finding is supported by the law.

The CON Act requires the Department to provide public notice when it accepts a CON application for filing and when it deems a CON application complete, which begins the staff review period. S.C. Code Ann. §§ 44-7-200(D), -210(A). The Act further provides that a person who has notified the Department in writing during the staff review that it is an affected person regarding a particular CON application and specifically states his objection to the application may submit a written request for final review of a staff decision approving the CON application. *Id.* § 44-7-210(C). A staff decision approving a CON application is not final until the completion of the final review process as provided for in Section 44-1-60. *Id.* § 44-7-210(D). Upon completion of the final review process, an affected person may file a request for a contested case hearing with the ALC. S.C. Code Ann. §§ 1-23-600(A), 44-1-60(G), 44-7-210(E). Judicial review of a final decision of the ALC in a CON case may be sought by filing a notice of appeal with the Court of Appeals. S.C. Code Ann. §§ 1-23-380, 1-23-610(A)(1), 44-7-220(A).

In the *MRI at Belfair* case discussed above, the issue of whether State Health Plan standards violated the CON Act came before the Supreme Court by way of an affected person's challenge to a Department decision approving a hospital's CON application for a new MRI. 379 S.C. at 4, 664 S.E.2d at 473. A contested case hearing was held at the ALC regarding the Department's decision on the CON application, at which the affected person argued the State Health Plan's MRI standards were legally insufficient. *Id.* The affected person then sought judicial review of the ALC's final order. Like the affected person in *MRI at Belfair*, Amedisys may raise its arguments regarding the statutory sufficiency of the Current Plan's standards as part of a contested case at the ALC challenging a Department decision on a CON application for which Amedisys is an affected person with standing. Amedisys therefore has an adequate remedy at law available to it.

Because Amedisys has an adequate remedy at law, the Circuit Court did not abuse its discretion in denying the motion for preliminary injunction.

C. <u>Amedisys failed to establish irreparable harm</u>.

The purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation. *Peak v. Spartanburg*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (2005). One may not generally enjoin a state agency from the performance of duties imposed by a valid state statute. *Frady v. Student Loan Servicing Ctr.*, 313 S.C. 561, 564, 443 S.E.2d 580, 582 (Ct. App.1994); *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 369, 709 S.E.2d 639, 643-44 (2011). An injunction seeking to enjoin a governmental agency from performing its statutory duties will only be granted upon a clear showing of injury. *See Tallevast v. Kaminski*, 146 S.C. 225, 225, 143 S.E. 796, 800 (1928).

The Circuit Court found Amedisys failed to demonstrate that it would be irreparably harmed in the absence of an injunction. (R. pp. 8–9). The Circuit Court found Amedisys' claim of irreparable harm was based on conclusory statements that lacked evidentiary support. (R. p. 8).

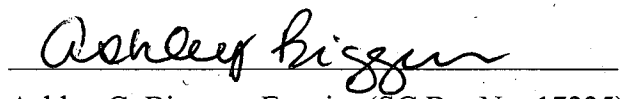
Amedisys submitted no affidavits or other evidence indicating how it would be harmed by the granting of CON applications to additional home health providers in counties in which Amedisys operates or seeks to operate. In the event a staff decision is made granting a CON application to another home health provider in a county in which Amedisys operates, or denying a CON application to Amedisys in a county in which it seeks to operate, Amedisys may seek final review before the Board pursuant to S.C. Code Ann. § 44-1-60 and, thereafter, a contested case hearing before the ALC pursuant to S.C. Code Ann. §§ 1-23-600(A), 44-1-60(G), and 44-7-210(D)–(E). The filing of a request for a contested case hearing triggers an automatic stay of the decision, preserving the status quo until resolution of the contested case. S.C. Code Ann. § 1-23-600(H)(2). Therefore Amedisys would suffer no irreparable harm prior to an opportunity for a full merits hearing on the CON application before the ALC.

The Circuit Court did not abuse its discretion in denying Amedisys' motion for preliminary injunction, since the record contains no evidence regarding irreparable harm and injunctive relief is not necessary to preserve the status quo.

CONCLUSION

For the foregoing reasons, the Department respectfully requests the Court of Appeals affirm the Circuit Court's Order denying Amedisys' motion for preliminary injunction.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Respondent South Carolina Department of Health and Environmental Control complies with Rule 211(b), SCACR, and the South Carolina Supreme Court Order of April 15, 2014.

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Of Whom South Carolina Department of Health and Environmental Control, National Healthcare Corporation, Pruitthealth Corporation, In-Care Home Health, Inc., Tri-County Home Health Care & Services, Inc., M&C Group, LLC d/b/a Home Helpers of Bluffton, Tidewater Home Health, PA, and Hedgemark Brentwood Medical Services Inc. d/b/a PHC Home Health are .....Respondents.

PROOF OF SERVICE

I, Jaimie Presley Jones, with the Office of General Counsel for the South Carolina Department of Health and Environmental Control, do hereby certify that I have on this **1st day of August, 2016**, served a copy of the following:

1. ***SCDHEC's Final Brief***
2. ***Certificate of Counsel***

upon all parties and counsel of record in the above-captioned case, via United States Mail, First Class, postage prepaid, addressed as follows:

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South Carolina Department of Health and Environmental Control

Jaimie Presley Jones

Date: August 1, 2016