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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Phillip S. Lenski, Administrative Law Judge

Opinion No. 2017-UP-013 (S.C. Ct. App. filed Jan. 11, 2017)

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

Respondent,

vs.

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 the Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the petition for a writ of certiorari fail to present novel questions of law regarding the well-settled rules of issue preservation for appeals?

Did the Court of Appeals properly find that Carolinas failed to preserve its dormant commerce clause argument for appellate review?

Did the Court of Appeals properly find the requirement for Carolinas to post an appeal bond to challenge the grant of Piedmont's Certificate of Need, as required by S.C. Code Ann. § 44-7-220(B), to be constitutional?

INTRODUCTION

Respondent South Carolina Department of Health and Environmental Control ("Department") submits this return to the petition for a writ of certiorari filed by Petitioner The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas"). Carolinas seeks review of the Court of Appeals' unpublished opinion, filed January 11, 2017, on its appeal of a final order and decision from the Administrative Law Court ("ALC"). The ALC final order and decision, issued following a contested case hearing, concluded that the Certificate of Need ("CON") application of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont") more fully complied with applicable laws than Carolinas' competing CON application for the establishment of a new hospital in York County. The ALC therefore reversed the Department's decision to award the CON to Carolinas and ordered the Department to instead award the CON to Piedmont.

In its appeal, Carolinas argued the ALC applied the CON laws in a manner that violated the dormant commerce clause. The Court of Appeals found this argument unpreserved for appellate review, on the basis that Carolinas raised it for the first time in a motion filed pursuant to Rule 59(e), SCRCF. Carolinas filed a petition for rehearing

and a motion to supplement the record on appeal, both of which were denied by order of the Court of Appeals filed March 23, 2017. Carolinas seeks certiorari to review the Court of Appeals' decision related to the dormant commerce clause issue, and to review the Court of Appeals' denial of Carolinas earlier motion for relief from the provisions of the appeal bond requirement set forth in S.C. Code Ann. § 44-7-220(b). For the following reasons, Carolinas' petition should be denied, allowing this case, which began more than twelve years ago, to finally come to an end.

ARGUMENTS

“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), SCACR. While not an exhaustive list, Rule 242 sets forth criteria relevant to the Court's exercise of its discretion to grant certiorari to review a decision of the Court of Appeals. This appeal does not involve a novel question of law, a conflict with a prior decision of this Court, a substantial constitutional issue, or other grounds warranting review by the Court.

1. THE PETITION FOR A WRIT OF CERTIORARI FAILS TO PRESENT NOVEL QUESTIONS OF LAW REGARDING THE WELL-SETTLED RULES OF ISSUE PRESERVATION FOR APPEALS.

It is well settled in South Carolina jurisprudence that an issue must be raised to and ruled upon by the trial court in order to preserve the issue for appellate review. S.C. Dep't of Transp. V. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 658, 667 S.E.2d 7, 14 (2008); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Moreover, an issue raised for the first time in a motion filed pursuant to Rule 59, SCRCR, is not preserved for appellate review. Dixon v. Dixon, 362 S.C. 388,

399, 608 S.E.2d 849, 854 (2005); see also Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481 (Ct. App. 1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”).

Carolinas contends its dormant commerce clause argument, which challenges the constitutionality of the CON law as applied by the ALC, was not ripe until the ALC issued its order. Carolinas argues it could not have raised its as-applied constitutional challenge until it received the ALC’s decision and read the ALC’s findings and conclusions. The record does not support Carolinas’ position.

Although Carolinas did not take issue below with the Department’s application of the CON laws, Piedmont presented arguments before the ALC requesting a different application of the CON laws and reversal of staff’s decision, in particular as to adverse impact and outmigration. The ALC’s findings and conclusions regarding adverse impact and outmigration served as a primary basis for Carolinas’ dormant commerce clause argument. Carolinas could have raised its as-applied dormant commerce clause argument during the hearing in response to Piedmont’s case. See Travelscape, LLC v. S.C. Dep’t of Revenue, 391 S.C. 89, 108-09, 705 S.E.2d 28, 38-39 (2011) (confirming the ALC has jurisdiction to determine as-applied constitutional challenges, and finding an as-applied constitutional challenge based on the dormant commerce clause not preserved for judicial review where the ALC did not rule on arguments regarding two elements and no Rule 59(e) motion was filed). Instead, Carolinas raised the issue for the first time in its Rule 59(e) motion. The Rule 59(e) motion was insufficient to preserve the issue for appellate review.

Carolinas also claims the Court of Appeals should have resolved any doubt as to whether its dormant commerce clause argument was preserved for appeal in favor of preservation, citing Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004). Carolinas argues that because it raised the dormant commerce clause issue in its Rule 59(e) motion and obtained a ruling on it when the ALC issued its second final order and decision, it satisfied the requirements for issue preservation. It further contends the “liberal application of issue preservation rules” found in Elam and in In re Estate of Timmerman, 331 S.C. 445, 502 S.E.2d 920 (Ct. App. 1998) should apply to the instant appeal. However, Elam was focused on whether a Rule 59(e) motion, which tolls the time for the filing of a notice of appeal pursuant to circuit court rules, could be found to be unnecessary, potentially resulting in an untimely appeal. The Court in Elam acknowledged that a party questioning whether the trial court ruled on or considered the arguments raised to it during trial may wish to file a Rule 59(e) motion in lest an appellate court find an issue unpreserved. In this case, however, Carolinas failed to raise the dormant commerce clause argument during the contested case hearing. There is no inconsistency between the Court of Appeals’ ruling on issue preservation in this case and the Court’s ruling on issue preservation issues in Elam.

The instant appeal also differs from circumstances in Timmerman. In Timmerman, the lower tribunal issued an order without hearing any arguments, granting relief not previously contemplated or presented to the court. Id. at 460, 502 S.E.2d 922. In such circumstances, a Rule 59(e) motion would have been an appropriate mechanism to preserve the issue of whether the relief granted by the lower court exceeded that allowed by statute for appeal, had such a motion been filed. Id. Unlike the appellant in

Timmerman, however, Carolinas was on notice of the potential for the ALC to apply the CON laws in the manner it did in its final order prior to the issuance of the order. The ALC found in favor of Piedmont and, persuaded by the evidence and arguments presented by Piedmont, adopted many of the findings and conclusions presented throughout the contested case hearing. Carolinas could have raised an argument during the contested case hearing that Piedmont's proposed application of the law would result in a potential violation of the dormant commerce clause, but it did not.

Carolinas next argues that the Court of Appeals unfairly denied its motion to supplement the record on appeal, thus depriving it of an opportunity to establish that it properly preserved its dormant commerce clause argument for appeal. Carolinas notes that it did not anticipate issue preservation to be raised by the Court of Appeals, since it was not raised by the other parties in their initial briefs, and therefore did not include all documents relevant to issue preservation in its designation of matter. An appellant must show to the reviewing court in the record on appeal that the issues on appeal were properly raised to and ruled on by the lower tribunal, however. Zaman v. S.C. Bd. of Med. Examiners, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) (declining to address an issue on appeal where the record provides no basis for finding that it was preserved for appeal). Further, this Court has stated:

[W]e are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us. In fact, a rule which would permit such an "appeal by consent" is contrary to the very core of our preservation requirement: "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review."

Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012), quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C.

342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Thus Carolinas should have known to include all portions of the record from the contested case hearing in the record on appeal that would show it raised the issue to the ALC.

Even if the Court of Appeals had granted Carolinas' motion to supplement the record on appeal, it would not change the outcome of the ruling on issue preservation. The documents attached as exhibits to Carolinas' motion provided no additional evidence that Carolinas raised a dormant commerce clause argument based on Piedmont's proposed application of adverse impact and outmigration factors prior to the filing of its Rule 59(e) motion.

The Court of Appeals' finding that Carolinas failed to preserve the issue for appeal is consistent with this Court's earlier decisions, and presents no novel issues of law. The petition for writ of certiorari should therefore be denied.

2. THE DORMANT COMMERCE CLAUSE ARGUMENT IS UNPRESERVED FOR APPEAL AND DOES NOT PRESENT A BASIS FOR GRANTING A WRIT OF CERTIORARI.

For the reasons stated in response to the first argument, the Court of Appeals properly found that that Carolinas' dormant commerce clause argument is not preserved for appeal. Therefore the dormant commerce clause argument does not constitute a basis for granting a writ of certiorari.

3. THE COURT OF APPEALS PROPERLY REJECTED CAROLINAS' CONSTITUTIONAL CHALLENGE TO THE BOND REQUIREMENT.

Carolinas contends the Court should grant a writ of certiorari to resolve the question of whether the requirement for posting a bond upon the filing of an appeal challenging a party's grant of a CON application set forth in S.C. Code Ann. § 44-7-220(B) is unconstitutional. Courts are reluctant to find a statute unconstitutional and will

make every presumption in favor of a statute's constitutionality. Knotts v. S.C. Dep't of Natural Resources, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002). Gold v. South Carolina Bd. of Chiropractic Exam'rs, 271 S.C. 74, 245 S.E.2d 117 (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., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999), cert. denied 529 U.S. 1087 (2000). Carolinas fails to present sufficient grounds for the Court to review the Court of Appeals' decision rejecting Carolinas' constitutional arguments regarding the bond requirement.

A. The bond requirement does not violate the Equal Protection Clause.

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.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 480-81, 636 S.E.2d 598, 613 (2006). "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." Id. 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.”). There is a rational basis underlying a legitimate governmental purpose. The Court of Appeals properly rejected Carolinas’ equal protection argument.

B. The bond requirement does not violate the Separation of Powers Doctrine.

The separation of powers doctrine, derived in constitutional law, provides that each of the three branches of government, the legislative, executive, and judicial, is separate from the others, and that none of the three branches shall exercise powers exclusively delegated to the other. S.C. Const. art. I, § 8; see also State ex rel. McLeod v. Yonce, 274 S.C. 81, 86, 261 S.E.2d 303, 306 (1979). “At its simplest, the constitutional division of powers can be described as ‘[t]he legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws.’” Hampton v. Haley, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013), quoting Yonce at 84, 261 S.E.2d at 305. While “courts have striven to uphold the separation of powers provision[,] ... we recognize that some overlapping authority has been tolerated by reason of the minimal degree of involvement. Yonce at 88, 261 S.E.2d at 306.

Statutes, enacted by the legislature, govern appellate jurisdiction. See Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 668 S.E.2d 795 (2008) (statute, not the rules of civil procedure, governs jurisdictional appealability issues); N.C. Fed. Sav. & Loan Ass’n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986) (“The right of appeal arises from and is controlled by statutory law.”); see also S.C. Code Ann. § 14-3-330 (establishing appellate jurisdiction in law cases); S.C. Code Ann. § 44-8-200(a) (setting forth the appellate jurisdiction of the Court of Appeals); S.C. Code Ann. § 1-23-

610 (governing judicial review of final decisions of the ALC); S.C. Code Ann. § 44-1-60 (establishing procedures for seeking judicial review of staff decisions of the Department). Failure to comply with procedural requirements for perfecting an appeal, whether contained in rules, regulations, or statute, deprives a court of appellate jurisdiction. State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2002); Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 82 n.5, 529 S.E.2d 6, 7 n.5 (2000); Allison v. WL Gore and Assocs., 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (“the question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction.”).

Section 44-7-220 sets forth particular provisions, including the bond requirement, applicable to parties seeking judicial review of final decisions of the Administrative Law Court in Certificate of Need cases. Failure to deposit the required bond with the Court of Appeals within in the time frame set forth in Section 44-7-220 (five calendar days after filing the petition to appeal) would constitute failure to perfect the appeal, thereby depriving the Court of Appeals of appellate jurisdiction. Since appellate jurisdiction is governed by statute, the bond requirement set forth in Section 44-7-220 does not violate the Separation of Powers Doctrine.

C. The bond requirement did not unconstitutionally burden Carolinas' right to judicial review.

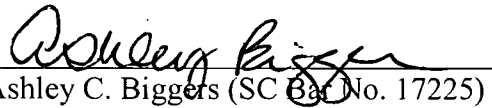
The fundamental requirements of due process include adequate notice, the opportunity for a hearing, and the right to judicial review. Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008); see also S.C. Const. art. I, § 22. Carolinas presented evidence, including witness testimony and exhibits, as well as argument at the contested case hearing before the ALC, following adequate notice. 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). Carolinas has offered no evidence to support a finding that the bond requirement prevented it from receiving judicial review in this matter or unconstitutionally infringed upon its right to judicial review. The Court of Appeals properly found no due process violation.

CONCLUSION

For the foregoing reasons, Respondent asks the Court to deny the petition for a writ of certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, Legal Assistant with the S.C. Department of Health and Environmental Control, hereby certify that I have this **22nd day of May 2017**, served the foregoing ***Respondent South Carolina Department of Health and Environmental Control's Return to Petition for Writ of Certiorari*** upon counsel of record by placing a copy of same in an envelope and depositing it for delivery in the United States Mail with sufficient postage prepaid, at the address indicated below:

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