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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

APPELLATE CASE No.: 2019-001159
ADMINISTRATIVE LAW COURT CASE No.: 18-ALJ-07-0100-CC

Trident Medical Center, LLC, d/b/a Trident Medical Center Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control
and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center
– Berkeley County Respondents,

Of Which Medical University Hospital Authority d/b/a MUSC Radiation
Therapy Center – Berkeley County is the Appellant.

**RETURN OF PETITIONER/RESPONDENT TRIDENT MEDICAL CENTER, LLC TO
MOTION TO CERTIFY AND TRANSFER FROM THE COURT OF APPEALS**

The Appellant Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County (“MUHA”) has moved the Court to certify the above case for review by the Supreme Court prior to the Court of Appeals considering the matter and issuing its decision thereon. MUHA contends that certification to this Court is justified because an issue raised by it on appeal is allegedly of significant public interest and involves a legal principle of great importance. While the Petitioner/Respondent Trident Medical Center, LLC, d/b/a Trident Medical Center (“Trident”) believes that the issues involved in this Certificate of Need (“CON”) case are important, they are neither novel or of such significant public or legal interest as to justify removing this case from the jurisdiction of the Court of Appeals prior to a decision by that court. Therefore, Trident respectfully requests that this Court deny MUHA’s Motion to Certify.

Procedural Background

On May 22, 2017, the Appellant MUHA submitted a CON application to add a sixth linear accelerator (“LINAC”) to its inventory, proposing that this LINAC be located in a planned radiation therapy center in Berkeley County. (R. pp. 1595-1817). On June 7, 2017, Trident timely notified the Respondent South Carolina Department of Health and Environmental Control (“DHEC”) of its status as an affected person opposing MUHA’s LINAC. (R. p. 1818). On November 22, 2017, DHEC staff issued its decision approving MUHA’s LINAC. (R. pp. 1969-1972). Trident appealed and, in due time, the Administrative Law Court (“ALC”) conducted a contested case hearing on this matter over five nonconsecutive days beginning January 14, 2019 and ending January 24, 2019. (R. p. 90).

On January 24, 2019, at the close of the hearing, Trident made an oral motion, supplemented with a written motion and memorandum, requesting judgment as a matter of law on the grounds that MUHA’s LINAC project constitutes an unlawful and unconstitutional joint venture, which by its nature cannot comply with the standards and criteria applicable to it under the Certificate of Need laws. (R. p. 1297, line 17 – p. 1310, line 13). As relief, Trident requested that the ALC reverse DHEC’s decision and deny MUHA’s CON application. (R. pp. 1999-2030).

On May 14, 2019, after allowing further briefing of the issues by the parties, the ALC granted Trident’s motion for judgment as a matter of law and denied MUHA’s CON application. (“Final Order”). (R. pp. 1-35). On June 14, 2019, the ALC denied MUHA’s Motion to Reconsider the Final Order. (R. 36). MUHA filed its Notice of Appeal to the Court of Appeals on July 15, 2019.

Factual Background

This case arises under the Certificate of Need program for health care facilities and services. The framework of the CON program is established by the State Certification of Need and Health Facility Licensure Act found at S.C. Code Ann. §§ 44-7-110, *et seq.* (2018 and Supp. 2019) (the “CON Act”), the regulations set forth at 3 S.C. Code Ann. Regs. 61-15 (Supp. 2019), and the State Health Plan (collectively the “CON Law”). The goals and purposes of the CON Law are implemented through the requirement that a provider apply for, and receive, a CON from DHEC prior to establishing a new health facility or service, adding beds, making large capital expenditures or acquiring medical equipment when the total project cost exceeds a certain threshold amount. S.C. Code Ann. §§ 44-7-120 and 44-7-160 (2018). In determining whether to grant or deny an application for a CON, DHEC must evaluate the proposed project under the project review criteria found in the CON regulations (“Project Review Criteria”) and under the applicable standards of the State Health Plan in effect at the time the application is filed. S.C. Code Ann. § 44-7-225 (2018). Under the CON Act, DHEC is prohibited from granting a CON to an applicant unless the project as proposed complies with the State Health Plan, the Project Review Criteria, and other applicable regulations. *See* S.C. Code Ann. § 44-7-210(B) (2018); 3 S.C. Code Ann. Regs. 61-15, § 801(3) (Supp. 2019).

In May 2017, MUHA applied to DHEC for a CON to expand its services by adding a linear accelerator to a proposed radiation therapy center in Berkeley County with a project cost of \$9.8 million. (R. pp. 1595-1817). In response to the Part A Questionnaire¹ of the CON application form concerning the ownership and management of the LINAC project, MUHA

¹ 3 S.C. Code Ann. Regs. 61-15 § 202(2)(a) (Supp. 2019) sets forth in its Appendix the CON application form, including Questionnaire A, which an applicant must complete as part of the CON review process.

identified itself as the proposed licensee of the radiation therapy center. Under the law, the “licensee” of a project is the “legal entity who, or whose governing body, has the ultimate responsibility and authority for the conduct of the facility or services; the owner of the business. The licensee must be the entity to whom the Certificate of Need is issued.” 3 S.C. Code Ann. Regs. 61-15, § 202(8)(b) (Supp. 2019).

MUHA is an agency of the State of South Carolina, separate and distinct from the Medical University of South Carolina (“MUSC”), created under S.C. Code Ann. § 59-123-60(E) (2020) for the purpose of governing all of the hospitals, clinics, and other healthcare and related facilities of MUSC. Although MUHA has sources of funding other than the State, including revenues from its clinical operations and grants and donations from third parties, MUHA receives regular appropriations from the General Assembly and is required to prepare and submit an annual budget to the General Assembly and the Governor. S.C. Code Ann. §§ 59-123-60(E)(9) and (11) (2020).

Although MUHA is named as the proposed licensee of the LINAC project, the CON application indicates that the operation and management of the LINAC project will be vested in an entity known as “MUSC Health Cancer Care Network, LLC” (“MUSC Network”). (R. pp. 1599-1600). MUSC Network is described in MUHA’s CON application as a Delaware limited liability company licensed to do business in South Carolina, which is owned 51% by Alliance Oncology, LLC and 49% by MUSC Strategic Ventures. (Id.).

Alliance Oncology, LLC (“Alliance”), the majority owner of MUSC Network is identified in MUHA’s CON application as a “nationwide leader in radiation oncology and radiosurgery programs.” (R. pp. 1600-1601). As became clear during discovery for the contested case proceeding and later during the contested case hearing, Alliance is a for-profit Delaware

limited liability company based in Newport Beach, California. (R. pp. 1524 and 1529; R. p. 798, lines 7-8). As ultimately found by the ALC, based on the evidence presented at the hearing, Alliance is actually the entity with the right of control over the operation of MUSC Network and the LINAC project. (R. pp. 30-31).

MUSC Strategic Ventures, the minority owner of MUSC Network, is described in MUHA's application as a 501(c)(3) entity formed at the direction of MUSC for the purpose of supporting the missions and activities of MUSC and University Medical Affiliates ("UMA"), MUSC's physician practice organization. (R. p. 1603). The application indicates that MUSC and UMA "control" MUSC Strategic Ventures. (Id.). According to the CON application, MUSC Strategic Ventures' function is to determine and implement strategies that enable MUSC, UMA and MUHA to "collectively collaborate" with other healthcare providers. (R. p. 1604). According to the official description set forth in an organizational chart contained in MUSC's Comprehensive Annual Financial Report for the Year Ended June 30, 2018, "MUSC Strategic Ventures ... was formed in September 2015 to allow affiliation with tax exempt entities to support the missions and programs of [MUSC], UMA, and MUHA." (R. p. 1508, n. 7).

However, Dr. Patrick Cawley, who is the Chief Executive Officer of MUSC Strategic Ventures (as well as the Vice-President of Health Affairs for MUSC and the Executive Director of MUHA), disclosed for the first time in his deposition in this case that MUSC Strategic Ventures "predominantly joint ventures with for-profit companies that we otherwise couldn't work with as part of MUHA or MUSC." (R. p. 2015, lines 11-18). Dr. Cawley confirmed his understanding of MUSC Strategic Ventures' purpose in his hearing testimony. (R. p. 769, lines 6-12). As noted, consistent with Dr. Cawley's testimony, MUSC Strategic Ventures participated

in the LINAC project as the joint owner of a for profit company (MUSC Network), which is majority owned by another for profit entity (Alliance).

Although the application contained summary descriptions of the various entities involved in the LINAC project, it did not contain the organizational documents for the entities involved in the project nor did it contain the management or services agreements applicable to the project. As found by the ALC in its Final Order, DHEC also seemed to be unsure of Alliance's exact role in the LINAC project, citing the testimony of the DHEC reviewer that she could not recall anything specific about Alliance. (R. p. 12). In its order, the ALC made the factual finding, based on the testimony and documentary evidence before it, that Alliance actually is the entity with ultimate control over the LINAC project. (*Id.*, at pp. 12-13).

In discovery in the ALC proceedings, MUHA was required to produce the MUSC Network Operating Agreement ("Network Operating Agreement") between Alliance and "MUSC Health" and the Network Management Agreement ("Network Management Agreement") by and among Alliance, MUSC Network, and "MUSC Health." These agreements set out in detail the specific rights, duties and functions of the parties regarding the ownership, operation, and control of the LINAC project, as well as the broader relationships among the parties. Such clarifying evidence, produced during discovery and entered into evidence at the ALC hearing, prompted Trident to move the ALC for judgment as a matter of law that the LINAC project constitutes an unlawful joint ownership arrangement in violation of MUHA and MUSC's enabling legislation and in violation of S.C. Const. art. X, § 11.

On appeal, MUHA contends, among other things, that the ALC lacked the statutory authority to consider and make a determination on the constitutional and statutory issues raised by Trident because the issues allegedly do not arise under the CON Law and because the ALC,

as an executive branch court, lacks the authority to decide constitutional issues. In its Final Order, the ALC appropriately rejected both of these arguments. **(R. pp. 14 – 19).**

Trident moved for judgment as a matter of law on the grounds that the LINAC project in MUHA's CON application did not comply with the standards and criteria established by the CON Law because MUHA identified as the facility's manager and operator an entity which is unlawfully owned jointly by a state agency and a private for-profit corporation in violation of the agency's enabling statutes and the South Carolina Constitution. As relief, Trident requested that the ALC reverse DHEC's decision to approve MUHA's CON application because of the defective ownership and management structure of the project as proposed. **(R. p. 2010).** In granting Trident's motion, the ALC did not order the dissolution of MUSC Network or any other entity. Instead the ALC merely ordered that the decision of DHEC to grant a CON for the addition of a LINAC be reversed and that MUHA's CON application be denied. **(R. p. 35).**

As found by the ALC, the issue of the ownership and administration of a project and the ability of the designated operator and manager of the project to meet all the requirements of the CON Law is a crucial determination for the ALC in a CON contested case proceeding. As such, the CON Law requires that an applicant address ownership of the project and the record of the applicant in its CON application. The Project Review Criteria also make ownership and the record of the applicant a factor to be considered when awarding a CON. In its Final Order, the ALC discusses in detail how the legality of MUSC Network directly implicates the LINAC project's ability to comply with these and other critical standards and criteria that must be met in order to obtain a Certificate of Need under the CON law. **(R. p. 16).** Because the inquiry into the legality of MUSC Network furthers the ALC's consideration of the applicable criteria and standards under the CON Law, the ALC correctly concluded that it has the statutory authority,

and, indeed, the obligation to address these issues in deciding the ultimate question of whether MUHA's CON application should be denied. (R. p. 16).

MUHA also contends that the ALC lacks the authority to rule on the constitutional issues raised by Trident because the ALC is an executive branch court. Trident had originally asserted in its motion for judgment as a matter of law that Trident's claims were in the nature of "as-applied" constitutional claims that are within the authority of the ALC to decide under *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 108-109, 705 S.E.2d 28, 38-39 (2011)(The ALC, as part of the executive branch, is without power to pass on the constitutional validity of a statute or regulation but is empowered to make factual determinations and find a statute or regulation unconstitutional as applied to a specific party.). In its Final Order, however, the ALC rejected Trident's "as applied" argument and found that *Travelscape* is not implicated at all in this matter because the ALC did not address or determine the constitutionality of any statute or regulation. Instead, the ALC applied the provisions of S.C. Const. art. X, § 11 to the facts of the case before it and determined that the operating entity of the LINAC project, MUSC Network, existed in violation of the prohibition against joint ownership found in that section of the constitution. (R. p. 17). Accordingly, the ALC properly exercised its statutory authority in considering the issues presented to it and found that the LINAC project as presented to DHEC did not comply with the criteria and standards of the CON Law.

As to the merits of Trident's contentions, Trident moved the ALC for an order denying MUHA's CON application on the grounds that (a) MUSC Strategic Ventures is an *ultra vires* corporation created by MUSC in violation of its enabling statute found at S.C. Code Ann. § 59-123-60 (2020); and (b) MUSC Network, which has MUSC Strategic Ventures as a minority owner, is an illegal and unconstitutional joint venture formed in violation of S.C. Const. art. X, §

11. Trident contended that, because MUSC Network, the designated operator of the Linac project is an unlawful entity, MUHA's CON application does not comply with the standards and criteria of the CON Law. (R. pp. 1999 - 2030).

Under established case law, MUSC, as a creature of statute, has only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged. *See Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). In its enabling legislation, MUSC's governing board is given the authority to elect officers and appoint professors and fix their compensation, to make bylaws and regulations for the management of its affairs and operations, to confer degrees in medicine and other healthcare fields, to make contracts, to hold, purchase, and lease real estate and personal property for corporate purposes, and to sell and dispose of personal property and buildings. S.C. Code Ann. § 59-123-60(A) (2020). The law specifically requires all revenues earned by MUSC to be expended for a public purpose and makes MUSC subject to the Freedom of Information Act and to State ethics laws. S.C. Code Ann. § 59-123-60(B), (C), and (D) (2020).

In a 2000 amendment to the same legislation, the General Assembly established MUHA as a separate and distinct state agency to be governed by a board composed of the same persons as sit on the MUSC board. As conceived by the General Assembly "Whenever the board functions in its capacity as the governing body of the hospital, the board of trustees is constituted and designated as the Medical University Hospital Authority, an agency of the State of South Carolina (hereinafter called authority)." S.C. Code Ann. § 59-123-60(E)(2020). In its enabling legislation, MUHA is granted the sole authority to manage, regulate and operate the healthcare (as opposed to the educational) functions of MUSC, including the power to form non-profit entities on the condition that "any entity created pursuant to this subsection is considered to be an

entity of the authority and subject to all laws and regulations applicable to the authority under this section.” S.C. Code Ann. §59-123-60(E)(13) (2020). This section provides that “the formation of for-profit corporations by the authority is strictly prohibited.” *Id.* Thus, MUHA can create and utilize non-profit entities to carry out its functions but those entities are subject to all laws and regulations applicable to MUHA, including the constitutional prohibition against joint ownership in private companies and the prohibition against the creation of for-profit companies.

Under the doctrine of statutory construction “*expressio unius est exclusio alterius*,” the grant of authority to MUHA to create nonprofit subsidiaries and affiliates compels the conclusion that the absence of such grant of authority to MUSC in the same statute means that the General Assembly did not intend for MUSC to have that authority. Therefore, as found by the ALC, MUSC lacked the authority to create MUSC Strategic Ventures and, therefore, MUSC Strategic Ventures is an unlawfully created entity which is legally incapable of being a part owner of MUSC Network, the putative manager and operator of the LINAC project. **(R. p. 22)**.

Furthermore, as found by the ALC, even if MUSC Strategic Ventures were lawfully created, MUHA and MUSC cannot use it to joint venture with for profit entities in circumvention of the constitution. S.C. Const. art. X, § 11 provides in relevant part that “neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation.” As admitted by Dr. Cawley, with respect to the LINAC project, MUSC Strategic Ventures is being used by MUHA and MUSC to joint venture with a private for-profit company and to hold an ownership interest in another private for-profit company (MUSC Network) because MUHA and MUSC, as state agencies, are prohibited under the law and the South Carolina Constitution from holding these interests directly. The attempt by MUHA to circumvent the restrictions placed on it as a governmental entity and to do indirectly what it

cannot do directly is exactly the type of conduct condemned by this Court in *O'Brien v. S.C. ORBIT*, 380 S.C. 38, 43, 668 S.E.2d 396, 398-399)(2008) (“It is troubling that the City attempted to avoid the constitutional prohibition on investing in equity securities, thereby using government funds to jointly own a company with other investors, by merely setting up a trust.”).

As found by the ALC in this case, the participation of MUSC Strategic Ventures in MUSC Network in violation of the law and the South Carolina Constitution renders MUSC Network an illegal entity incapable of managing and operating the LINAC as presented in MUHA’s CON application. (R. p. 35). It cannot lease the facility space, employ all of the technical and administrative staff of the facility, provide or procure the financing for the facility, and own all of the equipment to be used in the project, all of which responsibilities lie with MUSC Network under the operating and management agreements among the parties. Therefore, the ALC correctly exercised its authority and correctly determined that MUHA’s CON application did not comply with the CON Law and properly ordered that the application be denied.

Grounds for Certification

MUHA requests certification of this case for review by this Court on the grounds that the issue of the ALC’s authority to determine the legality of the LINAC project as proposed in MUHA’s CON application is of public and legal significance. Trident does not agree that the issues in this case rise to the level required for certification of a case to this Court under Rule 204(b), SCACR.

First, the authority of the ALC to determine constitutional issues has already been addressed and clarified by this Court in *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89,

108-109, 705 S.E.2d 28, 38-39 (2011) and the cases cited therein. Therefore, the resolution of this matter would not result in a pronouncement or clarification of a significant legal principle.

Secondly, unlike many of the other cases in which the Court has granted certification, this case does not involve the interpretation of a statute or regulation. The challenge to the authority of the ALC in this case arises under and is dependent on the specific facts as applied in the context of the CON Law. In other words, the ALC considered the facts and the law in the context of a single project as presented to DHEC in a specific CON application. Thus, resolution of the issues in this case does not have an application that is of broad significance to the public.² See, e.g., *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011)(reversing the ALC's interpretation of a statute as prohibiting a single-member limited liability company that is not taxed as a corporation from claiming the four percent legal residence property tax ratio); *Clarendon County ex rel. Clarendon County Assessor v. TYKAT, Inc.*, 394 S.C. 21, 714 S.E.2d 305 (2011)(interpreting constitutional and statutory provisions to conclude that the lease of public property by a private entity is not tax exempt); *Fox v. Moultrie*, 379 S.C. 609, 666 S.E.2d 915 (2008)(reconciling federal and state tax sale notice requirements).

Finally, in this case, the ALC found as an additional sustaining ground that MUHA does not own or control the LINAC project and, therefore, does not qualify as the proper licensee under the law. (**Brief of Appellant, pp. 37 - 38**). In its Final Order, the ALC describes in detail the roles and functions of the entities named by MUHA as the owner and operator of the LINAC project. (**R. pp. 12 - 13 and R. pp. 29 - 33**). The ALC ultimately concluded, based on the

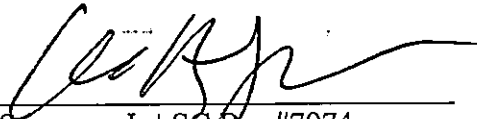
² It should be noted that every CON case involves issues that are of interest to the public because every CON case concerns the establishment of healthcare facilities, the provision of healthcare services, and the purchase of healthcare equipment. Thus, while Trident agrees with MUHA that the resolution of this case impacts public healthcare in the Charleston, Berkeley, and Dorchester service areas, there exists no unique public interest issue to distinguish it from any other CON case.

evidence before it, that “[w]hile the Management Agreement is replete with references of ‘with input from MUSC,’ it is also clear from the details of the Operating Agreement that, in almost every respect, Alliance is in control of this operation, carries the rights of first refusals, owns 51% of the company and will carry away 51% of the profits from this joint venture.” (R. p. 30). This conclusion that MUHA is not the proper licensee under the law is supported by the substantial evidence in the record and by the ALC’s correct application of the law to those facts. It is also dispositive in its own right and does not require consideration of the issue of the ALC’s authority to determine the legality and constitutionality of the LINAC project as proposed by MUHA. Because the issue that MUHA relies upon to justify certification is not dispositive, certification is not appropriate.

Conclusion

Trident respectfully requests that the Court deny MUHA’s Motion to Certify and allow this matter to continue before the Court of Appeals.

Respectfully submitted,



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– Berkeley County Respondents,

Of Which Medical University Hospital Authority d/b/a MUSC Radiation
Therapy Center – Berkeley County is the Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on August 13, 2020, he caused a copy of the
**RETURN OF PETITIONER/RESPONDENT TRIDENT MEDICAL CENTER, LLC TO MOTION TO
CERTIFY AND TRANSFER FROM THE COURT OF APPEALS** to be served upon all parties of record
by email and U.S. Mail addressed as follows:

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August 13, 2020

**VIA EMAIL SUPCTFILINGS@SCCOURTS.ORG
AND HAND DELIVERY**

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

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SC Court of Appeals

Re: *Trident Medical Center, LLC, d/b/a Trident Medical Center vs. South Carolina Department of Health and Environmental Control and Medical University Hospital Authority d/b/a MUSC Radiation Therapy Center – Berkeley County Appellate Case No. 2019-001159*

Dear Mr. Shearouse:

Enclosed for filing please find an original and six copies of the *Return of Petitioner/Respondent Trident Medical Center, LLC to Motion to Certify and Transfer from the Court of Appeals* in the above-referenced matter. Please file the original and return a filed stamped copy to us in the enclosed postage-prepaid envelope provided for your convenience.

By copy of this letter, we are providing the Court of Appeals, and serving all counsel of record, with a copy of the Return.

With best regards, I am

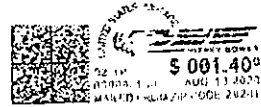
Sincerely,

David B. Summer, Jr.

DBSjr/ccq
Enclosures

cc: ~~Honorable Jenny Abbott Kitchings, Clerk~~ (via U.S. Mail and email ctappfilings@sccourts.com)
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Vito Wicevic, Esquire (via U.S. mail and electronic mail)
Daniel J. Westbrook, Esquire (via U.S. mail and electronic mail)
Travis Dayhuff, Esquire (via U.S. mail and electronic mail)
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