THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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

Case No. 2014-ALJ-07-0332-CC

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 .....Respondent,

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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC") replies herein to the separate briefs of the Respondent Department of Health and Environmental Control ("Department") and the Respondent Sisters of Charity Providence Hospitals' ("Providence") by addressing their specific arguments in the context of the issues as framed by Trident in its main brief. In offering this brief in reply to selected arguments of the Respondents, LMC incorporates and reiterates all of its arguments on all of the issues as set forth in its main brief.

As a preliminary matter, LMC takes issue with Providence's perjorative statement of its version of the facts.[1] Specifically, Providence characterizes the actions of LMC and the Department as "misconduct," which was "secretive", "hidden" and "concealed" from the public. Nothing in the record supports these characterizations.

To the contrary, the record shows that LMC did not hide its projects or proceed in secret to implement them. LMC met with the Department, including the Director, advised the Department of its need for the third catheterization laboratory and the second open heart suite, and then worked with the Department to implement the projects within the only regulatory structure available to LMC at the time. Department staff reviewed plans, made site visits and inspections and issued approvals for every stage of the planning and construction. There was nothing secretive or nefarious about LMC's development of its projects. (R. pp. 211–212).

[1] As argued by LMC in its main brief, all of the decisions of the ALC were made without the benefit of discovery. As a consequence, almost all material facts were in dispute except for the dates of issuance of Department notices and approvals and the dates of filing by Providence of its various requests for information and requests for review.

Providence and the rest of the provider community and the public were given advance notice by the Department that, as was the case with LMC, the Department would be working with providers to implement projects without utilization of the CON notification and approval process. The Department explicitly announced that such actions would begin and be ongoing after July 1, 2013.[2]

Further, both LMC and the Department are subject to Freedom of Information Act disclosure laws and were so during the entire time period at issue. Finally, LMC's utilization of the projects, after they were approved by the Department, was open and public. Far from being "secret", Providence and any other member of the public had ample means to learn of LMC's plans.

I. THE ADMINISTRATIVE LAW COURT ERRED IN CONCLUDING THAT PROVIDENCE'S REQUEST FOR REVIEW WAS TIMELY UNDER SECTION 44-1-60 DESPITE PROVIDENCE'S FAILURE TO FILE ITS REQUEST WITHIN 15 DAYS OF THE DATE DHEC DELIVERED NOTICE OF ITS DECISION TO LMC.

In its appeal, LMC contends that the Administrative Law Court lacked the authority to hear and decide Providence's contested case because Providence's request for review was not timely filed.[3] LMC argues that, despite being on notice the projects could be approved without CON review, Providence took no action to protect its interests

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[2] In response to almost every issue in this case, Providence insists that LMC must have known of the litigation that arose from the Department's decision to approve projects without CON review and that LMC should have acted accordingly. If this assumption is valid, Providence must likewise be charged with knowledge of the Department's publicly stated intent in June 2013 to approve projects without CON review. Nevertheless, Providence argues that it had no reason or obligation to attempt to protect its interests until, for whatever reason, it decided on April 9, 2014 to advise the Department of its status as an affected person and to request notice of any LMC projects the Department intended to approve. (R. pp. 269–270; R. p. 268). By the time Providence took these steps to protect its interests, however, the Department had already approved LMC's projects and the projects were already implemented and in use.

[3] Although LMC contested subject matter jurisdiction of the ALC below, LMC does not raise that issue on appeal. In this issue, which LMC also raised below, LMC contends that Providence's remedy to seek contested case review was foreclosed by its failure to timely request review, and that the court cannot exercise its jurisdiction in light of such failure.

with regard to such projects and did not file its request for review of the Department's approval of LMC's open heart suite within fifteen days of the Department's notification to LMC of such approval. The South Carolina Supreme Court has strictly construed section 44-1-60(E) of the South Carolina Code to mean that, unless a request for review is filed in the interim, a decision is final fifteen days after notice is mailed to the applicant, and there is no dispute that Providence did not meet this deadline. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 427, 702 S.E.2d 246, 251 (2010).

However, even if this Court allows, as it did in *South Carolina Coastal Conservation League* (albeit under specific and different facts from the case at hand[4]), for the statutory timeframe to run from when Providence (rather than the applicant) first received notice of the decision, then Providence's request was only timely if it was made within fifteen days of the date that Providence first became aware of LMC's second open heart suite. When Providence received notice sufficient to trigger the statutory deadline in this case is a material, disputed question of fact, which was not appropriate for decision on summary judgment.

Providence's counsel has repeatedly contended that Providence had no notice of the approval of LMC's second open heart suite until LMC responded to a Freedom of Information Act ("FOIA") request on April 29, 2014. (R. p. 267). However, no evidence

[4] In *South Carolina Coastal Conservation League*, the Supreme Court held that the time for appeal under Section 44-1-60 runs fifteen days from receipt of the decision by the applicant unless (a) the affected person has requested notice from the Department and (b) the requested notice is not provided simultaneously with the transmittal of the decision to the applicant. In this case, Providence does not meet the first condition that persuaded the Court in *Coastal Conservation League* to extend the fifteen day time frame to appeal. Providence was on notice as of June 28, 2013 that all of its competitors' projects (and its own) would be proceeding without consideration of Certificate of Need requirements and without the usual published notice. (R. p. 209). It was incumbent on Providence to protect its rights by promptly notifying the Department that it desired notice of any projects approved for its competitors, including LMC.

was before the ALC to support such assertion. Further, LMC has strenuously and consistently disputed the assertion. LMC argued before the ALC, and raises as an issue on appeal, the ALC's finding of jurisdiction and granting of summary judgment with the material fact of the timeliness of Providence's appeal at issue.

In its brief, Providence sets forth a list of "facts" which the ALC characterizes as undisputed and argues that these so-called "undisputed" facts support the ALC's decision. (Providence Brief, pp. 4-5). However, the finding which the ALC characterizes as "not disputed" is only that "Providence received written notice from LMC of the DHEC approvals on April 29, 2014." There was and is no evidence, disputed or otherwise, that LMC's response to Providence's FOIA request was the first notice Providence had of the approval of LMC's open heart suite. LMC argued that the April 9, 2014 notice of affected persons sent by Providence to the Department is, in fact, evidence to the contrary. (R. pp. 269–270). The ALC had no basis upon which to conclude that Providence's request for review was timely, even assuming that, under *South Carolina Coastal Conservation League,* the strict fifteen day requirements of section 44-1-60(E) did not apply.[5]

"Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *BPS, Inc. v. Worthy*, 362 S.C. 319, 329, 608 S.E.2d 155, 161 (Ct. App. 2005). Therefore, the ALC's grant of summary judgment was not supported by the substantial (or any) evidence in the record and was arbitrary,

[5] Providence argues in its brief that finding it untimely would deprive it of due process in this case. Contested cases founded on due process (Article I, § 22) claims must be brought within the time periods prescribed by statute. *See S.C. Tax Comm'n v. S.C. Tax Bd. of Rev.*, 278 S.C. 556, 299 S.E.2d 489 (1983). By its terms, section 44-1-60 applies to all Department decisions giving rise to a contested case. Therefore, the 15-day time frame for filing applies whether jurisdiction over Providence's appeal is through statute or through Article I, Section 22.

capricious, clearly erroneous, and an abuse of discretion. Accordingly, it must be reversed. *See* S.C. Code Ann. § 1-23-380(5).

II. THE ADMINISTRATIVE LAW COURT ERRED IN GRANTING PROVIDENCE'S MOTION FOR SUMMARY JUDGMENT AS TO LMC'S ESTOPPEL CLAIMS WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO THOSE CLAIMS.

III. THE ADMINISTRATIVE LAW COURT ERRED IN HOLDING THAT DHEC COULD NOT BE ESTOPPED FROM ENFORCING A CERTIFICATE OF NEED REQUIREMENT FOR LMC'S SECOND OPEN HEART SURGERY SUITE NOTWITHSTANDING THE DHEC DIRECTOR'S PRIOR ASSERTIONS TO LMC THAT THE PROJECT COULD PROCEED WITHOUT CON REVIEW AND LMC'S REASONABLE RELIANCE THEREON.

Both Providence and the Department contend that, as a matter of law, DHEC cannot be estopped from enforcing a Certificate of Need requirement as to LMC's open heart surgery suite. The ALC agreed and decided the estoppel question with no factual evidence on any of the relevant issues. However, as argued in LMC's main brief and supported by the cases cited therein, whether Director Templeton's statements were made outside of the scope of her authority and whether LMC reasonably relied upon those statements are questions of fact. *See Bishop v. City of Columbia*, 401 S.C. 651, 738 S.E. 2d 255 (Ct. App. 2013) (finding that the scope of authority and reasonable reliance in an estoppel claim are questions of fact).

Providence attempts to frame the scope of Director Templeton's authority as whether or not her directives were ultimately upheld by the Supreme Court in *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 407 S.C. 583, 757 S.E.2d 408 (2014). Rather, the question here is whether Director Templeton's statutory authority encompasses speaking for the Department and determining the control and operation of the agency. Because "a public officer derives his

authority from statutory enactment," *Ahrens v. State*, 392 S.C. 340, 353, 709 S.E.2d 54, 60-61 (2011), whether Director Templeton's actions were within the scope of her authority will be determined by section 1-30-10(D) of the South Carolina Code. Section 1-30-10(D) states, "The governing authority of a department is vested with the duty of overseeing, managing, and controlling the operation, administration, and organization of the department." At a minimum, a question of fact exists as to whether Director Templeton was acting within the scope of her statutory authority as the head of the sole agency charged with administering the CON program when she issued the June 28, 2013 letter to the regulated community, however erroneous her decision was later determined to be.

The cases cited by Providence and the Department in support of their position are distinguishable from the current case. In both *Morgan v. South Carolina Budget and Control Board*, 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008), and *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011), the appellate courts were faced with questions regarding state retirement benefits. In *Morgan*, the retiree complained that he relied upon information from the Retirement Systems regarding his eligibility to purchase retirement credits. The retiree initially received misinformation, but the Court of Appeals found that he could not establish lack of knowledge because eligibility to purchase retirement credits is "purely statutory" and the retiree could have turned to the statute for his information. 377 S.C. at 319–21, 659 S.E.2d at 267–68. Similarly, in *Ahrens*, the Supreme Court found that the retirees could not establish lack of knowledge that the retirees would not be able to make contributions to the retirement system once they became working retirees

because the Retirement System provided materials explaining that the law governing the system may change. 392 S.C. at 355, 709 S.E.2d at 62.

In this case, the ALC erroneously determined that the validity of the CON program could have been determined by a "simple reading" of the CON statute and that, therefore, LMC should have known it could not rely on the actions and representations of the Director of the Department in announcing the Department's policy that the lack of funding and the upheld veto of the Governor suspended operation of the program. The issue presented to the Supreme Court in the *Amisub* case, cited above, did not turn on a simple reading of the CON statute. The issues in that case involved a constitutional determination whether the Governor and the House of Representatives could in essence repeal the CON program by defunding it. No "simple reading of the CON statute" would have given LMC the ability to determine the resolution to this constitutional question. LMC, as a regulated provider, had the right to rely on the Director of the sole agency charged with administering the CON program when it sought the Department's input and advice in order to implement its projects. It is important to remember that LMC received all of the regulatory approvals for its project that the Department policy at the time allowed.

The Department argues that LMC had no right to rely on the statements of its Director because the Department included language on certain of its approval documents which indicated that the Department had no control over third parties and courts with regard to its decision to approve LMC's project. This statement of the obvious (that the Department cannot control the actions of third parties or the court) does nothing to diminish or discourage LMC's right to rely on the Director's statements that LMC could

proceed with its projects without any further Department action or enforcement. Indeed, the Department admits that the Department believed its position to be sound until the Supreme Court addressed the constitutional issues involved. (Department Brief, p. 4). LMC was entitled to a full and fair opportunity to develop and present the facts necessary to support its assertion of estoppel against the Department. The ALC's grant of summary judgment on this issue was premature and improper and should be reversed.

CONCLUSION

For the reasons stated above and contained in LMC's main brief, the orders of the ALC appealed from in this case should be vacated for lack of jurisdiction, or, alternatively, reversed and remanded to the ALC to allow LMC the opportunity to proceed with discovery and develop the necessary facts. Further, if the Court determines that no factual findings are necessary on the issue of estoppel, then LMC requests this Court find that the ALC erred in not finding the Department is estopped and remand the case to the ALC for entry of the appropriate order.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief of Appellant complies with Rule 211(b), SCACR.

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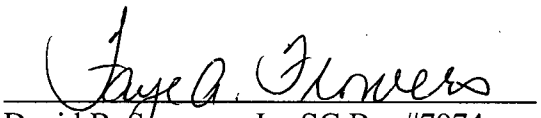

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PROOF OF SERVICE

The undersigned hereby certifies that on February 17, 2016, s/he has caused a copy of the **REPLY BRIEF OF APPELLANT** to be served upon all counsel of record by hand delivering a copy of the same addressed as follows:

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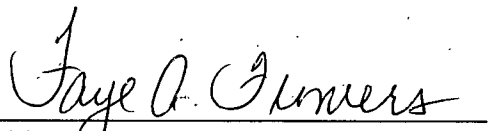

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