

The Court invalidated DHEC's suspension of the CON program, ruling that the General Assembly's failure to fund the CON did not negate DHEC's statutory mandate to administer the CON program. *Amisub of S.C., Inc. v. S.C. Dep't of Health and Envtl. Control*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014). LMC was aware that this case was pending before the Supreme Court.

Following DHEC's decision to suspend the CON program, LMC notified the Department's Bureau of Health Licensing and Division of Health Facilities Construction of its plans to open another Open Heart Suite and Cath Lab. On October 11, 2013, DHEC Staff issued a "Report of Visit" approving LMC's occupation and utilization of Operating Room #22 in its hospital as the Open Heart Suite. DHEC noted in its approval letter for LMC to "[p]lease be on notice that any action by the General Assembly, the Judiciary, or third parties challenging the validity of a license issued without CON approval, are outside the control of the Department."

On February 21, 2014, the Department approved the Shielding Plan developed by LMC for use of imaging modalities in the Cath Lab. On February 25, 2014, the DHEC Division of Health Facilities Construction issued a final Plan Approval to LMC for the construction of the Cath Lab. On March 20, 2014, the Department generated a Notice of Completion indicating that construction activity in the third Cath Lab had been completed. On April 10, 2014, the Department issued a Report of Visit approving utilization of the Cath Lab. However, at no time prior to or since the acquisition of these approvals did LMC apply for or obtain a valid CON to offer the health care services contemplated by the Open Heart Suite and Cath Lab.

There have been no facts alleged that either DHEC or LMC provided notice to the public or affected persons in the manner prescribed by the Section 44-1-60 or the CON Act about the above-referenced DHEC Staff approvals relating to the Open Heart Suite and Cath Lab. The only facts alleged concerning either DHEC or LMC giving notice to Providence of LMC's specific actions and approvals was that LMC provided a response to Providence's Freedom of Information request on April 29, 2014.

On May 14, 2014, Providence filed a request that the DHEC Board conduct a Final Review regarding the DHEC Staff's actions in approving the Cardiovascular Care Projects. On June 25, 2014, the Board notified Providence of its decision not to conduct a Final Review in this matter. Pursuant to South Carolina Code Section 44-1-60(F) (Supp. 2013), when the DHEC Board declined to conduct a Final Review, the decisions of the DHEC Staff to approve LMC's

projects became DHEC's Final Agency Decisions. On July 9, 2014, Providence filed a Request for Contested Case Hearing with this Court asserting that because LMC did not have a CON for a third Cath Lab and second Open Heart Suite, LMC should not be permitted to occupy and to use them. On July 24, 2014, Providence filed a Motion for Summary Judgment and Motion to Enforce Automatic Stay.¹

STANDARD OF REVIEW

Rule 68 of the South Carolina Administrative Law Court Rules provides that “[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules.” Rule 56(c) of the South Carolina Rules of Civil Procedure states that summary judgment is properly granted when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.”

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). “In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). However, “when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). Moreover, “[t]he question of statutory interpretation is one of law for the court to decide.” *Alltel Commc’ns, Inc. v. S.C. Dep’t of Revenue*, 399 S.C. 313, 315, 731 S.E.2d 869, 870 (2012).

¹ On July 25, 2014, LMC filed a Motion to Dismiss for lack of subject matter jurisdiction by this Court, which the Court denied in a separate Order.

DISCUSSION

Providence argues that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law because the CON Act applied to LMC's Cath Lab and Open Heart Suite projects and LMC failed to acquire a CON for either of these projects. I agree that summary judgment is appropriate as to LMC's Cath Lab. However, because there remains a genuine issue of material fact as to whether LMC made a capital expenditure for the Open Heart Suite, the Court must deny summary judgment on that issue and will allow limited discovery pertaining to that one issue.

As an initial matter, LMC argues that this Court lacks subject matter jurisdiction to consider Providence's Motion for Summary Judgment. For the reasons set forth in the Court's Amended Order Denying LMC's Motion to Dismiss, this Court not only has subject matter jurisdiction to hear this matter but also procedural jurisdiction. Turning, then, to the Motion, I find that there is no genuine issue of material fact in this case as to the Cath Lab, but there is a genuine issue of material fact regarding the Open Heart Suite. The following material facts are undisputed:

- (1) The CON Act was never suspended and DHEC was required by law to operate the program for fiscal year 2013-2014;
- (2) Chapter VIII of the *2012-2013 South Carolina Health Plan* is entitled "Cardiovascular Care" and contains standards and criteria for both cardiac catheterizations and open heart surgery;
- (3) LMC expended no less than \$200,000 on the construction of the Cath Lab.;
- (4) LMC is a "health care facility" as defined in the CON Act and previously received a CON to provide comprehensive cardiac services, including open heart surgery and therapeutic catheterizations on June 18, 2010;
- (5) LMC did not obtain a CON prior to undertaking a Second Open Heart Surgery Suite or a Third Cardiac Catheterization Laboratory;
- (6) Neither LMC nor DHEC notified the public of the applications for licensing and/or construction submitted by LMC to DHEC;²

² As discussed in the Court's Order Denying LMC's Motion to Dismiss, notice was required as a matter of law; and as further discussed in that Order, Catherine Templeton's June 28, 2013 letter was neither the actual notice required by the CON statute and Section 44-1-60 nor constructive notice.

- (7) Providence received written notice from LMC of the DHEC approvals on April 29, 2014; and
- (8) Providence filed its Request for Review with the DHEC Board on May 14, 2014.³

Cath Lab

Providence argues that LMC violated the CON Act as a matter of law by expanding and operating its Cath Lab without a CON. I agree. For the reasons set forth in the Court's Amended Order Denying LMC's Motion to Dismiss, S.C. Code Ann. §§ 44-7-110 et seq. (CON Act) was in effect during the period at issue and applies to LMC's Cath Lab and Open Heart Suite projects. Section 44-7-160(4) (Supp. 2013),⁴ provides:

A person or health care facility as defined in this article is required to obtain a Certificate of Need from the department before undertaking any of the following:

- (4) a capital expenditure by or on behalf of a health care facility which is associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the South Carolina Health Plan[.]

see also 3 S.C. Code Ann. Regs. 61-15 § 102(1)(d) (2011). There is no dispute that LMC is a "health care facility" pursuant to S.C. Code Ann. § 44-7-130(10) (Supp. 2013). The Cath Lab would be LMC's third comprehensive catheterization laboratory, thus expanding on its comprehensive cardiac catheterization services. The standards and criteria for these services are prescribed in the State Health Plan, on pages VIII-5 to VIII-15. Indeed, at the September 3, 2014 hearing, DHEC conceded that had its director not issued the June 28, 2013 letter regarding the purported suspension of the CON program, DHEC would have required a CON for each of LMC's projects because "they would have been an expansion of an existing service that has standards in the State Health Plan." Therefore, the only remaining question is whether LMC made a capital expenditure for the Cath Lab project. According to DHEC's Plan Approval for the project, dated February 25, 2014, the cost of the Cath Lab project was \$200,000. That cost

³ The Court will not consider the evidence concerning the volume of cardiac services in South Carolina between 2009 and 2011 or the quality of those services. Whether the alleged "success and growth" of LMC's cardiac services program warrants expansion is a question for the Department to consider during review of a properly filed CON application.

⁴ Providence's Motion for Summary Judgment and Memorandum in Support contained a scrivener's error, mistakenly referring to subsection (5) of Section 44-7-160 instead of subsection (4). However, Providence corrected this error in its Reply in Further Support of Summary Judgment and had also cited subsection (4) in its Request for a Contested Case Hearing filed July 9, 2014

was not disputed. Therefore, as a matter of law, LMC was required to first obtain a CON before undertaking the Cath Lab project.

Open Heart Suite

Providence also argues that LMC violated the CON Act as a matter of law by expanding its open heart surgery services and operating its Open Heart Suite without a CON. The same statutory and regulatory provisions that apply to the Cath Lab apply to the Open Heart Suite, except that the Open Heart Suite has different standards under the State Health Plan. The Open Heart Suite would be LMC's second open heart surgery operating room, thus expanding on its existing open heart surgery services. The standards and criteria for these services are prescribed in the State Health Plan, on pages VIII-17 to VIII-21. As noted above, at the September 3, 2014 hearing, DHEC conceded that had its director not issued the June 28, 2013 letter regarding the purported suspension of the CON program, DHEC would have required a CON for the Open Heart Suite because it "would have been an expansion of an existing service that has standards in the State Health Plan." Therefore, the only remaining question is whether LMC made a capital expenditure for the Open Heart Suite project. However, Providence has provided no evidence that LMC made a capital expenditure for its Open Heart Suite project, and therefore it remains a triable issue of fact that will require discovery.

Estoppel

Finally, LMC argues that even if it was required to have a CON prior to undertaking its projects, the Department should be estopped from enforcing this requirement because the Director of the Department, who was authorized to speak for the Department, acted within the scope of her authority when she declared that the CON program was suspended. LMC contends that every member of the regulated community therefore had a right to rely on the Director's directive regarding administration of the CON program. LMC further asserts that its reliance was justified because it took the additional steps of meeting with the Director to receive direct assurances regarding the lack of a requirement for a CON, as well as with the staffs from the Department's legal, construction inspection, and licensing divisions to ensure compliance with all departmental requirements prior to operation. Consequently, LMC contends that Lexington had the right to expand its open heart surgery and cardiac catheterizations services without first obtaining a CON.

“A governmental body is not immune from the application of the doctrine of estoppel where its officers or agents act within the proper scope of their authority. . . .” *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (quoting *DeStefano v. City of Charleston*, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)) (emphasis in original). “If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position.” *Id.* at 236-37, 692 S.E.2d at 506 (emphasis added).

In this case, the Director of the Department is authorized to speak for the Department; but Director Templeton, as the Supreme Court discussed in *Amisub, supra*, was not authorized to contravene the authorizing CON statute by declaring the CON program suspended. “An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.” *S.C. Dep’t of Nat. Res. v. McDonald*, 367 S.C. 531, 534, 626 S.E.2d 816, 818 (Ct. App. 2006). “The authority to enact, modify, or repeal legislation lies solely within the General Assembly’s broader authority.” *Amisub*, 407 S.C. at 595, 757 S.E.2d at 415. As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged. *City of Rock Hill v. S.C. Dep’t of Health and Envtl. Control*, 302 S.C. 161, 394 S.E.2d 327 (1990); *City of Columbia v. S.C. Dep’t of Health and Envtl. Control*, 292 S.C. 199, 355 S.E.2d 536 (1987). Because Templeton exceeded the scope of her authority by issuing her June 28, 2013 letter, estoppel will not lie against the Department. *See DeStefano v. City of Charleston*, 304 S.C. 250, 258, 403 S.E.2d 648, 653 (1991) (quoting *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987)) (“The public cannot be estopped . . . by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.”).⁵

Moreover, even if estoppel was applicable against the Department, LMC should have been aware of the great risk that it took in carrying forward with its projects without a CON. In this case, the CON Act was available for LMC to read, there was no reliance on an erroneous

⁵ LMC also contends that the determination not to grant Certificates of Need was, at the least, acquiesced in by the Board through silence. I need not address this novel approach to projecting the Department policy because the Board has no greater authority to disregard its statutory obligations than the Director.

CON Act (or even the Act itself). The CON Act is, and has been, in effect throughout the events at issue, and DHEC has all the while been responsible for enforcing it. Therefore, LMC was on “notice” that the Department’s interpretation of the state of the CON program was incorrect. In addition, LMC conceded at the September 3, 2014 hearing that it, as well as the whole regulated community, was aware of the pending action before the Supreme Court regarding the Department’s purported suspension of the CON program. Furthermore, the Department specifically advised LMC: “Please be on notice that any action by the General Assembly, the Judiciary, or third parties challenging the validity of a project undertaken without CON approval during the program’s suspension is outside the control of the Department.”⁶ Therefore, LMC knowingly assumed the risk of receiving an adverse decision from the Supreme Court when it undertook its projects without obtaining the requisite CONs.

Conclusion

For the foregoing reasons, I find that summary judgment is appropriate as to issue of LMC’s Cath Lab. Pursuant to S.C. Code Ann. § 1-23-630(A) (2005), the Court has the power to “issue those remedial writs as are necessary to give effect to its jurisdiction.” Therefore, the Court hereby stays LMC’s activities relating to the Cath Lab until LMC properly files the requisite CON application, should LMC choose to do so. However, because there remains a genuine issue of material fact as to the sole issue of whether LMC made a capital expenditure for the Open Heart Suite, the Court denies summary judgment as to that issue. Pursuant to ALC Rule 21(B), discovery will be available to the parties but will be limited to the sole issue of whether LMC made a capital expenditure for its Open Heart Suite.

ORDER

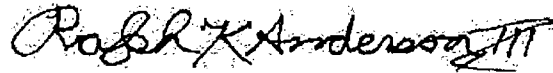
IT IS THEREFORE ORDERED that Providence’s Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART.**

⁶ The Department also sets forth in its comment regarding the second Open Heart Surgery Suite that: *Should the General Assembly restore the CON program in the future, or should the court determine the program is not suspended, the Department will not take action to revoke any license issued during the suspension period for the facility or service for which the Act requires a CON review, unless otherwise instructed by the General Assembly or Judiciary.* (italics in original). The Court was unable to find this language specifically addressing the Cath Lab. However, it would be fair to assume that the Department’s commitment is also applicable to the Cath Lab. In remanding this matter, the Court finds that the Department’s pledge not take action against LMC was unlawful and void.

IT IS FURTHER ORDERED that LMC cease and desist from any further activities relating to the Cath Lab unless and until LMC properly files and obtains the requisite CON application for that project.

IT IS FURTHER ORDERED that the remedial stay will be in effect **five (5)** calendar days from the date of the issuance of this Order.

AND IT IS SO ORDERED.

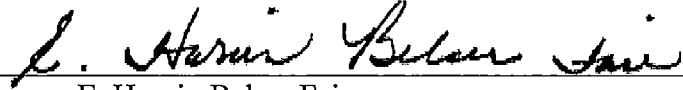


Ralph King Anderson, III
Chief Administrative Law Judge

October 23, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

A handwritten signature in cursive script, reading "E. Harvin Belser Fair", is written over a horizontal line.

E. Harvin Belser Fair
Judicial Law Clerk

October 23, 2014
Columbia, South Carolina