

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

DEC 14 2015
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Trial Court Case No. 2014-ALJ-07-0332-CC

Case No. 2015-001151

Sisters of Charity Providence Hospitals,Respondent,

v.

South Carolina Department of Health and Environmental Control and Lexington County
Health Services District, Inc. d/b/a Lexington Medical Center

Of Whom South Carolina Department of Health and Environmental
Control is the Respondents,
and

Lexington County Health Services District, Inc. d/b/a Lexington
Medical Center isAppellant.

**INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL**

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201
(803)898-3350

Attorneys for Respondent SCDHEC

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF ISSUES.....1

FACTS.....1

ARGUMENT.....3

I. The doctrine of equitable estoppel is not applicable where the underlying statement is determined to be a misstatement of law.....3

II. Even if estoppel applied, LMC has not met the elements of estoppel.....5

CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

<i>Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control</i> , 407 S.C. 583, 757 S.E.2d 408 (2014).....	2, 4
<i>Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant</i> , 308 S.C. 205, 417 S.E.2d 579 (1992).....	4, 6
<i>Grant v. City of Folly Beach</i> , 346 S.C. 74, 551 S.E.2d 229, (2001)	3, 4
<i>Morgan v. S.C. Budget and Control Bd.</i> , 377 S.C. 313, 319, 650 S.E.2d 263, 267 (Ct. App. 2008)	4
<i>Quail Hill, LLC v. Cty. of Richland</i> , 387 S.C. 223,962 S.E.2d 499 (2010).....	4, 5
<i>S.C. Coastal Council v. Vogel</i> , 292 S.C. 449, 357 S.E.2d 187 (Ct. App. 1987)	4

Statutes

S.C. Code Ann. § 44-7-140	1
---------------------------------	---

Other Authorities

2013-2014 Appropriations Act.....	1
-----------------------------------	---

STATEMENT OF ISSUES¹

Did the Administrative Law Court (“ALC”) correctly hold that a claim of equitable estoppel against a governmental agency does not apply or, if it does apply, is not met where the underlying government statement was held by the Supreme Court to be a misstatement of law?

FACTS

When the 2013-2014 Appropriations Act took effect on July 1, 2013, it included no funds for the Certificate of Need (“CON”) program. Governor Haley had vetoed a line item for the CON budget, and that veto had been sustained by the House of Representatives. Respondent South Carolina Department of Health and Environmental Control (“Department”), which is the sole state agency responsible for administering the CON program pursuant to S.C. Code Ann. § 44-7-140, issued a statement to the regulated community on June 28, 2013, stating its position that the sustained veto effectively suspended the operation of the CON program for the 2013-2014 Fiscal Year. (LMC July 25, 2014 Motion to Dismiss, Exhibit A). The Department also filed a petition with the Supreme Court seeking a ruling on the issue, as did other interested parties.

After the Department issued its statement, but before the Supreme Court issued a ruling on the pending petitions, Appellant Lexington Medical Center (“LMC”) notified the Department of its plans to utilize existing space in its hospital to pursue two heart-related projects for which it had not received prior CON approval: the addition of a third cardiac catheterization laboratory (“cath lab”), and the addition of a second open heart surgery

¹ The Department does not take a position on the remaining issue raised by LMC, regarding whether Providence timely filed its request.

suite. On October 11, 2013, Department staff issued LMC a Licensing "Report of Visit" ("ROV") approving LMC's occupation and utilization of an operating room as an open heart surgery suite. (Providence July 24, 2014 Motion for Summary Judgment, Exhibit A). The ROV included notice of the Department's pending petition at the Supreme Court, and advised as follows: "Please 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 25, 2014, Department staff issued LMC a Construction Plan Approval for upfit and renovation of existing space to be utilized as a cath lab. (*Id.* at Exhibit B). On March 20, 2014, Department staff issued a Notice of Completion to LMC indicating all construction activity for the cath lab had been completed. (Providence July 9, 2014 Request for Contested Case Hearing, Exhibit F). On April 10, 2014, the Department issued a Licensing ROV approving utilization of the space as a cath lab. (*Id.* at Exhibit G).

On April 14, 2014, the Supreme Court issued its opinion in *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 407 S.C. 583, 757 S.E.2d 408, finding the Department was obligated to operate the CON program despite the lack of funding for the program in the Appropriations Act. The Supreme Court denied the Department's petition for rehearing on May 22, 2014.

Respondent Sisters of Charity Providence Hospitals ("Providence") filed a request for final review with the Board of Health and Environmental Control on May 14, 2014, regarding staff's actions in issuing licensing and construction approvals for LMC's cath lab and open heart surgery suite in the absence of prior CON approval. The Board notified the parties it would not conduct a final review conference in this matter, and Providence

subsequently filed a request for a contested case hearing with the Administrative Law Court (“ALC”). (Providence Request for Contested Case Review).

On September 22, 2014, the ALC granted partial summary judgment to Providence, staying LMC’s operation of the cath lab until LMC filed a requisite CON application. In its order, the ALC rejected LMC’s claim that the Department should be estopped from enforcing the CON requirements as to its two heart-related projects based upon the Department’s June 28, 2013 statement, which was issued by the Director of the Department, and subsequent communications with Department staff regarding the two projects specifically. The ALC held “Because [Director] Templeton exceeded the scope of her authority by issuing her June 28, 2013 letter, estoppel will not lie against the Department.” (Oct. 23, 2014, Amended Order Granting Partial Summary Judgment, p. 7). The ALC further held “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.” (*Id.*).

On May 29, 2014, the ALC granted summary judgment to Providence as to LMC’s open heart surgery suite, finding that project required CON approval from the Department as well. LMC then filed this appeal.²

ARGUMENT

I. The doctrine of equitable estoppel is not applicable where the underlying statement is determined to be a misstatement of law.

“As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.” *Grant v. City of*

² This recitation of facts omits reference to other interlocutory orders filed by the ALC in this case. The Department takes no position on the ALC’s denial of LMC’s motion to dismiss.

Folly Beach, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001). While the acts of government agents acting within the proper scope of their authority can give rise to estoppel against the government, unauthorized or erroneous conduct or statements do not give rise to estoppel. *S.C. Coastal Council v. Vogel*, 292 S.C. 449, 453, 357 S.E.2d 187, 189 (Ct. App. 1987). “Specifically, ‘[e]stoppel will not lie against a government entity where a government employee gives erroneous information in contradiction of statute. Simply stated, equity follows the law.’” *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (quoting *Morgan v. S.C. Budget and Control Bd.*, 377 S.C. 313, 319, 650 S.E.2d 263, 267 (Ct. App. 2008).

Although the Department did not believe its June 28, 2013, statement regarding the effect of the budget veto on the CON program to be erroneous at the time it was issued, the Supreme Court determined in the *Amisub* case that the Department’s position was legally inaccurate. Specifically, the Court held that in sustaining the budget veto for the CON program the Legislature did not intend to suspend the Department’s duty to administer the CON program. *Amisub* at 597, 757 S.E.2d at 415. The Court further held that the Department had a duty to administer the CON program as contemplated by the CON Act, and a duty to fund the program, during Fiscal Year 2013-2014. *Id.* at 603, 757 S.E.2d at 419. Therefore, LMC’s estoppel claim against the Department based on the Department’s June 28, 2013, statement will not lie. See *Quail Hill* at 238, 692 S.E.2d 508 (finding that a zoning classification was a mistaken statement of law, and thus it could not be used to estop the County from enforcing it); *Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992) (“Estoppel may not be based upon an illegal act.”).

For the foregoing reasons, the ALC properly held that estoppel does not apply in this case.

II. Even if estoppel applied, LMC has not met the elements of estoppel.

“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.” *Quail Hill* at 236-37, 692 S.E.2d at 506. Even if estoppel applied in this instance, LMC has not established the element of justifiable reliance upon the Department's conduct.

LMC states it relied upon the Department's June 28, 2013, correspondence stating that the sustained budget veto for the CON program for Fiscal Year 2013-2014 completely suspended the operation of the CON program for that fiscal year, and subsequent similar communications from Department staff about its two projects specifically. However, LMC admittedly was aware of the action pending in the Supreme Court challenging the Department's position that the budget veto suspended operation of the CON Program. (See Oct. 23, 2014 Amended Order Granting Partial Summary Judgment, p. 6). Furthermore, the Department advised LMC on October 11, 2013, with respect to its open heart surgery project, that it had petitioned the Supreme Court on the issue of the effect of the funding veto. The Department's October 11, 2013 communication included the following language: “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 beyond the control of the Department.” (Providence July 24, 2014 Motion for Summary Judgment, Exhibit A). Accordingly, LMC's reliance upon the

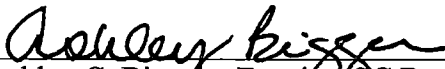
Department's statement as to the effect of the veto item, and whether or not the CON statute applied to its projects during the 2013-2014 Fiscal Year, was not justifiable. *See Berkeley Elec. Co-op.* at 210, 417 S.E.2d at 582 (holding that a party was charged with knowing the statutory limitations on a municipality's power and therefore could not justifiably rely upon a municipality's action taken in excess of its statutory power, even if the party was unaware that the municipality's act was in contravention of statute.).

For the reasons stated above, the ALC properly held that even if estoppel applied in this case, LMC knowingly assumed the risk of going forward with its project during the period of CON suspension without first receiving proper CON approval.

CONCLUSION

For the foregoing reasons, the ALC's orders granting summary judgment should be affirmed.³

Respectfully submitted,



Ashley C. Biggers, Esquire (SC Bar No.: 17225)
Vito M. Wicevic, Esquire (SC Bar No.: 100265)
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29078
P: (803) 898-3350
F: (803) 898-3367

December 14, 2015
Columbia, South Carolina

³ The Department takes no position on the ALC's order on LMC's motion to dismiss, based on the timeliness of Providence's filing.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM THE ADMINISTRATIVE LAW COURT

DEC 14 2015

SC Court of Appeals

The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Trial Court Case No. 2014-ALJ-07-0332-CC

Case No. 2015-001151

Sisters of Charity Providence Hospitals,Respondent,

v.

South Carolina Department of Health and Environmental Control
and Lexington County Health Services District, Inc. d/b/a
Lexington Medical Center

Of Whom South Carolina Department of Health and Environmental
Control is theRespondent,


and Lexington County Health Services District, Inc. d/b/a Lexington
Medical Center is the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on December 14, 2015, she has caused a copy
of Respondent South Carolina Department of Health and Environmental Control's *Initial
Brief and Designation of Matter* to be served on all parties of record by United States
Mail, First Class, postage prepaid, addressed as follows:

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202

David B. Summer, Jr., Esquire
William R. Thomas, Esquire
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450 (29201)
Post Office Box 1509
Columbia, SC 29202



Ashley C. Biggers, Esquire (SC Bar No.: 17225)
Vito M. Wicevic, Esquire (SC Bar No.: 100265)
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29078
P: (803) 898-3350
F: (803) 898-3367
E-mail: biggerac@dhec.sc.gov
E-mail: Vito.Wicevic@dhec.sc.gov
Paralegal: jonesjp@dhec.sc.gov

Date: December 14, 2015



Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment

RECEIVED

DEC 14 2015

SC Court of Appeals

December 14, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Sisters of Charity Providence Hospitals v. SCDHEC and Lexington
County Health Services District, Inc., d/b/a Lexington Medical Center
Case No.: 14-ALJ-07-0332-CC
Appellate Case No.: 2015-001151
OGC No.: 22231

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of *Respondent South Carolina Department of Health and Environmental Control's Initial Brief, Designation of Matter and Proof of Service* in the above-referenced matter to be clocked and filed.

Should you have any questions regarding this matter, please do not hesitate to contact our office. With kindest regards, I am,

Sincerely,

Ashley C. Biggers

Enclosures

cc: James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
David B. Summer, Jr., Esquire
William R. Thomas, Esquire