The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

May 14, 2018

The Honorable Jenny Abbott Kitchings
1220 Senate Street
Columbia SC 29201-3726

Re: Amisub of South Carolina, Inc. v. SCDHEC
Lower Court Case No. 2011-ALJ-07-0575CC
Appellate Case No. 2017-000984

Dear Clerk of Court:

Please be advised that no petition for rehearing has been received in this case. Therefore, the South Carolina Court of Appeals should proceed as directed in the remand from this Court. Please note the language directing expedited consideration by the Court of Appeals.

Very truly yours,

CLERK

cc: Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Ashley Caroline Biggers, Esquire
Vito Michael Wicevic, Esquire

Douglas M. Muller, Esquire
Trudy Hartzog Robertson, Esquire
E. Brandon Gaskins, Esquire
Susannah Reid Knox, Esquire
The Honorable Jana E. Shealy

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

v.

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

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill is the Petitioner, and

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center and South Carolina Department of Health and Environmental Control are the Respondents.

Appellate Case No. 2017-000984

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 27792
Submitted February 14, 2018 – Filed April 25, 2018

REVERSED IN PART AND REMANDED

Douglas M. Muller, Trudy Hartzog Robertson, and E. Brandon Gaskins, of Moore & Van Allen, PLLC, all of Charleston, for Petitioner.

Stuart M. Andrews, Jr., Susanna Knox and Daniel J. Westbrook, of Nelson, Mullins, Riley & Scarborough, LLP, all of Columbia; and Ashley Caroline Biggers and Vito Michael Wicevic, both of Columbia, all for Respondents.

PER CURIAM: Petitioner seeks a writ of certiorari to review the court of appeals' decision in *Amisub of South Carolina, Inc. v. South Carolina Department of Health & Environmental Control*, Op. No. 2017-UP-013 (S.C. Ct. App. filed Jan. 11, 2017). We deny the petition for a writ of certiorari as to question III, but grant the petition as to questions I and II, dispense with further briefing, and reverse the court of appeals' finding that the dormant Commerce Clause issue was not preserved for appellate review. We remand the case to the court of appeals to issue a ruling on whether the decision of the Administrative Law Court (ALC) "interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation" in violation of the dormant Commerce Clause. *See McBurney v. Young*, 569 U.S. 221, 234-37, 133 S. Ct. 1709, 1719-20, 185 L. Ed. 2d 758, 771-72 (2013) (explaining the concept of the "dormant Commerce Clause" (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806, 96 S. Ct. 2488, 2496, 49 L. Ed. 2d 220, 229 (1976))).

To explain our ruling that the issue is preserved, we recite portions of the procedural history of this case. In 2005, four hospitals—Petitioner, Respondent Amisub, Presbyterian Healthcare System, and Hospital Partners of America—applied for a certificate of need (CON) to construct and operate an acute-care hospital in Fort Mill. In May 2006, the Department of Health and Environmental Control (DHEC) determined the acute-care hospital was necessary, and granted a CON to Amisub, but denied a CON to Petitioner and the others. DHEC's decision to award the CON to Amisub was based in part on its interpretation of the language of the South Carolina Health Plan[1] that only existing health care providers in York County were eligible for additional hospital beds. Petitioner filed a contested case at the ALC, contending DHEC had erroneously interpreted the language of the Health Plan.

---

[1] *See generally* S.C. Code Ann. § 44-7-180 (2018) (providing for the development of the South Carolina Health Plan).

Alternatively, Petitioner argued that if DHEC's interpretation was correct, the Health Plan violated the dormant Commerce Clause because it improperly restricted interstate commerce. The ALC found DHEC's interpretation of the Health Plan was not correct, reversed, and remanded to DHEC.[2] The ALC's determination that the Health Plan did not require the CON to be awarded to an existing York County provider made it unnecessary for the ALC to reach the alternative dormant Commerce Clause claim.

On remand, DHEC granted a CON to Petitioner, but denied a CON to the others. Amisub filed a second contested case at the ALC, which again reversed, this time ordering a CON be granted to Amisub and denied to Petitioner. Petitioner appealed to the court of appeals. The court of appeals affirmed, finding Petitioner's dormant Commerce Clause argument as to the ALC's ruling in the second contested case was unpreserved for appellate review.

Petitioner's theory that the dormant Commerce Clause issue is preserved begins with the fact that any potential violation arising from the language of the Health Plan was resolved in Petitioner's favor by the ALC in the first contested case. We find this was a reasonable interpretation of the ALC's order in the first contested case. In the second contested case, therefore, Petitioner reasonably believed the dormant Commerce Clause was not an issue. However, Petitioner contends the ALC's ruling in the second case improperly restricted interstate commerce—and thus violated the dormant Commerce Clause—not because of the language of the Health Plan, but because the ALC ruled partially on the basis that the hospital Amisub was already operating in South Carolina should be protected from out-of-state competition like Petitioner, a North Carolina entity. In other words, Petitioner contends the ALC reversed DHEC's award of a CON to Petitioner, and awarded a CON to Amisub, based on the ALC's improper desire to protect Amisub from out-of-state competition, even though the Health Plan does not provide for such protection. Petitioner argues it had no reason to anticipate this basis for the ruling, and thus it had no reason to renew its dormant Commerce Clause challenge before or during the second contested case trial. Rather, Petitioner argues it was only after it received the ALC's ruling that it realized the dormant Commerce Clause had again become an issue. At that time—Petitioner argues—it made the argument of a dormant Commerce Clause violation with clarity in a timely Rule 59(e) motion.

---

[2] We dismissed Petitioner's appeal from this decision on the ground the order was not immediately appealable. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010).

The court of appeals found "the record does not show [Petitioner] presented to the ALC any argument that [Amisub]'s positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause. [Petitioner] waited until filing its Rule 59(e) motion to present this argument, which is too late." If Petitioner had reason to believe this issue was actually being litigated before the ALC in the second contested case, and yet remained silent, we would agree with the court of appeals.[3] However, the dormant Commerce Clause issues arising out of the language of the Health Plan were resolved in Petitioner's favor in the first contested case. Thus, Petitioner could not reasonably have foreseen the ALC would craft its order in a fashion to revive those issues. Therefore, Petitioner had no reason to raise the dormant Commerce Clause challenge in the second contested case until the ALC issued its order. No party should be penalized for not addressing an issue as to which it had previously prevailed, and which it did not reasonably contemplate would yet be the basis of the court's ruling. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (finding appellate courts should remain "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner"); *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("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), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.").

---

[3] While not dispositive, we find it important that Respondents did not raise issue preservation in their briefs to the court of appeals. We also note the court of appeals specifically recognized the dormant Commerce Clause issue before it presented a different question from the one presented in the first contested case. The court of appeals stated,

> [Petitioner] does not challenge the constitutionality of the CON Act itself. Further, [Petitioner] does not challenge the constitutionality of the State Health Plan or the Project Review Criteria. Rather, [Petitioner] argues the purpose and effect of the ALC's application of the CON Act, the State Health Plan, and the Project Review Criteria are to protect [Amisub] from out-of-state competition, and, therefore, such an application violates the dormant Commerce Clause.

Amisub, slip op. at 5.

Accordingly, we reverse the court of appeals' finding that the dormant Commerce Clause issue was not preserved for appellate review, and remand the case to the court of appeals for a ruling on the merits of the issue.

The parties have stressed to us the obvious point that it has been almost twelve years since DHEC made the determination an acute-care hospital was necessary in York County. For this reason, we order the court of appeals to expedite consideration of this case.

REVERSED IN PART AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 the Appellant.

Appellate Case No. 2015-000056

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 2017-UP-013
Heard November 8, 2016 – Filed January 11, 2017

AFFIRMED

Douglas M. Muller, Trudy Hartzog Robertson, and E. Brandon Gaskins, of Moore & Van Allen PLLC, of Charleston, for Appellant.

Stuart M. Andrews, Jr. and Daniel J. Westbrook, of Nelson Mullins Riley & Scarborough LLP, of Columbia, for Respondent Amisub of South Carolina.

Ashley Caroline Biggers and Vito Michael Wicevic, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

PER CURIAM: Appellant Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (Carolinas), challenges a decision of the South Carolina Administrative Law Court (ALC) ordering Respondent South Carolina Department of Health and Environmental Control (DHEC) to issue a Certificate of Need (CON) to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center (Piedmont). Carolinas argues the purpose and effect of the ALC's application of the CON Act, the Project Review Criteria,[1] and the 2004-2005 State Health Plan (State Health Plan) are to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause.[2] Carolinas also argues the ALC erred in approving Piedmont's proposal to transfer beds from its existing hospital in Rock Hill to its proposed hospital in Fort Mill because the ALC failed to make any findings of fact or conclusions of law regarding the eight criteria in the Bed Transfer Provision of the State Health Plan.[3] Finally, Carolinas contends the ALC's application of certain Project Review Criteria was arbitrary and capricious. We affirm.

---

[1] There are thirty-three criteria for DHEC's review of a project under the CON program. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012).

[2] The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, grants Congress the power to regulate commerce among the several states. However, "[e]ven in the absence of Congressional regulation, the negative implications of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly burdens interstate commerce." *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 104, 705 S.E.2d 28, 36 (2011) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)).

[3] Chapter II.G.1 § (A)(4)(h), State Health Plan (Bed Transfer Provision). The Bed Transfer Provision allows for the transfer of beds between affiliated hospitals "in order to serve their patients in a more efficient manner," provided certain conditions are met.

FACTS/PROCEDURAL HISTORY

Piedmont Medical Center in Rock Hill is the sole hospital in York County. It provides standard community hospital services as well as specialized services, such as open heart surgery, neurosurgery, neonatal intensive care, and behavioral health. Amisub of South Carolina, Inc., which is a subsidiary of Tenet Healthcare Corporation, operates Piedmont Medical Center. Tenet Healthcare Corporation is headquartered in Dallas, Texas and owns forty-nine hospitals in ten states. Carolinas, which is headquartered in Charlotte, North Carolina, owns multiple hospitals in North Carolina with a large network of employed physicians, many of whom have practices in York County. Additionally, Carolinas owns and operates Roper Hospital in downtown Charleston.

In 2005, Piedmont, Carolinas, Presbyterian Healthcare System (Presbyterian), and Hospital Partners of America, Inc. submitted their respective applications for a CON to build a sixty-four-bed hospital near Fort Mill based on the State Health Plan's identification of a need for sixty-four additional acute care hospital beds in York County. Subsequently, Piedmont withdrew its application and submitted a new application for a 100-bed hospital, which would include thirty-six beds transferred from Piedmont's Rock Hill facility to its proposed Fort Mill facility. In 2006, DHEC approved Piedmont's new application and denied the other three applications. Carolinas and Presbyterian filed separate requests for a contested case hearing before the ALC, which took place in September 2009.

Prior to the contested case hearing, Carolinas and Presbyterian filed summary judgment motions on the ground that DHEC misinterpreted the State Health Plan to allow only existing providers to fulfill the designated need for additional hospital beds in York County. During the hearing, Carolinas and Presbyterian renewed these motions, which the ALC granted. In December 2009, the ALC issued an order remanding the case to DHEC for a determination of which applicant most fully complied with the CON Act, the State Health Plan, Project Review Criteria, and applicable DHEC regulations.[4] The remaining three

[4] When DHEC is considering competing applications, it must award a CON on the basis of which applicant most fully complies with the CON Act, the State Health Plan, Project Review Criteria, and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010). The ALC rejected the arguments of

applicants appealed the ALC's remand order; however, our supreme court dismissed the appeal because the remand order was interlocutory. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

By October 2010, the three remaining applicants submitted to DHEC additional information to supplement their respective applications. In September 2011, DHEC granted Carolinas' application and denied the applications of Piedmont and Presbyterian. Piedmont and Presbyterian submitted their respective requests for a contested case hearing before the ALC, and the ALC consolidated the cases. Presbyterian later withdrew its request, and the ALC dismissed Presbyterian as a party. The ALC conducted a contested case hearing over the course of fifteen days in April and May 2013 and subsequently ordered DHEC to award the CON to Piedmont. Carolinas filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, and the ALC issued an Amended Final Order denying the motion. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review from a decision of the ALC, allowing this court to

> reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2016).

LAW/ANALYSIS

Carolinas and Presbyterian that Piedmont was not a "competing applicant" for purposes of section 44-7-210(C).

I. Dormant Commerce Clause

Carolinas does not challenge the constitutionality of the CON Act itself. Further, Carolinas does not challenge the constitutionality of the State Health Plan or the Project Review Criteria. Rather, Carolinas argues the purpose and effect of the ALC's application of the CON Act, the State Health Plan, and the Project Review Criteria are to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause. In particular, Carolinas challenges the ALC's conclusions of law concerning adverse impact and outmigration as violating the Dormant Commerce Clause. However, 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. *See, e.g.*, *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding an issue raised for the first time in a Rule 59(e) motion was not preserved for review).

In its Rule 59(e) motion, Carolinas stated a Dormant Commerce Clause argument was presented in writing to the ALC after the conclusion of the 2009 contested case hearing. However, the record reflects that any Dormant Commerce Clause argument raised by the parties in 2009 would have concerned DHEC's interpretation of the State Health Plan to allow only existing providers to obtain a CON to fulfill York County's need for more hospital beds. There is nothing in the record showing that the issues of adverse impact or outmigration even could have been reached before the ALC issued its December 2009 order remanding the case to DHEC to consider all three competing applications.

Issue preservation is especially important when a party raises an as-applied Dormant Commerce Clause argument because the determination of a Dormant Commerce Clause violation is fact-intensive. *See Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (stating the two tests for determining a violation of the Dormant Commerce Clause are both "fact-bound"); *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38 (referring to an "as-applied" constitutional challenge to a statute or regulation as an "inherently factual issue"); *id.* at 109, 705 S.E.2d at 39 (stating the ALC is "better suited for making the factual determinations necessary for an as applied challenge, and finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision"). Therefore, during the 2013 contested case hearing, it was incumbent upon Carolinas to present, with supporting evidence, the argument

it now makes on appeal, i.e., the ALC's adoption of Piedmont's positions on adverse effect and outmigration would violate the Dormant Commerce Clause. Because Carolinas did not do this, it has failed to preserve its Dormant Commerce Clause argument for this court's review.

II. Bed Transfer Provision

Carolinas next argues the ALC exceeded its authority under the CON Act and the State Health Plan in approving Piedmont's proposal to transfer beds without making any findings of fact or conclusions of law addressing the requirements of the Bed Transfer Provision. Piedmont correctly points out that Carolinas did not raise this issue during the contested case hearing or in its Rule 59(e) motion, and, therefore, it is not preserved for review. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("[A]ll parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling."); *West v. Newberry Elec. Coop.*, 357 S.C. 537, 543, 593 S.E.2d 500, 503 (Ct. App. 2004) (holding an issue unpreserved when it was neither addressed in the final order nor mentioned in the appellant's Rule 59(e) motion).

III. Arbitrariness and Capriciousness

Carolinas contends the ALC's application of certain Project Review Criteria was arbitrary and capricious. We hold the ALC's decision was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious. *See Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.").

CONCLUSION

Accordingly, we affirm the ALC's Amended Final Order.

AFFIRMED.

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.