THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED
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SC Court of Appeals

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...Appellant.

RESPONDENT AMISUB OF SOUTH CAROLINA, INC.'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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I. INTRODUCTION

Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center ("Piedmont") submits this Return to the Petition for Rehearing filed by Appellant, Charlotte-Mecklenberg Hospital Authority ("CHS" or "Carolinas"). In its Petition, CHS identifies three general arguments it believes this Court overlooked or misapprehended, justifying a rehearing under Rule 221, SCACR. To put these arguments in context, it is important to re-emphasize two points. First, CHS has not challenged any findings of fact by the Administrative Law Court ("ALC"). Second, CHS has not challenged state law, only what it believes is the ALC's misapplication of state law. In particular, CHS contends that the ALC misapplied the law with respect to the health planning concept of adverse impact. The principle of adverse impact, however, permeates the South Carolina CON Act, regulations, and State Health Plan. *See* Amisub Final Brief at 8-14. In this case, the ALC applied the principle of adverse impact in a manner completely consistent with the requirements of state law, which, as noted, CHS has not challenged.

II. ARGUMENT

A. The Court Correctly Found that the ALC Order Was Neither Discriminatory nor Unduly Burdensome.

CHS mistakenly assumes that a court must fully analyze a dormant Commerce Clause case under *both* the discrimination test and the undue burden test. In fact, what a court must do is first determine a threshold question: is the challenged law – or, in this case, the alleged misapplication of law – discriminatory. If so, the discrimination test applies. If not, the discrimination test is irrelevant, and the undue burden test applies. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("*Once a state law is shown to discriminate against interstate commerce*" the discrimination test is applied.).

While that seems to be a clear and simple analytical framework, its application requires flexibility. Although worded differently, the two tests "are not separated by a bright line." *Colon Health Centers of America, LLC v. Hazel*, 2014 WL 5430973 at *5 (E.D.Va. 2014) (*"Colon Health Ctrs. II"*). "While these rules are easy to recite, their application to a particular factual setting is often difficult." *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). As a result, "the Supreme Court has cautioned that the dormant Commerce Clause inquiry should be undertaken by 'eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects.'" *Walgreen* at 55 (quoting *West Lynn Creamery v. Healy*, 512 U.S. 186 201 (1994)). Both the discrimination and undue burden tests are "fact-based." *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (*"Colon Health Ctrs. I"*).

In its Petition for Rehearing, CHS mistakenly argues that this Court, in its June 6, 2018, Order affirming the ALC decision (the "June 6 Order" or "Op. No. 5568"), made a threshold finding of discrimination, yet failed to apply the discrimination test. In support of its conclusion that this Court made a finding of discrimination, CHS relies on two sentences from the June 6 Order:

1) "We acknowledge that ***the proper application*** of these criteria ***may*** have the effect of protecting competing providers who already have a presence in the service area, ***regardless of whether these providers represent in-state or out-of-state interests***." Pet. for Rehearing at 4, citing *Amisub*, Op. No. 5568 at 14 (emphasis added).

2) "***To the extent that the proper application*** of these criteria ***may*** have a discriminatory effect, Carolinas has failed to carry its burden of 'proving that the burdens placed on interstate commerce outweigh the...local benefits" of these criteria." *Id., citing Amisub*, Op. No. 5568 at 20 (emphasis added).

Neither of the statements quoted above reflects a finding of discrimination by the ALC in its application of state law. Both statements speak to the "proper" application of state law. But CHS has not challenged the *proper* application of state law, only its *improper* application.

Moreover, both quoted statements are qualified: the proper application of certain criteria "may" (or may not) have an effect. The first statement is qualified even further: the "proper" application of certain criteria "may" have an effect, but that effect is without regard (or indiscriminate) to whether the affected providers represent "in-state or out-of-state interests." This cannot be a finding of discrimination, a term which, in the context of the dormant Commerce Clause, is defined as the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). *See also* June 6 Order at 15 ("Carolinas first argues that the goal of reducing patient outmigration to North Carolina discriminates against and burdens interstate commerce. We disagree."); Amisub Final Brief at 19-29 (discussing whether the ALC's application of state law was discriminatory).

Since this Court did not make a finding of discrimination, the appropriate test to employ was the undue burden test. That test is set forth in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970): where a law or its application by a court "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Under the undue burden test, CHS has failed to show that the incidental effects on interstate commerce of the ALC's proper application of state law outweigh the putative health benefits to the public. *See* Amisub Final Brief at 31-32 (discussing application of undue burden test).[1]

In analyzing undue burden, a court must bear in mind that the Constitution "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety

[1] Even if the Court had made a finding of discrimination, which it did not, the ALC's application of state law in this case would also pass the discrimination test. *See* Amisub Final Brief at 29-30.

of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960). Indeed, "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). Consequently, "when evaluating state health and safety regulations, courts 'must give deference to the State's choice to protect its citizens in [a certain] way' when evaluating the putative local benefits of the law." *Yakima Valley Mem. Hosp. v. Washington State Dept. of Health*, 2012 WL 2720874 at *3-4 (E.D. Wash. 2012) (quoting *Nat'l Ass'n of Optoms. & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009)).

The deference courts give the states in matters of health regulation is not limited to the undue burden test. In *Maine v. Taylor*, a dormant Commerce Clause case in which the Surpreme Court upheld a state law under the discrimination test, the Court reasoned that "[a]s long as a State does not ***needlessly*** obstruct interstate trade...it retains broad regulatory authority to protect the health and safety of its citizens." *Maine v. Taylor*, 477 U.S. at 151 (emphasis added). This Court's reliance on the sentence quoted above is entirely consistent with Supreme Court guidance that courts must give states deference in all Commerce Clause challenges involving the regulation of public health.

B. This Court Considered and Rejected Arguments Untimely Raised in CHS's Reply.

In its reply brief, CHS raised at least two arguments for the first time:

1) "The ALC's ruling fails to demonstrate that [the] purpose [of maintaining needed healthcare services in York County] is supported by sufficient evidence under the strict scrutiny analysis."

2) "Piedmont presented no specific evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON."

CHS Reply at 9.

In the June 6 Order, the Court correctly noted: "Because Carolinas did not raise these arguments in its main appellate brief, we need not consider them." June 6 Order at 17, n.11. CHS criticizes the Court for "refusing to consider" these arguments and cites several cases from other jurisdictions for the proposition that arguments raised first in reply are not the same as new issues and are therefore preserved for appeal. *See* Pet. for Rehearing at 9, citing *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (2001). *See also Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use...the reply brief as a vehicle to argue issues not argued in the appellant's brief.").

Whether CHS raised its arguments in a timely fashion, however, is a moot point. Although the Court found it "need not consider them," it did so, anyway. After summarizing the trial testimony of Piedmont witness Arun Adlakha, M.D., the Court concluded that "Carolinas' allegations are simply unfounded." June 6 Order at 17, n.11.

C. <u>The Court Appropriately Considered the In-State and Out-of-State, Local and Non-Local Interests of CHS and Piedmont.</u>

CHS contends that because the ALC decision discriminated against interstate commerce, the in-state and out-of-state, local and non-local economic interests of the parties are irrelevant. Pet. for Rehearing at 10. As previously noted, however, the Court found that the ALC's application of state law did ***not*** discriminate against interstate commerce. *See supra* at 3-4. In reaching that conclusion, it was necessary for the Court to consider benefits and burdens the ALC decision places on in-state, out-of-state, local, and non-local interests. *See Oregon Waste Sys. Inc.*, 511 U.S. at 99 (defining "discrimination" as the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). Under such an analysis, it was completely appropriate for the Court to consider that the parties hardly fit the typical models of insider and outsider. Piedmont's corporate parent is a national

healthcare system based in Texas. Carolinas, based in Charlotte, has ownership and management interests in several South Carolina health care facilities, including one in York County. Amisub Final Brief at 23. Such facts are obviously relevant to an analysis related to discrimination against interstate commerce.

The "fulcrum" of a dormant Commerce Clause analysis is whether the law "erects a special barrier to market entry by non-domestic entities." *Colon Health Ctrs. I* at 546. The ALC order erects no such barriers. CHS could have been awarded the CON if it had convinced the ALC it would: (a) provide specialized, tertiary services at its new hospital, or (b) ensure that Piedmont would be able to continue providing such services. CHS did neither. Had there been a third competing applicant, its application would have been reviewed under state law in the same manner. Regardless of its location, headquarters, or state of incorporation, under the South Carolina CON Act, regulations, and State Health Plan, a third applicant would not have been approved if, like CHS, its impact would have been to decrease or eliminate local healthcare services. This would be true even if the third applicant were a major, South Carolina hospital system. *See* June 6 Order at 17, n.10; *see also Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473, n. 17 (1981) (upholding state law against a dormant Commerce Clause challenge, in part because "[t]he existence of major in-state interests adversely affected by [a state law] is a powerful safeguard against legislative abuse").

CHS repeatedly mischaracterizes the purpose of the ALC decision as reducing the number of patients obtaining health care services in North Carolina. "Put simply," writes CHS, "the ALC restricted Carolinas' [business activities in York County] on the alleged basis that its new hospital would potentially result in more York County patients being referred to North Carolina hospitals. This is *per se* discriminatory." Pet. for Rehearing at 11. Put simply, CHS is

wrong. The ALC denied CHS's CON application on the basis of uncontested factual findings that approval of the application would jeopardize Piedmont's continuing ability to provide high-quality, specialized health services in York County; that the new CHS hospital would restrict admissions of Medicaid and indigent patients; and that the result would be decreased access to services for county residents, especially the medically underserved. R. pp. 96-99, 110, see June 6 Order at 15-18.[2] Such a result is entirely inconsistent with the purposes of the CON Act.

III. CONCLUSION

The CON applications at issue were filed with DHEC in 2005. York County is still without a new hospital. For all reasons set forth above, Piedmont respectfully requests this Court to deny the Petition for Rehearing.

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Columbia, South Carolina
July 26, 2018

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[2] CHS argues that the Court failed to consider *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012), but that decision has virtually no relevance to the case at hand. *Florida Transportation* did not involve the provision of healthcare services but rather the provision of stevedore permits under a county ordinance, which the court invalidated. Nothing in the decision suggested invalidation of the ordinance would result in the loss or reduction of stevedore or any other local services. *See* Amisub Final Brief at 28.

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Medical Center-Fort Mill ....Respondents,

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

PROOF OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Return to Petition for Rehearing*** by U.S. Mail, addressed as follows:

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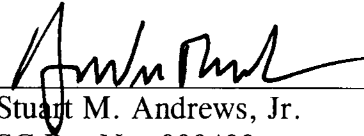

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Via Hand Delivery
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RE: Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center v. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill,
Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC
Our File No. 005946/01509

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and 7 copies of Respondent Amisub of South Carolina, Inc.'s Return to Petition for Rehearing 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/kh
Enclosures
cc: Douglas M. Muller, Esq.
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