

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Dec 17 2020

SC Court of Appeals

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

Appellate Case No. 2019-001159
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.

MOTION FOR LEAVE TO FILE A JOINT AMICUS BRIEF

Pursuant to Rule 213, SCACR, the Medical University of South Carolina (MUSC) and MUSC Strategic Ventures (MSV) respectfully request leave to file a joint amicus brief in the above-captioned appeal. As required by Rule 213, this motion identifies the “interest” of MUSC and MSV in this matter, including the reasons why an amicus brief is “desirable.” As permitted by Rule 213, MUSC and MSV conditionally file their joint amicus brief with this motion.

INTRODUCTION

This is an appeal from the South Carolina Administrative Law Court (ALC). The South Carolina Department of Health and Environmental Control (DHEC) granted a Certificate of Need (CON) to construct and operate a cancer treatment center in Berkeley County. The ALC reversed DHEC by first determining the rights and interests of several entities that were never parties to the DHEC or ALC proceedings, including MUSC and MSV. The ALC's determinations on these "non-party issues" are the cornerstone for the appealed order.

The joint amicus brief presents two basic arguments. First, the ALC had no power to consider or determine the non-party issues. (See Amicus Br. at Args. I-IV). Second, assuming the ALC had such power, the ALC erred in exercising it without first giving the non-parties notice and an opportunity to be heard on the non-party issues. (See Amicus Br. at Arg. V).

BACKGROUND

Appellant Medical University Hospital Authority (MUHA) filed the CON application at issue here. MUHA is a state agency that operates the hospitals and healthcare facilities associated with MUSC, a separate state agency. Respondent Trident Medical Center (Trident) is a competing private hospital that objected to the application.

The only parties to the DHEC proceedings were MUHA and Trident. DHEC staff granted the application, and Trident requested review by the DHEC Board. The Board denied the request. The staff decision thereby became the final agency determination. Trident sought review of DHEC's decision by requesting an ALC contested case hearing. The ALC reversed DHEC and denied the CON application. (See ALC Order, R. Vol. I at 1-35). The only parties to the ALC proceedings were Trident, MUHA, and DHEC.

The CON application outlined the following ownership and operational structure for the proposed cancer treatment facility (the Project):

1. MUHA was the applicant, licensee, and facility owner of the Project described in the CON application. (R. Vol. IV at 1595-1599, 1607-1609).
2. MUHA engaged MUSC Cancer Care Network, LLC (Network), a Delaware limited liability company licensed to do business in South Carolina, to manage and operate the facility. (Id. at 1595, 1599-1600, 1604, 1609-1610).
3. Alliance Oncology, LLC (Alliance), a Delaware limited liability company with its principal office in California, owned 51% of the Network. (Id. at 1600-1601, 1609).
4. MUSC Strategic Ventures (MSV), a non-member South Carolina nonprofit corporation established at the direction of and for the support and benefit of MUSC, owned 49% of the Network. (Id. at 1600, 1603-1604, 1609).

MUSC, MSV, Alliance, and Network (the “non-parties”) were **not** parties to the DHEC review process or the ALC contested case hearing. Nevertheless, after the close of the evidence and for the first time at any stage in this matter, Trident argued and the ALC ruled that the CON application must be denied under the following analysis of the non-parties’ rights and interests:

1. MUSC did not have the statutory power to form MSV and, therefore, MSV’s mere existence was unlawful and *ultra vires* in violation of MUSC’s enabling legislation.
2. Network was an unlawful joint venture between Alliance and MUSC (through MSV) and, therefore, Network’s mere existence was unconstitutional and *ultra vires* in violation of S.C. Const. art. 10, § 11.

(R. Vol. I at 4-9, 19-35, *passim*). The ALC thus undertook the administration and enforcement of Article 10, § 11 of the South Carolina Constitution and S.C. Code Ann. §§ 59-123-10 *et seq.* (Rev. 2020), the enabling legislation that created and empowered MUSC. The ALC had no power over these non-party issues for several reasons.

First, the non-party issues require the exercise of “judicial power” that resides solely in the unified judicial system, *i.e.*, courts created by or pursuant to Article V of the Constitution. The ALC is not an Article V court, so it has no power over the non-party issues. (Amicus Br., Arg. II).

Second, the ALC is an executive branch agency, so its power is limited to that granted by statute. Statutory power over the non-party issues could arise in only one of two ways: (1) a statute granting such power directly to the ALC; or (2) a statute granting such power to DHEC, with the ALC reviewing the exercise of that power in a contested case hearing. No such statute exists and, therefore, the ALC had no power over the non-party issues. (Amicus Br., Args. I and III).

Third, Section 44-7-210(E) expressly limits the issues in a CON contested case to the issues presented or considered during DHEC's staff review. This specific statute controls against any general statute that might be construable as granting the ALC or DHEC power over the non-party issues. Here, the non-party issues were **not** presented or considered during DHEC's staff review. Thus, the ALC had no power over the non-party issues in this case. (Amicus Br., Arg. IV).

Fourth, assuming the ALC had any power over the non-party issues, it erred in exercising that power without first joining the non-parties or otherwise giving them notice and an opportunity to be heard. Only then could the ALC satisfy due process. (Amicus Br., Arg. V).

ARGUMENT

Both MUSC and MSV have a compelling interest in this matter, because the appealed order hinges upon determinations of their rights and interests, including the question of whether MSV even exists under the law. It is therefore desirable that they be heard in this matter.

MUSC is the only comprehensive academic health science center in South Carolina. It provides a unique, inter-professional learning environment for educating health care professionals and biomedical scientists, conducting health sciences research, and providing comprehensive, leading-edge health care. The facility at issue here will enable MUSC to fulfill its mission of educating and training future physicians, nurses, and technicians in modern cancer treatment. Thus, MUSC has a vital interest in this matter. It is therefore desirable that MUSC be heard.

MUHA is the owner and operator of the hospitals and healthcare facilities at which MUSC provides medical care and medical education. MUHA is a frequent party in ALC proceedings related to CON matters that directly affect MUSC's ability to fulfill its missions of providing leading-edge healthcare and education, including the role of MSV in supporting those missions. Thus, MUSC and MSV have a vital interest in the ALC's power over the non-party issues generally and the exercise of any such power. It is therefore desirable that MUSC and MSV be heard.

Trident presents "waffling" arguments on whether the ALC determined the rights and interests of the non-parties. (*Compare* Resp. Br. Arg. III at pp. 22-24 *with* Arg. IV at pp. 24-35). In these arguments, Trident admits the ALC considered and determined the rights and interests of the non-parties, and admits this was necessary to determine the rights of the parties. Trident can hardly do otherwise, because it invited the ALC to rule on these matters in its post-trial motion. Nevertheless, Trident also argues there was no impermissible adjudication of the non-parties' rights and interests. Trident blithely ignores the ALC's multitude of repeated rulings and findings on the rights and interests of the non-parties, including MUSC and MSV (all boldface added):

"The **motion** before the Court **requires** a **determination** of the **constitutionality** of **[Network]**." (R. Vol. I at 4).

The motion **requires** a two-step analysis: (1) "**Is The Network** a . . . **violation of** [Article X (11)] . . . and **is** the Network **illegal or ultra vires** because the **enabling statutes** of **MUSC** and **MUHA do not permit** ownership of for-profit entities" and (2) "**If the Network** is **unconstitutional or ultra vires**, does that render the Application [un-approvable]?" (*Id.* at 13).

"Should a **determination** be made that The **Network** is **illegal or ultra vires**, then the **necessary dissolution** of that entity would affect [the CON Application]." (*Id.* at 15).

"**If** . . . the **Network** is an **unconstitutional** and, as such **illegal** entity, **then** [the Application becomes called into question]." (*Id.* at 16).

A nexus exists "between the **determination** of The **Network's constitutionality**" and DHEC's approval of the application." (*Id.* at 16).

“[T]he Court has the authority to . . . **determine** whether particular conduct or arrangements before it violate **constitutional or statutory restrictions.**” (*Id.* at 17).

“[T]he **issue** is **whether . . . MUSC has crossed a constitutional and/or or statutory line . . .**” (*Id.* at 17).

Trident moved “the Court to **determine** that the proposed project [cannot meet the CON requirements] when those specific requirements are proposed to be met by an **entity** that is **unconstitutional, illegal, or ultra vires.**” (*Id.* at 19).

“Accordingly, **because MUSC’s** enabling statutes do not explicitly vest any authority in **MUSC** to create subsidiary or affiliated entities, the Court **finds** that [**MSV**] and **The Network** are **illegal or ultra vires.**” (*Id.* at 22).

“The Court **finds** that **The Network** is an entity formed in **violation** of the **state constitution** and . . . **outside** of the **authority** enumerated in **MUSC’s** and **MUHA’s** **enabling legislation.** As such, **The Network** is an **unconstitutional** and, therefore, **illegal or ultra vires** entity.” (*Id.* at 26-27).

“[T]he **ultimate dissolution of The Network** requires a second inquiry [and the] Court **finds** that the **necessary dissolution of The Network** substantially alters the Application and materially affects the project . . . in several ways.” (*Id.* at 27).

“[T]his Court **finds** that upon the **necessary dissolution of The Network**, the [application cannot be approved.]” (*Id.* at 28).

“[T]he Court **finds** that the proposed project . . . **constitutes** an **unlawful** joint venture in **violation of [Article X(11)] and the enabling statutes of MUSC** [and therefore] the Application must be denied.” (*Id.* at 35).

In short, the ALC reached and decided numerous issues involving the rights and interests of several entities that were never parties to the proceedings before DHEC or the ALC, including the rights and interests of MUSC and MSV, and including MSV’s interests in the Network. The ALC had no power (jurisdiction) over these non-party issues for the reasons earlier summarized herein and detailed in the Amicus Brief. MUSC and MSV manifestly have a vital and overwhelming interest in these rulings and should therefore be heard by this Court.

CONCLUSION

For all of the foregoing reasons, MUSC and MSV respectfully submit that this Court should grant the instant motion and accept the attached Joint Amicus Brief of the Medical University of South Carolina and MUSC Strategic Ventures.

Respectfully Submitted,

s/Robert L. Widener
Robert L. Widener (SC Bar 6089)
rwidener@burr.com
Celeste T. Jones (SC Bar 3173)
ctjones@burr.com
Jane W. Trinkley (SC Bar 5633)
jtrinkley@burr.com
BURR & FORMAN LLP
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

December 17, 2020
Columbia, SC

ATTORNEYS FOR AMICI

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM THE ADMINISTRATIVE LAW COURT **Dec 17 2020**
The Honorable H.W. Funderburk, Jr.

SC Court of Appeals

Appellate Case No.: 2019-001159

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-Berkeley County is the Appellant.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of Burr & Forman LLP, certify that I have served copies of the *Motion for Leave to File a Joint Amicus Brief and Joint Amicus Brief of the Medical University of South Carolina and MUSC Strategic Ventures* on all parties as noted below, via email, at the email addresses listed below, on December 17, 2020:

David B. Summer, Jr. Esquire
davidsummer@parkerpoc.com

Daniel Westbrook, Esquire
dan.westbrook@nelsonmullins.com

Ashley C. Biggers, Esquire
biggerac@dhec.sc.gov


Ann Shuler

Robert L. Widener
rwidener@burr.com

Burr & Forman LLP
1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

Office (803) 799-9800
Fax (803) 753-3278

BURR.COM

RECEIVED
Dec 17 2020
SC Court of Appeals

December 17, 2020

VIA EMAIL (ctappfilings@sccourts.org)

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Trident Medical -v- SCDHEC (Medical University)
Appeal Case No: 2019-001159

Dear Madam Clerk:

Attached for filing please find the *Motion for Leave to File a Joint Amicus Brief*, and the *Joint Amicus Brief of the Medical University of South Carolina and MUSC Strategic Ventures*.

By copy of this letter, the motion and brief are being served via email to all parties as evidenced by the attached Certificate of Service. Our check in the amount of \$50 for the filing fee is being placed in the mail today with a copy of this letter.

Thank you for your assistance in this matter.

Respectfully yours,

Burr Forman McNair



Robert L. Widener
Partner

Honorable Jenny Abbott Kitchings
December 17, 2020
Page 2

RLW/as

Attachments

cc: Ashley C. Biggers, Esquire (biggerac@dhec.sc.gov)
David B. Summer, Jr., Esquire (davidssummer@parkerpoe.com)
Daniel Westbrook Esquire (dan.westbrook@nelsonmullins.com)