

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

JUN 01 2017
S.C. SUPREME COURT

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

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 Petitioner.

REPLY

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ARGUMENTS

I. The novel issue of law is whether Carolinas was required to lodge an anticipatory challenge to the ALC's unconstitutional reversal of DHEC's decision.

In their Returns, Respondents Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Piedmont") and the South Carolina Department of Health and Environmental Control ("DHEC") both argue without any supporting judicial precedent that it was incumbent upon Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") to argue to the Administrative Law Court ("ALC") during the contested case hearing that the ALC's adoption of Piedmont's position would violate the dormant Commerce Clause, even though DHEC issued the Certificate of Need in question to Carolinas, and Carolinas was defending the constitutional and legally correct decision of DHEC. (Piedmont's Return, pp. 6-7); (DHEC's Return, p. 3). Piedmont's and DHEC's failure to rely on any authority to support this argument underscores the point that Carolinas' Petition for Writ of Certiorari presents a novel issue of law as to whether a prevailing party at the agency level must anticipate during a contested case the unconstitutional reversal of the agency decision by the ALC prior to the ALC's decision in order to preserve that party's ability to challenge such reversal on appeal.

Piedmont's and DHEC's argument ignores the procedural difficulties of lodging during the course of a contested case a constitutional challenge to a decision that has not been made. South Carolina courts have not previously addressed the issue of whether a prevailing party must anticipate an ALC decision during a contested case to preserve a potential ground for a future appellate challenge. Given the lack of guidance on the proper procedural mechanism for preserving a constitutional challenge in this procedural posture, Carolinas should receive the benefit of the doubt as to whether it properly preserved its Dormant Commerce Clause challenge on appeal. Alternatively, the Supreme Court should address the novelty of this issue and fill the

void of procedural clarity for the benefit of future parties in contested cases before the ALC. As eloquently stated by former Chief Justice Toal in her dissent in *Atlantic Coast Builders v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012):

In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice.... I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a “gotcha” game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests. In light of my view, I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.

Id. at 332-33, 730 S.E.2d at 287 (Toal, C.J., Dissenting).

II. The Court of Appeals should have permitted Carolinas to supplement the Record on Appeal and allowed Carolinas to demonstrate that its Dormant Commerce Clause argument was preserved for appellate review.

Piedmont and DHEC also assert in their Returns that Carolinas raised its Dormant Commerce Clause argument to the ALC for the first time in its Rule 59(e) motion, and thus, the legal issue is not preserved for appellate review. (Piedmont’s Return, pp. 5-7); (DHEC’s Return, pp. 2-4). Significantly, neither Piedmont nor DHEC argued in their briefs to the Court of Appeals that Carolinas failed to preserve its Dormant Commerce Clause argument. As such, Carolinas did not include information related to issue preservation in the Record on Appeal because it was not relevant to the Dormant Commerce Clause issue on appeal.¹ Instead, during oral argument, the Court of Appeals raised *sua sponte* whether Carolinas had properly preserved its Dormant Commerce Clause argument for appellate review. In its subsequent written opinion, the Court of

¹ It is significant that the Record on Appeal is 7,861 pages long, the bulk of which consisted of documents sought to be added to the Record by Respondent Piedmont.

Appeals determined that the Record on Appeal was devoid of any evidence that the Dormant Commerce Clause issue had been raised during the contested case hearing prior to Carolinas filing a Rule 59(e) motion. The Court specifically stated: “the record does not show Carolinas presented to the ALC any argument that Piedmont’s positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause. Carolinas waited until filing its Rule 59(e) motion to present this argument, which is too late” (App. p. 366). The Court of Appeal’s reference was to the initial Record on Appeal without Carolinas’ proffered supplemental record, which the Court of Appeals declined to accept.

The proffered supplemental record on appeal contained a portion of Carolinas’ opening statement from the ALC hearing transcript. During his opening statement, Carolinas’ counsel previewed evidence relating to DHEC’s prior application of the certificate of need (“CON”) laws to prevent an out-of-state provider, such as Carolinas, from entering the local hospital market and thereby preventing competition. (App. pp. 395-98). The point of Carolinas’ opening statement was that Piedmont was presenting a variation of its State Health Plan argument that it had presented in the prior contested case – to convince the ALC (as it had done in the previous, erroneous review by DHEC) to exclude Carolinas because it was a North Carolina provider that did not have a hospital in York County and therefore its services to York County citizens constituted “out-migration.” Carolinas did not have the opportunity to fully develop its Dormant Commerce Clause argument during its opening statement because Piedmont objected to such argument, and the ALC sustained that objection.

Specifically, Piedmont interrupted Carolinas’ Dormant Commerce Clause argument and objected to Carolinas raising any arguments to the ALC relating to anticompetitive practices and the exclusion of a North Carolina provider. (App. pp. 396-97). Piedmont insisted these arguments

were to be presented to the ALC only through a proffer at the end of the hearing. The ALC agreed with Piedmont and ruled that this legal argument could only be presented by proffer. (App. p. 398). Piedmont's objection and the ALC's following ruling did not permit Carolinas to fully develop its Dormant Commerce Clause argument during its opening statement and effectively forced Carolinas to rely upon the proffer at the end of the hearing to present this argument to the ALC.

With respect to the evidence presented during the contested case hearing, the parties each presented and cross-examined witnesses and presented evidence relating to the application of the CON Act and regulatory criteria and the competitive effects of their application, including the effects on interstate commerce. The central issue in dispute throughout the contested case hearing was whether and to what extent the establishment of Carolinas' proposed hospital would impact the outmigration of South Carolina residents to hospitals in North Carolina. Contrary to Respondents' assertion, Carolinas did not have an adequate opportunity to raise its Dormant Commerce Clause argument to the ALC during the contested case hearing. Evidence and testimony on this issue was not expressly presented in relation to the Dormant Commerce Clause because it would have been improper for fact and expert witnesses to provide legal opinions regarding the constitutionality of such application.

Following the conclusion of the parties' respective cases, the ALC discouraged the parties from providing closing arguments, which would have been the most appropriate time for Carolinas to renew its argument regarding the Dormant Commerce Clause. (App. pp. 399-401, 407). Rather, the ALC directed the parties to proffer their respective positions regarding the outstanding legal issues to the ALC via written submissions. (App. pp. 400-406). Consistent with the ALC's

direction, Carolinas presented its Dormant Commerce Clause argument by proffer. (App. pp. 410-01478).

Respondents contend that Carolinas' Dormant Commerce Clause claim asserted in the proffer is different than the Dormant Commerce Clause claim that Carolinas asserts on appeal and thus is not preserved. (Piedmont's Return, pp. 7-8); (DHEC's Return, pp. 2-6). To the contrary, through this proffer, Carolinas argued, as it did on appeal, against an application of the CON Act and State Health Plan that "places a barrier on any new entry in the South Carolina hospital market" and that "favor[s] in-state interest and actually closes the hospital market to out of state interest in favor of existing providers that cannot be justified and serves no use other than economic protectionism for the existing South Carolina hospitals." (App. pp. 00809-00812). This proffer, which Carolinas did not include in the Record on Appeal due to its relevancy, demonstrates that Carolinas has been consistent in arguing that an interpretation, whether by DHEC or by the ALC, of the State Health Plan, CON Act, S.C. Regs. 61-15, and the Project Review Criteria that prevents a North Carolina health care provider from operating a hospital in York County and which favors a South Carolina provider is a violation of the Dormant Commerce Clause.

Further, the first contested case and the second contested case were in different postures. It would have been difficult to frame the legal arguments identically, but Carolinas has been consistent in arguing that any interpretation of the State Health Plan, the CON Act, S.C. Regs. 61-15, and the Project Review Criteria that prevents a North Carolina health care provider from operating a hospital in York County and which favors the incumbent South Carolina provider is a violation of the Dormant Commerce Clause. This Court's holding in *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004), does not limit the issues that can be raised in a motion for reconsideration, and it is consistent with federal law on the subject. *See Yee v. City of Escondido*,

503 U.S. 519, 534-35 (1992) (providing once a constitutional claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below). Moreover, even if the Court determines that the proffer was incomplete, it was more than sufficient to show that Carolinas had argued and was arguing that any interpretation made in the CON process that results in prohibiting out-of-state competition violates the Dormant Commerce Clause. *See State v. Myer*, 301 S.C. 251, 391 S.E.2d 551 (1990) (providing that while the proffer was not complete, it was sufficient to preserve the issue for appellate review).

Additionally, because Carolinas has argued that it is the ALC's interpretation "as applied" that is unconstitutional, it would have been unlikely that Carolinas would have advanced that argument in detail until the ALC issued the Final Order, as Carolinas was defending DHEC's agency decision, which found in favor of Carolinas, and Carolinas' position was such that it was not arguing that DHEC's underlying agency decision was unconstitutional. *See In re Estate Timmerman*, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998) (providing when a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCF, to alter or amend the judgment in order to preserve the issues for appeal); *Godfrey v. Heller*, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993) (providing where the theory of unjust enrichment was first raised in the trial court's order, appellant should have challenged this basis for recovery by a Rule 59(e) motion to preserve the issue for appeal).

The Court of Appeals' decision to raise error preservation *sua sponte*, to decline Carolinas' request to supplement the Record on Appeal, and to declare the record insufficient to demonstrate the Dormant Commerce Clause issue was raised or ruled upon is fundamentally unfair and fails to serve the policy of deciding matters on the merits. This issue was raised to the ALC prior to

Carolinas' Rule 59(e) motion, and Piedmont and DHEC acknowledged that it was so raised when it did not oppose Carolinas' Dormant Commerce Clause argument on preservation grounds on appeal. The Court should grant the Petition in this matter, permit briefing and argument, and reverse the Court of Appeals' opinion disposing of this issue on error preservation grounds.

III. The ALC considered and ruled upon Carolinas' Dormant Commerce Clause argument and rejected Piedmont's contention that it was not preserved.

Following the contested case hearing, Carolinas filed a Rule 59(e) motion and requested the ALC to reconsider its Final Order on the basis that the ALC's application of the CON laws violates the Dormant Commerce Clause. In Piedmont's written response to Carolinas' 59(e) motion, Piedmont argued that Carolinas failed to properly raise the Dormant Commerce Clause argument at the contested case hearing, and thus, it was not preserved. Carolinas filed a Reply, asserting, with supporting evidence, that its Dormant Commerce Clause argument had been properly raised to the ALC during the contested case hearing.²

The points raised in Carolinas' Rule 59(e) motion were of such significance that the ALC decided to vacate its Final Order and issue an Amended Final Order. Further, the Rule 59(e) motion caused the ALC to spend a substantial amount of time in preparing the Amended Final Order, which was not issued until seven (7) months after the ALC vacated its Final Order. In particular, in the Amended Final Order, the ALC revised certain portions of the prior Final Order to strengthen the ALC's decision from an appellate challenge on the basis of the Dormant Commerce Clause.

Most importantly, the ALC determined that it had sufficient facts from which to consider and decide if Piedmont's proposed application of the CON Act and regulatory criteria violated the

² As has been stated, Carolinas omitted its Reply from its Record on Appeal on the basis of relevancy. The Reply further shows how Carolinas' Dormant Commerce Clause argument was raised to the ALC during the contested case hearing and was included in Carolinas' proffered supplemental record on appeal. (App. pp. 01480-01494).

Dormant Commerce Clause, and specifically ruled upon the Dormant Commerce Clause argument in the Amended Final Order by addressing it directly:

[T]he court does not believe it violated the Dormant Commerce Clause in its analysis and application of the State Health Plan or Project Review Criterion in the original or amended decision. The same plan, criterion and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers. . . . Because the court chose to accept or reject certain testimony and assign different weight and credibility to the evidence presented by the parties in the *de novo* hearing does not mean that its decision violates the Dormant Commerce Clause or the Commerce Clause. Similarly, merely because [Carolinas] disagrees with the court's ruling, does not render its analysis in violation of the Dormant Commerce Clause.

(R. p. 75, n.2). The ALC considered and rejected Piedmont's issue preservation argument and ultimately considered and ruled upon the Dormant Commerce Clause legal issue. The ALC's ruling on Carolinas' Dormant Commerce Clause provides further evidence that Carolinas properly raised this issue to the ALC, it was ruled upon by the ALC, and it was preserved for appellate review.

IV. Carolinas' Dormant Commerce Clause challenge presents a novel question of law.

Piedmont mistakenly argues Carolinas' Dormant Commerce Clause challenge does not present a novel issue of law under federal precedent, *Colon Health Ctrs. of Am. v. Hazel*, 813 F.3d 145 (4th Cir. 2016). Contrary to Piedmont's contention, *Colon Health Ctrs.* does not control or address the issues presented under Carolinas' Petition. In that case, the challenger to Virginia's CON scheme did not apply for and was not denied a CON. Rather, it challenged the entire CON scheme based on its alleged effects on interstate commerce. In contrast, Carolinas is challenging the specific denial of its CON application because the ALC based its denial on an intent to reduce interstate commerce.

Colon Health Ctrs. does not involve the unprecedented denial of a specific CON motivated by the express intent to keep patients from crossing state lines to receive health care, which is what

the ALC did in this case. Although the court in *Colon Health Ctrs.* refused to hold as a matter of law that incumbency bias under a CON scheme violates the Dormant Commerce Clause *per se*, that decision cannot be reasonably construed as holding that an administrative agency or court may favor an incumbent provider to protect the provider's patient base from travelling to another state to receive health care as the ALC did in this case. Because the challenge in *Colon Health Ctrs.* did not involve a specific decision based on a discriminatory purpose of reducing interstate commerce, it does not resolve the novel issues presented by Carolinas' Petition for Writ of Certiorari.

V. Carolinas' challenge to the appellate bond requirement for CON appeals involves novel questions of law and substantial constitutional issues.

In its Petition for Writ of Certiorari, Carolinas asserts that the appellate bond required for a CON appeal under S.C. Code § 44-7-220(B) is unconstitutional under the South Carolina and United States Constitutions on three (3) grounds: (1) That the bond requirement under S.C. Code § 44-7-220(B) violates the separation of powers doctrine under the South Carolina Constitution because it interferes with the South Carolina Supreme Court's constitutional authority to promulgate its rule of procedure and practice in the appellate courts of this State; (2) that the bond requirement violates the Equal Protection Clause of the South Carolina and United States Constitutions because it imposes an arbitrary and discriminatory appeal bond requirement on a narrow class of appellants without being rationally related to a legitimate state interest; and (3) that S.C. Code § 44-7-220(B) violates the due process provision of Article I, § 22 of the South Carolina Constitution by substantially burdening appellants' rights to judicial review of the ALC's CON decisions involving a competing applicant.

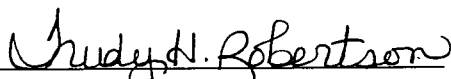
In the decision below, the Court of Appeals ruled that the appellate bond requirement of S.C. Code § 44-7-220(B) did not violate the separation of powers doctrine or Carolinas' equal

protection and due process rights. This ruling by the Court of Appeals has no supporting judicial precedent and is in conflict with other state and federal courts who have held that similar statutory bond penalties are unconstitutional. This Court should grant Carolinas' Petition because the issue of whether the appellate bond required for a CON appeal under S.C. Code § 44-7-220(B) is unconstitutional involves novel questions of law and substantial constitutional issues that need to be resolved.

CONCLUSION

This Court should grant Carolinas' Petition for Writ of Certiorari and reverse the Court of Appeals' and the ALC's rulings.

Respectfully submitted,



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