

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

SC Court of Appeals

Appellate Case No. 2015-000056

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

v.

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

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

**RESPONDENT AMISUB OF SOUTH CAROLINA, INC.’S RETURN TO
APPELLANT’S PETITION FOR REHEARING AND MOTION TO SUPPLEMENT
THE RECORD ON APPEAL**

I. INTRODUCTION

This appeal from the South Carolina Administrative Law Court (“ALC”) arises from competing applications for a Certificate of Need (“CON”) submitted to the South Carolina Department of Health and Environmental Control (“DHEC”) by Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center (“Piedmont”) and the Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill (“CHS”).

Piedmont and CHS submitted their competing applications to build a hospital in Fort Mill in 2005. In the ensuing twelve years this case has undergone a DHEC administrative

review, been tried before the ALC, remanded for a second administrative review, and tried a second time in the ALC. The second trial, held April 8 – May 7, 2013, resulted in the issuance of a 2014 Amended Final Order awarding the CON to Piedmont. See Piedmont’s Final Brief at 1-3. On January 11, 2017 the Court of Appeals affirmed.

CHS’s Petition for Rehearing argues that the Court of Appeals overlooked or misapprehended that CHS preserved its dormant Commerce Clause argument, misapprehended or failed to apply the proper standard of review; and overlooked or misapprehended CHS’s argument that the bond requirement of S.C. Code Ann §44-7-220(B) violates the United States and South Carolina Constitutions. For the reasons set forth below, CHS’s Petition and Motion to Supplement the Record on Appeal should be denied.

II. ARGUMENT

A. Dormant Commerce Clause

On December 9, 2009, after two weeks of trial, the ALC granted summary judgment to Petitioners CHS and Presbyterian Healthcare System.¹ Grounds for the order were that DHEC had erroneously interpreted the State Health Plan to allow only existing providers in a service area to obtain a CON (the “State Health Plan Issue”). (R. pp. 26-27). The State Health Plan Issue was not a basis for the 2014 ALC decision.

In its 2014 decision, the ALC adopted Piedmont’s position that its application satisfied applicable CON standards and criteria better than CHS’s application, particularly the criteria related to adverse impact and outmigration. At no point during the litigation did CHS present evidence or argue that a decision in favor of Piedmont based on adverse impact or

¹ Presbyterian Healthcare System later withdrew as a party to this action.

outmigration could violate the dormant Commerce Clause. As noted by the Court of Appeals, CHS did not raise that issue until the Rule 59(e) motion.

In its Petition for Rehearing, CHS argues that it failed to include evidence of a dormant Commerce Clause violation in the record on appeal because neither Respondent argued in their appellate briefs that CHS had failed to preserve the issue. That, of course, does not bar this Court from finding the issue unpreserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring).

CHS moves to supplement the record on appeal with evidence and argument that it contends will demonstrate it did raise the dormant Commerce Clause issue below. But the material CHS wishes to add to the record only confirms the Court of Appeals' finding that the only dormant Commerce Clause issue raised prior to CHS's Rule 59(e) motion related to the State Health Plan Issue. For example, the argument between counsel that interrupted CHS counsel's opening statement in the 2013 trial specifically relates to the State Health Plan Issue (and does not reference the dormant Commerce Clause). CHS Motion to Supp. Record on Appeal, Att. A, pp. 99-102. Similarly, the 2007-2009 motions, briefs, and testimony CHS wishes to add to the record on appeal all relate specifically to the State Health Plan Issue. *See id.*, Att. B. None raise an issue or support an argument that a decision that Piedmont's application satisfied applicable CON standards and criteria better than CHS's application, particularly criteria related to adverse impact and outmigration, would violate the dormant Commerce Clause.

B. Standard of Review

The Court of Appeals correctly apprehended and properly applied the standard of review set forth in S. C. Code Ann. § 1-23-380(5) (Supp. 2016).

C. Bond Requirement

The bond requirement of S.C. Code Ann. § 44-7-220(B) serves to deter appeals raised primarily for the purpose of delay and is not unconstitutional.

III. CONCLUSION

For the reasons set forth above, Appellant's Petition for Rehearing and Motion to Supplement the Record on Appeal should be denied.

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Columbia, South Carolina

February 13, 2017

CERTIFICATE OF SERVICE

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by delivering to the following address(es):

Pleadings: *Respondent Amisub of South Carolina, Inc.'s Response to Appellant's Petition for Rehearing and Motion to Supplement the Record on Appeal*

Counsel Served:

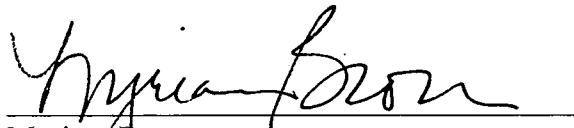
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February 13, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

RE: Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center, Petitioners v. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill, Respondents
Appellate Case No. 2015-000056
Our File No. 05946/01509

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and 6 copies of Respondent Amisub of South Carolina, Inc.'s Return to Appellant's Petition for Rehearing and Motion to Supplement the Record on Appeal and Certificate of Service. Please return a clocked-in copy of same via our courier. By copy of this letter to counsel of record, we are hereby serving them with a copy of the same.

Very truly yours,



Daniel J. Westbrook

DJW/mb

Enclosures

cc: Douglas M. Muller, Esq.
Trudy H. Robertson, Esq.
E. Brandon Gaskins, Esq.
Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.
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