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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Casey L. Manning, Circuit Court Judge

C.A. No.: 2016-CP-40-00818
Court of Appeals Docket No. 2016-000631

Amedisys SC, L.L.C ..... 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, Hedgemark Brentwood Medical Services Inc. d/b/a PHC Home Health are ..... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondents have filed three initial briefs. One was filed by respondent South Carolina Department of Health and Environmental Control ("**DHEC**"), referred to herein as the "**DHEC Brief**;" another was filed by a group of intervenor-respondents including National Healthcare Corporation ("**NHC Intervenors**"), referred to herein as the "**NHC Brief**;" and the third was filed by a group of intervenor-respondents including In-Care Home Health, Inc. ("**In-Care Intervenors**"), referred to herein as the "**In-Care Brief**." The DHEC Brief, the NHC Brief, and the In-Care Brief are referred to collectively herein as the "**Respondent Briefs**."

Appellant Amedisys SC, L.L.C. ("**Amedisys**") respectfully submits this single Reply Brief to the three Respondent Briefs. This Reply Brief addresses only certain aspects of the Respondent Briefs. As to all other issues, Amedisys relies upon its opening Brief.[1]

ARGUMENT IN REPLY

1. *The pure question of law that is the sole issue in this case is now properly before this Court, and this Court's determination of the likelihood of success will resolve the issue.*

It is first necessary to re-focus on the critical, singular question in this appeal. The Respondent Briefs address the four factors at issue for a preliminary injunction, as if this case would, following this appeal, go back for decision of an open, and as-yet undecided question on the merits. In an ordinary case involving questions of law, facts, and application of law to facts, that would be correct. *See Helsel v. City of N. Myrtle Beach,* 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992), stating that a preliminary injunction "is

[1] Capitalized terms used herein and not otherwise defined have the meaning given them in Amedisys's opening Brief.

made without prejudice to the rights of either party pending a hearing on the merits," and the merits "are determined without reference" to the preliminary injunction at trial. Applying *Helsel*, the South Carolina Supreme Court, in a typical case of appeal from a preliminary injunction, "decline[d] to reach Appellants' and [respondent]'s arguments regarding the merits of section 17-1-40(A)'s applicability." *Compton v. S. Carolina Dep't of Corr.*, 392 S.C. 361, 365 (fn. 3), 709 S.E.2d 639, 641 (2011).[2]

Here, however, the sole issue in the underlying declaratory judgment action is a legal question, that rare "pure question of law" – whether the Current Plan, as it relates to home health services, contains what is required by S.C. Code Ann. § 44-7-180(B) (Supp. 2015). The Supreme Court has previously held that that issue "is a legal conclusion based on statutory interpretation principles. Thus, no factual findings are necessary to determine compliance with § 44-7-180(B)." *MRI at Belfair, LLC v. S. Carolina Dep't of Health & Envtl. Control*, 379 S.C. 1, 7, 664 S.E.2d 471, 474 (2008) (emphasis added). Further, "'[t]he interpretation of a statute is a question of law.' . . . This Court may interpret statutes, and therefore resolve this case, 'without any deference to the court below.'" *Brock v. Town of Mt. Pleasant*, Op. No. 27621 (S.C.Sup.Ct. filed April 13, 2016) (Shearouse Adv. Sh. No. 16 at 21) (citations omitted; emphasis added).

The issue of an appeal of the grant or denial of a preliminary injunction involving a pure question of law in a declaratory judgment action has not (as far as Amedisys's research has uncovered) been presented to the South Carolina courts. Other courts,

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[2] The merits issue in *Compton* involved the purpose for which certain records were kept and whether they related to certain charges so that they would be subject to an allegedly applicable statute requiring their destruction. Here, however, there is no question that the State Health Plan must comply with the requirements of the CON Act, and whether it does is a pure question of law. *MRI at Belfair, LLC v. S. Carolina Dep't of Health & Envtl. Control*, 379 S.C. 1, 7, 664 S.E.2d 471, 474 (2008).

however, including the United States Supreme Court, have held that in such cases the appellate court's review of the "likelihood of success" question should be a full review and thence dispositive.

> [I]f a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction.[footnote omitted] The Court of Appeals in this case properly recognized and applied these principles when it observed:
>
> > Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a District Court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law.
>
> 737 F.2d, at 290 [*quoting from Am. Coll. of Obstetricians & Gynecologists v. Thornburgh,* 737 F.2d 283 (3d Cir.1984)]. That a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, not a limit on judicial power. With a full record before it on the issues now before us, and with the intervening decisions in *Akron, Ashcroft,* and *Simopoulos* at hand, the Court of Appeals was justified in proceeding to plenary review of those issues.

Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 757-58 (1986) *overruled on other grounds by Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

Thornburgh's teaching on appellate review of preliminary injunctions involving pure questions of law has been regularly followed.

> In light of *Thornburgh* and its progeny, we must determine whether the record in this appeal presents "a pure question of law" that is "intimately related to the merits of the grant [or denial] of preliminary injunctive relief," *United Parcel Serv.,* 615 F.2d at 107, or whether the Leagues' "probability of success on the merits depends on facts that are likely to emerge at trial," *Thornburgh,* 476 U.S. at 757 n. 8, 106 S.Ct. 2169. For the reasons that follow, we conclude that this case falls into the former category.

OFC Comm Baseball v. Markell, 579 F.3d 293, 298-300 (3d Cir. 2009).[3]

Moreover:

> It is well-settled that the law of the case doctrine applies when an appellate court issues a "fully considered appellate ruling on an issue of law made on a preliminary injunction appeal." Federal Practice and Procedure, § 4478.5 (April 2012); *American Civil Liberties Union v. Mukasey,* 534 F.3d 181 (3rd Cir.2008). Such a ruling, particularly where it does not depend on the factual record or where the facts are not disputed, "become[s] the law of the case for future proceedings in the trial court on remand and in any subsequent appeal." Federal Practice and Procedure, § 4478.5

Minard Run Oil Co. v. U.S. Forest Serv., 894 F. Supp. 2d 642, 651 (W.D. Pa. 2012), *aff'd*, 549 F. App'x 93 (3d Cir. 2013). Consequently, this Court in considering the likelihood-of-success prong has the power to decide, and in fact will decide, the pure question of law involved in this case.[4]

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[3] The *Thornburgh* progeny cited by the Third Circuit in *OFC Comm Baseball, supra* at 299-300, were: *Campaign for Family Farms v. Glickman,* 200 F.3d 1180, 1186-87 (8th Cir. 2000) (the court was "faced with a purely legal issue on a fixed ... record" and explained that "[t]he considerations that caution against a broad scope of review in the usual interlocutory appeal—that is, a tentative and provisional record with conflicting material facts—simply are not present here."); *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250, 1272, 1274 (11th Cir. 2005) (reviewing the district court's denial of a preliminary injunction and finding that the facts of the case were "simple and straightforward, and the record need[ed] no explanation," and explaining that "we do not think it necessary or prudent to confine our opinion to holding that [the plaintiff] has shown a *likelihood* of success on the merits, when it is altogether clear that [the plaintiff] *will* succeed on the merits of its First Amendment claims," (emphasis in original)); *Doe v. Sundquist,* 106 F.3d 702, 707 (6th Cir. 1997) (noting "[i]f an issue unaddressed by the district court [in consideration of a preliminary injunction] is presented with sufficient clarity and completeness and its resolution will materially advance the progress of the litigation," then "[t]he sort of judicial restraint that is normally warranted on interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy." (citation and internal quotation marks omitted)).

[4] The practicality of this rule becomes clear when one considers what would happen in the present case otherwise: the case would be remanded for disposition on the merits; the parties would make cross-motions for summary judgment on the question of law as to which, per *MRI at Belfair*, "no factual findings are necessary;" the motions would be granted and denied; and the case would be back before this Court for resolution of the same question presented now, with no additional factual record.

2. *Other Plan standards that the Respondent briefs describe as vague but acceptable are different in kind from the Current Plan's home health services "standards" and so provide no support.*

With regard to the merits of that pure question of law, the Respondent Briefs point to the *MRI at Belfair* case in which the Court acknowledged that whether a State Health Plan complies with the CON Act is a pure question of law and held that the requirements of the 2003 Plan concerning MRI equipment did so comply.[5] DHEC Brief at 8-10; NHC Brief at12-13; In-Care Brief at 19.[6] The DHEC Brief also contends that other portions of the Current Plan are acceptably vague. DHEC Brief at 10 (concerning ambulatory surgical facilities and inpatient hospice facilities).[7]

MRI at Belfair, supra, concerned a hospital's application for a CON for MRI equipment. The Court rejected the argument that the Plan standards violated the CON Act because they failed to adequately establish need for additional MRI equipment. However, those standards included an objective minimum number of MRIs necessary to meet public need, *i.e.*, at least one MRI available to every hospital. That constituted a clear, objective standard: was one available or was one not? It was a simple matter of ordinary judicial construction of a text and statutory interpretation to determine what was meant by that provision of the Plan. By contrast, the Current Plan provides no objective quantification (or methodology for reaching an objective quantification) of what

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5 The In-Care Brief appears to cite *MRI at Belfair* primarily to assert that deference is owed to the enforcing agency. Amedisys has dealt with that argument in its opening Brief at 17-18, and does not re-address it here.

6 Page references to Respondent Briefs are to the initial briefs. It is possible that pagination of the final Respondent Briefs may vary slightly.

7 Those other allegedly "vague-but-acceptable" standards are not at issue in this case. As to whether they really are legally adequate under the CON Act, that is merely a conclusion of the Respondents. It is not a proposition that has been decided by any court.

additional home health services are needed where and what applicants must show to meet that need.

Moreover, the MRI equipment and other standards cited by DHEC with allegedly "vague-but-acceptable" standards all govern physical facilities, which have inherent limitations of time and space. One can fit only so many patients into a hospital bed, or a surgery room, or an MRI machine within a set period of time. Home health services, on the other hand, are inherently scalable. Once licensed in a county, one can serve as many patients there as request service, subject only to the availability of employees (who can be drawn from anywhere). Amedisys made this point to the lower court during the hearing on its preliminary injunction motion. (Tr. at 48:12-49:8. R. 240-241.)

3. *DHEC Regulations outside of the Plan provide no objective criteria for determining need beyond the Plan itself.*

The NHC Brief opens another front in an attempt to defend the adequacy of the Current Plan for home health services, arguing that DHEC regulations (3 S.C. Code Ann Regs. 61-15 § 802 (Supp. 2015)) provide sufficient objectivity for determination of need. The NHC Intervenors argue that "[t]hese criteria are extensive and include: need, acceptability, distribution, medically underserved groups, record of the applicant, and financial feasibility." NHC Brief at 11.

The present case relates to need, so it is instructive to see what the cited regulations say with respect to need. 3 S.C. Code Ann Regs. 61-15 § 802(1) (Supp. 2015) reads in full as follows:

> 1. Need:
>
> The proposal shall not be approved unless it is in compliance with the South Carolina Health Plan.

Obviously, there are no additional objective criteria provided there.

The next sub-section, 3 S.C. Code Ann Regs. 61-15 § 802(2) (Supp. 2015), does outline some of what CON application documentation should accomplish; but again there is no buttressing for the NHC Intervenors' position. Indeed, § 802(2)(c) directly undercuts the NHC Brief's argument. That clause requires that "[a]ny deviation from the population projection used in the South Carolina Health Plan should be explained." The problem for the NHC Brief's argument is that the population projections for "Home Health Methodology" that had appeared in the Prior (2013) Plan (p. XII-13) and earlier plans were deleted from the Current Plan. The home health services sections of the Current Plan contain no relevant population projections, so it is impossible to comply with that requirement of § 802(2)(c).

Finally, the regulations cited by the NHC Brief are precatory only – suggestions, rather than requirements.

> A project does not have to satisfy every criterion in order to be approved, but no project may be approved unless it is consistent with the South Carolina Health Plan. A project may be denied if the Department determines that the project does not sufficiently meet one or more of the criteria.

3 S.C. Code Ann Regs. 61-15 § 801(3) (Supp. 2015).

Thus, the only real requirement is that a CON application must meet the Plan requirements; so that the question of the objectivity and validity of those Plan requirements remains the key and open question at the heart of this case. Everything other than the Plan requirements is in DHEC's discretion: whether any or all "criteria" have to be met, and if so to what level of "sufficiency." Under this regulation, one project could be rejected because it barely missed one criterion, while another could be approved even though it failed to meet any criteria other than what the Plan expressly contained. As Amedisys noted in its opening Brief, "within the context of home health CONs, this case

presents the question of whether there will be a promulgated, standards-based rule of law, or an *ex post facto* and arbitrary rule of agency staff;" and "[r]equiring a party to guess as to the relevance of potential evidence and its weight, and after the process, to guess as to whether the same standards have been applied uniformly to all applicants, rips at the fabric of the rule of law."

4. *The ability to challenge a grant or denial of a CON on a case-by-case basis does not remove Amedisys's right to seek a legal determination under the Uniform Declaratory Judgment Act.*

With regard to the existence of an adequate remedy at law, the Respondent Briefs point to an interested party's ability to challenge CON grants or denials before DHEC and on through the administrative law court. That, in itself, however, is not a remedy at law, as neither DHEC nor the administrative law courts are judicial branch entities. That remedy becomes a remedy at law only because S.C. Code Ann. § 44-7-220(A) allows for an appeal to a judicial branch court (this Court of Appeals) under S.C. Code Ann. § 1-23-380 (Supp. 2015) of the Administrative Procedures Act. However, § 1-23-380 expressly provides:

> This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law.

It is clear that Amedisys has a right to seek relief from an invalid Plan under the Uniform Declaratory Judgment Act. That is what it has done here. The right to seek preliminary injunctive relief under Rule 65, SCRCP, is an integral part of the scope of judicial review and the redress available thereby. Section 1-23-380 expressly disavows any impact on that relief.

Moreover, if Respondents' contention is that a party can seek declaratory relief but cannot seek preliminary injunctive relief within a declaratory judgment action, then in

the case of a pure question of law (where a motion for preliminary injunction is functionally equivalent to a motion for summary judgment as discussed above), form would be elevated over substance since one motion could be granted but a functionally equivalent motion would be denied.

CORRECTIONS OF MIS-STATEMENTS IN RESPONDENT BRIEFS

Two statements of background and procedural status from the Respondent Briefs bear correcting.

First, the NHC Intervenors stated (NHC Brief at 11):

> Despite the prolonged and detailed review process which culminated in issuance of the current Plan in August of 2015, Amedisys waited until February of 2016 to raise its complaints.

This is similar to a statement made by counsel for the In-Care Intervenors at the hearing on the motion. (Tr. 34: 7-13. R. 226.) Amedisys corrected that on the record of the hearing, stating, "Amedisys did, in fact, participate in the process. Amedisys, in fact, made a proposal that DHEC staff agreed to. This was not a proposal that worked its way through with DHEC going up to the state planning committee and saying that makes sense." (Tr. 43: 9-14. R. 235.)[8]

Second, the Respondent Briefs refer to Amedisys's requested preliminary relief by reference to Amedisys's original motion, asking for an injunction against "accepting, reviewing, and issuing staff decisions on CON applications for new home health services." DHEC Brief at 2; see also NHC Brief at 1 and 3. See also Motion at 1 and 20 (R. 85, 104). At the hearing (Tr. 24: 7-10. R. 216), Amedisys restricted the scope of the

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[8] The word "This" beginning the last quoted sentence refers to the adopted version of the Current Plan, which was modified by the State Health Planning Committee in the final stage by removing the home health standards from the proposal that DHEC staff had put forward.

requested injunction to "acting to grant" CONs. See also Amedisys's Proposed Order at 23, R. 333. Amedisys's Proposed Order also requested that the court direct expedited filing of summary judgment motions. *Id.*

CONCLUSION

For the foregoing reasons and those stated in Amedisys's opening Brief, Amedisys respectfully asks that this Court issue the order requested in its opening Brief.

July 12, 2016

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

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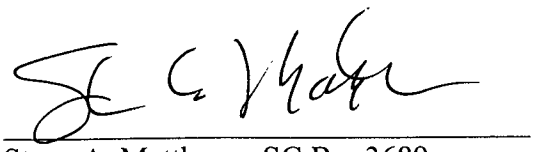
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b).



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PROOF OF SERVICE

Pursuant to Rule 211(a), SCACR, I hereby certify that one copy of the printed and bound Final Brief of Appellant in the above-referenced matter was served on each of the Respondents by hand-delivery to their attorneys at the following address:

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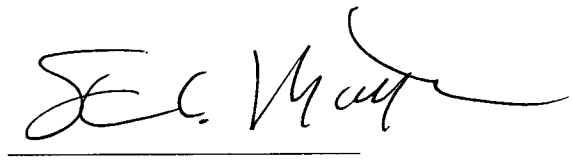
By: 

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