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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.

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

## REPLY ARGUMENT

### I. **Trident's Argument A has no merit.**

In its Argument A, Trident correctly quotes one statute, two SCACR rules, and three cases for the general proposition that an appellate court's review of the merits of an appealed order is limited to matters that were presented to the lower court. (Return at 5-6). Trident misses the point of MUHA's motion. MUHA does not seek to supplement the briefs or the record regarding the merits of the appealed order. Rather, the issue here is whether this Court should exercise its inherent authority and power to protect itself from Trident's inconsistent factual assertions and estop Trident from making such assertions. This issue is entirely separate from this Court's review of the merits of the appealed order, and this Court's authority to protect itself and the judicial system is not constrained by any of the authorities cited by Trident.

#### A. **Section 1-23-610(B) does not preclude the relief sought in MUHA's motion.**

Trident cites S.C. Code Ann. § 1-23-610(B) and quotes it in part for the proposition that "[t]he review of the administrative law judge's order must be confined to the record." (Return at 5). As made clear by the various other parts of § 1-23-610(B), the clear purpose of this statutory limitation is to restrict appellate review of the merits of the ALC's order to the record made before the ALC.<sup>1</sup> Here, however, MUHA's motion does not involve the merits of the appealed order.

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<sup>1</sup> Section 1-23-610(B) provides in full as follows:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (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.

Rather, it involves Trident's conduct before this Court of taking an inconsistent factual position, a matter totally outside the purview of § 1-23-610(B) and residing solely in the inherent authority and discretion of this Court.

**B. The SCACR Rules cited by Trident do not preclude the relief sought in MUHA's motion.**

Trident correctly cites Rules 209(c) and 210(c) of the SCACR for the general proposition that designations are limited to what may be placed in the record on appeal, and the record is limited to matters presented to the lower court. (Return at 5). These rules, however, are part of a process designed for challenging the merits of an appealed order. Again, MUHA's motion does not involve the merits of the appealed order, and the SCACR does not address or control the issues raised or the relief sought in motion. Rather, that relief lies solely in the inherent authority and discretion of this Court.

**C. The cases cited by Trident do not preclude the relief sought in MUHA's motion.**

Trident cites three cases. (Return at 5). First, it cites *Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth.*, 627 S.E.2d 690 (S.C. 2006), *rev'g* 593 S.E.2d 154 (S.C. App. 2003). There, this Court affirmed an order granting summary judgment but the Supreme Court reversed, finding that this Court "improperly rested its decision in large part [on an affidavit] attached to County's petition for rehearing filed after" this Court's first decision in the case. 627 S.E.2d at 693. Noting that "[n]othing in the appellate court rules permits a party to unilaterally add after-created evidence to the record," the Supreme Court limited its review of "the summary judgment issue [to] the evidence presented to the trial court and included in the Record on Appeal." *Id.* Here, unlike the affidavit in *Williamsburg*, the Motion and Appendix does not involve the merits of the appealed order. Moreover, MUHA is not "unilaterally" adding

anything – it has sought the permission of this Court by the instant motion. Finally, MUHA did not create any evidence – rather, Trident created the facts at issue here through its own conduct of taking inconsistent factual positions.

Trident next cites *Hennig v. Kaye*, 415 S.E.2d 794 (S.C. 1992). There, the respondent moved to dismiss the appeal based on the appellant’s failure to comply with the SCACR. The Supreme Court denied the motion but ordered the appellant to file an amended initial brief that complied with the requirements of Rule 207, SCACR (now Rule 208, SCACR). In addition, the Supreme Court ordered the appellant to file an amended designation that clearly identified the matters being designated for inclusion in the Record on Appeal as required by Rule 208, SCACR (now Rule 209, SCACR). The Supreme Court “reminded” the appellant of the prohibition in Rule 209(c) (now Rule 210(c)) that the “Record on Appeal shall not contain any matter not presented to the trial court.” *Id.* at 794-795. In *Henning*, the Supreme Court enforced the rules on how an appellant may challenge the merits of the appealed order. Here, MUHA’s motion and appendix does not challenge the merits of the appealed order.

Trident next cites *Norris v. Ferre*, 432 S.E.2d 491 (S.C. App. 2005). There, this Court affirmed on three merits issues, finding no abuse of discretion by the trial court. The fourth issue involved a motion to supplement the record. The following is this Court’s entire discussion of the issue: “Finally, Norris moved to supplement the record on appeal with deposition testimony from an unrelated action. We deny the motion since the matters were not presented to the trial judge.” *Id.* at 493, *citing* Rule 209(c), SCACR (now Rule 210(c), SCACR). The nature, content, and purpose of the deposition testimony is unknown, but it presumably related to the merits of the appealed order, and nothing indicates it involved any issue like that raised in MUHA’s instant motion.

**D. Trident’s “foundation” and “remand” argument has no merit.**

Included in its Argument A, Trident summarily asserts that no foundation has been laid for the matters presented in the Appendix. (Return at 5-6). Notably, Trident does not challenge the authenticity of anything in the Appendix, nor could it do so in good faith.

The Appendix contains four documents. Two of the documents are Trident’s CON application and the approval that Trident received from DHEC. Thus, Trident would know if anything in either document is not authentic or is without proper foundation. The other two documents are Roper’s CON application and DHEC’s approval of that application. Trident made itself a party to the DHEC proceedings on Roper’s application by appearing as an “affected person” and objecting to Roper’s application. Thus, here again, Trident would know if anything in either Roper document is not authentic or is without proper foundation. Trident, however, never challenges the authenticity of anything in the Appendix, because it knows that everything in the Appendix is authentic. Therefore, Trident’s “foundation” argument is manifestly without merit.

Trident also argues that any consideration of the issues and materials raised in the motion must first be considered by the trial court upon remand by this Court. Trident again misses the point. The act by Trident to be estopped is its argument *to this Court* and, therefore, the issues and materials presented in the motion and appendix are properly before this Court.

**II. Trident’s estoppel arguments have no merit.**

**A. Trident’s principal argument of the applications being made under different versions of the South Carolina State Health Plan does not preclude estoppel.**

MUHA filed its CON application under the 2017-2018 State Health Plan – Trident filed its application under the 2020 Health Plan. Trident’s principal argument is that the technical “service area” under the 2020 Health Plan is Dorchester County as opposed to the Tri-County “service area” of Berkeley, Charleston, and Dorchester Counties under the 2017-2018 Health Plan. Based

on this accurately stated technical distinction between the Health Plans, Trident argues estoppel cannot lie because the need issues are not comparable. This argument, itself, is inconsistent with Trident's CON application.

Trident admits in its CON application that only 7 beds are needed for the population in Dorchester County, Trident's technical service area under the 2020 Plan. (Appx. 45-46).<sup>2</sup> Trident nevertheless sought 50 beds based on the significant population growth in its "service area, *which extends beyond Dorchester County*" (Appx. 46; 51) (emphasis added), and which Trident defined as "a population that primarily resides in Dorchester *and Berkeley* Counties and adjoining ZIP Codes in *northern Charleston County*." (Appx. 34) (emphasis added). This extended "service area," which overlaps with MUHA's service area for its new hospital, was the basis for Trident's proof that its application satisfied the requirements of the CON Act for 50 beds.

Throughout its application, Trident asserts satisfaction of various requirements based on the following assertions:

- "the needs of its *service area residents*" (Appx. 20, 32, 51);
- "continued growth in utilization" of its services" (Appx. 20, 22, 32, 42, 46, 49);
- "necessary to support the growth in the *community*" (Appx. 20, 32);
- "continue to expand to meet the needs of the *community*" (Appx. 20, 21); and
- "significant population growth in *the area*" (Appx. 21).

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<sup>2</sup> While the 2020 Plan allows an applicant with a bed need less than 50 to apply for up to 50 beds, the Plan requires the applicant to "document the need for additional beds based on historical and projected utilization, projected population growth that has not been considered in this Plan or other factors demonstrating the need for the proposed beds." (Trident's Exh. B-005). Trident does not acknowledge this requirement of Standard 6 in its Return.

The “service area residents,” “community,” and “area” used by Trident in its application is based on the map and ZIP codes in Exhibits 4, 5, and 6.<sup>3</sup> As shown in the table below, these exhibits list 23 zip codes. Only 7 of these zip codes are in Dorchester County – the remaining 16 zip codes are spread amongst four other counties (7 in Berkeley County, 5 in Charleston County, 2 in Orangeburg County, and 2 in Colleton County):

Zip Code	County	Zip Code	County	Zip Code	County
29405	Charleston	29437	Dorchester	29479	Berkeley
29406	Charleston	29445	Berkeley	29483	Dorchester
29410	Berkeley	29448	Dorchester	29485	Dorchester
29418	Charleston	29456	Charleston	29486	Berkeley
29420	Dorchester	29461	Berkeley	29488	Colleton
29431	Berkeley	29466	Charleston	29048	Orangeburg
29435	Colleton	29472	Dorchester	29059	Orangeburg
29436	Berkeley	29477	Dorchester		

(For the County information, see also [www.unitedstateszipcodes.org](http://www.unitedstateszipcodes.org)). Nineteen of the 23 zip codes are from the former “Tri-County” service area that Trident claims is irrelevant, yet this is the geographic service area Trident relies on to demonstrate its need for an additional 43 beds.

MUHA’s hospital will be in zip code 29486 (Berkeley County), which Trident claims as part of its service area, and which is bounded on all sides by other zip codes claimed by Trident as part of its service area. (Exh. 5 at Appx. 36). A comparison of the map and zip codes in Exhibits 4-6 with the maps and zip codes used in MUHA’s CON application demonstrates that MUHA’s new hospital and Trident are operating in the same area and serving the same population base. (See, *e.g.*, R-10 at 4338-4342, 4345-4348). Trident’s challenge to MUHA’s 128-bed hospital before this Court is therefore necessarily inconsistent with its CON assertion that an additional 50

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<sup>3</sup> Exhibit 4 identifies the zip codes where inpatients discharged from Trident actually live. Exhibit 5 is a map of Trident’s claimed service area and the zip codes therein, which extends well beyond the boundaries of Dorchester County. Exhibit 6 is a table of the current and projected population growth in the same area.

beds are needed in the same area for the same population despite the known existence of MUHA's 128 beds.<sup>4</sup>

**B. Trident's individual arguments do not preclude estoppel.**

Trident makes four arguments regarding the elements of judicial estoppel. As shown below, Trident fails to demonstrate that estoppel, judicial or otherwise, is inappropriate here.<sup>5</sup>

1. Inconsistent Factual Positions

Trident accurately states that it did not mention MUHA's new hospital in its CON application. (Return at 6-7). Trident, however, had to show that its requested 50-bed expansion would not adversely affect other existing providers. More importantly, as shown in II(A) above, Trident went outside the 2020 Plan defined "service area" of Dorchester County and largely used the same population and area to be served by MUHA's new hospital to show a need for its 50 beds. Trident has not denied the significant overlap in the geographic population and growth relied on by MUHA and now by Trident to demonstrate bed need. Trident knew of MUHA's hospital and its patient area/population and, therefore, it necessarily took the factual position that despite MUHA's hospital, there was a need for 50 beds over and above the need filled by MUHA's hospital. The remainder of Trident's argument is based on its "2020 v. 2017-2018" Health Plan arguments refuted in II(A) above. (See Return at 6-10).

2. Same Party or Parties in Privity

Trident first argues that the supplemental material regarding Roper's recent CON is irrelevant. (Return at 10-11). To the contrary, the Roper information demonstrates that DHEC

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<sup>4</sup> The Record on Appeal in this case has 12 volumes and is cited herein as R-[vol. number].

<sup>5</sup> Trident addresses the "benefit" element of judicial estoppel by conceding that it obtained a benefit from its assertions in its CON application but summarily denying its assertions before this Court are inconsistent. (Return at 12 n.7). As shown in MUHA's motion and this reply, Trident's assertions in this appeal to this Court are inconsistent with the factual assertions successfully made to obtain its 50-bed CON.

concluded, when approving the Roper application, that MUHA's 128-bed hospital did not and would satisfy the need for beds in the general patient area and population that warranted additional beds at Trident and Roper. Notably, Trident never refutes this.

Trident next argues that CMC is not in privity with SMC (on whose behalf Trident sought the additional 50 beds). (Return at 11). CMC and SMC are owned by the same parent (HCA) and are part of HCA's South Atlantic Division. (R-5 at 2385). Therefore, SMC and CMC are in privity. They have been in lock step from the outset of this litigation. In opposing MUHA, CMC adopted "by reference" the opposition letter filed Trident's expert. Moreover, Trident filed a brief in this case on behalf of CMC. Ironically, if one accepts Trident's technical "service area" argument, then CMC should not be heard in the present appeal, because CMC was not in the Tri-County Service Area under the 2017-2018 Health Plan.

### 3. Same or Related Proceedings

Trident's argument relies on its earlier refuted "2020 v. 2017-2018" Health Plan argument that the 2020 Plan defines a different geographic service area than the 2017-2018 Plan. (Return at 11-12). This argument ignores that fact MUHA and Trident show need by relying on the same population located in the same geographic area. Trident also ignores and never addresses MUHA's argument that the proceedings are related, because they involve availability, need for and distribution of beds under the CON Act, regulations, and South Carolina State Health Plans for the same patient populations in the same area.<sup>6</sup>

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<sup>6</sup> S. C. Code § 44-7-225 states: "The department, the Administrative Law Court, and the *Court of Appeals* shall consider the South Carolina Health Plan in place at the time the application was filed and *may consider the current South Carolina Health Plan when making its decision.*" (Emphasis added).

4. Intentional Effort to Mislead

Here, Trident simply incorporates its prior arguments. (Return at 12). Notably, Trident does not dispute that, if this Court finds Trident has made inconsistent factual assertions, then this element is satisfied as argued by MUHA in its motion.

**CONCLUSION**

For all of the foregoing reasons, and for the reasons set forth in its motion, MUHA respectfully submits that this Court should grant MUHA's motion and estop Trident from challenging the need for MUHA's new hospital under judicial estoppel and/or this Court inherent authority and discretion. In the alternative, MUHA respectfully submits that this Court should submit MUHA's motion to this Court's merits hearing panel for consideration in conjunction with its consideration of the merits of this appeal.

Respectfully Submitted,

/s/ Robert L. Widener

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September 19, 2022  
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**CERTIFICATE OF SERVICE**

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I, Ann Shuler, an employee of Burr & Forman, LLP, hereby certify that a true and correct copy of the Respondent Medical University Hospital Authority's *Reply to Return to Medical University Hospital Authority's Motion to Supplement Briefs and Record on Appeal* 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 19th day of September, 2022, addressed as follows:

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September 19, 2022

**VIA EMAIL (ctappfilings@sccourts.org)**

Honorable Jenny Abbott Kitchings  
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**Re: Trident Medical Center -v- SCDHEC (Medical University)  
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 *Reply to Return to Respondent Medical University Hospital Authority's Motion to Supplement Briefs and Record on Appeal*. We are serving all counsel of record with a copy of the Reply via email.

Thank you for your assistance in this matter.

Sincerely,

Burr & Forman LLP



Robert L. Widener

RLW/as

Honorable Jenny Abbott Kitchings  
September 19, 2022  
Page 2

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