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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson III, Administrative Law Court Judge

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APPELLATE CASE NO.: 2020-001610
ADMINISTRATIVE LAW COURT CASE NO.: 20-ALJ-07-0108-CC

Lexington County Health Services District, Inc.,
d/b/a Lexington Medical Center, ... Petitioner/Respondent,

v.

South Carolina Department of Health and Environmental Control, Prisma Health-Midlands, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC
d/b/a Kershaw Health Medical Center, ... Respondents,

OF WHICH
Prisma Health-Midlands is the……………………………………………..Appellant/Respondent,

AND
Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center are the ……………………………………………………………………………Respondent/Appellants.

PETITIONER/RESPONDENT'S RETURN TO MOTION TO WITHDRAW APPEAL AND VACATE APPEALED ORDERS

Pursuant to Rule 240(e), SCACR, Petitioner/Respondent, Lexington County Health Services District, Inc., d/b/a Lexington Medical Center (LMC), submits this Return to Appellant/Respondent Prisma Health – Midland's (PHM) Motion to Withdraw Appeal and Vacate Appealed Orders (the "Motion" herein) filed on April 7, 2021. While LMC has no objection to PHM's request to withdraw its appeal, for the reasons further addressed herein, LMC respectfully requests that the Court refuse the request to vacate the underlying orders.

PROCEDURAL BACKGROUND

PHM and Respondent/Appellants Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield (Providence Health), and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center (Kershaw Health) (collectively "LifePoint") have each appealed from the Administrative Law Court (ALC) in a contested case proceeding that arose from the Respondent South Carolina Department of Health and Environmental Control's (DHEC or the Department) decision dated February 28, 2020, that amended the ongoing conditions of an existing COPA[1] issued to Baptist Healthcare System of South Carolina, Inc. (BHS), and Richland Memorial Hospital (RMH), on October 6, 1997 ("COPA-97-01"). The agency decision issued to PHM without any public notice or affected person participation[2] is viewed by PHM[3] as approving PHM's proposed acquisition of acute care facilities owned by LifePoint and operating in the same market area as PHM, to be included under the COPA issued in 1997 to BHS and RMH. DHEC's decision identifies the assets PHM proposes to purchase from LifePoint as the Providence Health acute care hospitals (Providence Health (HTL-0928), Providence Health – Northeast (HTL-0929) in Richland County, and a freestanding emergency department in Fairfield County operating

[1] Pursuant to the Health Care Cooperation Act (the "COPA Act"), a certificate of public advantage (COPA) is defined to mean "the formal approval, including any conditions or modifications, by the department of a contract, business or financial arrangement, or other activities or practices between two or more health providers, health provider networks, or health care purchasers that might be construed to be violations of state or federal antitrust laws." S.C. Code Ann. § 44-7-510(2).

[2] DHEC reviewed the transaction proposed by PHM to acquire the LifePoint assets as an amendment to COPA-97-01 pursuant to Section 508 of Regulation 61-31, "without public notice, public comment, or a hearing." (R. p. 24).

[3] PHM's Motion states, "PHM requested that DHEC make [the LifePoint] assets subject to and covered by the 1997 certificate of public advantage (COPA-97-01) and its conditions. In 2020, DHEC determined that the assets to be purchased by PHM would be covered by and become part of COPA-97-01 and the amended conditions when purchased by PHM." PHM Mot., 2-3.

under HTL-0929), as well as the Kershaw Health acute care hospital (HTL-0101) in Kershaw County. (R. p. 53).

Although DHEC elected not to conduct a public review of Prisma's request to "amend" COPA-97-01, LMC and other affected persons learned of Prisma's plans and DHEC's approval shortly after the February 28, 2020 decision through various press releases by Prisma and LifePoint, and sought final review by the DHEC Board, which was denied. (R. p. 60). PHM's Motion notes it "had sought expedited treatment in this case since June 2020." PHM Mot., n.4. In fact, PHM asserted to the ALC in its request for expedited treatment, "Prisma has paid $10,000,000, non-refundable at this point, to LPNT - $5,000,000 when the LOI was executed on September 13, 2019, and an additional $5,000,000 when the APA was executed. PHM should not lose $10,000,000 and the Transaction should not close for lack of a timely ALC decision." (R. p. 258).

Several months later and roughly three weeks after filing this appeal, PHM reiterated its demand for expedited treatment to the Supreme Court in its Motions to Certify and to Expedite Review, repeating its claim that, "PHM should not lose $10,000,000 and the Midlands Area health care benefits that DHEC found would arise from the Proposed Transaction for lack of a timely decision." PHM Mot. Certify & Exped., 18. According to that motion, "Absent regulatory clearance, LPNT, at its sole election can, on March 2, 2021, terminate the APA. If the APA is terminated pursuant to ¶ 10.1(g), the $10,000,000 deposit shall be paid to LPNT." *Id.* PHM also referenced this basis for expedited treatment in the similar Motion to Expedite filed with this Court on February 17, 2021, which was granted with an expedited briefing schedule ordered. *See* PHM Mot. Exped., n.13.

PHM now asks this Court to vacate the ALC Orders *appealed by PHM* as well as vacate the DHEC decision *solicited by PHM*, claiming the issues are mooted because "[a]fter the first anniversary date of the asset purchase agreement, LifePoint exercised [its] discretion and terminated the asset purchase agreement." PHM Mot., 3. Claiming it "had no control" over the termination of the agreement by LifePoint, PHM asserts it would be "inequitable to deny PHM appellate review of the important issues in this case." *Id.* Notably, PHM makes this Motion voluntarily and is not being denied appellate review. Nevertheless, LMC does not oppose PHM's Motion to the extent it seeks dismissal of PHM's appeal[4]; however, PHM is not entitled to the relief sought in the Motion of vacating the ALC Orders[5].

STANDARD OF REVIEW

The Appellate Court Rules do not provide for vacation of prior opinions, orders, decisions or judgments in the circumstance of a voluntary withdrawal of appeal. *See* Rule 260(c), SCACR. Such relief is addressed in the procedural rule governing agreements and settlements of an appeal, stated to be "extraordinary" relief parties may request but is still subject to denial by the Court. Rule 261(d), SCACR; *see also* Rule 260(b), SCACR. As to the mootness doctrine, a matter can become moot "when some event occurs making it impossible for the reviewing court to grant effectual relief." *Sloan v. Greenville Cty.,* 380 S.C. 528, 535, 670 S.E.2d 663, 667 (2009). While mootness operates to ensure only justiciable controversies are presented for review, there are three well known exceptions to the rule:

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[4] LMC does not waive its rights under Rule 222, SCACR, should the Court grant the dismissal.

[5] It is unclear by what mechanism both the ALC decision reversing the DHEC staff and the underlying DHEC staff decision could be vacated. Further, as noted below, vacation of these decisions does not undo or vacate the opinion of the Attorney General orchestrated by PHM prior to DHEC's decision. (R. pp. 506-511; 543-548). *See also*, Op. S.C. Att'y Gen. 2020 WL 1068931 (S.C.A.G. Feb. 25, 2020).

> First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Application of the public interest exception requires the question at issue to be (1) of public importance, and (2) of imperative and manifest urgency. Third, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Sloan, 380 S.C. at 535, 670 S.E.2d at 667 (internal citations omitted). As explained in *Sloan*, "[t]he utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked." *Id.*

ARGUMENT

A. The Issues Presented Are Not Mooted by Abandonment of the Purchase/Sale.

PHM offers nothing more than the bald assertion that because LifePoint invoked a contractual right to terminate the parties' asset purchase agreement ("APA"), "the issues raised in this appeal are moot, because there is no longer any need for any determination by DHEC, the ALC, or this Court in this matter." PHM Mot., 3. Once again solely as a result of contractual terms negotiated and agreed to between Prisma/PHM and LifePoint, PHM demands extraordinary preferential treatment in the administrative and judicial review process, this time because one party to the proposed transaction (the seller) exercised a right to terminate the deal, and the other party (the buyer) now wants to undo and erase the administrative precedent created at its request. Not only is PHM hardly an innocent given the sophisticated nature of the transaction that led to inclusion of such right to LifePoint, but PHM's request would prejudice LMC's rights as a party to the proceeding.

"A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Byrd v. Irmo High School*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864

(1996). In asserting mootness, PHM fails to appreciate LMC's rights (and the future interests of other persons affected by proposed combinations of competing hospital providers), to have this Court affirm the ALC and confirm that DHEC's approval of Prisma's request to amend COPA-97-01 was in error. This circumstance is very different than as contemplated by the mootness doctrine, which finds mootness where "judgment, if rendered, will have no practical legal effect upon the existing controversy." *Wayne's Auto. Center, Inc. v. S.C. Dep't of Public Safety*, 431 S.C. 465, 475-76, 848 S.E.2d 56, 62 (Ct. App. 2020) (citing *Sloan* at 535, 670 S.E.2d at 667).

The underlying administrative proceeding is not one merely between the agency and the regulated party, but rather includes and involves the rights of third parties to the proposed transaction. LMC is as an "affected person" under the COPA Act and Regulation 61-31, which gives rise to its standing to challenge DHEC's decision to approve Prisma's request to modify COPA-97-01. *See* S.C. Code Ann. § 44-7-510(1); S.C. Code Ann. Regs. 61-31 § 102(1). The General Assembly directed that a DHEC decision "to approve or deny [an] application for the certificate [of public advantage] is entitled to judicial review in accordance with the Administrative Procedures Act" by the applicant or an affected person. S.C. Code Ann. § 44-7-550(B); *see also* S.C. Code Ann. Regs. 61-31 § 311 (providing for administrative and judicial review for the applicant or an affected person). Here, DHEC received a request to "amend" the COPA issued to BHS and RMH in 1997, and after determining the requested amendment was a substantial change to the approved COPA, undertook a private, internal review and approved the amendment without public notice or opportunity to affected person participation. (R. pp. 64-66). Throughout the underlying contested case proceeding, DHEC and Prisma supported this conduct and opposed LMC's Petition for Administrative Review.

As evidenced by the Record that is now before the Court, and the issues fully briefed by the parties, DHEC's decision to approve Prisma's proposed transaction by way of amendment to COPA-97-01, without first following the review process set forth in the COPA Act or Regulation 61-31, was "distinctly put in issue, and directly determined by a court of competent jurisdiction" in the ALC's denial of Prisma's request. *See U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 38 (1950). While the specific transaction proposed by Prisma may have been abandoned, that change does not warrant vacating the appealed orders in total disregard of the significant time and expense of resources devoted by all parties, including LMC, to addressing the concerns presented in the contested case. Because the abandonment of the proposed transaction does not moot the issues raised in this appeal, PHM's Motion seeking to vacate the ALC Orders should be denied.

B. <u>The Exceptions to Mootness Necessitate Denial of Motion</u>.

Prisma continues to conduct business as PHM pursuant to COPA-97-01. DHEC continues to have statutory authority to review cooperative agreements and applications for COPAs, to issue decisions approving or denying COPAs, to monitor and regulate approved agreements, and under its Regulation 61-31, to review amendments to existing COPAs. *See* S.C. Code Ann. §§ 44-7-530, -550, -560, -570; *see also* S.C. Code Ann. Regs. 61-31 §§ 302, 307, 401, 501, 508. Even if the mootness doctrine is implicated by the abandonment of the proposed transaction between Prisma/PHM and LifePoint, the exceptions to mootness necessitate denial of PHM's request for vacation.

For matters that are capable of repetition but could evade review, LMC "need only show the issue raised is *capable* of repetition and is not required to prove there is a 'reasonable expectation' the issue will arise again." *S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 121, 804 S.E.2d 84, 860 (2017) (emphasis in original) (citing *Sloan v. Greenville Cty.*, 356

S.C., 531, 554-55, 590 S.E.2d 338, 351 (Ct. App. 2003)). In fact, there is no requirement that the same complaining party be subject to the challenged action. In *Byrd v. Irmo High School*, the Supreme Court held that even if the due process challenge to a public school suspension policy was mooted by the passage of time for the complaining student, the issue was capable of repetition for others and could evade review, and therefore continuation of the appeal was appropriate. *Byrd*, 321 S.C. at 431-32, 468 S.E.2d at 864.

Here, "Respondents are capable of repeating their actions in the future, especially since they maintain their conduct was lawful." *S.C. Pub. Int. Found.*, 421 S.C. at 122, 804 S.E.2d at 860 (finding the issue giving rise to the appeal was moot but continuing with judicial review because the agency may repeat the conduct in the future). As noted earlier, the agency and the applicant have at all times asserted the conduct challenged by LMC was appropriate. Given the conduct included only internal review without opportunity for affected person participation, similar conduct in the future may evade review. *See id.* This possibility of repetition is bolstered by the published opinion of the Attorney General's Office, obtained by DHEC with orchestration by PHM, which has been an authority cited by PHM repeatedly in these proceedings as supporting the propriety of DHEC's review and approval and which would not be affected by PHM's requests. (R. pp. 165-66; 280-81; *see also* PHM Final Br., 7, 18). Clearly, the waters are far more muddied than PHM's Motion suggests.

Not only are these issues capable of repetition, but PHM's filings in the ALC and on appeal evidence the public importance of the issues presented and the need for rules to address future conduct. PHM's Motion to Certify Case for Review by the Supreme Court presents several pages describing the public importance of its appeal. *See* PHM Mot. Certify, 9-18. In that motion, PHM reiterates its desire that the appellate courts address the vagueness of Regulation 61-31 § 508. *Id.*,

17. PHM also asserts its appeal is of "significant public interest as it raises a novel question of law – whether an entity operating under an approved cooperative agreement, can purchase health care facilities from another entity, and operate the assets under the approved cooperative agreement subject to DHEC's monitoring and regulation and additional COPA conditions, thereby having antitrust immunity." *Id.* Based just on this description by PHM, "a decision on the merits of this case certainly will affect future events, *to wit*" how DHEC reviews substantial amendments to COPAs in the future. *Sloan v. Dep't of Transp.*, 379 S.C. 160, 169, 666 S.E.2d 236, 240 (2008).

In *Sloan v. Department of Transportation*, a private citizen challenged the agency's compliance with emergency procurement provisions. Although the problematic contract had been completed shortly after the action was filed and well before the appealed summary judgment ruling, the Supreme Court declined to find the matter moot both because the issue was capable of repetition, and because of the public importance. *See id.*, 379 S.C. at 168-69, 666 S.E.2d at 240. Where judicial guidance on an issue exists, "there is no imperative and manifest urgency for an advisory opinion." *Id.* (citing *Sloan v. Greenville Cty.*, 361 S.C. 358, 606 S.E.2d 464 (2004)). "In the instant case, however, there is no case law specifically addressing the DOT's authorization of an emergency procurement. Because this is a matter of public importance which could occur at any time (given the inherent unpredictability of emergencies), we find there is an urgent nature to this issue." *Id.* at 169, 666 S.E.2d at 240. In the case at bar, PHM has not only acknowledged that the issues presented are novel, it further presents arguments implicating far more than this single transaction. To be clear, PHM takes the position that its conduct in attempting to buy its competitor's assets under a pre-existing COPA that approved a different joint operating agreement is "immunized from challenge or scrutiny under federal antitrust laws under the plain and

unambiguous language of § 44-7-520(5).”[6] PHM Final Br., 35. The public interest is served by finality, and LMC is entitled to affirmance, as opposed to an outcome that nullifies the significant investment of time and resources that all parties have committed to this proceeding, both prior to these consolidated appeals and since – not an insubstantial task given the plethora of motions pursued by PHM since June 2020.

CONCLUSION

For the reasons set forth above, LMC respectfully requests that the Court deny PHM's Motion to Vacate Appealed Orders. LMC has no objection to PHM's request to dismiss its appeal, subject to the provisions of Rule 222, SCACR.

[6] There is no Section 520(5) in the COPA Act.

Respectfully submitted,

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……………………………………………………………………………Respondent/Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on April 19, 2021, she caused a copy of the foregoing ***Petitioner/Appellant's Return to Motion to Withdraw Appeal and Vacate Appealed Orders*** to be served upon all parties of record by email addressed as follows:

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