

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.

**RECORD ON APPEAL
VOLUME 2 OF 2**

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Transcript of the Testimony of
**SISTERS OF CHARITY PROVIDENCE
HOSPITALS V. SCDHEC**

Date: September 3, 2014



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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 14-ALJ-07-0332-CC

Sisters of Charity Providence Hospitals,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
South Carolina Department of Health and Environmental Control, and Lexington Health Services District, Inc., d/b/a Lexington Medical Center,	)	
	)	
Respondents.	)	
	)	

MOTIONS HEARING

Wednesday, September 3, 2014

10:00 a.m. - 11:11 a.m.

The motions hearing before the Honorable Ralph King Anderson, III, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 3rd day of September, 2014 before Cassandra E. Vance, Court Reporter and Notary Public in and for the State of South Carolina.

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Also Present:
Michael J. Biediger, CEO of Lexington Medical Center

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing
is being taken pursuant to the rules of the
Administrative Law Judge Division and the South
Carolina Rules of Civil Procedure.

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1 THE COURT: All right. This is a motions hearing in
2 the matter of Sisters of Charity Providence
3 Hospitals, Petitioner, versus South Carolina
4 Department of Health and Environmental Control,
5 and Lexington Health District, Inc., d/b/a
6 Lexington Medical Center, Respondents.

7 We've got a Motion to Dismiss and a Motion for
8 Summary Judgment. I probably would elect to do
9 the Motion for Summary Judgment first, but what
10 sayeth y'all? What --

11 MR. LONG: Your Honor, we also have a Motion to
12 Enforce the Stay --

13 THE COURT: Yeah.

14 MR. LONG: -- but we'd want to hear that third in
15 the hearing.

16 THE COURT: I don't know if I need to hear that
17 today because, depending on what happens with
18 the Motion to Dismiss or Summary Judgment, we
19 may never need to get there.

20 MR. LONG: Right.

21 THE COURT: I could probably do that over the phone.

22 MR. SUMMER: Your Honor, I think since the threshold
23 question is always jurisdiction and the Motion
24 to Dismiss is based upon jurisdiction, it seems
25 to me it'd be logically consistent to do the

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1 Motion to Dismiss first and the Summary
2 Judgment second, but it's your courtroom.

3 THE COURT: Well, we'll go logically consistent. I
4 think the Motion to Dismiss may be one that I'm
5 not so sure about, but I'll let you charge that
6 mountain and we'll see. Here, let me pull
7 up -- I got to get -- I've read all your briefs
8 and I've even got a little outline. So let me
9 pull that up real quick, if you don't mind.
10 All right. Motion to Dismiss, I'll open the
11 folder and I'm ready.

12 MOTION TO DISMISS:

13 MR. SUMMER: Thank you, Your Honor. I have with me
14 today Michael Biediger, who is the chief
15 executive officer of Lexington Health Services
16 District, Inc., d/b/a Lexington Medical Center.
17 I'm also here with Faye Flowers and also here
18 with Ms. Biggers from DHEC. There's a lot of
19 papers flowing back and forth, a lot of case
20 law, lot of statutory citations and in
21 preparation for today --

22 THE COURT: I think -- the CEO's name is?

23 MR. SUMMER: Biediger.

24 THE COURT: I think these people charge by the
25 pound, Mr. Biediger.

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1 MR. SUMMER: I don't know how much to thank you for
2 that, Your Honor, but it was a group effort,
3 I'll have to say that.

4 THE COURT: Yeah. Well, I agree.

5 MR. SUMMER: What I wanted to try to do was to boil
6 this down to -- from a jurisdictional
7 perspective, looking at the face of the
8 pleading, does this litigant, Providence, have
9 a justiciable case of controversy before this
10 Court? Is there subject matter jurisdiction
11 and was it timely filed?

12 Now, I'm sure that Your Honor and Providence
13 are going to be making reference to the
14 HealthSouth decision. We've clearly --

15 THE COURT: I won't be.

16 MR. SUMMER: Okay. We clearly have a difference of
17 opinion with Providence as to the applicability
18 of the HealthSouth decision and primarily
19 because it's not only factually
20 distinguishable, it's legally distinguishable,
21 and that will become very, very clear when we
22 look at those cases that interpret 44-1-60.
23 And so -- but before we get there, I just want
24 to point out some very important differences.
25 In HealthSouth, Trident and HealthSouth were

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1 already in a contested case proceeding
2 before -- or a competing review before the
3 Department in the spring of 2013 for the 14
4 rehab beds that were at issue.

5 Trident was attempting to establish a new
6 service, okay? So, if we look at that from the
7 standpoint of the LMC and Providence, there was
8 nothing pending before the Department. Also,
9 LMC has an established program. They have an
10 established service for cardiac open heart
11 surgery. They have an established program for
12 cardiac interventional therapy with their cath
13 labs. So they weren't establishing a new
14 service.

15 The issue in HealthSouth was whether or not
16 Trident was going to get a license for those 14
17 beds, okay? That was a licensure case. This
18 is not a licensure case and the Department
19 agrees with us on that, that there was no
20 license required for what was done in this
21 case.

22 The other thing I think is really important --

23 THE COURT: They agree with you concerning that
24 based upon the purported suspension of the CON
25 program or based upon the fact that the

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1 statutes do not require a license whatsoever to
2 expand your facility?

3 MR. SUMMER: These were already licensed services
4 and no additional license was required. That's
5 irrespective of what's required.

6 THE COURT: No CON was required?

7 MR. SUMMER: Well, we take the position no CON was
8 required. But in terms of the licensure issue,
9 HealthSouth was seeking the license and new
10 service. Lexington already had a licensed
11 service.

12 The other thing that's very important and
13 this --

14 THE COURT: Well, how do you distinguish license
15 versus CON?

16 MR. SUMMER: Well, in South Carolina -- and we could
17 talk about this because it's going to really
18 come down to what is at issue in the case and
19 this --

20 THE COURT: And is that -- let me stop you. I keep
21 interrupting you. If I'm messing you up, I'll
22 start asking these questions later, but --

23 MR. SUMMER: Just learned a long time ago, you
24 answer the Judge, Your Honor, so I'm going to
25 keep going.

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1 THE COURT: I know that, but I don't want to throw
2 you off, either.

3 MR. SUMMER: I'm going to keep --

4 THE COURT: You're pretty good at not getting thrown
5 off.

6 MR. SUMMER: I try to get back to the road, if I
7 can. Every now and then I roll into the ditch.
8 The CON is a permit to licensure. CON's
9 irrelevant once a licensed service is
10 established. You don't hold a CON in
11 perpetuity. You do hold that license until
12 such time as you seek to close it.

13 I'm involved in closing two or three hospitals
14 right now and turning a license in and that's
15 a phenomenon I think we're going to see a lot
16 more of. But the bottom line is, is that
17 license is what you want to get.

18 In this case, the services were already
19 approved both for cardiac interventions, for
20 cath labs and for the open heart surgery.
21 But another important difference between the
22 HealthSouth case and the case at hand today is
23 that HealthSouth had timely and purposely
24 availed itself of the right to be notified
25 under 44-1-60. That's key to conferring

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1 jurisdiction is that they raised their hand and
2 then they timely challenged.

3 And I think the real case that's going to
4 control whether or not Your Honor grants the
5 Motion to Dismiss is a South Carolina Coastal
6 Conservation League versus DHEC and the Ports
7 Authority and that's a 2010 case that I'm sure
8 Your Honor is familiar with, but from my --

9 THE COURT: Yep.

10 MR. SUMMER: -- perspective, it means that Hamm is
11 irrelevant now as to how these proceedings are
12 determined in a 44-1-60..

13 Footnote seven in that decision quotes the
14 preamble to the Act and is also in the
15 reporter's comment, which talks about Act 387
16 and that's the Act that embodied 44-1-60:
17 "This Act is intended to provide a uniform
18 procedure for contested cases and appeals from
19 administrative agency and to the extent that a
20 provision of this Act conflicts with an
21 existing statute or regulation, the provisions
22 of this Act controlling."

23 And so the focus in the Coastal Conservation
24 League was, had the League availed itself of
25 the right to be notified. And Judge Geathers

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1 at the ALC and then later the Court of appeals
2 said they had not been timely.

3 Why? Because when we look at 44-1-60, it says
4 there is a finite statute -- it's not unlike
5 the procurement cases. There's a finite time
6 period that you have to raise your hand and ask
7 to be heard and that finite period is 15 days
8 from the date of mailing of the decision or
9 what other underlying staff decision that there
10 is to the applicant, okay?

11 In the event that somebody has raised their
12 hand and asked to be notified, that should be
13 a simultaneous mailing. And what they found in
14 Coastal Conservation League was, because the
15 Department clearly knew that Coastal
16 Conservation League wanted to be notified --
17 and I think it's important to note they didn't
18 have like any formal requirement. They didn't
19 say that they had to have written a special
20 letter and done anything. It was clear from
21 the record and the e-mails that were between
22 the parties that DHEC had just not mailed it
23 out simultaneously. And in that case, they
24 said it would be from the date of mailing to
25 Coastal Conservation League, which then

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1 conferred the jurisdiction. Absent that, there
2 would be no jurisdiction.

3 What happened here? What happened here is
4 that --

5 THE COURT: So when -- if I follow the logic of that
6 case, what the Appellate Court did is, it said
7 that we'll look at the statute, but the
8 statute -- face of the statute doesn't remedy
9 the situation. We will use statutory
10 construction to explain a remedy that would
11 result in justice. And that -- so when you say
12 Hamm is dead, they didn't follow Hamm, but they
13 followed some of the same underlying reasonings
14 for which Hamm existed.

15 MR. SUMMER: I think the discovery rule is dead in
16 light of Coastal Conservation League. If you
17 don't raise your hand and ask to be notified,
18 you have no rights under 44-1-60.

19 THE COURT: But in this case, you're wanting to --
20 you're wanting to be able to require the 15-day
21 time frame-day time frame. But is there any --
22 or the preceding provision in the statute that
23 gets you to that 15-day time frame is the
24 notice by the Department of a CON application
25 to allow someone to be placed on -- let's just

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1 call it a "list" -- as an affected person. But
2 that didn't happen here, did it?

3 MR. SUMMER: There was notice to the whole
4 community. Your Honor, may I approach the
5 bench?

6 THE COURT: You're talking about Catherine Templeton?

7 MR. SUMMER: Yes, Your Honor, and this is her
8 letter. It was issued on June 28th and the
9 entire regulated community knew about it.
10 There was no secret here. Everybody knew about
11 it. Everybody was focused upon it. There was
12 a Supreme Court action that transpired. The
13 Hospital Association, for which they are
14 members, had multiple mailings regarding this
15 letter and the contents of this letter. And
16 this is interesting --

17 THE COURT: When you say there was a Supreme Court
18 action, did everybody know about that?

19 MR. SUMMER: Well, you can't be in this regulated
20 community and not know that this -- that
21 Supreme Court action was pending, okay?

22 THE COURT: And that would mean Lexington knew about
23 it?

24 MR. SUMMER: That's exactly right. Lexington
25 certainly knew. Nobody in the regulated

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1 community who did not know of the June 28th
2 letter and nobody in the community -- and I'll
3 stipulate to the Court -- who didn't know of
4 the pending action before the Supreme Court,
5 which was filed later in the fiscal year.
6 Here's the important thing: It's clear that
7 HealthSouth purposely availed itself of
8 44-1-60.

9 Now, I haven't addressed yet, and we want to
10 preserve for the record, I don't believe there
11 was a decision that would give --

12 THE COURT: Can I stop you there? When you say
13 HealthSouth, you don't really need to
14 distinguish that one only. I'm going to hear
15 this case on its own merits, so. I mean, I
16 need -- I tell people in the past, I even have
17 got the history of actually reversing myself.
18 If lawyers come forth and they present to me
19 something where I was in error, I'll gladly
20 reverse myself, so.

21 MR. SUMMER: I've personally been a victim of that,
22 Your Honor.

23 THE COURT: Well, I'm sorry, but the bottom line is,
24 you don't need to worry about that case. We'll
25 deal with this case.

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1 MR. SUMMER: Well, and from the -- from the briefs,
2 it's very clear that Providence is going to
3 rely on that case. So it --

4 THE COURT: Okay.

5 MR. SUMMER: Whether Your Honor is predisposed or
6 not, I know that Providence is. And so when I
7 make those comments, I think what's important
8 is, HealthSouth didn't have any trouble
9 figuring out, through Freedom of Information
10 Act request or whatever means that they used.
11 They timely appealed. Within a matter of just
12 a few days, they timely appealed.

13 They appeared before this Court and they got to
14 you prior to licensure. They were vigilant.

15 They were not asleep at the switch. They
16 basically exercised reasonable due diligence
17 for things that they cared about, purposefully
18 availed themselves of the right to be notified
19 under 44-1-60, and that case proceeded to you.

20 Now, we haven't -- and I've briefed this and
21 the Department agrees with us, that there are
22 no decisions in this case that would give rise
23 to a 44-1-60 staff decision which would entitle
24 the third party to appeal.

25 But for the sake of argument, okay, we don't

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1 have to get there because if Providence did not
2 purposely avail themselves of the right to be
3 notified under 44-1-60, they're not entitled to
4 be in this Court and, with all due respect,
5 Your Honor, you have no subject matter
6 jurisdiction. So --

7 THE COURT: No subject matter or no procedural
8 jurisdiction?

9 MR. SUMMER: I would say at that point in time --

10 THE COURT: The Supreme Court's -- you know, in a --
11 and it was in a order I recently issued, which
12 you may not know about, but where I address the
13 fact that the Supreme Court has been laying
14 out: There is procedural, there's personal,
15 and then there's just a generic jurisdiction
16 issue, which I call "procedural jurisdiction."
17 Because subject matter jurisdiction is the
18 right to hear the class of cases to which this
19 proceeding belong. I think I quoted it.
20 I have the right to hear CON cases, both
21 permitting and violations. So I think I've got
22 subject matter jurisdiction. But that's my
23 thought, so correct me on that one.

24 MR. SUMMER: Well, Your Honor, I take the position
25 that your jurisdiction is not invoked unless

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1 the requirements -- for sake of argument,
2 unless the requirements --

3 THE COURT: Well, to that -- to that comment, I
4 would go "ding, ding, ding."

5 MR. SUMMER: -- instead of procedural.

6 THE COURT: That's procedural, yes, sir.

7 MR. SUMMER: Okay.

8 THE COURT: And I do -- I've even got some orders
9 where I've discussed what's called the "statute
10 of creation;" meaning that under that
11 principle, you don't invoke jurisdiction until
12 you follow the statute, so.

13 MR. SUMMER: And for purposes of argument, let's
14 stay with that and say, if that procedural
15 jurisdiction, if it's not invoked, you don't
16 have jurisdiction to hear the case or
17 controversy at bar.

18 THE COURT: I would agree with you on that --

19 MR. SUMMER: Okay. So --

20 THE COURT: -- if not properly invoked.

21 MR. SUMMER: Okay. So, again, we take the position
22 that the decisions that were made here to take
23 an existing operating room where there was no
24 capital expenditure, everything was already
25 there, and to look at it and say, "Okay, you

1 can now use that for open heart surgery
2 procedures," we take the position that that
3 decision that was made on October the 11th of
4 2013 doesn't give rise to a decision as defined
5 under 44-1-60. But, for sake of argument,
6 if --

7 THE COURT: Yeah, because I want to stop you. You
8 used the phrase "decision." So there was a
9 decision made by the Department.

10 MR. SUMMER: You know, Your Honor, there was an --

11 THE COURT: Whatever semantics you use, a
12 determination, whatever, "It's a decision
13 that ..." and then you have to fill in the
14 blank, "that we don't proceed forward
15 because ...," whatever.

16 MR. SUMMER: Right. Well -- and let's talk about
17 that for a minute, but I want to get back to my
18 timing and whether or not --

19 THE COURT: And I don't want to mess you up.

20 MR. SUMMER: -- and whether or not this party is
21 properly before the Court, because I take the
22 position they're not.
23 But let's take the position of the ROV. An ROV
24 is a Report of Visit. Thousands of those are
25 issued each year by DHEC, because if they walk

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1 through a facility, if they check the kitchen
2 out, you can get an ROV, okay?

3 So what is a ROV? It is a document that
4 memorializes that DHEC was there on a licensure
5 visit, an inspection, and those are ongoing and
6 constant.

7 You may have a survey that comes just randomly.
8 You may have a complaint that they come and
9 they visit. You may be called out. The
10 provider in this case went to great lengths
11 because they had a need. Because the
12 Department was no longer administering CON,
13 they had to meet a patient need.

14 And so they went and met with the Department
15 and then they asked the Department to come out
16 and look at the facility and make sure that
17 that room complied with whatever requirements
18 that they have.

19 So, to the extent that the ROV memorializes a
20 visit, yes, it's a decision. Is it a decision
21 that gives rise to contested case? We would
22 argue, no, that it doesn't.

23 But just for the sake of argument, let's say
24 that Providence is correct and they want to
25 invoke 44-1-60. What could they have done?

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1 The whole market is on notice. And, Your
2 Honor, you've read this letter a thousand times
3 and you've looked at this language, but it
4 says --

5 THE COURT: I don't know if I'd go a thousand. It's
6 not that interesting.

7 MR. SUMMER: Well, it probably feels like it.

8 "Suspending the program has the practical
9 effect of allowing new and expanded health care
10 facilities to move forward without the
11 Certificate of Need process." And it says,
12 "The Department will continue to license and
13 inspect health care facilities."

14 Everybody's on notice, okay? If you are
15 Providence, what's the easiest thing to do
16 here? The easiest thing to do is to just write
17 a letter and say, "Hey, if anybody in my
18 service area -- Palmetto or Lexington or
19 Kershaw, anybody in my service area seeks to
20 expand cardiac modalities, I request to be --
21 I oppose and request to be notified."

22 Because one of the things that you have to do
23 for that notice to be effective, you have to
24 say -- under 44-7-210, you have to say that you
25 oppose it and state your grounds for it. So

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1 there's an additional requirement to 44-1-60.
2 That would have been so easy. You don't have
3 to worry about -- I had some clients, Your
4 Honor, we were writing FOIA requests to the
5 Department requesting specific information
6 regarding certain modalities or beds on a
7 monthly basis, because we wanted to make sure
8 that if anything was issued, we had the right
9 to go in there and raise our hand under 44-1-60
10 and say "no."

11 THE COURT: Well, I understand the Freedom of
12 Information Act request. But you're asking to
13 send a letter to a -- involving a suspended
14 program? I just don't see how that would work.

15 MR. SUMMER: Well, Your Honor, let's look at
16 44-1-60. This case can --

17 THE COURT: I know that -- I understand that. But
18 under Templeton's letter, they suspended the
19 program. So people weren't there.

20 MR. SUMMER: But if you're going to have the right
21 to be notified under Coastal Carolina (sic),
22 you have to avail yourself of the right. You
23 cannot sit idly by.

24 So, one, could have done this; two, FOIA
25 request would have generated the information

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1 from which to appeal or to seek a contested
2 case review, to ask for an RFR and then go
3 forward. That was not done here until April
4 9th or 10th of 2014 of this year.

5 And so they did not avail themselves of the
6 right to be notified and if you don't, under
7 44-1-60, as -- you're basically just out of
8 luck. You can't bring the action. And that's
9 what Coastal stands for, is that if you don't
10 raise your hand and say, "I want to be
11 notified," you have no rights under 44-1-60.
12 So, we don't have to get to the issue, which we
13 could spend an awful lot of time debating on
14 "Where is your statutory right of appeal? Is
15 that a decision that is appealable," or, "Is
16 that a decision that would give rise to a
17 contested the case?" This litigant doesn't
18 meet the mandatory threshold question of
19 raising your hand and asking to be noticed.
20 Similar fashion, because they didn't raise
21 their hand and ask to be notified, there's no
22 way that they are within the 15-day time
23 period.

24 If they had done it prior to, if they'd done it
25 on the September 28th letter, they would've

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1 easily been able to walk into this Court at any
2 point in time and say, "You know what, DHEC, we
3 asked you to tell us and you didn't do it and,
4 therefore, we're squarely under Coastal."

5 Because Coastal says, "If I ask to be notified
6 and you didn't do it, the 15 days runs from
7 when you send me the notice, because I'd asked
8 to be notified." They didn't do that. So
9 under 44-1-60, they cannot bring this case.

10 And then, again, if -- if you look past
11 44-1-60, that leads you to Ambulatory Surgery
12 Centers case, because is this an Article One
13 case? And I would submit to Your Honor that
14 outside of the CON program, outside of 44-1-60,
15 any complaint this party has is merely about
16 prospective economic loss in the future. It's
17 not about a property right here today.

18 And you made that decision in the State Health
19 Plan case a year ago when you said that
20 Ambulatory Surgery Center prevented Trident
21 from challenging deficiencies, perceived
22 deficiencies in the State Health Plan because
23 you said there is nothing under 44-1-60 that
24 gave them that right and that Ambulatory
25 Surgery Center prevented that from being a case

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1 or controversy before you because it wasn't a
2 concrete, real, present property interest. And
3 if you didn't have that, then you don't have
4 the case.

5 So, you know, we've obviously briefed a lot
6 more than this, but those are the threshold
7 questions. This litigant can't bring this case
8 now. It's not timely. The record is devoid of
9 any requests as an affected person to be
10 notified, and the complaint is devoid of any
11 request of notice.

12 Therefore, you can look at the face of the
13 complaint or the petition in this case and say,
14 "Well, they didn't say that they'd ever asked
15 DHEC to notify them." So, you know, on that
16 basis, we believe we're entitled to an order
17 dismissing this case because you lack
18 jurisdiction.

19 THE COURT: All right.

20 MR. SUMMER: Thank you.

21 THE COURT: Ms. Biggers?

22 MS. BIGGERS: Your Honor, the Department filed a
23 brief in support of the Motion to Dismiss. So
24 we have our position on record, but we're not
25 going to provide any argument on the issue,

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1 unless you have any specific questions for us.

2 THE COURT: I don't right now, then. Mr. Long?

3 MR. LONG: Thank you, Your Honor. And I appreciate
4 you obviously having read all the briefs and
5 the conversation and I will certainly take your
6 questions as Mr. Summer did.

7 THE COURT: You're not going to have
8 Ms. Hollingsworth speak?

9 MR. LONG: If you insist, Your Honor, I will, but
10 she's counting on me to do it.

11 THE COURT: Well, I was going to pick at her, you
12 know.

13 MS. HOLLINGSWORTH: We thought you might, Your
14 Honor.

15 MR. LONG: But I think she's counting on me to do
16 it.

17 THE COURT: She's the only one in the courtroom
18 who's ever told me she loved me.

19 MR. LONG: That's right. That's right.

20 MS. HOLLINGSWORTH: That should go for something,
21 Your Honor, considering our arguments.

22 THE COURT: Oh, well.

23 MR. LONG: Your Honor, just taking -- taking
24 Mr. Summer's arguments, a couple things I want
25 to kind of give our position and try to clarify

1 for the Court.

2 I think first thing, Mr. Summer continually
3 uses this word "jurisdiction" to Your Honor and
4 Your Honor talked to him about procedural
5 jurisdiction and all.

6 I think actually in regards to the timeliness
7 argument, the timeliness argument functions as
8 a statute of limitations. The question on
9 jurisdiction is whether this case is in the
10 class of cases --

11 THE COURT: I don't agree with you on that, but I'll
12 let you argue it.

13 MR. LONG: And I think when you look, it's kind
14 of -- and I think that's important to note --

15 THE COURT: Well, wait a second, I'm sorry. I'll
16 agree with you on the functionality of it.

17 MR. LONG: Right.

18 THE COURT: Maybe not -- but it's not a statute of
19 limitations, but it may function that way.

20 MR. LONG: It functions as a statute of limitations.
21 And the reason I think that's important is
22 because when you look at the cases, Coastal
23 Conservation League and Hamm, what you find in
24 the Supreme Court is, is that they're very
25 focused on a couple of things that Mr. Summer

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1 didn't mention.

2 One of the things they're very focused on is
3 that the agency and the department cannot
4 engage in any, what I would call, gamesmanship.
5 Both cases talk about how the Department could
6 potentially manipulate these rules to put
7 people out of Court by mailing it over here and
8 not mailing it to the other person until after
9 the time had run, or in Hamm, they talk about
10 that same thing.

11 The Court in Coastal Conservation League was --
12 did not overrule Hamm. I think those cases are
13 actually read together. They actually should
14 be read in a way that's very similar with them,
15 because basically what the Court is very
16 focused on is there can be no gamesmanship in
17 regards to this process because we're dealing
18 with such an important constitutional right in
19 Section 22.

20 And, really, the Court -- Mr. Summer kept
21 saying that Providence has to stand up and
22 avail itself for the right, okay? That's what
23 the ALC and the Court of Appeals said. That's
24 not what the Supreme Court said.

25 What the Court of -- what the Supreme Courts

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1 says is, we don't need to get into this
2 formality needed that -- of whether an affected
3 person is necessary. They said DHEC's
4 concession that the League was on a mailing
5 list and should have received a copy is
6 sufficient for purposes of giving them affected
7 person status, and that was it.

8 So they very were just focused on, "What's
9 really going on here," as opposed to the
10 formalities and the really strict application
11 of the time period.

12 They upheld the statute. They said it's 15
13 days from when you mailed. But they also were
14 very focused, there can be no gamesmanship, and
15 in the process that's followed -- and what I
16 would suggest to you is in 44-1-60(B), the
17 Legislature was also concerned about this
18 because --

19 THE COURT: 44-1-60(D)?

20 MR. LONG: Subsection (B), which is the subsection
21 that says that --

22 THE COURT: Hold on.

23 MR. LONG: -- the Department should comply --

24 THE COURT: Hold on one moment.

25 MR. LONG: Okay.

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1 THE COURT: Let me pull that up. I don't have that.
2 I got (A), (D), but I didn't get (B). Go
3 ahead.

4 MR. LONG: Sorry, but it's short. What it says
5 there is, "The Department shall comply with the
6 requirements for public notice, receipt of
7 comments, and public hearings before making a
8 decision." They didn't do that in this case.
9 And then, secondly, "To the maximum extent
10 possible, the Department shall use a uniform
11 system of public notice of permit applications,
12 opportunity for public comment and hearings."
13 This letter on the June 28th does not satisfy
14 that statute because it doesn't provide any
15 specific information to any provider about what
16 decision could be made by the Department.
17 Basically, you can do whatever you want is not
18 sufficient notice to somebody of what is going
19 to be involved in regards to the decision
20 they're making. So I would suggest to Your
21 Honor that the Department never followed the
22 procedures properly in this matter at all,
23 okay, and still hasn't.
24 Because when you -- when somebody is required
25 to get permission from the Department and the

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1 Department winks at them and says, "You don't
2 have to get permission," and still apparently
3 says that today since they're still operating
4 an open heart suite today and says, "You don't
5 have to do it," that's the same thing as
6 telling them you do have permission. I mean,
7 that's the practical effect of it.

8 THE COURT: Well, that's what I was asking about,
9 the decision. There's a decision made.

10 MR. LONG: And so the question is, they never really
11 made -- they didn't follow any of their
12 procedures to make the decision. They just did
13 it basically arbitrarily and outside the scope
14 of basically the process that they're
15 legislatively required to follow.

16 And I would point out a couple of things first.
17 In a CON application, there's publication in
18 the newspaper. They never put anything in the
19 newspaper that they were doing this.

20 In a CON application, you're required to
21 basically publish it in a state register; that
22 never occurred in this regard, either.

23 And then, thirdly, there's a CON mailing list
24 that all the providers subscribe to where the
25 Department tells you everything that's been

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1 filed or they're doing in the CON program and
2 that mailing list never went out. It certainly
3 never had anything like this on it.

4 So the Department has established these
5 procedures, this uniform -- this system that's
6 set by both statute and reg and their
7 procedure, and then they didn't follow any of
8 it in regards to the situation with Lexington.
9 So I think that's why in this case the -- you
10 can't inform the 15 days -- it's really
11 interesting. They never give you a date. I
12 guess they're counting the 15 days from June
13 28th, 2013, of when -- of when the time period
14 would start, of when the -- or -- because it
15 could be these construction projects, but they
16 say that that's not a decision.

17 So when was the decision that gave them the
18 permission to do the project and when were they
19 formally notified by that?

20 So, Your Honor, I think in regards to the
21 timely -- and then, also, we should not forget,
22 we did file within 15 days of knowing it. We
23 heard a rumor. We basically filed a Freedom of
24 Information Act request. We still never got
25 our information from the Department. They

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1 never formally notified us of any of this. We
2 got it from Lexington and then we filed within
3 the 15 days.

4 THE COURT: And you still haven't gotten notice.

5 MR. LONG: We never got anything from the Department
6 in regards to this, that I'm aware of. Nothing
7 was certainly ever mailed to us or anything
8 like that to -- to do that.

9 And, Your Honor, I'd also point out, it's not
10 like the Department's not aware of Providence's
11 interest in this service and in this area. We
12 litigated this in this Court for three weeks
13 eight years ago; same lawyers, okay, that are
14 here today, same witness. Okay. So everybody
15 knows that that is certainly an issue that is
16 of interest to Providence and to Lexington and
17 in this area.

18 Your Honor --

19 THE COURT: All right. Before you move on to the
20 next one, what -- what is your position about
21 whether a CON is required?

22 MR. LONG: Absolutely a CON is required in this
23 situation. I don't even know what they're
24 talking about. The State Health Plan
25 specifically says -- has a provision for open

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1 heart surgery and for cath labs that deal with
2 the expansion of an open heart program or the
3 addition of a cath lab, that you have to file
4 for a CON and there's specific requirements and
5 criteria for what you have to show before you
6 can qualify for a Certificate of Need.

7 That's in the Health Plan and it's in the
8 current Health Plan that came out that is --
9 that we're currently operating on right now.
10 In the open heart case that we tried in front
11 of Judge Geathers, one of the major issues in
12 the case was whether Lexington could have a
13 backup open heart suite.

14 They applied for an open heart suite and a
15 backup, okay? All right. We litigated that
16 issue and Judge Geathers unequivocally found
17 you cannot have a backup. There is no
18 provision in the law that allows for backup
19 open heart suites. You cannot flip these rooms
20 around.

21 You can't say, "Today, we're using this room
22 for open surgery and tomorrow we're using a
23 different room." You have to have a designated
24 open heart suite to do open heart surgery
25 because of the seriousness, the sophistication

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1 of the procedures. So they can't flip things
2 around, all right?

3 I guess they're -- I don't know really what
4 they're saying. There's obviously a capital
5 expenditure here. They have to buy some
6 equipment to run two open heart suites, all
7 right? And there's nothing in the statute that
8 says it's some minimal amount. It just says,
9 "A capital expenditure related to the State
10 Health Plan;" that's the provision. But we did
11 cite an incorrect provision in our original
12 brief, Your Honor. We corrected --

13 THE COURT: Five and you went back to four.

14 MR. LONG: I don't know why we got confused on the
15 five and four, but whatever. It didn't change
16 the law. The fact is, the provision clearly
17 applies. So, to me, there's -- I mean, I
18 don't -- there's no question that both the cath
19 lab and the open heart suite require a
20 Certificate of Need.

21 If that was the case, Your Honor, any provider
22 in South Carolina could have as many open heart
23 rooms as they wanted, according to their logic,
24 which is not the way the system is set up in
25 South Carolina, because in South Carolina, we

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1 measure production and utilization, and quality
2 by room, not by program. And that's been the
3 case in South Carolina for probably 25 or 30
4 years, okay, that we do it by room.

5 So, absolutely, they have to have a Certificate
6 of Need to open this second -- to open this
7 second room and to operate a third cath lab.

8 THE COURT: All right. I interrupted you.

9 MR. LONG: No problem, Your Honor. And with regards
10 to the contested case issue, Your Honor, this
11 clearly is in the case of classes that Your
12 Honor could hear and once it falls in that
13 class of cases that should be a contested case,
14 you clearly have jurisdiction over the matter.
15 And I point out a couple of things for the
16 Court to think about. First, the definitions
17 of "contested case" and "licensure" that are
18 found in 1-23-505 are broad definitions. They
19 say "including but not restricted to," in
20 regards to a contested case when it lists the
21 types of matters or whatever. And "licensure"
22 says "similar form of permission required by
23 law."

24 So these two statutes should not be read super
25 narrowly. And I would point out, the

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1 Constitutional basis of this is critically
2 important, too. It's the whole reason that
3 this Court exists today is Section 22 of the
4 Constitution.

5 When you look at the Ross case, it's one of the
6 few times our Supreme Court actually quotes --
7 Ross versus MUSC where they quote legislative
8 history and they say, "This provision was put
9 into the Constitution because so many more
10 agency decisions are being made now and it is
11 critical to safeguard the liberty and property
12 of the citizens of South Carolina and to have
13 the opportunity for notice and the opportunity
14 to be heard."

15 So this constitutional right to be heard and
16 the actions of an agency is critical, is based
17 in the Constitution. And so the contested --
18 and then, like in the Eagle case that just came
19 out last year, that we -- which was an
20 environmental case, but the Court says in that,
21 Supreme Court, it cites the provision from the
22 Constitution. It says, "To that end, a
23 contested case process exists."

24 So the Court recognizes that this Court is the
25 process to deal -- to satisfy the

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1 constitutional protection. And I think when
2 you read the cases, it should be read broadly
3 to basically satisfy that constitutional kind
4 of mandate.

5 The -- and so I think we fall under that, just
6 the whole thing with the CON and the fact that
7 they basically are required to get this permit
8 but they don't, but they haven't gotten it, is
9 sufficient to raise a contested case. If the
10 Court --

11 THE COURT: Can I ask --

12 MR. LONG: Sure.

13 THE COURT: When you said Ross earlier, was that
14 Ross I or Ross II?

15 MR. LONG: That's -- it's Ross II; that's the
16 Supreme Court -- the last Supreme Court case on
17 it. And there's a provision in there that
18 talks about the --

19 THE COURT: I'm familiar with it.

20 MR. LONG: I'm sure you are, Your Honor. It's
21 pretty

22 If the Court -- if the Court buys that argument
23 that I just made, then we're done. You have
24 jurisdiction over the case; no question about
25 it, okay? But if Your Honor is uncomfortable

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1 with dealing with it from a constitutional
2 matter and that point of view, there's no
3 question, too, that these construction
4 decisions are absolutely decisions that you can
5 appeal.

6 That's what Amisub CPN is all about.

7 Ms. Biggers argued that case with Lee in the
8 Supreme Court a couple of years ago. And that
9 case involved the situation where you had --
10 you had a couple of these non-applicability or
11 exemptions that did not require any sort of
12 interface with the Department. You could build
13 it without any interface.

14 THE COURT: Where I can be clear, you're -- in this
15 case, you're challenging both the underlying
16 permitting of the whole process and of the
17 construction?

18 MR. LONG: Yes, Your Honor, because, see, they can't
19 approve that construction --

20 THE COURT: I understand.

21 MR. LONG: -- without that CON.

22 THE COURT: Okay.

23 MR. LONG: And so that is the basis of our objection
24 to the construction.

25 But it is clearly a decision that can be

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1 appealed because, Your Honor, in the Amisub CPN
2 case, the Court drew the line and said, "Is the
3 Department required to make a decision?" And
4 so -- and they focused on, "Is approval
5 required by law?"

6 When you look at the Section 2003 and 2002 in
7 the Reg 61-16, the language says, "Any
8 construction changes" -- I'm sorry,
9 "Construction work should not be started until
10 approval of the final construction documents or
11 written permission to begin has been received
12 from the Department." That's 2003-1.

13 And if you want to the say 2003-2 applies, it
14 says the same thing: "The work shall be
15 submitted to the Department for review and
16 approval." That's why they went over to the
17 Department and got the approval. They had to
18 get the approval under the regulations before
19 they could open the cath lab.

20 It isn't a -- what Mr. Summer is talking about
21 is just routine inspections that occur over at
22 the hospital and that does probably occur on a
23 daily basis or weekly or monthly basis. That's
24 not what this is.

25 This is a construction process that's set out

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1 in 61-16 that which require -- where Department
2 approval is required. And that's what Amisub
3 CPN says. If the Department has to issue -- is
4 required by law to issue an approval, then you
5 can bring a contested case and -- and that's
6 where they drew the line in a very lengthy, you
7 know, careful -- careful decision.

8 So I think that there's no doubt that we have
9 jurisdiction either one of those two ways, in
10 addition to -- so either basically through the
11 process itself, satisfying the constitutional
12 provision, or basically the construction
13 decisions that were made give the Court
14 jurisdiction.

15 THE COURT: Okay.

16 MR. LONG: And -- and I guess that's really the crux
17 of their argument, Your Honor. I'd be happy to
18 answer any more questions they had.

19 THE COURT: Ms. Biggers?

20 MS. BIGGERS: Yes, Your Honor.

21 THE COURT: Was a CON required for -- if -- I'm
22 going to back up. I kill the court reporter by
23 my stop and starts. If Director Templeton had
24 not ever issued her letter and the CON program
25 was never so-called suspended, would a CON have

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1 been required for the activities -- for the
2 services that Lexington Hospital expanded?

3 MS. BIGGERS: Yes, Your Honor, because they would
4 have been an expansion of an existing service
5 that has standards in the State Health Plan, a
6 capital expenditure --

7 THE COURT: Okay.

8 MS. BIGGERS: -- on behalf of the health care
9 facility. And the standards in the State
10 Health Plan are per -- for open heart per
11 suite, for cath labs per lab.

12 THE COURT: Okay.

13 MS. BIGGERS: So that would make it an expansion.

14 THE COURT: All right. I think the only other
15 question I have then that is for you is, the
16 construction component that we're arguing
17 about --

18 MS. BIGGERS: Uh-huh (affirmative response).

19 THE COURT: -- or hearing about. I don't know if
20 they're arguing.

21 MS. BIGGERS: Uh-huh (affirmative response).

22 THE COURT: Is that construction licensing originally
23 part of a CON consideration or is it separate?

24 MS. BIGGERS: The CON application has to address the
25 construction and inform the Department what the

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1 construction will be. But there is also a
2 separate licensing requirement for construction
3 and when our construction people actually go
4 out there and inspect health care facilities,
5 they're doing that basically because it's a
6 licensing requirement.

7 THE COURT: Okie doke. All right. Mr. Summer?

8 MR. SUMMER: I'm not going to get down into the
9 merits. There's a lot of merits arguments that
10 were made. I want to focus back on the
11 petition itself and what's on the face of it.
12 On the face of the petition, there is no proof
13 that this party gave notice to the Department,
14 "I'm an affected person and I want to know
15 about something."

16 The fact of the matter is, it's not in the
17 record, but they waited until April 9th to do
18 that. That notice is defective -- and that may
19 be in my Summary Judgment Motion if this goes
20 forward, because that notice doesn't say, "We
21 oppose on these grounds," which is required in
22 the 44-7. It just says, "Hey, we're an
23 affected person," and they waited till April
24 the 9th, 2013 -- 2014 to do it.

25 On the face of the pleading, there's nothing

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1 from which this Court has to establish
2 jurisdiction, to invoke jurisdiction. The
3 request to visits are not appealable under
4 44-1-60.

5 And it's interesting, I heard counsel for
6 Providence talk about 61-16. No one has the
7 right to appeal --

8 THE COURT: 61-16?

9 MR. SUMMER: 16, that's the construction issue.

10 THE COURT: Oh, okay.

11 MR. SUMMER: The construction requirement and the
12 construction approval is under 61-16. No third
13 party has a right to appeal under 61-16; only
14 the applicant.

15 And guess what? The applicant doesn't have the
16 ability to appeal the approval of a
17 construction plan; logically, only the denial
18 of the construction plan. 61-16 does not
19 provide this litigant with an opportunity to be
20 heard.

21 So if we look at those statutory requirements
22 and we look at Coastal Conservation League,
23 they can't get into this Court because they did
24 not timely file. They did not raise their
25 hand.

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1 These modalities -- and let's think about this.
2 The whole process that we have for a contested
3 case is to allow it to occur prior to
4 construction and implementation.

5 HealthSouth was vigilant, exercised reasonable
6 due diligence, and got to this Court prior to
7 those things happening. This litigant did not.
8 And, therefore, if we were to address -- and I
9 understand Your Honor not wanting to address
10 the automatic stay today. The automatic stay
11 preserves a status quo. The status quo is,
12 there are patients that are in these modalities
13 today getting treatment. And so if we're going
14 to enforce a stay to maintain a status quo, it
15 would be to not undo anything rather than to
16 undo it.

17 When we look at that the face of this petition,
18 the requirements of 44-1-60 were not met and
19 under Coastal Conservation League, they can't
20 avail themselves of this procedure because they
21 didn't raise their hand and they didn't ask to
22 be notified.

23 THE COURT: All right. I'm going to take a short
24 break before I get to the Summary Judgment
25 Motion, because I don't have a need for it.

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1 But I will say, Mr. Summer, sometimes you come
2 into this Court and other litigants wouldn't
3 have a chance. You're very good at stirring
4 the pot, but I'm going to have to think about
5 it.

6 So, here, let's just take a short break. I'm
7 not going to make a ruling on it today. I'm
8 just going to take a break and move to Summary
9 Judgment in a second. All right. Thank y'all.

10 MR. LONG: Thank you, Your Honor.

11 (Off the record from 10:46 a.m. to 10:53 a.m.)

12 MOTION FOR SUMMARY JUDGMENT:

13 THE COURT: Now Summary Judgment, then.

14 MR. LONG: I guess this one's mine, Your Honor.

15 Your Honor, I really think -- and this is a
16 question for the Court, that's a legal
17 question, and that's why we filed Summary
18 Judgment almost immediately after the case was
19 filed. We think it's very much a legal issue
20 for the Court.

21 THE COURT: Well, if you didn't think so, you
22 shouldn't be filing it.

23 MR. LONG: Thank you. We would have not have. But
24 I think the -- really the Department's answer
25 to your question just right before the break

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1 are really the crux of our argument.

2 I mean, there's no doubt that they had to
3 obtain a CON to add an open heart suite and a
4 cath lab. The Department just agreed to us on
5 that. I made the argument on that earlier.
6 And there's no doubt that the Supreme Court
7 said in the Amisub case, the suspension case in
8 the spring, that the CON program was never
9 suspended.

10 So Lexington Medical Center has to obtain a
11 Certificate of Need to expand their -- to add
12 an open heart suite and to add a cath lab and
13 there's no dispute that they have not done
14 that.

15 So we can argue about this fact and that fact
16 and whether it's a license or not and all
17 these -- but these are all distinctions without
18 a difference and that's why the case really has
19 no material issues. There's no question --
20 it's really those three facts or those facts --
21 maybe it's two facts -- that basically, you
22 know, control in the case.

23 And if Your Honor -- I think Your Honor has
24 concluded -- and I realize the cases are
25 different, but their argument of estoppel or

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1 detrimental reliance has already been really --
2 has already been rejected by this Court.
3 And they admitted at the beginning of the
4 argument that they were well aware of a Supreme
5 Court case, as everybody in the regulated
6 community was, and they certainly knew that the
7 Supreme Court could rule that the program had
8 not been suspended. And they certainly knew
9 that that was a potential outcome, because it
10 was being argued and briefed over there in the
11 Supreme Court and the Department told them
12 in -- in our request for contested case, we
13 attached the e-mails from Ms. Biggers and
14 Mr. Biediger where she says, "We don't make any
15 promises on what the" -- you know, I can read
16 the exact language to it.

17 THE COURT: I read it.

18 MR. LONG: But she basically says, you know,
19 "There's a lawsuit. The Court may decide
20 differently."

21 They also wrote that on their approval for the
22 open heart suite; that language is in there in
23 one of the documents that we attached as one of
24 the decisions that were made in regards to the
25 construction process.

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1 And so I think the fact that they don't
2 satisfy -- and even when they lay out in their
3 brief what the elements are -- of estoppel are,
4 which is basically the same thing as the
5 detrimental reliance I think that was raised in
6 the other Trident Neuroscience case, they don't
7 meet it because they clearly were aware of the
8 potential of an adverse ruling or an adverse
9 decision from the Department. You just can't
10 rely on the director to basically tell you what
11 the law is and then she be wrong.

12 If that's the case, then you make the heads of
13 these agencies kings and they can do whatever
14 they want and there's no accountability for it
15 because they simply say, "Hey, I was wrong, but
16 who cares? You relied on it, so you get to
17 go."

18 That's why that doctrine has to be very
19 narrowly construed because it's very important
20 that the agencies treat the providers
21 consistently or you have a situation that we
22 have right now, which is basically that you
23 have one provider that has expanded their open
24 heart program and added an open heart suite and
25 a cath lab without getting a CON and every

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1 other provider in the state had to get a CON
2 for theirs. And that's just not -- that's not
3 proper executive branch actions and how you --
4 and agencies should operate.

5 So, Your Honor, it's not complicated. The
6 Summary Judgment issue is not complicated.
7 There are not a lot of factual issues that need
8 to be explored. It's a question of law.

9 THE COURT: You said not a lot. Your argument must
10 be --

11 MR. LONG: Really, there's zero.

12 THE COURT: -- would be none.

13 MR. LONG: There are none in dispute.

14 THE COURT: Two questions, though. Mr. Summer
15 brings up the doctrine of constructive notice.
16 So my question regarding that is: A, is
17 constructive notice an applicable doctrine in
18 this case and, B, if it is, then are there any
19 genuine issues of material fact regarding it?

20 MR. LONG: I don't think it's a legit -- I don't
21 think it's an issue in this case because the
22 Department never followed the proper procedures
23 for the CON or permitting. There was never
24 any --

25 THE COURT: So what you're tell me is -- where I can

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1 be clear then, is that the statutory provisions
2 set forth no provision; therefore, we do not
3 enter into the constructive notice
4 consideration.

5 MR. LONG: That would be correct, Your Honor. And
6 there's no -- so I don't think constructive
7 notice is an issue for this Court. And I think
8 that --

9 THE COURT: If it was an issue, is there a genuine
10 issue of material fact regarding it?

11 MR. LONG: You know, no, Your Honor, because
12 basically I don't think it's -- there's no
13 dispute that we learned of the open heart
14 program being in existence -- the second open
15 heart suite in existence when we received the
16 information from the Freedom of Information
17 Act.

18 Whether someone hears a rumor in the street or
19 not is not constructive notice. I mean, the
20 constructive notice has to come from someone in
21 authority.

22 The Department never communicated with us about
23 it. Lexington communicated with us about it in
24 response to a Freedom of Information Act.
25 There's really no other sources that could

1 provide us the information of constructive
2 notice.

3 If somebody out in the street said, "Hey, I
4 hear this or I hear that," I mean, we don't --
5 that's just a rumor. That can't be
6 constructive notice.

7 THE COURT: All right. Anything else?

8 MR. LONG: I really -- no, Your Honor, I think
9 that's our issue.

10 THE COURT: All right.

11 MR. LONG: It's that simple.

12 THE COURT: Mr. Summer?

13 MR. SUMMER: Your Honor, obviously we're going to
14 renew our jurisdictional arguments because
15 they're not properly before this Court.

16 THE COURT: I understand.

17 MR. SUMMER: And I think Your Honor has already hit
18 upon a very important issue and that is
19 what -- and that is, there are facts at issue
20 here.

21 If you look at the affidavits that are attached
22 to our response, if you look -- if you look at
23 all of the affidavits that are attached to our
24 response, there clearly are factual issues.

25 One, Lexington had a significant growth in its

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1 program. Two, its facilities were not such
2 sufficient to take care of those patients.
3 They were aware of the April 28th letter.

4 THE COURT: Well, that would be facts you would
5 consider in the CON. I think I agreed with you
6 on that. I think it was you just said that I
7 shouldn't consider those facts or that those
8 facts would be pertinent to the spanning of the
9 case, if I ever got to them.

10 MR. SUMMER: And let's just talk about what our
11 defense is going to be to what they're doing.
12 We have the right, the absolute right, to
13 develop those factual defenses and they can be
14 the need that was necessary; the fact that we
15 had to do this. We met with DHEC. What did we
16 say? What did we learn? What did they tell
17 us? What were the circumstances under which
18 this was done? DHEC has emergency authority to
19 do things. So was that an issue?
20 The fact of the matter is, is that each one of
21 these things is uniquely factual. I went to
22 the oral arguments in the Supreme Court case
23 and the issue came up about all these things
24 that got permitted, you know, 70, 100, whatever
25 it was. The Court declined to address that

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1 issue. They could have said that all of those
2 are void ab initio, but they didn't.

3 And I would submit to the Court that the reason
4 they didn't was because every single one of
5 those would be fact specific and fact
6 dependent. And until this Court knows all of
7 those facts, it's simply premature without
8 discovery to rule on Summary Judgment.

9 Now, there may be, with proper depositions
10 being taken by both sides, the ability to do
11 things like constructive notice; also, that the
12 issues about whether or not these modalities
13 were necessary in order for patient safety.

14 But to grant Summary Judgment now and also have
15 the effect of throwing patients out of those
16 rooms today without knowing what the facts are,
17 I think would be premature and inappropriate.

18 You know, there are other factual issues. You
19 know, they now want to rely on four instead of
20 five. Five clearly would not have required a
21 CON, but four says "any capital expenditure."
22 Lexington utilized existing -- an existing open
23 heart room or an existing suite that was
24 already built, that was already equipped, that
25 was already performing general surgery. And

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1 all they asked the Department to do was to come
2 over there and say, "Hey, does this meet the
3 specifications for an open heart surgery
4 suite?" And they said "yes." If there was no
5 capital expenditure, no CON would be required.
6 There's no evidence between -- before this
7 Court today about what that capital expenditure
8 is. I'm sure if we did discovery, he'd be
9 looking to see if we spent one red cent. You
10 know, conversely, we would be sitting here
11 trying to prove that we didn't spend any. So,
12 again, it's factually dependent.

13 Also under four is, what is a substantial
14 expansion? In other words, if those patients
15 aren't going to migrate -- and that's what our
16 affidavits say is that patients don't migrate.
17 They're just required to wait until
18 8:00 o'clock at night to get a surgery because
19 we arbitrarily and capriciously in this
20 state -- only state in the Union, by the way,
21 that does it by OR and rooms, I'm told by my
22 experts, as opposed to OR -- to open heart
23 programs. There's really no substantial
24 expansion involved when you already have the
25 service and the patient is just going to have

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1 to wait until 8:00 o'clock at night to get the
2 surgery.

3 Finally, Your Honor, you know, as to
4 constructive notice and I want to hand this up
5 to the Court. This is the only affected person
6 letter that I am aware of and it was -- and it
7 was submitted on April the 9th of this year.

8 And I think if you look at this, it was sent to
9 the Department, but look what it asked for. It
10 says "Lexington Medical Center development of a
11 third cath lab," okay? "Lexington Medical
12 Center development of new operating OR's,"
13 okay? And "Lexington Medical Center renovation
14 of existing OR's."

15 Seems to me they knew an awful lot on April the
16 9th. They clearly had constructive notice
17 because they're telling the Department on April
18 9th, "Hey, we want to be an affected person if
19 any of those things are happening." That could
20 have been done on June the 29th of 2013. And
21 it also goes, again, to the jurisdictional
22 issue of that this is not a timely filed case
23 by any -- whatever yardstick Your Honor wants
24 to use. April 9th compared to May 14th when
25 they initiated their RFR doesn't meet that

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1 15-day requirement.

2 So, again, we believe that jurisdictionally
3 this case is not properly before this Court and
4 should be dismissed because if Your Honor wants
5 to say lack of procedural jurisdiction and/or
6 being untimely, but if it's not, there are an
7 awful lot of factual issues that need to be
8 developed during the course of discovery.

9 Because I intend to be back here at Summary
10 Judgment after I've taken some depositions to
11 determine what did Providence know and when did
12 they know it. Thank you, Your Honor.

13 THE COURT: Ms. Biggers?

14 MS. BIGGERS: Nothing from DHEC, Your Honor.

15 THE COURT: I've got a question for you and that
16 is ...

17 MS. BIGGERS: Okay.

18 THE COURT: Did the Department make any
19 determination about whether capital
20 expenditures occurred or not in determining
21 whether or not Lexington could move forward?

22 MS. BIGGERS: No, Your Honor.

23 THE COURT: All right. Mr. Long?

24 MR. LONG: A couple of points, Your Honor. First,
25 I'd -- all of the defenses that are set out in

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1 the affidavit of Mr. Summer are -- or almost
2 most of the ones he's raised are all issues
3 that would be tried in a CON case. Is there a
4 need for the room or the -- or for the cath
5 lab?

6 And, of course, in all CON cases, the South
7 Carolina Health Plan is the critical document
8 to determine need, not what other people say or
9 whatever about -- the Health Plan is the
10 critical document to determine -- to determine
11 need.

12 All of the things that he mentioned, none of
13 them happened. There's no dispute about that.
14 The Department didn't declare an emergency and
15 allowed them to have an extra open heart suite
16 or whatever. I mean, none of that occurred.
17 And in regards to the capital expenditure, the
18 evidence in the record is that they did make a
19 capital expenditure, because on Exhibit B to
20 our Motion for Summary Judgment it says
21 \$200,000 as the capital expenditure.

22 And, I mean, so the issue of whether they --
23 you heard the Department already. I mean,
24 basically what he's arguing is, is that even
25 though the Health Plan specifically says that

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1 open heart suites are done by room and that
2 there's a provision with criteria about
3 expanding an open heart suite, you don't have
4 to do it if you bought the equipment earlier.
5 Because, you know, there are two open -- there
6 are two heart/lung machines that you would have
7 to have if you were running rooms
8 simultaneously. So if you bought the equipment
9 earlier, then it doesn't count. So, I mean,
10 none of that -- it just all fails, Your Honor.
11 It's all just distinctions. There's no
12 material issue of fact here, because the
13 critical facts that dwarf everything are: Was
14 the program suspended? The Supreme Court said
15 "no." Do they have to get a CON to do this
16 project? Yes, they do. Did they get a CON?
17 No, they didn't. They have to go through the
18 process.

19 THE COURT: All right. With that said --

20 MR. SUMMER: One other thing. The \$200,000
21 expenditure was for the cath lab, not the open
22 heart surgery suite. I'm not aware of any
23 evidence in the record that any dollar was
24 expended for the open heart surgery suite, Your
25 Honor.

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1 THE COURT: Okay.

2 MR. LONG: Your Honor, could I talk about the stay
3 for a moment? I realize these other motions
4 are dispositive motions, but the issue with the
5 stay is, we filed the Motion to Enforce the
6 Stay, all right? If the case continues, the
7 automatic stay applies. There's no motion to
8 lift the stay and his -- his kind of discussion
9 about status quo and all, that's not the
10 analysis.

11 Your Honor's well aware of what the analysis is
12 under the statute with good cause and prejudice
13 and there's no motion to lift the stay. So, I
14 mean, for this to be kind of still hanging out
15 in limbo -- I mean, the case -- I mean, the
16 stay is in effect. It was in effect the day we
17 filed.

18 And so I would hope that Your Honor -- so we
19 filed a motion just to get some -- the Court to
20 comment on that. But if Your Honor -- if Your
21 Honor is not going to resolve the case in
22 final, then I would hope that Your Honor would
23 at least address that issue of the stay to
24 acknowledge that it's in effect.

25 THE COURT: I will do that and I will do that

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1 promptly. I was just going to think about this
2 first.

3 MR. LONG: No, I understand. I'm not -- I just
4 didn't --

5 THE COURT: I told you, I think I can do that --
6 could I not do that on a phone call?

7 MR. LONG: Well, we can --

8 THE COURT: Or do we need to have it on the record?

9 MR. LONG: The only issue is whether the stay is in
10 effect. They haven't moved to lift it.

11 THE COURT: That's what I said.

12 MR. LONG: So I think you can decide it on the
13 brief.

14 THE COURT: Yeah.

15 MR. LONG: I mean, we've laid out -- I mean, it's
16 just a matter -- I mean, if the case continues,
17 I think when you look at it, the stay is
18 pretty -- is very broad.

19 When you file it, the stay comes into effect
20 and then people can move to try to lift it.

21 And I would not -- when you brief the issue of
22 whether it should be lifted, they should file
23 a motion to lift it if they want to.

24 But I just was going to say, Your Honor,
25 however when you do the decision, I would just

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1 hope for some guidance on that issue about the
2 stay that --

3 THE COURT: Well, what I intended to do is, once I
4 decide whether to go forward or not, at that
5 point in time, even if I haven't issued the
6 order, I can address the stay. I wanted to
7 think about this first.

8 MR. LONG: Okay. Well, obviously, however you want
9 to proceed with it, Your Honor, is fine. I
10 just didn't want to --

11 THE COURT: I understand your point.

12 MR. LONG: I didn't want to lose the motion and the
13 other --

14 THE COURT: You're not losing the motion.

15 MR. LONG: I know we're not. I know Your Honor is
16 on top of it, so.

17 MR. SUMMER: We believe it's logically consistent to
18 determine whether or not, one, the Court has
19 jurisdiction and, two, whether the case is
20 going to continue before we address the
21 automatic stay.

22 I would submit to Your Honor that there are
23 extenuating circumstances here and if this case
24 is going to go forward, we would certainly
25 immediately file a motion to lift the stay

1 because we are treating patients every day in
2 those rooms.

3 I don't want to be in the position where we
4 disrupt patient care and I want Your Honor to
5 know what the facts are before that decision is
6 made.

7 So we understand that it'd be logically
8 consistent to determine whether or not the case
9 is going forward. We'll go ahead and prepare
10 that motion promptly and then we can decide
11 that issue afterwards.

12 THE COURT: I try to be logical.

13 MR. LONG: Thank you, Your Honor.

14 MR. SUMMER: Thank you, Your Honor.

15 THE COURT: Thank y'all for your time. Y'all be at
16 ease.

17 (The proceedings concluded 11:11 a.m.)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 14-ALJ-07-0332-CC

Sisters of Charity Providence
Hospitals,

Petitioner,

v.

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

Respondents.

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MOTIONS HEARING

Wednesday, October 22, 2014
10:00 a.m. - 10:58 a.m.

The motions hearing before the Honorable Ralph King Anderson, III, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 22nd day of October, 2014 before Cassandra E. Vance, Court Reporter and Notary Public in and for the State of South Carolina.



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RECORD 000518

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.



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1 **THE COURT:** All right. This is a hearing in the
2 matter of Sister -- Sisters of Charity
3 Providence Hospitals, Petitioner, versus South
4 Carolina -- well, I'll just say DHEC and
5 Lexington Health Services District d/b/a
6 Lexington Medical Center, Respondents.

7 The docket number is 14-ALJ-07-0332-CC. This
8 is a hearing in the matter whether or not to
9 lift the automatic stay. So I assume
10 Mr. Summer is going to be up first.

11 **MR. SUMMER:** It is our motion, Your Honor. Thank
12 you very much.

13 **ARGUMENT BY MR. SUMMER:**

14 **MR. SUMMER:** Your Honor will remember that on page
15 six of the order granting partial Summary
16 Judgment in this case, the Court said,
17 "Therefore the only remaining issue is whether
18 LMC made a capital expenditure for the open
19 heart surgery suite. However, Providence has
20 provided no evidence that LMC made a capital
21 expenditure for its open heart surgery suite
22 project and therefore remains a triable issue
23 of fact that will require discovery."

24 So the case is still to proceed in that regard
25 and that discovery will have to take place.



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1 Capital costs are usually considered in CON
2 cases to be based on generally accepted
3 accounting principles and so until such time as
4 we have accounting evidence that is presented,
5 we have, you know, no case that can be made one
6 way or the other on the merits here.

7 So the only thing for purposes of today is,
8 does the automatic stay -- should the automatic
9 stay be lifted? And, Your Honor, we've laid
10 this out carefully in multiple memoranda that
11 have been filed with the Court.

12 **THE COURT:** I've read -- I've read it when y'all
13 submitted it.

14 **MR. SUMMER:** In Section 1-23-600(H) --

15 **THE COURT REPORTER:** Can you say that one more time
16 a little slower?

17 **MR. SUMMER:** It's 1 --

18 **THE COURT:** No, can you do it faster?

19 **MR. SUMMER:** 1-23-600(H) as in hotel, provides
20 that -- that section provides that it applies
21 to timely requests for contested case.

22 Obviously arguing today, we are not conceding
23 jurisdiction and certainly maintain our
24 position that this Court lacks subject matter
25 jurisdiction.



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1 But for purposes of arguing for the lift of the
2 stay, Section 4 of that provision states that
3 "After a contested case is initiated before the
4 Administrative Law Court, a party may move
5 before the presiding administrative law judge
6 to lift the stay imposed pursuant to this
7 subsection. Upon motion by any party, the
8 court shall" -- that's a mandate -- "lift the
9 stay under one of two conditions." It's in
10 disjunctive. "Either for good cause shown or
11 if no irreparable harm will occur, then the
12 stay" -- again, mandate -- "shall be lifted."
13 Your Honor took up this very issue in 2008 in
14 *Piedmont versus CHS* case and we basically
15 followed Your Honor's logic and reasoning
16 regarding good cause and the purpose of the
17 stay and irreparable harm.
18 As to good cause, I think -- I think we all
19 hope that is a unique situation. In other
20 words, this is not a situation that would
21 normally have presented itself pursuant to the
22 Certificate of Need Act. And I, for one, hope
23 that this is not a situation that we find
24 ourselves in again, although the Executive
25 Branch can do what it wants to.



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1 At the end of the day, what do you have a stay
2 for? It is to maintain the status quo.
3 In the normal course of events, there would
4 have been an application or a request for NAD
5 or a request for an exemption. The Department
6 would have issued a decision and that decision
7 would have made its way through the board to
8 this Court. And that decision would have been
9 to do some affirmative act in the future. And
10 that affirmative act would be to add a service,
11 to construct beds, to purchase equipment, okay?
12 And, therefore, the stay is designed to
13 maintain the status quo until this Court
14 determines, one, is that decision correct or,
15 two, if it's not, to prohibit the action or
16 activity that is the subject of the decision.
17 **THE COURT:** All right. Wait a second. So the stay
18 would be to maintain the status quo. And what
19 would the status quo be in your interpretation?
20 **MR. SUMMER:** Well, the status quo for --
21 **THE COURT:** Let me just stop you. One, we're
22 looking at 600(H) and (H)(2) says or sets
23 forth: "A request for a contested case hearing
24 for a decision to issue a new license stays all
25 actions for which the license is a



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1 prerequisite."

2 So is that not the status quo?

3 **MR. SUMMER:** Well, the status quo, Your Honor, is
4 that -- first of all, Your Honor's taking the
5 position that there is no decision in this case
6 and that the Act was not followed, okay?

7 **THE COURT:** Yeah.

8 **MR. SUMMER:** So it's counterintuitive to say that
9 you're trying to maintain the status quo of a
10 decision that didn't occur.

11 The point -- the foundation I was trying to lay
12 before we get to the facts of this case --

13 **THE COURT:** Okay.

14 **MR. SUMMER:** -- is that the Act is designed for --
15 as it applies to a Certificate of Need, there
16 is an applicant and that applicant does one of
17 three things: Files a Certificate of Need
18 application or seeks a non-applicability
19 determination or seeks an exemption --

20 **THE COURT:** Yeah.

21 **MR. SUMMER:** -- and that requires departmental
22 action.

23 **THE COURT:** Right.

24 **MR. SUMMER:** And that action comes in the form of a
25 decision and that decision is to do one of two



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1 things. It's to say, "No, you may not have
2 this new piece of equipment," or beds or
3 whatever it is that you want under the Act or,
4 "Yes, you may."

5 There's no change in the status of the parties
6 as they come to present to you. The question
7 is: Shall there be something done in the
8 future? And the reason the stay exists is so
9 that an applicant cannot ignore the competitor
10 or the challenge and move forward with a
11 project. That's the purpose of the stay --

12 **THE COURT:** Yeah.

13 **MR. SUMMER:** -- is to maintain that status quo.

14 **THE COURT:** Okay.

15 **MR. SUMMER:** All right. Let's now go to this case.

16 In this case, on June the 28th of 2013, the
17 Department made a decision, okay? My client's
18 position is, any appeal should be based off of
19 that decision because it was given to every
20 provider in the provider community and it said,
21 "We're not going to force the CON Act anymore.
22 If you need something, if you want something,
23 go get it licensed. The doors are open."
24 Okay. That was done on June the 28th of 2013.
25 Because of the fact that nobody appealed that



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1 decision, our position is, is that as to our
2 client that this case is not timely.

3 But if we assume for the time being that we're
4 going to move forward with this case, in
5 October of 2013, DHEC went in and approved the
6 use of an existing operating room. That
7 operating room has been in existence and
8 providing open heart surgery services since
9 October of 2013.

10 And so our position is, is that the purpose of
11 the Act to maintain the status quo, then the
12 equities are on the side of Lexington Medical
13 Center.

14 Now, I know there's been a ton of pejorative
15 information --

16 **THE COURT:** Are we at the good cause stage now?

17 **MR. SUMMER:** Getting ready to be, Your Honor.

18 **THE COURT:** Okay.

19 **MR. SUMMER:** Okay. Getting ready to be.

20 I realize there's been a ton of pejorative
21 accusations, but I would caution the Court that
22 the only factual information before this Court
23 is that Lexington had a growing program, went
24 to the Department, sought Department advice,
25 consent, and approval for the actions that it



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1 took both for the open heart surgery suite and
2 for the cath lab.

3 You know, to sit here and say that somehow the
4 client's been nefarious when it has a
5 pronouncement that you don't need a CON anymore
6 and it has pressing needs -- the notion that
7 the regulated community was --

8 **THE COURT:** Well, this Court hasn't adopted any of
9 that nefarious language, I don't think.

10 **MR. SUMMER:** Well, there's plenty of --

11 **THE COURT:** If it did, it was by accident.

12 **MR. SUMMER:** And there's plenty of it flying around.

13 After all, Your Honor, until some discovery's
14 been taken, no one can establish or attempt to
15 establish "state of mind," especially of a
16 corporation.

17 But at the end of the day, okay, the client had
18 needs --

19 **THE COURT:** Now, that can bite you, but go ahead.

20 **MR. SUMMER:** Discovery can bite you always.

21 **THE COURT:** No, I'm talking about the "state of
22 mind" thing.

23 **MR. SUMMER:** But, again, we're at a stage in the
24 proceedings where there's a paucity of facts
25 before this Court. There are plenty of



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1 arguments of counsel, but a paucity of facts
2 before this Court because no discovery has yet
3 been taken.

4 The point I'm trying to make here, Your Honor,
5 is that because the regulated community had
6 needs, they needed equipment, they needed
7 services, are they to ignore those patient
8 needs? Are they to deny patients' care? Are
9 they to not do what they believe is responsible
10 in terms of providing quality care for whenever
11 the Supreme Court chose to take it up, which
12 was not September but April of 2014?

13 So they engaged the regulatory body, they moved
14 forward in a judicious manner, and they
15 established the services that they need to
16 respond to patient demand. They did that. And
17 so from October of 2013 until Your Honor's
18 recent decision, that modality had operated.
19 Now, the good cause to be shown here is that
20 there's no showing that this client acted in
21 any nefarious way. In fact, the only facts
22 before the Court is, is that they had -- and
23 that's in the affidavit of Mr. Armstrong --

24 **THE COURT:** Well, let's move on from that, because I
25 don't need -- as far as my determination is



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1 concerned, I'm not going to consider the
2 nefarious aspects of it. I'm going to consider
3 whether there is good cause to continue the
4 activity.

5 **MR. SUMMER:** So --

6 **THE COURT:** So I don't think that's a component of
7 it.

8 **MR. SUMMER:** Well -- and, Your Honor, because of all
9 the allegations that have been flying in the
10 memoranda, I wanted to address that. So let's
11 look at what the good cause is.

12 We have two affidavits from the program itself
13 that set forth that it was a growing program,
14 that it needed -- in order to provide timely
15 care for the patients, that it needed this
16 modality. That to get it, they went, they met
17 with DHEC, they complied with DHEC's
18 requirements, and that they ultimately received
19 approval to utilize that room and the open
20 heart surgery program.

21 All of the facts mitigate in favor of allowing
22 that modality to operate during the pendency of
23 discovery. In fact, there's no compelling
24 reason, Your Honor, to say that good cause does
25 not exist. There's been nothing put in front



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1 of this Court that says that there is no good
2 cause.

3 And I would submit to you that the only
4 affidavits --

5 **THE COURT:** Well, what is the logic of your good
6 cause? Let's go with the premises. You've
7 got -- is your first premise Lexington is
8 operating and -- or properly operating an open
9 heart surgery center?

10 **MR. SUMMER:** First of all, they are licensed to do
11 so. You're exactly right. They have a
12 legitimate licensed program.

13 And if Your Honor looks at the affidavit of Tod
14 Augsburger -- he is the chief operating officer
15 of the system. He is the one who oversaw the
16 implementation and development of the program.
17 And he says -- and I'm just going to read
18 through it and you can look and see what the
19 good cause is and this is: It is a pressing
20 need on behalf of the institution.

21 **THE COURT:** I've got that affidavit. I've gone
22 through it and highlighted it. But go ahead if
23 you want to (inaudible).

24 **MR. SUMMER:** Well, it sits --

25 **THE COURT:** Not the whole thing, though.



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1 **MR. SUMMER:** Right. And so what he's basically
2 saying is they're up to 300 -- approximately
3 300 cases per year.

4 Paragraph five: "As a result of the success
5 and growth of the program, physicians and
6 administration determined it was essential to
7 have a second open heart surgery suite in which
8 to perform cases. The lack of a second open
9 heart surgery suite at LMC was beginning to
10 create delays in the provision of timely care
11 to LMC's patients. Timely care is essential to
12 the successful performance of an open heart
13 surgery and to treatment of patients,
14 especially those who present in an emergent
15 state."

16 And in paragraph six, "On September 25, 2013,
17 Mr. Augsburger and the CEO from LMC met with
18 Ms. Catherine Templeton, Director of DHEC, for
19 the purpose of discussing LMC's need to utilize
20 an existing operating room for open heart
21 surgery procedures."

22 **THE COURT:** Let me just go through where you're
23 going with all this.

24 **MR. SUMMER:** All right.

25 **THE COURT:** So under your theory, if



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1 someone -- anytime an individual seeks a CON,
2 if they can come in before this Court and say
3 from their perspective, that the -- the
4 services are needed -- and then we've got this
5 debate about urgent versus emergent.

6 And, really, it's not clear from that affidavit
7 whether the one heart -- whether the one
8 surgery center would satisfy all emergent --
9 but -- emergent services needed versus urgent.
10 But let's just say on the first path and that
11 is, you come in -- in every instances where an
12 individual seeking a CON can say, "I
13 can -- I've got -- my party can establish that
14 it's needed," then in all those instances I
15 should lift the stay.

16 **MR. SUMMER:** No.

17 **THE COURT:** Okay. So now let's go down further and
18 say: Under what circumstances?

19 **MR. SUMMER:** Because they have not opened the
20 service, they have not staffed the service,
21 they are not providing that service to the
22 patients. In other words, in this case, the
23 modality's been operating. In the case you're
24 suggesting is, there's just a piece of paper
25 that says, "You may go forth."



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1 **THE COURT:** But in this case, at least so far, we
2 haven't come to a determination whether the
3 modality has been operating properly or not.
4 If it's been -- if it's been operating, there's
5 an issue before the Court about whether it's --
6 it should be operating at all. I mean, I'm not
7 saying -- I'm not determining the case, but I'm
8 saying that's an issue before the Court.

9 **MR. SUMMER:** If that's --

10 **THE COURT:** And wouldn't that be true on --

11 **MR. SUMMER:** Your Honor --

12 **THE COURT:** It would be true in almost every case
13 that would come before the Court, unless
14 somebody just decides to proceed ahead and --

15 **MR. SUMMER:** And I respectfully disagree. And the
16 reason --

17 **THE COURT:** Okay. Well, tell me wrong -- where I --

18 **MR. SUMMER:** And the reason I respectfully disagree
19 is --

20 **THE COURT:** Because I don't mind respectful
21 disagreement if you tell me where I'm wrong.

22 **MR. SUMMER:** -- is that in the -- the way the Act
23 was -- and, again, we don't believe the Act
24 applies here, does not confer jurisdiction on
25 this Court. But assuming arguendo that it



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1 does --

2 **THE COURT:** I know. We got -- we got to get beyond
3 that on this.

4 **MR. SUMMER:** Assuming arguendo that it does, is that
5 the cases that you're talking about are in the
6 normal course where a CON decision has been
7 made.

8 Nothing has been done to implement and operate
9 the new beds, the new service, the new
10 equipment that's at issue on that piece of
11 paper. Here, okay, the piece of paper -- the
12 only piece of paper was from June the 28th.

13 And in October of that year, after conferring
14 with DHEC, this client, this hospital, opened
15 up the second surgery suite in order to serve
16 its patients effectively and efficiently. It's
17 been operating.

18 The good cause is, is that, my goodness, we've
19 been doing this since October of 2013. Where
20 is the prejudice? And then we'll get next to
21 irreparable harm.

22 **THE COURT:** Yeah.

23 **MR. SUMMER:** The real question is, is that since
24 it's up and running and operating, the good
25 cause is, is that at this stage, the harm



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1 occurs by shutting it down.

2 In your other situations, you're not shutting
3 down anything. In other words, all you're
4 doing is preventing a decision from going
5 forward.

6 Here, the project's been completely
7 implemented --

8 **THE COURT:** All right.

9 **MR. SUMMER:** -- and what's shown to you is you've
10 got an MD cardiovascular surgeon saying, "I
11 need this room," and you've got an
12 administrator saying, "I need this room," and no
13 other information to the contrary.

14 **THE COURT:** When you analyze harm, then is a
15 component of considering harm from your view
16 point whether the services are lawful or not?

17 **MR. SUMMER:** All right. Well, Your Honor, remember,
18 it's disjunctive. And what Your Honor --

19 **THE COURT:** Well, we're on good cause right now.
20 We'll get to irreparable harm later, but --

21 **MR. SUMMER:** Right.

22 **THE COURT:** -- I'm on good cause now, so.

23 **MR. SUMMER:** All right. And your question is to
24 harm?

25 **THE COURT:** Whether the services are lawful, is that



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1 a consideration in determining good cause or
2 not?

3 MR. SUMMER: Well, Your Honor --

4 THE COURT: Or do I always -- is there some
5 presumption that I presume that because your
6 client has determined that it's lawful, that I
7 should have to presume that it's lawful and,
8 therefore, logically move forward from that to
9 analyzing whether the services should continue
10 or not?

11 MR. SUMMER: Well, I would respectfully say that now
12 you're doing what Providence is doing and
13 you're now making assumptions on the merits of
14 the case and whether the merits of the case --

15 THE COURT: What I'm doing now is asking questions.

16 MR. SUMMER: Right. Well -- and, again, to ask the
17 questions on the merits of the case basically
18 defies the due process.

19 THE COURT: Well --

20 MR. SUMMER: The due process is --

21 THE COURT: -- let me back you up, because what
22 I'm -- I'm not really asking about merits. I'm
23 asking about are there -- it seems to me that
24 your argument would follow a presumption. It
25 would be a logical inference that you were



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1 basing your argument on that what I do is --
2 what I'm doing is lawful and, therefore, it
3 should be allowed to proceed. And I'm asking,
4 is there an underlying analysis of the
5 lawfulness of the activity that is warranted?

6 **MR. SUMMER:** Well, Your Honor, I would say that
7 you've already presumed that the activity may
8 very well be lawful.

9 "However, Providence" -- your words -- "has
10 provided no evidence that LMC made a capital
11 expenditure for its open heart surgery suite
12 project and therefore remains a triable issue
13 of fact that will require discovery."

14 Therefore, if there's a clear path to this room
15 being lawful and utilized in a lawful manner,
16 and Your Honor has recognized that there's a
17 clear path for it to be utilized in a lawful
18 manner, then why not allow it to be continued
19 to use -- to use it so that patients are not
20 prejudiced, staff are not prejudiced in trying
21 to maintain not the status quo, but to shut the
22 door on the operation of a modality that's been
23 going for now the better part of a year.

24 I think the equities and the facts are on the
25 side of allowing the stay to be lifted. Now



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1 that's as to good cause. As to no irreparable
2 harm --

3 **THE COURT:** Well, let me -- before move on -- so my
4 analysis on good cause is based upon not the
5 harm involving the number of procedures,
6 et cetera, but to the equities of whether or
7 not there is harm in disallowing the use.

8 **MR. SUMMER:** All right. Are you on good cause and
9 not --

10 **THE COURT:** I'll stay on good cause. I'm trying to
11 keep it --

12 **MR. SUMMER:** Okay.

13 **THE COURT:** -- from moving on to irreparable harm,
14 because one of the things I've done in previous
15 decisions is in analyzing good cause, I have
16 tried to figure out, "Well, how do you analyze
17 harm?"

18 And in analyzing harm, I've gone and looked
19 at -- let me pull it up. It's -- well, you
20 probably already know this because you're as
21 thorough as you are -- 44-7-120. I've
22 considered, you know, the purposes of the CON
23 Act in considering harm.

24 And so am I errant in doing that or is your
25 argument subsumed under that existing statute?



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1 MR. SUMMER: Well, in your prior decision, you
2 looked at the purposes of the CON Act, if I
3 remember correctly, under the irreparable harm
4 section.

5 THE COURT: Yeah, I'm -- you're correct.

6 MR. SUMMER: And so if we make that bridge, and
7 we've briefed that --

8 THE COURT: Well, but we're looking at harm now
9 under good cause, too, so I mean ...

10 MR. SUMMER: Well -- and let's think about this.

11 THE COURT: Because I'll get to irreparable harm.
12 I'm just trying to flesh out good cause right
13 now.

14 MR. SUMMER: What can we glean from the affidavits
15 that are before the Court? There is no harm to
16 Providence because these patients are not being
17 transferred, okay? It's clear from Dr. Travis'
18 affidavit that patients are not transferred.
19 They don't benefit from transfer.

20 In fact, I've made the assertion, these
21 patients are not chattel to be shuttled from
22 one hospital to another so that somebody can
23 book revenue. They are human beings.

24 And they are sitting in a hospital and whether
25 or not they get a surgery at 10:00 p.m. at



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1 night or at 8:00 p.m. -- or 8:00 a.m. in the
2 morning is entirely dependent upon the decision
3 this Court makes here today.

4 And so the issue here in terms of harm is that
5 there's no harm to Providence because these
6 patients are not going to be put in an
7 ambulance and moved; that's clear. That's
8 factually before the Court. And so the issue
9 then becomes one of: Where is the harm? The
10 irreparable harm is to the poor patient.

11 **THE COURT:** No, we're on good cause now, though.

12 **MR. SUMMER:** Okay. All right. And you have to
13 excuse me because you continue to ask me harm
14 questions under the good cause analysis.

15 **THE COURT:** Yeah.

16 **MR. SUMMER:** And so from my perspective --

17 **THE COURT:** Well, I'm trying to figure out what the
18 analysis is.

19 **MR. SUMMER:** Right. And in your prior decision --

20 **THE COURT:** How do I determine what is good cause?

21 **MR. SUMMER:** Right. In your prior decision, you
22 analyze good cause and then you, because of the
23 disjunctive in the statute, then went to the
24 irreparable harm. So there is no irreparable
25 harm to Providence because those patients are



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1 not going to move. And I think another
2 telling --

3 **THE COURT:** And let me just back you up, because I
4 keep pulling you into harm's -- analyzing good
5 cause and maybe that's confusing you. But what
6 I'm getting at is, good cause has a myriad of
7 factors of which one factor in your analysis
8 can be whether there's harm. And that's what
9 I'm asking about: Is that a proper factor and,
10 if so, how do I consider it under good cause?

11 **MR. SUMMER:** And I believe what I'm telling Your
12 Honor is, is that the harm that exists is as
13 to -- is to the patient who is delayed care and
14 is -- and from our perspective, having a
15 program with 300 hearts in it and not having
16 the redundancy of a second open heart surgery
17 suite, there are clear issues there for patient
18 care that require that second room.

19 **THE COURT:** That's what I want to be clear on..

20 **MR. SUMMER:** Okay.

21 **THE COURT:** You got me there.

22 **MR. SUMMER:** All right. And if we don't have it,
23 there are human beings that are going to be
24 hurt by this; not numbers on a balance sheet,
25 but human beings who are going to be hurt by



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1 this.

2 If we go to irreparable harm, I think we've --
3 Dr. Travis' affidavit makes it clear these
4 patients are not being sent across the river.
5 The other issue is, is that for whatever
6 reason, from October of 2013 until April of
7 2014, there obviously was no harm recognized by
8 Providence. They did nothing.

9 Now, you know, our position is, is certainly
10 that they knew or should have known long before
11 this process and we've argued that previously.
12 There's no way to know what Providence knew or
13 when they knew it until somebody does a
14 30(b)(6) deposition on them. So to suppose --

15 **THE COURT:** That's what I was getting at when --
16 about the "state of mind," because you can't
17 just predetermine "state of mind" of Providence
18 right now until -- as you said earlier, until
19 you do the deposition, so.

20 **MR. SUMMER:** Well, which -- and from my perspective,
21 in timing of profecting any kind of a contested
22 case, not having that fact before the Court
23 makes it impossible to determine.
24 But coming back to what we're dealing with here
25 is -- and we went through this analysis, is



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1 that there's nothing in the purpose of the CON
2 Act that is harmed, okay, by permitting the
3 lifting of the stay in this case.

4 In fact, what it does do, is that it does
5 provide for efficient and effective quality of
6 care and that's the most important thing
7 because we're not adding a new provider. What
8 we're trying to do is make sure that this
9 provider has the tools necessary to provide the
10 care effectively and efficiently and properly.

11 **THE COURT:** Well, when you say nothing in the CON
12 Act, you in your -- in your memorandums, you've
13 addressed the number of procedures, correct?

14 **MR. SUMMER:** Correct.

15 **THE COURT:** The number of procedures is an element
16 of the consideration of the CON Act.

17 **MR. SUMMER:** Of the State Health Plan, not the Act.

18 **THE COURT:** State Health Plan, which is -- works its
19 way back into the Act.

20 **MR. SUMMER:** Right. And Your Honor will remember
21 that we made the argument early on in this case
22 that it's arbitrary and capricious to plan by
23 OR. No other state in America does that.

24 **THE COURT:** Yeah. Well, I -- I don't know if I can
25 address the constitutionality. But what I'm



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1 considering then is, we've got the number of
2 procedures that you're addressing. And the
3 struggle I've got -- there's a secondary
4 premise. And when you address the argument of
5 harm concerning the effect of the number of
6 procedures on Providence, to me there's two
7 presumptions, and that's what I want to ask you
8 about.

9 The first presumption is that the number of
10 procedures at Providence were -- or the effect
11 of the number of procedures at Providence was
12 established -- is reflected by their actions
13 concerning notice in this case. Did you follow
14 me? Because I didn't word that --

15 **MR. SUMMER:** Yeah. I don't know whether there's any
16 fact in the record as to that.

17 **THE COURT:** Well, what you're arguing is, if
18 Providence had been affected, then they would
19 have taken some action.

20 **MR. SUMMER:** One would assume.

21 **THE COURT:** Okay. And what would that action be?

22 **MR. SUMMER:** Coming to this Court in a timely
23 fashion, for one.

24 **THE COURT:** All right. And how have you established
25 that -- inferentially that they, number one,



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1 were not affected -- I mean, is it just based
2 solely upon their lack of taking action?

3 **MR. SUMMER:** Well, there's a cause and effect issue
4 here, okay?

5 **THE COURT:** Uh-huh (affirmative response).

6 **MR. SUMMER:** Is the cause of any harm at all to
7 Providence because there's the existence of a
8 second OR is the fact that the patient has
9 chosen to have the procedure at Lexington?
10 I mean, what -- what I guess I'm -- the point
11 I'm trying to make is, is that the fact that
12 they delayed so long in doing anything about
13 this and I -- this is what I'd submit to the
14 Court since everybody else has submitted an
15 opinion. I guarantee you if I took a 30(b)(6)
16 deposition of Providence, I'd find someone
17 who's either an employee or agent of that
18 hospital who knew darn good and well there was
19 a second OR suite in 2013; not 2014, but 2013.
20 There's no way in my mind, my opinion, that
21 that could be otherwise. But let's just --

22 **THE COURT:** That would be your "constructive notice"
23 argument, but it wouldn't -- but it would
24 actually harm your the effect of the number of
25 procedures, because your argument is, if they



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1 were affected, then they would have taken
2 action.

3 **MR. SUMMER:** Well, I think that would be an indicia
4 if they were affected, they would have taken
5 action.

6 But at the end of the day, there's a cause and
7 effect issue. Is the presence of the second
8 open heart surgery suite causing any harm? No.
9 The decision to have the surgery at Lexington
10 as opposed to Palmetto, Providence, MUSC, or
11 Duke is a choice between the cardiologist who
12 refers and that patient. And they decide where
13 they want to have that done.

14 That's the time period that it's done. The
15 fact that there is the ability to have two open
16 heart surgery suites does not affect that
17 decision-making process. It doesn't.

18 And at the end of the day, that's what I'm
19 trying -- the point I'm trying to make about
20 irreparable harm is that the existence of that
21 room to better serve the patients is not what
22 is causing parties to stay at Lexington Medical
23 Center, by any stretch of the imagination.

24 That decision's already been made by a
25 referring cardiologist and the patients



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1 themselves because, ultimately, the patient can
2 say, "I want to go to Duke; I want to go to
3 Emory; I want to go to MUSC." They'd don't
4 have to go to Lexington. They don't have to go
5 to Providence. And they don't have to go to
6 Palmetto. And I think that gets lost in this
7 shell game that we're playing.

8 **THE COURT:** Well, when you say lost in the shell
9 game, does not the State Health Plan via the
10 CON set forth the disbursement of the
11 procedures just by the very way that the
12 license is approved?

13 **MR. SUMMER:** Distribution is an element. It's one
14 of 33 elements --

15 **THE COURT:** Yeah.

16 **MR. SUMMER:** -- of criteria in deciding about where
17 services ought to be. But at the end of the
18 day, and Your Honor's heard plenty of testimony
19 on this over the years, it is physician and
20 patient choice that determine where procedures
21 are done.

22 **THE COURT:** All right. Well, one final thing, I
23 think -- you never know -- when I'm considering
24 the effect of the number of procedures upon
25 Providence -- and you've offered evidence



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1 regarding that -- or argument regarding that --
2 would I not also consider the entire service
3 area?

4 Because just as Providence didn't respond,
5 would that necessarily mean that it didn't
6 affect Richland or any other service providers?

7 **MR. SUMMER:** And we don't see Richland here today,
8 either, do we?

9 **THE COURT:** Well, now -- so I've got to go on that
10 inference that if they're not here, they were
11 not harmed.

12 **MR. SUMMER:** Or that they understand that it's
13 necessary to run a program and they're not
14 going to get in the way of quality of care.

15 **THE COURT:** Okay. All right. Anything else?

16 **MR. SUMMER:** Nothing further, Your Honor.

17 **THE COURT:** Mr. Long?

18 **ARGUMENT BY MR. LONG:**

19 **MR. LONG:** Thank you, Your Honor.

20 Your Honor, it's interesting listening to
21 Mr. Summer's argument because basically his
22 argument is that they get to decide, okay?
23 It's their decision about whether they acted in
24 good faith or not and whether they were
25 nefarious. It's their decision as to whether



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1 they need the program or not. It's their
2 decision.

3 That's not the CON program. And to allow a
4 provider to come into court and basically say,
5 "Well, we think we want it, so you should lift
6 the stay and allow us to do it," when they have
7 not followed the legal procedures, I mean, that
8 is harm and that is not good cause.

9 **THE COURT:** That is harm to whom and in what way?

10 **MR. LONG:** It is harm to the system and to patients
11 as a whole. And I'll tell you, our Supreme
12 Court has already addressed this in *Dema*. It
13 is the exact same circumstance.

14 In the *Dema* case, Hilton Head Hospital was
15 doing unauthorized therapeutic
16 catheterizations. They were doing the
17 therapeutic caths at the hospital. They did
18 not have authority under the Health Plan or the
19 CON program or anybody to do them and they did
20 a bunch of them. And they got sued over it.

21 Now, the court didn't allow the lawsuit to go
22 forward, but they said some very important
23 stuff about what they were doing.

24 And the first thing they said, "In
25 conclusion" -- this is the State Supreme Court



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1 Justice Toal writing for the majority. Our
2 Legislature enacted the CON Act with the
3 purpose of promoting quality health care to the
4 citizens of South Carolina.
5 And when health care facilities, like Lexington
6 Medical Center, perform unauthorized medical
7 procedures, which they've done in their second
8 open heart suite, they act in direct derogation
9 of this purpose.
10 That's harm. That is absolute harm.
11 And in the first -- and just a few paragraphs
12 above that, the court says: In the instant
13 case, we find that Hilton Head was undoubtedly
14 unjustly enriched. They were not authorized to
15 perform the services, but did so and realized
16 a benefit in the form of their tremendous
17 revenues and profits from performing these
18 highly lucrative but unlawful procedures."
19 Well, if there's unjust enrichment, there's
20 harm, and there's no good cause.
21 And I would suggest to the Court, there's no
22 difference in what's been going on in Lexington
23 Medical Center than what went on in Hilton
24 Head.
25 Now, Mr. Summer says, "Well, we already had a



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1 license to do the open heart surgery." They
2 didn't have a license to expand it, okay?

3 We -- I would say a huge majority of our CON
4 cases -- probably a majority of our CON cases
5 are not new services where you don't do it,
6 they're expansions where providers are adding
7 more services to what they already do.

8 So under his theory today, any provider that
9 comes to court, whether they were granted the
10 CON or denied it, if they're seeking to expand
11 their service by adding beds or equipment or
12 whatever and they say to the court, "We think
13 we need it, you should lift the stay and let
14 them do it," regardless of the process, the
15 decision by the Department, what the other
16 providers say. That's the argument. That
17 can't -- that's not -- that is not good cause
18 or irreparable harm. And that can't be the --

19 **THE COURT:** Let's treat them separately, if you
20 don't mind.

21 **MR. LONG:** All right. Let's do treat them
22 separately. Thank you, Your Honor.

23 And I do think as a -- I think Your Honor
24 actually kind of hit on it a little while ago
25 that harm can be part of good cause. I was --



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1 I argued that. I was in the case where you
2 ruled on this in '08. And there's no doubt --

3 **THE COURT:** Ruled on this in what case?

4 **MR. LONG:** In the Amisub case that he referenced
5 where you dealt --

6 **THE COURT:** Okay.

7 **MR. LONG:** -- with a stay issue back in -- I think
8 it's 2008.

9 **THE COURT:** He referenced -- is *Piedmont* and *Amisub*
10 the same case.

11 **MR. LONG:** They are and I represented CHS.

12 **THE COURT:** Okay.

13 **MR. LONG:** And Your Honor basically drew the line,
14 you know, in that case where you said, "You can
15 build the building, but you can't do the
16 services." That's where you drew the line.

17 **THE COURT:** You could build the building, but you
18 can't let them come.

19 **MR. LONG:** You can't -- right. And you said you can
20 use it for other purposes or whatever, because
21 basically the building was like 85 percent
22 already built.

23 **THE COURT:** Yeah.

24 **MR. LONG:** And that was a situation, too, where the
25 Department said, "You don't" -- it was an



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1 exemption or NAD. "You don't have to have CON
2 approval to do this project."

3 So the issues do get somewhat tangled between
4 the harm and the good cause, but looking at
5 good cause, these are some of the -- things
6 that I would say that suggests that good cause
7 does not exist.

8 First, it can never be good cause when the
9 provider is violating the law. You just cannot
10 show that you had good cause when you're
11 violating the law.

12 It doesn't matter whether you mean to, whether
13 it's an accident, whether you know the law,
14 whether you are intentionally trying to violate
15 the law, or whether you just casually do it.
16 You cannot have good cause if you violate the
17 law. And that is exactly what's going on here,
18 because our State Supreme Court said that the
19 CON program was never suspended.

20 **THE COURT:** Well --

21 **MR. LONG:** And so --

22 **THE COURT:** -- if I can stop you there. "There
23 could never be good cause when someone's
24 violating the law," but that determination is
25 yet to be made because that's before me.



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1 MR. LONG: Exactly.

2 THE COURT: So what's your response to that?

3 MR. LONG: Well, I think that this is -- this is a
4 unique situation because there is no
5 underlying --

6 THE COURT: Yeah, I agree with that.

7 MR. LONG: Here's the thing -- but I would say this
8 in response to that, Your Honor cannot leave
9 the circumstances of the case at the door when
10 you're making this decision.

11 And where we stand today, Your Honor has
12 already concluded and granted Summary Judgment
13 on the cath lab, okay? No question that's
14 covered by CON. You've got to go apply for a
15 CON and you -- and that cath lab, that third
16 cath lab has been closed.

17 Your decision on the partial Summary Judgment
18 is very narrow. I was interested to hear about
19 all this depositions he wants to take of
20 Providence. I don't think so under the order.
21 Your Court -- Your Honor said that there's a
22 genuine issue of material fact as to the sole
23 issue of whether LMC made a capital expenditure
24 for the open heart suite and the Court denied
25 Summary Judgment on that issue.



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1 You will allow discovery, but it will be
2 limited to the sole issue of whether LMC made
3 a capital expenditure for its open heart suite.
4 So the only thing left in the case is whether
5 they made a capital expenditure.

6 We put evidence into the Court that would
7 suggest that they did. I'm not asking you to
8 make a finding on the merits.

9 **THE COURT:** Yeah.

10 **MR. LONG:** But certainly to weigh where the parties
11 are is something that you should consider.

12 They have never denied it. There's no
13 affidavit that says they didn't make a capital
14 expenditure and they've never said, "We did
15 not." They simply say, "It's not in the
16 record. There's no proof of it." And now the
17 argument is, "Well, you can't look at that
18 because then you'll be deciding the merits of
19 the case.

20 They spent \$3 million on the first room. And
21 we gave you the documents with the affidavit of
22 Joanne Carelli. And they -- and we've got two
23 affidavits saying you have to have a backup
24 open heart-lung machine if you're going to do
25 simultaneous surgeries, because if you don't,



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1 that would violate the standard of care,
2 because if the machine went down, the patient
3 would die.

4 They bought two heart-lung machines for one
5 room. Now, if they're doing surgeries over
6 there in the two rooms with two heart-lung
7 machines, I doubt it. They have -- they have
8 spent money to do this.

9 And the other thing to remember about this
10 thing about the capital expenditure, they're
11 asking you as the Court to conclude that CON
12 does not apply to a service and a criteria that
13 is expressly contained in the Health Plan.

14 There is a criteria that says "expansion of an
15 open heart suite" and it tells you what you
16 need to do. So, clearly, the Health Plan in
17 contemplation cannot add a room without a CON,
18 and they're saying to you, "We can add a room
19 without one. We think that's -- we think
20 because of the law."

21 So even what they're asking you to do would be
22 a great -- would be a seat change, really, in
23 regards to the way that open heart is regulated
24 in South Carolina, because according to their
25 position, then anybody can have as many rooms



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1 as they want, if they can just figure out a way
2 not to spend any money, okay?

3 So I think you have to -- you don't have to
4 decide the merits of the case, obviously, to
5 rule on this motion. And I wouldn't ask you to
6 do that or expect you to do that. But you
7 can't leave the circumstances of the case at
8 the door, either.

9 It's just a little, narrow issue that's left
10 for us to decide. And the only evidence before
11 you is, is that it will then ultimately go our
12 way.

13 There's not -- and so I think that that's
14 something that Your Honor certainly would
15 consider. But, you know, they never went
16 through the process.

17 I mean, I thought about -- this is a little bit
18 like the analogy of a -- you could use the
19 analogy that a provider applied to do
20 something -- Your Honor touched on this about
21 the prerequisite for the license. They applied
22 for it, were denied it, filed a contested case,
23 and then asked the Court to let them do it.

24 I mean, that would not -- I mean, that -- does
25 that even pass the laugh test? You should be



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1 allowed to go ahead and do something that the
2 Department told you "no" the first time around
3 that you've never been approved for?

4 In this case, they've never been properly
5 approved. They never went through a process.
6 What the Department told them was wrong. And
7 so they're really no different than anybody out
8 there who just decides to open up an open heart
9 program or to basically add -- if a hospital
10 went and added 25 beds to their hospital and
11 never told anybody. It's no different.

12 At the end of the day, what they're doing is
13 illegal. And if it's illegal, it can't be good
14 cause. So what is alleged in the case is that
15 they've acted illegally. And our Supreme -- we
16 have a Supreme Court decision.

17 The other thing to consider about the good
18 cause, too, I think, Your Honor, is this:
19 There's no backup open heart suite. So in
20 other words, the idea that they can kind of
21 operate this other room and use it as a backup
22 or maybe flip the rooms or whatever was
23 expressly rejected by Judge Geathers in the
24 open heart case.

25 We tried that issue. It was a major issue in



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1 the case. And in footnote four of the order --
2 which we submitted to, I think, in other --
3 attached to other motions -- he expressly finds
4 that LMC's projections would only allow it to
5 authorize one open heart surgery room rather
6 than the two rooms it requested. Okay? And it
7 talks about the minimum requirements of the 200
8 procedures annually that you would have to have
9 to have a room.

10 And it says, "Nothing in the Health Plan or the
11 CON Act or regulations authorize or provide
12 standards for a backup open heart surgery
13 operating room and in practice, hospitals
14 simply move open heart surgery equipment into
15 a standard operating room on those rare
16 occasions in which the dedicated open heart
17 surgery room is unavailable."

18 Therefore, regardless of the prudence of LMC's
19 request for a backup surgery room to supplement
20 its primary open heart surgery unit, they --
21 LMC would not be authorized for such additional
22 services unless they can project 200 surgeries
23 for the room, which they have not done in this
24 case.

25 So, basically -- and even now he says we're up



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1 to 300. Well, they need to be at 400 to have
2 two rooms. The capacity of these rooms is 500
3 surgeries a year. All right. That's the State
4 Health Plan capacity.

5 So I think that's something to be considered
6 too as a reason not to open it. So even if
7 they talk about how we're just going to
8 casually use it, that's not permitted under the
9 Health Plan or the CON Act and the Court's
10 already dealt with that in another case.

11 So I think those are all --

12 **THE COURT:** Where does that --

13 **MR. LONG:** -- good cause arguments as to why the --

14 **THE COURT:** Where does that capacity come from? Is
15 that the State Health Plan?

16 **MR. LONG:** Is in the State Health Plan.

17 You know, another argument that they're making
18 in regards to good cause is basically --

19 **THE COURT:** Have you cited that in anything you've
20 presented yet?

21 **MR. LONG:** It's in the Health Plan provision. I
22 believe the entire open heart section is in
23 there -- is in -- attached to either -- we've
24 presented it to the Court in one of the
25 memorandums. I can't recall off the top of my



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1 head which one it is. Maybe Ms. Hollingsworth
2 can recall, but it's -- the 500 is in, I think,
3 standard -- standard three.

4 "Capacity of an open heart surgery program is
5 500 open heart surgery procedures per year."
6 And then it's attached to our Motion for
7 Summary Judgment.

8 **THE COURT:** All right.

9 **MR. LONG:** But it's standard three --

10 **THE COURT:** Okay.

11 **MR. LONG:** -- on page 18 of the health plan, 8-18,
12 Chapter 8-18.

13 You know, another argument they make in regards
14 to the good cause is basically the old estoppel
15 argument that they've been continually making
16 over and over, which this Court has rejected in
17 multiple case.

18 Because, I mean, he -- when he starts talking
19 about, "Well, we relied on the Department's
20 decision in June," that's the old estoppel
21 argument. I mean, he's basically just
22 arguing -- that's been rejected by this Court,
23 in this case and in the other case where Your
24 Honor dealt with that.

25 So, I mean, I don't think -- how can that be



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1 good cause? How can estoppel be good cause
2 when it's been already rejected by the Court?
3 So I think when you're looking at good cause --
4 another thing I would say, too, Your Honor, is
5 about this good cause, there is a certain
6 amount of balancing with this. It's not that
7 they can find one little good cause reason and
8 suddenly the whole thing gets opened up.

9 I mean, you've got to look at the balance of
10 the reasons that there would not be good cause
11 and the reasons there would be good cause. And
12 I'd suggest to you that the good -- the no good
13 cause vastly outweighs the good cause, because
14 just the fact alone that they've never been
15 properly -- they've never received proper
16 authorization to do it, they acted outside the
17 scope of the law, that the backup open heart
18 suite is not permitted under the Health Plan
19 and CON Act, those all vastly outweigh what
20 their state of mind or what time of day they
21 want to do the surgeries, so -- which is really
22 they end up arguing.

23 I do think the harm issue, Your Honor, is -- if
24 I can flip over to that for a second.

25 **THE COURT:** Are we still on good cause?



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1 MR. LONG: Well, I was going to flip over to harm --

2 THE COURT: Okay.

3 MR. LONG: -- unless Your Honor has some questions
4 for me.

5 THE COURT: All right. No, that's fine.

6 MR. LONG: I think on harm, a couple of things --

7 THE COURT: I just want to make sure it's
8 irreparable harm.

9 MR. LONG: Your Honor, I think that you have to look
10 at harm -- one of the things that the Court
11 struggled with in the other cases and other
12 judges looking at this have struggled with is
13 it can't be just any provider come in -- I
14 would agree that no provider can come in and
15 just say, "Well, there's no harm here," or,
16 "There is harm to me." It has to be something
17 that would be somewhat unique.

18 THE COURT: Well, I've addressed that in my previous
19 orders.

20 MR. LONG: You did. And I think -- so one of the
21 things that we have to look at is kind of the
22 system and the program itself, the health care
23 system, the purpose of the Act; that's why
24 that's important criteria to consider as part
25 of the harm, and also what's actually going on



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1 here.

2 And I would say, when you start looking at the
3 big picture of this, then the harm becomes very
4 clear and very serious, because when you're
5 talking about allowing them to do a service
6 which is covered under the CON Act -- so the
7 purposes of the Act apply to the service and
8 you're saying to them, "You don't have to go
9 through a process to even determine whether
10 you're entitled to do it or not. You don't
11 have to basically ask the Department for a NAD.
12 You don't have to file an application. You
13 don't have to do anything. You just go over
14 and have a meeting with the director and she
15 says "okay"?

16 I mean, what kind of -- I mean, Your Honor's
17 already dealt with a lot of this in the other
18 orders. I mean, that is just not the way the
19 process is supposed to work. That's why it's
20 unique, is because all that -- when you go
21 to -- up and look at the whole system, that is
22 a -- the strongest reason of all. And then
23 when you look at the Dema case where our Court
24 has already said, "Look, unauthorized
25 procedures are in direct derogation of the law,



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1 the purpose of the Act," well, there's the
2 harm.

3 You don't need to look at whether Providence
4 lost this many cases or that many cases,
5 because the sole issue is -- at the end of the
6 day is, capital expenditure.

7 **THE COURT:** Sole issue is capital --

8 **MR. LONG:** In this case remaining is just the
9 capital expenditure. That's the sole issue
10 remaining in the case.

11 So, I mean, there is no -- all of this issue
12 about whether Providence lost cases or didn't
13 or knew about this or knew about that, that's
14 all been out. That's all out. Your Honor's
15 already ruled. It's the sole issue remaining
16 in the case is whether they made a capital
17 expenditure.

18 **THE COURT:** So number of procedures would not be a
19 consideration in determining irreparable harm
20 because I'm only considering capital
21 expenditure and -- which would thereby allow --
22 if I was to find that they -- they didn't make
23 any capital expenditures, what would my action
24 be?

25 **MR. LONG:** Well, if you determine that they did not



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1 make any capital expenditure, then you're going
2 to -- then the logical step to that is that you
3 will conclude that the expansion of their open
4 heart program was not covered under the CON
5 Act.

6 **THE COURT:** Okay.

7 **MR. LONG:** That's what the -- which will mean that
8 that provision in the State Health Plan is out,
9 that prior practice -- you will change the
10 prior practice, but basically -- in the Court's
11 decision. But that's where this will be
12 headed. And if they can prove that --

13 **THE COURT:** I know, but it would be handed to allow
14 them to continue to do what they're seeking to
15 do.

16 **MR. LONG:** Well, it would be -- right. It would be
17 for anybody.

18 **THE COURT:** So under that theory, then, if that's
19 where the ultimate resolution of the case will
20 be from their perspective --

21 **MR. LONG:** Right.

22 **THE COURT:** -- then why would I not consider the --
23 the number of procedures in analyzing the
24 effect upon the service area in determining
25 whether or not there is harm?



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1 **MR. LONG:** Well, I do think -- let me -- I think you
2 would look at the service area, too, because --
3 I'm just saying that when you -- there are a
4 couple ways to look at harm and one way is to
5 look at the big picture by what it would do the
6 system.

7 I do think in the individual service area of
8 the actual providers, there is harm in this
9 case, too, because of the quality findings in
10 the State Health Plan. I mean, the State --

11 **THE COURT:** Because of the --

12 **MR. LONG:** The quality findings.

13 Open heart is unusual to most services. There
14 actually are specific findings that are in the
15 Health Plan regarding the correlation between
16 volume and quality.

17 So unlike a lot of services where maybe that's
18 an issue for the Court, the Health Plan
19 specifically says that this 200 surgeries per
20 suite and the 200 surgeries within a period of
21 time -- it stays, "The State Health Plan
22 committee recognizes the important correlation
23 between volume and proficiency."

24 Everything in here is by room and so -- and the
25 Court -- the committee further recognized that



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1 the number of open heart surgery cases is
2 decreasing; that's certainly true. That was
3 predicted by Judge Geathers; that's certainly
4 come to pass. And that maintaining volume in
5 programs is very important to the provision of
6 quality care to the community.

7 And so therefore that is a finding that would
8 be one that would lead the Court to -- or the
9 Department in reviewing an application or
10 anything to seriously consider whether a
11 program should be allowed to expand or not
12 because the proliferation of these rooms is
13 something that could affect quality of the
14 provider.

15 So, actually, I think the most important way to
16 look at is on the quality side, which is that
17 by allowing the proliferation of rooms, you
18 could be -- you would be negatively affecting
19 quality according to that finding in the State
20 Health Plan.

21 **THE COURT:** All right. Anything else?

22 **MR. LONG:** I don't think so, Your Honor, except I
23 would be remiss, in neither case, I get to talk
24 and have to listen to Mr. Summer, but we -- I
25 do have here today with me Mike French, who is



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1 the CEO of Providence, and Michael Kapp, who's
2 the Chairman of the Board. They were here at
3 the other hearing, too, and I probably forgot
4 to introduce them at the other one. So I would
5 like to take a moment --

6 **THE COURT:** I think you did.

7 **MR. LONG:** -- and introduce them to the Court, so.

8 **THE COURT:** Who's got the burden of proof?

9 **MR. LONG:** On the motion, he certainly does. It's
10 his motion.

11 **THE COURT:** Ms. Biggers?

12 **MS. BIGGERS:** Nothing from the Department, Your
13 Honor.

14 **THE COURT:** Okie-doke. At this time I don't have
15 any questions for you, which Mr. Summer may be
16 happy about. Go ahead.

17 **REPLY STATEMENT BY MR. SUMMER:**

18 **MR. SUMMER:** Again, arguments of counsel are not
19 facts and what we really need to determine
20 is --

21 **THE COURT:** Amen.

22 **MR. SUMMER:** -- under the criteria set forth in the
23 statute, is LMC entitled to have relief from
24 the stay.
25 I will agree with one thing that Mr. Long said



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1 and this statement I think is true. While on
2 the one hand he's pounding the table saying
3 that my client violated the law, he said what
4 the Department told them was wrong.

5 I agree with him on that. I agree with him in
6 the wake of the Supreme Court decision, what
7 the Department told them was wrong.

8 But there is no evidence that my client did
9 anything other than act in good faith, that
10 once the pronouncement came out on June the
11 28th, they went and met with the director --
12 not someone who has a ministerial function of
13 stamping papers. Met with the director and
14 said, "We have these pressing needs on our
15 campus. What are we to do?" They then
16 followed her instructions, complied with the
17 staff's requirements, and implemented these
18 projects in order to provide better patient
19 care.

20 And all I am asking this Court is that if the
21 Court is sincere that Providence has provided
22 no evidence that LMC made a capital expenditure
23 for its open heart surgery suite project and
24 therefore it remains a triable issue of fact
25 that will require discovery, and since what



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1 will occur if LMC is successful is that it will
2 be allowed to continue to operate that second
3 open heart surgery suite.

4 And because they detrimentally relied upon the
5 director of the Department, it is only fair to
6 allow the patients at Lexington Medical Center
7 to have access to that room during the pendency
8 of this action.. Thank you, Your Honor.

9 **THE COURT:** All right. I'm going to cogitate upon
10 this... I've got 15 business days; is that
11 correct?

12 **MR. LONG:** Well, yeah.

13 **MR. SUMMER:** That's correct, Your Honor.

14 **MR. LONG:** Yes, Your Honor.

15 **THE COURT:** All right.. Well, thank y'all for your
16 time.

17 **MR. SUMMER:** Thank you, Your Honor.

18 **THE COURT:** Excellent arguments on both sides.

19 All right. This hearing is adjourned.

20 (There being nothing further, the hearing concluded
21 at 10:58 a.m.)
22
23
24
25



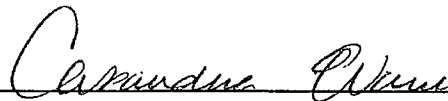
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CERTIFICATE

This is to certify that the within hearing consisting of fifty-four (54) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenotype with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on June 22, 2015.



Cassandra E. Vance
Court Reporter

Notary Public for South Carolina
My Commission Expires: February 26, 2018



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RECORD 000572

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 14-ALJ-07-0332-CC

Sisters of Charity Providence
Hospitals,

Petitioner,

v.

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

Respondents.

COPY

MOTIONS HEARING

Wednesday, April 8, 2015
10:07 a.m. - 10:30 a.m.

The motions hearing before the Honorable Ralph King Anderson, III, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 8th day of April, 2015 before Cassandra E. Vance, Court Reporter and Notary Public in and for the State of South Carolina.



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RECORD 000573

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EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.



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1 **THE COURT:** All right. This is a motions hearing in
2 the matter of Sisters of Charity Providence
3 Hospitals, Petitioner, versus DHEC and
4 Lexington Medical Center. I'm going to
5 shortcut the caption. The docket number is
6 14-ALJ-07-0332-CC. It's a motions hearing
7 involving a Motion to Compel.

8 All right. I've read both -- or all three
9 pleadings. So I will tell you, Mr. Long,
10 unless you've got something new to add, I think
11 I'm going to go ahead and move on to Mr. Summer
12 and then I can come back to you.

13 **MR. LONG:** Well, I -- yeah, I probably want an
14 opportunity to speak. I'm happy with you
15 letting Mr. Summer go first.

16 **THE COURT:** Well, I'm not going to neglect you.

17 **MR. LONG:** I know you wouldn't, Your Honor.

18 **THE COURT:** Although it would cut the hearing short.

19 **MR. LONG:** It would. And I'm sure there's been
20 times where you wished you could, but I will --
21 I'm fine with however you want to proceed, Your
22 Honor.

23 **THE COURT:** Well, from a judicial expediency point,
24 it would really make things more simple for me,
25 too.



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1 MR. LONG: Okay.

2 THE COURT: But Mr. Summer?

3 MR. SUMMER: Thank you, Your Honor.

4 THE COURT: If I could ask you a question right off
5 the bat.

6 MR. SUMMER: Yes, sir.

7 THE COURT: And that is, by stating that you spent a
8 dollar, does that end any further inquiry that
9 I need to make in this case?

10 MR. SUMMER: That was our intention, Your Honor.

11 THE COURT: Okay. Well, that's -- so now we've come
12 to the end of the road. All right. I just
13 want to make sure, because that's what I
14 thought, but I saw Mr. Long's argument.

15 MR. SUMMER: I'm kind of perplexed because I really
16 thought we'd be here on a Motion for Summary
17 Judgment to end the case.

18 THE COURT: Yeah.

19 MR. SUMMER: You know, when this case started -- and
20 I went back carefully looked and I'd ask the
21 Court to do so if it's inclined to do so. If
22 you look back at -- we didn't bring this case.
23 You know, other than moving for Summary
24 Judgment against ourselves, we don't have a
25 mechanism by which to end the case other than



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1 perhaps a factual stipulation on the
2 dispositive issue.

3 THE COURT: Which you have done.

4 MR. SUMMER: Which we have done.

5 THE COURT: Yeah.

6 MR. SUMMER: So when I went back and looked in
7 preparation for today, I looked first at the
8 request for contested case. And in light of
9 our stipulation, Providence gets everything
10 it's asked for, assuming that the Court rules
11 consistently with its prior ruling when it
12 granted partial Summary Judgment as to the cath
13 lab.

14 A similar situation, if you look at page -- I
15 mean page four, paragraph four of Providence's
16 prehearing statement, again --

17 THE COURT: Oh.

18 MR. SUMMER: -- all the relief requested is there
19 for the taking with a Motion for Summary
20 Judgment.

21 And I find it a bit awkward to be in this
22 situation. But what's really going on from my
23 perspective is that we've looked at a
24 particular sentence -- and I'm going to read it
25 for Your Honor -- in your prior order in which



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1 you granted partial Summary Judgment, you left
2 a very narrow, single issue for litigation in
3 this case.

4 **THE COURT:** Yes, sir.

5 **MR. SUMMER:** "Therefore the only remaining question
6 is whether LMC made a capital expenditure for
7 the open heart surgery or open heart suite
8 project. However, Providence has provided no
9 evidence that LMC made a capital expenditure
10 for its open suite project and, therefore, it
11 remains a triable issue of fact that will
12 require discovery."

13 And I think Your Honor is aware that we made a
14 motion for -- to stay these proceedings to get
15 through this Legislative session. I understand
16 that Your Honor has denied that and I
17 understand why Your Honor denied that.

18 But in that motion, which we filed way back at
19 the beginning of February, there is a specific
20 request to stay any pending discovery. We say,
21 "Therefore LMC respectfully requests that the
22 Court to stay all proceedings in this case,
23 include any pending discovery until June 30,
24 2015, which is the end of the Legislative
25 session."



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1 If you look at footnote five, it said, "In the
 2 event the proposed legislation does not become
 3 law and the stay of proceedings is lifted, the
 4 parties request that any pending discovery be
 5 due 30 days from the date the stay of
 6 proceedings is lifted by the Court."
 7 We weren't ignoring the discovery, but we were
 8 basically in our motion for stay seeking to
 9 either stay or receive that extension in the
 10 process.
 11 And so, you know, what my client has made a
 12 determination that conceding on this issue is
 13 a prudent course of conduct. And I don't know
 14 why Providence is seeking to pursue the Motion
 15 to Compel, but my client's action is saving
 16 tens of thousands of dollars in discovery.
 17 We answered the Request to Admit truthfully.
 18 If we had to go through discovery, we would
 19 certainly show what our rationale was and why.
 20 But the only mechanism my client had to end the
 21 case at this level -- and it doesn't mean that
 22 we're not going to preserve issues for -- other
 23 issues for appeal -- was to simply make a one
 24 dollar stipulation. And that was the purpose
 25 of making that offer in stipulation.



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1 So we assumed that what that would result in,
2 instead of the Motion to Compel or a
3 continuation of pursuing the Motion to Compel,
4 would have been a Motion for Summary Judgment
5 following up on the Court's language from its
6 order, which would then put the issue squarely
7 before the Court to at least resolve it for
8 purposes of this level of litigation.

9 And so that's what brought us here. Not sure
10 why we're pursuing the Motion to Compel, but we
11 believe that, you know, the action our client
12 has taken certainly results in judicial economy
13 and it also avoids an awful lot of fees that
14 would have been incurred in pursuit of
15 discovery. Because not only did we have the
16 written discovery, we were anticipating a
17 number of depositions, and all of that would
18 have cost a great deal of money.

19 So we believe that Providence is certainly the
20 beneficiary of a stipulation that puts it in a
21 position that should the Court act consistent
22 with prior ruling gives Providence everything
23 that it's asked for to this point.

24 **THE COURT:** Okay. Ms. Biggers, any position?

25 **MS. BIGGERS:** Well, Your Honor, as long as there is



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1 a capital expenditure by or on behalf of a
2 healthcare facility to expand open heart
3 surgery services, which are in the plan, then
4 the Department's perspective is the law on its
5 face would require a CON. So, if there is a
6 stipulation that a capital expenditure has been
7 made --

8 **THE COURT:** Okay.

9 **MS. BIGGERS:** -- then a CON would be required from
10 our perspective without further --

11 **THE COURT:** I was more asking you on the motion
12 to --

13 **MS. BIGGERS:** Oh. No, we have no position on the
14 motion.

15 **THE COURT:** Okay. All right.

16 **MR. LONG:** Thank you, Your Honor.

17 **THE COURT:** And Mr. Long's seat was either very,
18 very uncomfortable or he is ready to --

19 **MR. LONG:** He is ready to talk. Your Honor, let me
20 tell you, the first thing I want to say in
21 response is, I understand what he's trying to
22 do and what he -- and he doesn't have the
23 ability to file a Motion for Summary Judgment.
24 I understand that.
25 It's not a "course of conduct." That was the



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1 word he used. He said, "My client decided to
2 concede as a prudent course of conduct." It's
3 not a course of conduct. It's a factual
4 question that we raised all the way through
5 these proceedings. And on September 23rd, you
6 said basically to the parties, "I don't have
7 anything in the record that shows they made a
8 capital expenditure, but" -- and you certainly
9 implied -- "if they have, this case comes out
10 differently."

11 **THE COURT:** Yeah.

12 **MR. LONG:** And we have spent six months trying to
13 get them to answer that question. We went
14 through a Motion to Lift the Stay. We provided
15 affidavits to this Court and to them where we
16 said, "You had to have made a capital
17 expenditure or you have breached the standard
18 of care." Okay? And --

19 **THE COURT:** How about -- let me --

20 **MR. LONG:** Yeah.

21 **THE COURT:** Where I can understand, since I issued
22 my order setting this case for a factual
23 determination, what has Providence
24 Hospital -- I mean, excuse me, Lexington
25 Hospital done to warrant sanctions?



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1 MR. LONG: They have ignored -- they have refused to
2 answer -- up until the end of January, they
3 refused to answer the issue that we squarely
4 put before the Court with Joanne Carelli's
5 affidavit where we showed the Court the \$3
6 million that they spent for one open heart
7 suite and she said, "If you're going to do two
8 simultaneous surgeries, if you're going to be
9 operating two open heart suites at the same
10 time, you have got to have a back-up heart/lung
11 machine" --

12 THE COURT: Okay.

13 MR. LONG: -- "and you have got to have a
14 transesophageal cardiac machine."

15 THE COURT: Yeah.

16 MR. LONG: Those two machines alone cost in 2009
17 over \$425,000, okay? So that's a significant
18 expense. It isn't a dollar or five dollars.

19 THE COURT: Well, it doesn't matter at this point.

20 MR. LONG: And so they didn't respond to that. And
21 then I sent them a Request to Admit that was
22 exactly your questions. It's number six:
23 "Admit or deny LMC made a capital expenditure
24 for the second open heart suite after April
25 1st, 2012." They denied it, okay? And then,



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1 last week, they amended their answer and they
2 still didn't admit it.

3 And, see, my problem with the stipulation --
4 here's where I am. I'm in a quandary. I don't
5 know exactly what to do about this, because he
6 says this is the only way I can end the case.
7 Well, no, it's not.

8 The other way to end the case is to settle it
9 and they're choosing not to go that route,
10 because they could call us and basically say,
11 "It's over." We could enter into a settlement
12 agreement and it would be over, okay?

13 **THE COURT:** Well, they -- they would not preserve
14 their right to appeal me on issues that they
15 may think I have erroneously decided to bring
16 up to this point, though, if they settled it.

17 **MR. LONG:** Correct, which is exactly what -- and he
18 alluded to this in his comments -- which is
19 exactly what I think is happening which is,
20 they're going to appeal it. So they're trying
21 to get the Court to issue an order for Summary
22 Judgment and then he has interjected in his
23 self-serving -- and I do say it is self-serving
24 stipulation -- the dollar amount.

25 And that's what bothers me. He doesn't have to



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1 do that, but he's setting -- and he also adds
2 the self-serving part about the "after the
3 Department gave me permission," okay?

4 So he's got two things in there where he's
5 interjecting these new issues into it and I --
6 I just keep looking at this and I'm like, I
7 don't like it, okay? I don't like the
8 possibility that the Court of Appeals could
9 get -- you may not be distracted by it. I
10 wouldn't expect you to be distracted by the
11 dollar. You handle these cases on a very
12 regular basis and you understand this law. I'm
13 concerned about the appellate court being
14 distracted by the issue of whether one, two, or
15 five dollars is a capital expenditure.

16 **THE COURT:** But he made the statement while ago that
17 that -- that that brings this issue to a
18 conclusion.

19 **MR. LONG:** Well, he did --

20 **THE COURT:** So --

21 **MR. LONG:** That's the first time I've -- I mean, he
22 has said that in open court. I think he did
23 say that, okay, but my point is, is why is it
24 in there? Because all he -- he doesn't have to
25 do a stipulation if he wants the case over.



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1 All he's got to do is admit Request to Admit
2 number six. He just has to say "admitted" and
3 then he will admitted that he made a capital
4 expenditure and then we don't have this issue
5 about whether he really did or not because of
6 this dollar or two-dollar, five-dollar kind of
7 implication that's in there, in the
8 stipulation.

9 And I'm just -- if the record -- if the only
10 record in the Court of a capital expenditure is
11 a dollar, I just feel like I ought to have the
12 right to at least put some evidence before the
13 Court to say that it's several hundred thousand
14 dollars, because I think it is --

15 **THE COURT:** Okay.

16 **MR. LONG:** -- or -- or they violated the law,
17 because it's one or the other.

18 **THE COURT:** Can I stop you a second?

19 **MR. LONG:** Sure.

20 **THE COURT:** And that is, could we -- to settle this
21 particular issue about sanctions and whatnot
22 regarding this, if Mr. Summer simply admits
23 that he made a capital expenditure at this
24 point in time, that will settle his part of the
25 case, I'll issue a quick order, and we can just



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1 move on, will that satisfy you?

2 MR. LONG: I think it will satisfy my client if he
3 admitted Request to Admit number six, just said
4 "admit." My -- I did talk to my clients about
5 44-7-220. I not only think that the sanctions
6 are implicated under the Civil Procedure rules,
7 particularly the Request for Admission, and the
8 time line the events that have occurred and
9 Rule 37, but I also think it's implicated by
10 44-7-220, even though that's not something
11 that's been litigated very often --

12 THE COURT: I tell you what --

13 MR. LONG: -- but, you know, I could get -- but I
14 would say this, Your Honor.

15 THE COURT: I'm going to be --

16 MR. LONG: My clients aren't that interested in
17 that --

18 THE COURT: I love y'all because --

19 MR. LONG: -- at the moment.

20 THE COURT: -- I ask, "Will that satisfy you?"
21 "Yeah, but --"

22 MR. LONG: Well, I guess I should just say --

23 THE COURT: -- "he's still wrong."

24 MR. LONG: Okay. I know. And I should say, I
25 talked to my client about this yesterday and I



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1 think if we can get that resolved, they would
2 be -- they would be fine with that. They
3 definitely want to preserve their rights if we
4 don't have some sort of resolution on this. If
5 that -- if this stipulation is where we're
6 going, we're preserving our rights on that. I
7 think that that's something --

8 **THE COURT:** Okay.

9 **MR. LONG:** -- they -- that was kind of the answer I
10 got from them was ...

11 **THE COURT:** Okay. Mr. Summer?

12 **MR. SUMMER:** First of all, I'm not a party. I can't
13 admit anything, a requested -- and admission by
14 the party. Number two is, I've spent a great
15 deal of time with my client looking at
16 documentation and we haven't spent any money.
17 We have not made a capital expenditure. We
18 answered that thing truthfully. What I'm doing
19 is conceding an issue. I'm conceding a factual
20 issue. And I just -- I think he protests too
21 much. At the end of the day --

22 **THE COURT:** Well, if you're conceding a factual
23 issue -- let me rephrase it. You say that you
24 spent one dollar. If you are making that
25 statement, you are stating that you made a



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1 capital expenditure; are you not?

2 MR. SUMMER: Yes.

3 THE COURT: All right. So is that not an admission
4 that you made a capital expenditure?

5 MR. SUMMER: Let me --

6 THE COURT: I'm trying to figure out how we're
7 slicing this one.

8 MR. SUMMER: Well, I think first of all, my client
9 remains steadfast that they haven't, okay?

10 THE COURT: Okay.

11 MR. SUMMER: So, you know, through the course of --
12 and just so the Court has -- I realize that
13 Your Honor issued an order on September 22nd,
14 but we didn't get any discovery requests until
15 New Year's Eve.

16 THE COURT: Okay.

17 MR. SUMMER: So December 31. I mean, Providence did
18 nothing from September until December 31st in
19 this case. And so since that time, there was
20 30 days within which to answer; I had requested
21 a partial extension; then filed a Motion for
22 Stay.
23 I don't want the Court to think that we did
24 anything that was nefarious in terms of delay.
25 Had 30 days to answer, requested an extension,



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1 took that extension, told counsel I was filing
2 the Motion to Stay, filed the Motion to Stay,
3 asked for the extension in there. It was
4 denied, then came back and said, "You know
5 what? It's not worth what I suspect's going to
6 be tens of thousands of dollars worth of
7 discovery."

8 My clients basically said, you know, it's not
9 worth going through that laborious process and
10 if there's one hemostat that somebody says was
11 bought for that room, we're out, we're done.

12 My client firmly believes that no expenditures
13 were made in October of 2013 for this. That --
14 all the back-up equipment that he's talking
15 about was in the original Certificate of Need.
16 It was there. It was sitting at Lexington
17 Medical Center.

18 And so the ordination, if you will, of that
19 room by DHEC did nothing more than bless the
20 space upon which that equipment that was in the
21 original CON application resides. Nothing else
22 was done in response to that action by DHEC.

23 **THE COURT:** Okay.

24 **MR. SUMMER:** So our position is, is that we answered
25 the Request for Admission truthfully to begin



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1 with, but we're trying to concede a factual
2 issue and move on.

3 This seemed to be the most expeditious way to
4 get it done. So I wanted the Court to know
5 first of all is that, you know, we did make
6 appropriate motions or take appropriate actions
7 to seek not to answer discovery and spend money
8 and then when we did not get our Motion to
9 Stay, the only other logical thing to do at
10 this point in time to avoid the cost and delay
11 of discovery is to say, "Fine, we spent a
12 dollar."

13 So if the Court wants me to make the
14 stipulation here that there was a capital
15 expenditure and take the one dollar out of it,
16 I'm willing to say that here today.

17 **THE COURT:** As to the -- yeah.

18 **MR. SUMMER:** I do it as counsel and I do it as a
19 stipulation. I don't do it in response to
20 Request for Admission --

21 **THE COURT:** Okay.

22 **MR. SUMMER:** -- because I'm not a party.

23 **THE COURT:** Well, that's taken care of. That --

24 **MR. LONG:** He just keep -- that's the problem. He
25 keeps putting the fact into the record. That's



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1 my problem with it. If he would just admit --
2 if the client would just admit the request --

3 **THE COURT:** He just stipulated that --

4 **MR. LONG:** But then he said, "I can't -- I can't do
5 that --"

6 **THE COURT:** No, no, no, no. I think I --

7 **MR. LONG:** -- "because I'm just the lawyer." So the
8 only --

9 **THE COURT:** I think I understand what he did. As
10 counsel, he can stipulate that -- from a
11 factual standpoint that there was a capital
12 expenditure. He is saying that "I can't
13 admit -- make an admission -- of a response
14 from my client without my client being here to
15 confirm that statement is true." But either
16 way, it resolved the issue before this Court.

17 **MR. LONG:** Without a reference to the dollar.

18 **THE COURT:** Well, he moved on from the dollar and he
19 said, "I stipulate that there was a capital
20 expenditure," just now he said, "without a
21 reference to the dollar." That is the word.

22 **MR. LONG:** Well, I guess if Your Honor -- based on
23 your prior order --

24 **THE COURT:** That --

25 **MR. LONG:** -- then I guess you would -- that would



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1 be sufficient for you to issue an order for
2 Summary Judgment in our favor --

3 THE COURT: Yes.

4 MR. LONG: -- with no factual dispute --

5 THE COURT: Yes.

6 MR. LONG: -- as to the amount.

7 THE COURT: Yes, sir.

8 MR. SUMMER: As to that issue.

9 MR. LONG: Because that is my -- that is concern,
10 that there is a -- he is interjected this
11 factual dispute into the issue that he's now
12 going to argue later and I have no ability to
13 rebut it.

14 THE COURT: I don't think he's -- I think that would
15 be sanctionable at this point. All right.

16 MR. LONG: But if -- then maybe we have gotten to
17 the point where --

18 THE COURT: Do we need to make a motion or -- from
19 you or ...

20 MR. SUMMER: I think there needs to be a Motion for
21 Summary Judgment. And I'd like the opportunity
22 to be able to respond to that just to make sure
23 that I've preserved my issues. So, you know --

24 MR. LONG: Well, I -- see, that's my --

25 THE COURT: Preserve your -- the --



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1 MR. SUMMER: Other issues.

2 THE COURT: Other issues.

3 MR. SUMMER: Not as to this particular part of the
4 plan.

5 THE COURT: Look, I think I did a very good order,
6 but --

7 MR. LONG: Yeah.

8 THE COURT: -- I thought I did a very good order in
9 Kiawah.

10 MR. LONG: Yeah. No, I -- I understand. I think
11 you did, too. I don't know why I have to file
12 a motion -- a formal motion, though, Your
13 Honor. We're in court today.
14 I mean, the issue -- the other order was very
15 narrow. He clearly is not -- I mean, if he's
16 worried about that he's lost some rights on
17 appeal or whatever, he -- he hasn't; that will
18 finally end the case. There's a trial
19 scheduled. But he wants to go through another
20 round of briefing, which is what concerns me.
21 If I want to go through a round of briefing at
22 Summary Judgment, then I'd want to look at some
23 documents. That's my problem. He -- he gets
24 to say whatever he wants to say about the
25 context and I know he just he wasn't going to



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1 raise the dollar, but I'm not -- then what is
2 he going to raise?

3 THE COURT: Under what authority do I have to
4 dismiss the case at this point? I guess the
5 stipulation that the parties --

6 MR. LONG: He has stipulated --

7 MR. SUMMER: I think -- I think you still need a
8 motion, Your Honor. I mean, there's no motion
9 before you.

10 MR. LONG: Can I make an oral motion right now?

11 THE COURT: Yes.

12 MR. LONG: I mean, based on the stipulation --

13 THE COURT: Yes.

14 MR. LONG: -- without the dollar, then we would move
15 for Summary Judgment; the case is over.

16 THE COURT: It's granted. I'll issue an order to
17 that effect.

18 MR. SUMMER: And I want to just make sure I've
19 preserved all my other issues that have been
20 raised.

21 THE COURT: Yes, sir, I recognize that --

22 MR. SUMMER: Thank you.

23 THE COURT: -- I can be wrong. Although, when I
24 tell y'all that I was wrong in Kiawah, I really
25 would like my shot at being able to argue my



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1 order.

2 MR. LONG: It is unfortunate you don't get to go
3 over there and argue the -- defend the order in
4 argument.

5 THE COURT: There's some comments that I would like
6 to make, but I don't think --

7 MR. LONG: That's actually a good -- that's a good
8 point.

9 THE COURT: Yeah.

10 MR. SUMMER: We're arguing Kiawah right now in front
11 of the Court of Appeals, so it's there. It's
12 going to be -- and I -- you know, I know we're
13 still on the record, but from my perspective,
14 we've gone from extreme deference to obscene
15 deference. I think we're in a position where
16 Article One means nothing and this tribunal is
17 superfluous if Kiawah is taken to its logical
18 conclusion. That's my personal opinion.

19 THE COURT: Well, that's not even my concern. My
20 concern is another issue, so.

21 MR. SUMMER: Not having litigated that case, I don't
22 know what that is.

23 THE COURT: Well, thank y'all for your time.

24 MS. HOLLINGSWORTH: Thank you, Your Honor.

25 MR. SUMMER: Thank you, Your Honor.



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1 MR. LONG: Thank you for your help, Your Honor.

2 (There being nothing further, the hearing concluded
3 at 10:30 a.m.)
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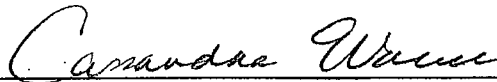
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CERTIFICATE

This is to certify that the within hearing consisting of Twenty-Five (25) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenotype with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on June 22, 2015.



Cassandra E. Vance
Court Reporter

Notary Public for South Carolina
My Commission Expires: February 26, 2018

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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.

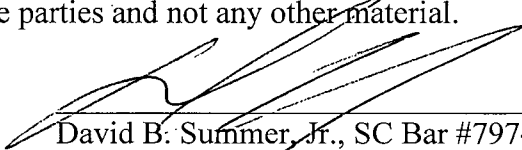
South Carolina Department of Health and Environmental Control
and Lexington County Health Services District, Inc. d/b/a Lexington Medical
Center,

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.



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February 3, 2016
Columbia, South Carolina

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