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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case No. 2020-001323
Case No. 18-ALJ-07-0358-CC
Case No. 18-ALJ-07-0360-CC
Case No. 18-ALJ-07-0366-CC

CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital, and Roper Mount Pleasant Hospital.Respondent,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents,

AND

Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center,Appellant,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents,

AND

Trident Medical Center, LLC, d/b/a Trident Medical Center and Summerville Medical Center,Appellant,

v.

South Carolina Department of Health and Environmental Control and Medical University Hospital Authority, d/b/a MUHA Community Hospital,..... Respondents.

RESPONDENT MEDICAL UNIVERSITY HOSPITAL AUTHORITY'S
MOTION TO SUPPLEMENT BRIEFS AND RECORD ON APPEAL

This is an appeal from the South Carolina Administrative Law Court (ALC). It is “ready for consideration,” but it has not appeared on a preliminary list.

The ALC granted a Certificate of Need (CON) to Respondent Medical University Hospital Authority d/b/a MUHA Community Hospital (MUHA) to build a 128-bed hospital in Summerville, South Carolina. Appellant Trident Medical Center, LLC (Trident) operates two hospitals in the same area, Trident Medical Center (TMC) and Summerville Medical Center (SMC), 10.7 and 11.2 miles respectively from MUHA’s new hospital. Trident argues that there is no need for MUHA’s hospital in this area. Recently, however, Trident successfully took the opposite factual position to obtain a CON for 50 additional beds at its Summerville hospital. MUHA submits that this Court should therefore estop Trident from arguing that there is no need for MUHA’s hospital.

MUHA moves to supplement the briefs and record with the arguments and materials presented in this Motion and Appendix, together with any Return and Reply, for consideration by the merits hearing panel of this Court. In the alternative, MUHA moves that the issue of supplementing the briefs and records be submitted to the merits hearing panel for this appeal, which was the approach earlier used by this Court’s motions panel regarding appeal bond issues.

BACKGROUND

This case began when MUHA submitted its CON application to the South Carolina Department of Health and Environmental Control (DHEC). Trident contested the application. Appellant Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center (CMC) also contested the application. Trident and CMC are for-profit subsidiaries of the Hospital Corporation of America, and they have presented a “united front” through joint motions and joint briefs.¹

¹ Trident is the principal appellant. CMC operates a hospital in Walterboro, 35 miles from MUHA’s new hospital. Their “joint” briefs seldom reference CMC or any CMC-related evidence. (App. Br. and Reply Br., *passim*).

Respondent CareAlliance Health Services, d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., Bon Secours-St. Francis Xavier Hospital, Inc., Roper St. Francis Berkeley Hospital, and Roper Mount Pleasant Hospital (Roper) also contested MUHA's CON application.

DHEC granted MUHA's application. Trident, CMC, and Roper filed separate requests for a contested case hearing with the ALC. After consolidating the cases, the ALC conducted a *de novo* evidentiary hearing over 11 days with numerous witnesses (including experts) and thousands of pages of exhibits – the Record on Appeal is 12 volumes with more than 5,500 pages. The ALC undertook an exhaustive *de novo* review of the application and evidence in a 70-page order that granted MUHA a CON for its 128-bed hospital. (R-1 at 4-74).

On October 2, 2020, Trident, CMC, and Roper timely commenced separate appeals from the ALC's order. For reasons that are not clear, Trident and CMC identified Roper as a respondent in their appeals. Roper did not identify Trident or CMC as a respondent in its appeal. As a result, this Court's October 7, 2020, "initial letter" designated Roper as "Appellant-Respondent."

These appeals triggered S.C. Code Ann. § 44-7-220(B) (Rev. 2018), an appeal bond statute that required the appellants to file appeal bonds. Roper filed a motion for relief from the appeal bond statute – Trident and CMC filed a joint motion for similar relief. MUHA filed a motion to dismiss all appeals for failure to comply with the requirements of the appeal bond statute.

On October 23, 2020, while the appeal bond motions were pending, Roper and MUHA submitted a "Notice of Agreed Dismissal" of Roper's appeal based on their settlement agreement. This Court dismissed Roper's appeal and re-designated Roper as a "Respondent" by order dated October 26, 2020. Trident and CMC do not make any arguments against Roper in their joint briefs, which is not surprising, because Roper has no continuing interest in this appeal.

On November 25, 2020, this Court’s motions panel ruled on the various appeal bond motions, granting partial relief to Trident and CMC but requiring them to post a joint appeal bond in a specified amount. (R-1 at 1-3). As to all other issues, including MUHA’s motion to dismiss, the panel denied the requested relief but allowed the parties to pursue those issues in their briefs. (*Id.*). Trident, CMC, and MUHA did so – DHEC did not address any appeal bond issues. (See App. Br. at 31-42; MUHA Resp. Br. at 30-40; DHEC Resp. Br., *passim*; Reply Br. at 12-17).

In November 2021, Trident finalized its CON application for 50 additional hospital beds at its Summerville hospital (SMC) for a cost of \$62 Million Dollars. (Appx. at 7, 15, 19). DHEC received the application on December 7, 2021. (*Id.* at 13). When Trident submitted its certified application, it knew about MUHA’s 128-bed hospital only 11.2 miles away. More importantly, Trident necessarily included those 128 beds when it contended that there nevertheless was a need for 50 additional hospital beds in the same area. In other words, as a predicate to its request for 50 additional beds, Trident necessarily abandoned its claim that there was no need for MUHA’s 128 beds. Otherwise, Trident could not certify (as it did) that there was a need for 50 beds in addition to MUHA’s 128 beds. (Appx. at 15).

Also in November 2021, Roper completed and submitted its CON application for 50 additional beds at its “Roper St. Francis Berkeley Hospital,” which is also in Summerville, for a cost of \$193 Million Dollars. (Appx. 1, 67). This hospital is approximately 4 miles from MUHA’s new hospital. (R-1 at 8).²

² As demonstrated by a simple comparison of the zip codes cited in Roper’s 50 bed application (Appx. at 76-83), Trident’s 50 bed application (Appx. at 34-39) and MUHA’s 128 bed application (R-10 at 4337-4341, 4738-4740; R-11 at 5200-5201; R-12 at 5540-5541), there is a significant overlap in the geographic area and population that would be served by the three hospitals. This also demonstrates that Trident is not adhering to the “10-mile radius” that it advocates to this Court in this appeal. See n.3 and accompanying text, *infra*.

Trident opposed Roper's CON application, and Roper opposed Trident's CON application. (Appx. at 2; 8-9). DHEC granted Roper's application on May 31, 2022, and Trident's application on June 27, 2022. (*Id.* at 1-4 and 7-10). DHEC therefore concluded that, even with MUHA's 128-bed hospital, 100 additional hospital beds were needed in the same area.

In seeking and obtaining its 50-bed CON, Trident necessarily and successfully took the factual position that there was a need for MUHA's 128 hospital beds, and that these 128 beds did not satisfy all of the need in the area. Manifestly, if there is a need for 50 beds in addition to the the 128-bed hospital, then there was and is a need for the 128-bed hospital. Trident, however, seeks to take the opposite factual position before this Court. This Court should decline to hear Trident any further on the question of need for MUHA's 128-bed hospital.

In addition, Trident argues in this appeal that need for MUHA's hospital should have been limited to the patient population within a 10-mile radius around the hospital. (See App. Br. 23 and Resp. Br. 14, 16-21). This was the opinion of its expert, which Trident presented in a classic "battle of the experts" that Trident lost in the ALC. (See Resp. Br. 20 & n.36). When Trident sought its 50-bed CON for SMC, however, it claimed a service area and patient population well beyond a 10-mile radius of SMC to show a need for its 50-bed addition. (Appx. at 34-39, 46, 51). Having done so and thereby received the benefit of a CON for those 50 beds, this Court should decline to hear Trident's "10-mile radius" arguments in this appeal.³

³ In its Reply Brief, Trident argues the "10-mile radius" issue is based on there being three hospitals within a 10-mile radius of MUHA's proposed hospital. (See Reply Br. 5 & n.5). Assuming this is true, it remains noteworthy that Trident nevertheless went beyond this same 10-mile radius of SMC, which is now within 10-miles of three hospitals when MUHA is included as it must be. (See n.1, *supra* and Appx. at 34-39, 46, 51). It is also noteworthy that Trident expects its 50 additional beds to become operational by June 2023 (Appx. 19, 24), while it effectively stays the construction of MUHA's new hospital with this appeal, which is based on assertions that are the opposite of the assertions that Trident recently and successfully made to obtain the CON for its 50 new beds.

ARGUMENT

Research reveals no case directly addressing the present situation, *i.e.*, an appellant making appellate assertions that are directly contrary to assertions recently made in a different proceeding in which the appellant was successful and received a substantial benefit by making those contrary assertions. MUHA submits that Trident's actions in and the circumstances of this appeal and the recent CON proceedings successfully concluded by Trident meet the elements of judicial estoppel and warrant this Court estopping Trident from pursuing contrary assertions in this appeal.

The fundamental purpose of judicial estoppel is to protect the integrity of the judicial process, including its truth-seeking function. *Murray v. Estate of Murray*, 871 S.E.2d 173, 183 (S.C. App. 2022). It is an equitable concept applied on a case-by-case basis, with a focus on the particular circumstances of each case and the protection of the truth-seeking function. *Id.* Judicial estoppel has five elements, and each element is present here:

Element 1: "two inconsistent positions taken by the same party or parties in privity with one another." *Murray*, 871 S.E.2d at 183. Satisfied here, because the same party, *i.e.*, Trident, took inconsistent positions on the need for hospital beds in the same area.

Element 2: "the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other." *Id.* Satisfied here, because Trident is a party in both proceedings, which involve application of the South Carolina State Health Plan and the CON statutes to the question of hospital beds in the same area to advance the public policy of providing the best possible health care to South Carolina's citizens.

Element 3: "the party taking the position must have been successful in maintaining that position and have received some benefit." Trident was successful on the "need" issues in the recent CON proceedings, receiving the benefit of a license to add 50 beds to SMC.

Element 4: "the inconsistency must be part of an intentional effort to mislead the court." *Id.* Satisfied here because Trident "advanced *whichever* factual position was *most advantageous* to [its] claims in each case." *Id.* at 185 (emphasis added).

Element 5: "the two positions must be totally inconsistent." *Id.* at 183. Satisfied here because Trident's position on the need for MUHA's 128 beds in this appeal is "totally inconsistent" with its recent position in seeking and obtaining the benefit of its own CON for even more beds in the same area.

If Trident is allowed “to change [its] position”, then “the truth-seeking function of the judicial process [would be] undermined.” *Quinn v. Sharon Corp.*, 570 S.E.2d 474, 476 (S.C. App. 2000). Even without judicial estoppel, MUHA submits that this Court has the inherent power and discretion to protect itself from a party taking inconsistent positions like those taken by Trident.

CONCLUSION

Judicial estoppel precludes a party from taking a factual position in a proceeding and, after reaping the benefits of succeeding on that position, subsequently take the opposite position in a different proceeding. That is what Trident seeks to do here.

Trident certified to DHEC that, even when one includes the 128 hospital beds at issue in this appeal, there was a need for 50 additional hospital beds in the same area. Therefore, Trident necessarily acknowledged and agreed that there was and is a need for the 128 hospital beds at MUHA’s new hospital. By successfully taking this position on the need for hospital beds in the area, Trident obtained the benefit of a CON to add those 50 hospital beds to its Summerville hospital (SMC) in the same area as MUHA’s new hospital.

Now, in this Court, Trident continues to challenge the need for those same 128 hospital beds at MUHA’ new hospital. This Court should not permit Trident to take this position before this Court under principles of judicial estoppel, as well as this Court’s inherent power and discretion to protect itself from such conduct by the parties before it.

Accordingly, MUHA respectfully submits that this Court should supplement the briefs and record in this appeal with the instant Motion and Appendix, together with any Return and Reply, for consideration by the merits hearing panel of this Court. In the alternative, this Court should submit this motion to the merits hearing panel for its consideration in conjunction with its consideration of the merits of this appeal.

Respectfully Submitted,

/s/ Robert L. Widener

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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of Burr & Forman, LLP, hereby certify that true and correct copies of the *Respondent Medical University Hospital Authority d/b/a MUHA Community Hospital's Motion to Supplement Briefs and Record on Appeal and Appendix to Respondent Medical University Hospital Authority's Motion to Supplement Briefs and Record on Appeal* was served upon counsel for all parties in the above-captioned matter, via email at the email addresses listed below pursuant to the Supreme Court Order 2020-05-29-02, this 8th day of August, 2022, addressed as follows:

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August 8, 2022

VIA EMAIL (ctappfilings@sccourts.org)

Honorable Jenny Abbott Kitchings
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**Re: CareAlliance Health Services v. SCDHEC
Appellate Case No. 2020-001323**

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Dear Ms. Kitchings:

Attached for filing, please find Respondent Medical University Hospital Authority d/b/a MUHA Community Hospital's Motion to Supplement Briefs and Record on Appeal and Appendix to Respondent Medical University Hospital Authority's Motion to Supplement Briefs and Record on Appeal. All counsel of record are being served with copies via email.

The filing fee for the motion is being hand delivered to your office this afternoon.

Thank you for your assistance in this matter.

Sincerely,



Robert L. Widener

RLW/as
Attachments

Honorable Jenny Abbott Kitchings
August 8, 2022
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