THE STATE OF SOUTH CAROLINA
In The 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.

FINAL BRIEF OF RESPONDENT SISTERS OF CHARITY PROVIDENCE HOSPITALS

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STATEMENT OF ISSUES ON APPEAL

I. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THAT PROVIDENCE'S REQUEST FOR REVIEW WAS TIMELY FILED.

II. THE ADMINISTRATIVE LAW COURT PROPERLY REJECTED LEXINGTON'S ESTOPPEL ARGUMENTS AND THERE ARE NO MATERIAL FACTS IN DISPUTE WARRANTING REVERSAL OF SUMMARY JUDGMENT.

STATEMENT OF THE CASE

Sisters of Charity Providence Hospitals (hereinafter "Providence") has reviewed and agrees with the procedural history set forth in the Statement of the Case contained in Appellant Lexington Health Services District, Inc. d/b/a Lexington Medical Center's (herein "LMC" or "Appellant") brief, but disputes and rejects the following statements contained therein. In particular, Providence first rejects the statement that Providence waited 215 days after the South Carolina Department of Health and Environmental Control ("DHEC" or Department) provided notice of its final approval to request review by the DHEC Board. As shown herein, Providence filed its appeal promptly after receiving notice of LMC operating the illegal second open heart surgery suite. Second, Providence rejects LMC's assertion that LMC "agreed" to stipulate that LMC made a capital expenditure when it expanded its open heart program to two open heart suites. LMC stipulated to a true fact; namely, that it made a capital expenditure when it implemented and utilized the second open heart surgery suite.

STATEMENT OF FACTS

In 2013, Governor Haley vetoed funding for the Certificate of Need ("CON") program which was sustained by the House of Representatives. Shortly thereafter, the former Director of DHEC issued a statement "suspending" the CON program. A lawsuit was promptly initiated in the Supreme Court to determine if the program was suspended. *See Amisub of S.C., Inc. v. S.C. Dept. of Health and Envtl. Control*, 407 S.C. 583, 757 S.E.2d 408 (2014), *reh'g denied* (May 22, 2014). LMC was certainly aware of the lawsuit. (R. p. 468, line 17 – R. p. 469, line 5). In *Amisub*, the Supreme Court held that the CON Act was never suspended and DHEC was required by law to operate the

program for fiscal year 2013–2014. *Id.* at 603; 757 S.E.2d at 419. Therefore, DHEC's statement announcing that the CON program was suspended was in error.

Rather than await the outcome of the *Amisub* litigation, LMC elected to act in secret with DHEC and proceeded with prohibited conduct by establishing a second open heart surgery suite in violation of the law. LMC's actions violated the law and the Administrative Law Court (herein "ALC") properly closed the illegally operating second open heart surgery suite. (R. p. 85). It is undisputed that at the time that LMC allegedly obtained the asserted "permission" from DHEC to operate a second open heart surgery suite, LMC did not have a CON to engage in those activities. (R. pp. 234-235). The CON Act clearly states:

> A person or health care facility as defined in this article is required to obtain a Certificate of Need from the department before undertaking any of the following: (4) a capital expenditure by or on behalf of a health care facility which is associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the South Carolina Health Plan.

S.C. Code Ann. § 44-7-160(4).

The standards for open heart surgery are clearly set forth in the South Carolina Health Plan and are well known to LMC. LMC has stipulated that it made a capital expenditure in opening the second open heart surgery suite, so it is undisputed that the expansion of the open heart program requires a CON that LMC has never obtained.

By way of background, the CON program is a comprehensive statutory scheme found at S.C. Code Ann. § 44-7-110 *et seq.* (Rev. 2002) (the "CON Act") that has been in existence for decades. The CON Act vests DHEC with the control and administration of the CON program. S.C. Code Ann. § 44-7-140. DHEC publishes a Health Plan every two years, and in addition has adopted Project Review Criteria to evaluate CON

Applications, and promulgated a host of other regulations to support the statutory requirements. The CON Act identifies its four purposes and the types of projects or services covered under the Act. *See* S.C. Code Ann. § 44-7-160. The Health Plan identifies the specific services and equipment requiring a CON and includes an inventory, projections, standards, and a statement of the most important project review criteria. S.C. Code Ann § 44-7-180. Before the Department may grant a CON, the application must comply with the applicable Health Plan and the Project Review Criteria found at Section 802 of Regulation 61-15. S.C. Code Ann. § 44-7-210(C).

Because neither LMC nor DHEC provided any public notice of their secret conduct, Providence did not have notice of the operation of the second open heart surgery suite until April 29, 2014, the date of LMC's written response to a Freedom of Information Act request submitted by Providence to LMC on April 9, 2014. This FOIA request was the first public disclosure of the existence of a second open heart surgery suite. (R. p. 267). Providence properly and timely followed all statutory procedures upon receipt of the notice, and was denied a Final Review Conference by the DHEC Board before filing the contested case proceeding in the Administrative Law Court ("ALC"). (R. pp. 96-97). The contested case was fully briefed with numerous motions filed by each party. As found by Judge Anderson in his Amended Order Granting Partial Summary Judgment, the following material facts are undisputed:

1) The CON Act was never suspended and DHEC was required by law to operate the program for fiscal year 2013–2014;

2) Chapter VII of the *2012-2013 South Carolina Health Plan* is entitled "Cardiovascular Care" and contains standards and criteria for both cardiac catheterizations and open heart surgery;

3) LMC expended no less than $200,000 on the construction of the Cath Lab;

4) LMC is a "health care facility" as defined in the CON Act and previously received a CON to provide comprehensive cardiac services, including open heart surgery and therapeutic catheterizations on June 18, 2010;

5) LMC did not obtain a CON prior to undertaking a Second Open Heart Surgery Suite or a Third Cardiac Catheterization Laboratory;

6) Neither LMC nor DHEC notified the public of the applications for licensing and/or construction submitted by LMC to DHEC;[1]

7) Providence received written notice from LMC of the DHEC approvals on April 29, 2014; and

8) Providence filed its Request for Review with the DHEC Board on May 14, 2014.[2]

(R. pp. 40-41). Later, LMC stipulated that LMC made a capital expenditure for the operation of the second open heart surgery suite (R. p. 2). Therefore, all material facts are undisputed and summary judgment was appropriate.

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT CORRECTLY DETERMINED THAT PROVIDENCE'S REQUEST FOR REVIEW WAS TIMELY FILED.

i. South Carolina Law Requires Public Notice, Which Was Never Provided.

As a threshold matter, the entire statutory scheme set forth in the CON Act has embedded within the Act and Regulations specific mechanisms whereby the public would have notice of applications and an affected person would obtain notice of a

[1] As discussed in the Court's Order Denying LMC's Motion to Dismiss, notice was required as a matter of law; and as further discussed in that Order, Catherine Templeton's June 28, 2013 letter was neither the actual notice required by the CON statute and Section 44-1-60 nor constructive notice. (R. p. 40, FN 2).

[2] The Court will not consider the evidence concerning the volume of cardiac services in South Carolina between 2009 and 2011 or the quality of those services. Whether the alleged "success and growth" of LMC's cardiac services program warrants expansion is a question for the Department to consider during review of a properly filed CON application. (R. p. 41, FN 3).

decision by the Department. Before turning to Section 44-1-60(E) of the Code, Section 44-1-60(B) clearly provides: "The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings." It is undisputed that DHEC never provided notice to the public of its decision to allow LMC to operate a second open heart surgery suite.[3] The fifteen calendar day provision of Section 44-1-60(E)(2) assumes and requires the Department's compliance with the public notice directive of Section 44-1-60(B). As the ALC found, "[I]t is precisely LMC's and the Department's failures to comply with Sections 44-1-60, 44-7-200, and 44-7-210 that precluded Providence from performing its role under Sections 44-1-60 and 44-7-210." (R. p. 54).

LMC argues on appeal as it did below that the letter published by DHEC Director Templeton purporting to suspend the activities of the CON program operated as "notice" to the community at large that any health care provider may opt to violate the CON laws pending a resolution of the funding issue in the Supreme Court. If the Court accepted the argument, the practical result would be to grant enormous power to the Department to "suspend" its statutory requirements and activities and further, such conduct would cause chaos in the regulated community as all providers would be constantly seeking information to uncover the secret activities of the Department. Despite the absurdity that the situation would entail, LMC argues that Providence was required to notify DHEC of

[3] In fact, as LMC points out in its Brief, Providence sent a Notice of Affected Persons letter to DHEC on April 9, 2014, requesting information about any projects undertaken by LMC, and DHEC has never responded.

"its interest in competitors [sic] projects and to request that DHEC provide Providence with notice of any decisions regarding such projects." App. Br. 11. LMC's flawed argument first assumes that DHEC would have even accepted, much less complied, with such a request. This is highly unlikely since DHEC had suspended the program and did not operate it. The second flaw to this argument is that the "decision" at issue occurred more than three months after the publishing of Templeton's letter. Thus, LMC expects Providence to guess when secret decisions are made and learn about secret decisions promptly after they occur. The absurdity of this position is apparent on its face. The ALC thoroughly considered this argument and properly rejected it, concluding, as this Court should, the following about periodic inquiries by an affected person: "Such an imposition would create an absurdity by essentially transforming the Department's burden of providing notice into an affected person's burden to ferret out its own notice." (R. p. 58).

LMC claims support for its position in the Supreme Court's opinion, *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control*, 390 S.C. 418, 702 S.E.2d 246 (2010). On its face, *Coastal Conservation League* is distinguishable from this case, because here, neither DHEC nor LMC complied with statutory public notice requirements prior to proceeding with the prohibited conduct. In *Coastal Conservation League*, "DHEC issued public notices regarding the pending applications and held many public hearings." 390 S.C. at 422, 702 S.E.2d at 248. In this proceeding, Providence's first written notice of the Department's decision to authorize a second open heart surgery suite was the response by LMC to Providence's FOIA request. (R. p. 267). While LMC posits the ways in which it claims

Providence "should" have requested earlier notice from the Department, the Supreme Court in *Coastal Conservation League* explicitly refused to create a bright line test for requesting notice as an affected person for purposes of Code Section 44-1-60(E). *See id.* at 428, 702 S.E.2d at 252. In this case, the Department and LMC's actions in hiding and concealing the challenged conduct is the obvious reason that Providence did not obtain notice of the second open heart surgery suite sooner. "[I]n situations where DHEC fails to simultaneously notify the applicant, permittee, licensee, and affected persons asking to be notified, the latest date of mailing controls when the fifteen day period begins to run." *Id.* at 429, 702 S.E.2d at 252. Clearly, under the reasoning of *Coastal Conservation League*, Providence's request for review was timely.

Furthermore, the very logic of the Supreme Court's holding in *Hamm v. S.C. Public Service Commission*, 287 S.C. 180, 336 S.E.2d 470 (1985), is implicated here. Because DHEC failed to provide the required statutory public notice of its decision to allow LMC to operate a second open heart surgery suite without a CON, Providence was thwarted from voicing its objection any earlier. If the Court accepts LMC's argument on this basis, LMC and DHEC would have succeeded in precluding judicial review of its decision "by concealing its decision until the [fifteen days] had run." *Hamm*, 287 S.C. at 182, 336 S.E.2d at 471. In *Hamm*, the Court specifically rejected a bright line notice provision if plaintiff created an opportunity to thwart further review by delaying notice. LMC's argument in its brief all but embraces the idea that DHEC should be allowed to hide its actions until the deadline to appeal is met. *Hamm* says otherwise.

ii. The Actions of LMC and DHEC Violate Article I Section 22 of the South Carolina Constitution

It cannot be disputed that DHEC, as an administrative agency, is required to meet minimum standards of due process. *Smith v. S.C. Dept. of Mental Health*, 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997). Article 1, Section 22 of the South Carolina Constitution was added in 1970 to protect the liberty and property of citizens in recognition of the increasing number of governmental powers delegated to administrative agencies. *Ross vs. Med. Univ. of S.C.*, 328 S.C. 51, 67, 492 S.E.2d 62, 71 (1997). The Court has interpreted this provision as guaranteeing persons the right to notice. *Id.* Without this basic guarantee of public disclosure, governmental agencies could act in secret, distributing permits and licenses without explanation or scrutiny. That is exactly what occurred here and such a system violates the South Carolina Constitution. As the Supreme Court has explained: "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing S.C. Const. art. 1 § 22) (emphasis added). The protection thus afforded to South Carolina citizens by Section 22 of Article 1 include the right to notice of the acts and decisions of an administrative agency affecting private rights. Were LMC to be successful in thwarting Providence's right to pursue the contested case proceeding, the result would be a denial of Providence's due process rights. "To prove denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process." *Leventis v. S.C. Dept. of Health and Envtl. Control*, 340 S.C 118, 131, 530 S.E.2d 643, 650 (Ct. App. 2000). Here, Providence would clearly be substantially prejudiced by the conduct of the Department in secretly

permitting LMC's unlawful operation of a second open heart surgery suite and concomitantly thwarting Providence's right to judicial review. For all of these reasons, the determination of the ALC that Providence's request for contested case was timely filed under the factual circumstances below was not in error.

II. THE ADMINISTRATIVE LAW COURT PROPERLY REJECTED LEXINGTON'S ESTOPPEL ARGUMENTS AND THERE ARE NO MATERIAL FACTS IN DISPUTE WARRANTING REVERSAL OF SUMMARY JUDGMENT.

In its brief, LMC's second and third issues on appeal are combined in one argument. It appears that LMC argues that DHEC should be permitted to violate the law and such violation should not be subject to judicial review. App. Br. 15. While LMC correctly points out that DHEC is the sole agency for "control and administration of the granting of Certificates of Need and licensure of health facilities," DHEC does not and cannot usurp the role of the Legislature in the enactment of those laws which it as a state agency is designated to oversee. *See* S.C. Code Ann. § 44-7-140. The Legislature determined that a CON was required before a health care facility is permitted to undertake "a capital expenditure . . . associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the South Carolina Health Plan." S.C. Code Ann. § 44-7-160(4). In response to the Governor's veto and Catherine Templeton's unilateral "suspension" of the CON program, the Supreme Court was quite clear: "The authority to enact, modify, or repeal legislation lies solely within the General Assembly's broader authority." *Amisub*, 407 S.C. at 595, 757 S.E.2d at 415. At no time did the Governor's or Ms. Templeton's statements or action affect the validity of the CON Act. A governmental agency has no authority to suspend a valid statutory obligation. There is no factual development that would change the

requirement that LMC is legally required to obtain a CON before opening and operating a second open heart suite. As a result summary judgment is proper.

LMC's arguments as to estoppel fail on numerous grounds. As a threshold matter, for estoppel to lie against a governmental body, the officers or agents must act within the proper scope of their authority. "Estoppel will not lie against a government entity where a government employee gives erroneous information in contradiction of statute." *Morgan v. S.C. Budget and Control Bd.*, 377 S.C. 313, 319, 659 S.E.2d 263, 267 (2008). Catherine Templeton's purported advice to proceed without a CON was clearly in direct contravention of established statutory law–the CON Act–laws with which LMC is well familiar. Moreover, "the law is clear that a public officer derives his authority from statutory enactment, and all persons are in law held to have notice of the extent of his powers, and therefore, as to matters not really within the scope of his authority, they deal with the officer at their peril." *Ahrens v. State*, 392 S.C. 340, 353, 709 S.E.2d 54, 60-61 (2011). It is apparent from the Supreme Court's holding in *Amisub*, just as the Governor's actions, the actions of Catherine Templeton were not within the scope of her authority. "The failure to fund the CON program [did] not negate the directive issued by the General Assembly (and detailed in the CON Act) mandating DHEC administer the CON program." *Amisub*, 407 S.C. at 599, 757 S.E.2d at 417. LMC knowingly proceeded at its peril in relying on the Templeton letter and subsequent "assurances" to ignore the CON laws.

Even assuming, *arguendo*, that Ms. Templeton acted within the scope of her authority (which Providence submits the ALC properly determined she did not), LMC is unable to establish the elements of estoppel as a matter of law. "To prove estoppel

against the government, the 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." *Ahrens* at 353, 709 S.E.2d at 61 (quoting *Grant v. City of Folly Beach*, 346 S.C. 74, 80-81, 551, S.E.2d 229, 232 (2001)). "The party asserting estoppel bears the burden of establishing all of its elements. . . . . Absent even one element, estoppel will not lie against a government entity." *Morgan*, 377 S.C. at 320, 659 S.E.2d at 267.

As to the first element, it cannot be disputed that LMC had the ability to await the Supreme Court's ruling in *Amisub* to determine the propriety of DHEC's actions and the Templeton letter. Moreover, LMC had full access to the ALC to seek a declaration as to the propriety of pursing an expansion of covered services without a CON despite the clear directive of the CON Act. LMC is presumed to know the law and is charged with exercising reasonable care to protect its interests. *See Ahrens*, 392 S.C. at 355, 709 S.E.2d at 62 (holding retirees were charged with knowing that the terms of the Working Retiree statutes could change); *see also Morgan*, 377 S.C. at 321, 659 S.E.2d at 267-67 (holding plaintiff had means to discern eligibility requirements clearly set forth by statute). LMC is very familiar with the CON Act and laws–even those particularly applicable to open heart surgery suites–and there is no genuine issue of material fact as to the ability of LMC to have discerned the ongoing validity of the CON Act.

As to the second element, LMC's reliance cannot be determined to have been justifiable given the Department clearly advised LMC that the decision to proceed without a CON remained subject to challenge and could be reversed by legislative action or judicial review. (R. p. 102; R. pp. 138-139). Moreover, the law as set forth above is

that LMC dealt with DHEC at its peril in accepting DHEC's purported position that the CON laws were not enforceable. LMC is presumed to know the law and DHEC's "suspension" of the CON program did not change or suspend the law. *See Ahrens*, 392 S.C. at 355, 709 S.E.2d at 62 (holding reliance on statements or documents of employer could not be justifiable particularly given disclaimers in materials and knowledge that laws are subject to change). Thus, no genuine issue of material fact exists that would support the legal presumption that LMC's alleged reliance on Ms. Templeton was justified.

Finally, LMC's claim of prejudicial change in position is very weak. LMC did not change its position; it sought a new right not available under the law. While LMC stipulates that it made a capital expenditure, it did so with full knowledge of the risk. Further, once the Supreme Court ruled in *Amisub*, LMC was well aware of the status of the CON program and should simply follow the legal process and apply for a CON if it can meet the requirements and criteria established in the CON Act and Regulations. LMC cannot establish any prejudicial change in position.

There are no additional facts that LMC could establish that would warrant relief in LMC's favor. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group*, 413 S.C. 630, 635, 776 S.E.2d 434, 437 (Ct. App. 2015), *reh'g denied* (Sept. 14, 2015). Summary judgment was appropriate in this case and was properly awarded.

CONCLUSION

For the reasons set forth herein, Providence respectfully requests that this Honorable Court reject the appeal and affirm the Orders of the ALC as to all matters which were or could have been raised on appeal.

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CERTIFICATE OF COUNSEL

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

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