THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISRATIVE LAW COURT

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

Case No. 2015-001151

Sisters of Charity Providence Hospitals, ...Respondent,

v.

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

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

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

BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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STATEMENT OF ISSUES[1]

Did the Administrative Law Court correctly hold that LMC's equitable estoppel argument against the Department did not apply where the underlying statement was held by the Supreme Court to be a misstatement of law, and even if it did apply LMC failed to establish justifiable reliance?

FACTS

When the 2013-2014 Appropriations Act took effect, it included no funds for the Certificate of Need ("CON") program. Governor Haley had vetoed a line item for the CON budget, and that veto had been sustained by the House of Representatives. The Department, which is the sole state agency responsible for administering the CON program, issued a statement to the regulated community on June 28, 2013, stating its position that the sustained veto effectively suspended the operation of the CON program for the 2013-2014 Fiscal Year. (R. p. 209). The Department also filed a petition with the Supreme Court seeking a ruling on the issue, as did other interested parties.

After the Department issued its statement, but before the Supreme Court issued a ruling on the petitions pending before it, Appellant Lexington Medical Center ("LMC") notified the Department of its plans to utilize existing space in its hospital to pursue two heart-related projects for which it had not received prior CON approval: the addition of a third cardiac catheterization laboratory ("cath lab"), and the addition of a second open heart surgery suite. On October 11, 2013, Department staff issued LMC a Licensing "Report of Visit" ("ROV") approving LMC's occupation and utilization of an operating room as an open heart surgery suite. (R. p. 138). The ROV included notice of the Department's pending petition at the Supreme Court, and advised as follows: "Please be on notice that any action by the General Assembly, the Judiciary, or third

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

parties challenging the validity of a license issued without CON approval, are outside the control of the Department." (*Id.*) On February 25, 2014, Department staff issued LMC a Construction Plan Approval, for upfit and renovation of existing space to be utilized as a cath lab. (R. p. 141). On March 20, 2014, Department staff issued a Notice of Completion to LMC, indicating all construction activity for the cath lab had been completed. (R. p. 113). On April 10, 2014, the Department issued a Licensing ROV approving utilization of the space as a cath lab. (R. p. 116).

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

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

By Order dated September 22, 2014, the ALC granted Providence's motion for partial summary judgement. In its order, the ALC rejected LMC's claim that if CON is applicable to its projects, the Department should be estopped from enforcing the requirement based upon its June 28, 2013 statement, which was issued by the Director of the Department. The ALC held "Because [Director] Templeton exceeded the scope of her authority by issuing her June 28, 2013 letter, estoppel will not lie against the Department." (R. p. 43). The ALC further held "even if estoppel

was applicable against the Department, LMC should have been aware of the great risk that it took in carrying forward with its projects without a CON." (*Id.*).

Based on its findings that LMC's two heart projects required but did not receive CON approval, and its rejection of LMC's claim regarding equitable estoppel, the ALC granted summary judgment in this matter to Providence. LMC appealed.

ARGUMENT

I. The doctrine of equitable estoppel is not applicable.

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

In *Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control*, 407 S.C. 583, 757 S.E.2d 408 (2014), the Supreme Court held that in sustaining the budget veto for the CON program the Legislature did not intend to suspend the Department's duty to administer the CON program. The Court further held that the Department had a duty to administer the CON program as contemplated by the CON Act, and a duty to fund the program, during Fiscal Year 2013-2014. *Id.*

Although the Department did not believe its June 28, 2013, statement regarding the effect of the budget veto on the CON program to be erroneous at the time it was issued, the Supreme Court determined in the *Amisub* case that the Department's statement was a misstatement of law. Therefore, under the foregoing legal authority, LMC's estoppel claim against the Department based on the Department's June 28, 2013, statement will not lie. *See Quail Hill* at 238, 692 S.E.2d 508 (finding that a zoning classification was a mistaken statement of law, and thus it could not be used to estop the County from enforcing it); *Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 210, 417 S.E.2d 579, 582 (1992) ("Estoppel may not be based upon an illegal act.").

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

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

"If estoppel is applicable against a government agency, a relying party must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Quail Hill* at 236-37, 692 S.E.2d at 506. Even if estoppel applied in this instance, LMC has not established the element of justifiable reliance upon the Department's conduct.

LMC states it relied upon the Department's June 28, 2013, correspondence stating that the sustained budget veto for the CON program for Fiscal Year 2013-2014 completely suspended the operation of the CON program for that fiscal year. However, LMC admittedly was aware of the action pending in the Supreme Court challenging the Department's position that the budget veto suspended operation of the CON Program. (R. p. 44). Furthermore, the Department advised LMC with respect to its open heart surgery project: "Please be on notice that any action by the General Assembly, the Judiciary, or third parties challenging the validity of a license issued without CON approval, are outside the control of the Department." (R. p. 138). Accordingly, LMC's reliance

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

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

CONCLUSION

For the foregoing reasons, the ALC's orders granting summary judgment should be affirmed.[2]

Respectfully submitted,

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February 23, 2016
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[2] The Department takes no position on the ALC's order on LMC's motion to dismiss, based on the timeliness of Providence's filing.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the final Brief of Respondent South Carolina Department of Health and Environmental Control complies with Rule 211(b), SCACR, and the South Carolina Supreme Court Order of April 15, 2014.

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