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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Case No. 2021-000617

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair, Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Beaufort Memorial Hospital, Respondents.

INITIAL BRIEF OF APPELLANT MRI AT BELFAIR, LLC D/B/A 3T MRI AT BELFAIR

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STATEMENT OF THE ISSUES ON APPEAL

1. WHETHER THERE IS AT LEAST A SCINTILLA OF EVIDENCE THAT RESPONDENT BEAUFORT MEMORIAL HOSPITAL IMPERMISSIBLY SPLIT OUT THE "RELOCATION" COSTS TO AVOID CERTIFICATE OF NEED REVIEW.

2. WHETHER THE ADMINISTRATIVE LAW COURT ERRED IN FAILING TO PROVIDE APPELLANT WITH PROPER NOTICE BEFORE CONVERTING THE MOTION TO DISMISS TO ONE FOR SUMMARY JUDGMENT.

3. WHETHER THE "RELOCATION" AT ISSUE IS AN ACQUISITION AND / OR EXPENDITURE AND SUBJECT TO CERTIFICATE OF NEED REVIEW.

4. WHETHER THE FACILITIES AT ISSUE ARE "HEALTH CARE FACILITIES" UNDER THE APPLICABLE CODE AND REGULATIONS AND THEREFORE SUBJECT TO CERTIFICATE OF NEED REVIEW.

STATEMENT OF THE CASE

This matter is before the Court on appeal from an Order of the Administrative Law Court ("ALC") dated March 30, 2021 Granting Respondents' Motion to Dismiss (the "Order") as amended by the Order Granting in Part and Denying in Part Petitioner's Motion to Alter or Amend and Granting Respondent's Motion to Dismiss entered May 14, 2021 (the "Final Order"). Appellant MRI at Belfair, LLC, d/b/a 3T MRI at Belfair ("Belfair") timely filed a notice of appeal on June 11, 2021, and a transcript of the hearing was submitted on July 6, 2021. On July 9, 2021, Belfair requested an extension of an additional thirty days to file this Initial Brief up to and including September 7, 2021. This Court granted the motion for an extension of time on July 12, 2021, for Belfair to file the Initial Brief up to and including September 7, 2021.

I. THE PARTIES

Respondent Beaufort Memorial Hospital ("BMH") calls itself the "largest medical facility between Savannah, Ga. and Charleston, S.C." *About Us*, BMHSC.org, available at https://www.bmhsc.org/about-us/ (last visited Aug. 30, 2021). According to its website, BMH has locations in five separate "communities" including Beaufort, Bluffton, Lady's Island, Port Royal, and Varnville / Hampton. *Find a Location,* BMHSC.org, available at https://www.bmhsc.org/find-a-location/ (last visited Aug. 30, 2021). As relevant here, BMH operates one facility at 300 Midtown Drive, Port Royal, South Carolina (the "Port Royal Facility"), and recently opened a brand new facility almost 20 miles away from the Port Royal Facility in Okatie at 122 Okatie Center Blvd North, Okatie, South Carolina (the "Okatie Facility"). (*See* Staff Response to Request for Final Review, Docket No. 20-RFR-37, at 2, attached to MRI at Belfair's Resp. to Mot. to Dismiss as Ex. A [hereinafter,"Staff Response"] and Request for NA Determination at 1, attached to Belfair's Resp. to Mot. to Dismiss as Ex. 1 to Ex. D [hereinafter "Request for NAD"].)

Appellant MRI at Belfair, LLC ("Belfair") operates a single MRI facility in Bluffton, South Carolina very near the Okatie Facility.

II. THE RELEVANT REGULATORY SCHEME

Because the claims in this case are based on the regulatory scheme set forth in the Certificate of Need Act (the "CON Act"), S.C. Code Ann. § 44-7-110, *et seq.*, and relevant regulations, it is helpful to begin with the relevant statutory and regulatory background.

The purpose of the CON Act "is to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure high quality services are provided in health

facilities in this state." S.C. Code Ann. § 44-7-120 (emphasis added). As such, the CON Act requires that persons and facilities apply for a Certificate of Need ("CON") prior to undertaking certain projects, and that the South Carolina Department of Health and Environmental Control ("DHEC") undertake a CON review prior to issuing a CON. *Id.*

As relevant here,

> "[a] person or health care facility . . . is required to obtain a [CON] from the department before undertaking . . . the construction or other establishment of a new health care facility, . . . [a]n expenditure by or on behalf of a health care facility in excess of []$2,000,000[], . . . [and] the acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of [$600,000]."

S.C. Code Ann. § 44-7-160(1), (3), and (6); S.C. Code Ann. Regs. 61-15, § 102(1)(a), (c), and (f). To maintain the integrity of the system, "**[a]n applicant may not split or combine one expenditure into two or more expenditures for the purpose of avoiding [CON] review**." S.C. Code Ann. Regs. 61-15 § 102(2) (emphasis added). "When any question exists, a potential applicant shall forward a letter requesting a formal determination by [DHEC] as to the applicability of the [CON] requirements to a particular project." *Id.* § 102(3).

Certain projects and acquisitions are "exempt" from CON review, but require a written determination from DHEC of that exemption, and others are exempt without a written determination. As relevant here, "[t]he replacement of like equipment for which a [CON] has been issued and the replacement does not result in a material change in service or a new service" is exempted, but a written determination of the exemption is required. S.C. Regs. Ann. 61-15 § 104.

In addition, CON review is "not applicable" to other projects, some of which require a written Non-Applicability Determination ("NAD") from DHEC and some that do not. As relevant here, an NAD is required for the: (1) "[r]eplacement of like equipment with similar capabilities" and (2) "[a]cquisition of medical equipment which is to be used for diagnoses or

treatment if the total project cost is not in excess of []$600,000[]." S.C. Code Ann. Regs. Ann. 61-15 § 105(1). Notably, an NAD is also required by § 102(3) of the Regulations whenever a question exists as to the applicability of the CON laws to a project. S.C. Code Ann. Regs. 61-15, § 102(3). By this provision, a provider can—and indeed should—request an NAD whenever there is doubt about a project's CON status, and obtaining an NAD carries the benefit of a formal regulatory determination that the project is permissible, which effectively guarantees the provider that DHEC will not seek to shut down the project on the grounds that it needed a CON. Where an NAD is granted, it is valid for a period of 12 months after issuance. *Id.*

Notably, the statutes and regulations do not contain any exemption or non-applicability status for the relocation of medical equipment or services.

III. THE UNDERLYING FACTS

In July 2003, DHEC issued an "exemption"[1] to Lowcountry Medical Group for the replacement of an old, obsolete 1.0T MRI with a new 1.0T MRI at the Port Royal Facility ("Exemption E-03-49"). (*See* Staff Response to Request for Final Review, Docket No. 20-RFR-37, at 2, attached to MRI at Belfair's Resp. to Mot. to Dismiss as Exhibit A [hereinafter, "Staff Response"].)

On April 4, 2019, almost 16 years after the original exemption, BMH, which had become the owner of Lowcountry Medical Group, received an NAD to replace the 2003 MRI at the Port Royal Facility with a new Canon Medical Titan 1.5T MRI ("NA-19-03" or the "2019 NAD").[2]

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[1] The CON regulations were updated in 2012 to separate exemption determinations from non-applicability determinations ("NADs").

[2] DHEC in the Staff Response and BMH in their motion refer to this as NA-19-09, but the documents DHEC provided in response to a FOIA request indicate that this was NA-19-03. (*See* April 4, 2019 Letter, at 1.) Thus, it appears that both DHEC and BMH were referring to NA-19-03, which is the only NAD of April 4, 2019 that was provided by DHEC.

(Staff Response, at 2.) In that NAD, DHEC stated that the NAD was based on S.C. Code Ann. Regs. 61-15 § 105(1)(a), which provides that CON review is not applicable to the "[r]eplacement of like equipment with similar capabilities." According to the materials submitted by BMH, the 1.5T MRI was purchased for $1,229,037.00. (*Id.*) Per the CON regulations, the NAD was valid for 12 months—April 4, 2019 to April 4, 2020. (*See* April 4, 2019 Letter from DHEC to Beaufort Memorial, at 2, attached to Belfair's Resp. to Mot. to Dismiss as Exhibit B [hereinafter "April 4, 2019 Letter"].)

On May 20, 2020, approximately six (6) weeks after the expiration of NA-19-03, BMH requested ***another*** NAD regarding the exact same piece of equipment. This time, BMH requested an NAD for the "relocation" of the 1.5T MRI from the Port Royal Facility, where it had just been installed, to the brand new Okatie Facility located almost 20 miles away and in a vastly different service area. (*See* Request for NAD, at 1.) **In that request, BMH submitted information showing that it intended all along for the new MRI to be installed in Okatie, not to replace the old MRI at Port Royal, as was deceptively claimed in the first NAD request**. (*Id.* at 20 (showing the justification of the **purchase** of the $1.2 million MRI was a "future move to new Bluffton MOB").) Despite this information, DHEC erroneously issued NA-20-04 (the "2020 NAD"), an NAD based on the alleged total project cost reported by BMH of $125,000.

In addition to moving the new 1.5T MRI to a brand new facility and building out a room for the MRI with shielding and other necessary construction, BMH is also moving a CT scanner to the new facility under an exemption. (*See* Certificate of Need Update, DHEC, June 2020 at 22, attached to Belfair's Resp. to Mot. to Dismiss as Exhibit C [hereinafter, "CON Update"].) [3] As

[3] It is notable that despite a FOIA request to DHEC requesting all information and documents submitted by BMH regarding the new Okatie facility, DHEC failed to provide Belfair with any information or mention of the requested exemption regarding the CT scanner.

demonstrated in the drawings BMH submitted to DHEC, BMH is building an entirely new imaging center, in a brand new location, in a new service area, using brand new equipment, but attempting to avoid any meaningful need review from DHEC. (*See* Request for NAD at 25.)

Contrary to BMH's claims, Belfair's expert health planner, Kathy Platt, has opined that the project cost to install a new 1.5T MRI in a brand new medical facility such as the Okatie facility is well above and beyond the $125,000 claimed by BMH. (*See* Platt Aff. ¶¶ 9-10, attached to Belfair's Resp. to Mot. to Dismiss as Exhibit D [hereinafter, "Platt Aff."].)

On July 1, 2020, despite the clear problems with BMH's request and submissions, DHEC issued the instant NAD for the "relocation" of the new MRI from Port Royal to Bluffton. (NA-20-04, attached to Belfair's Resp. to Mot. to Dismiss as Exhibit E.) Belfair timely requested final review. (Request for Final Review, attached to Belfair's Resp. to Mot. to Dismiss as Exhibit F.) The DHEC Board declined to hold a final review conference, and Belfair timely requested a contested case hearing in the ALC. (Denial of Final Review, attached to Belfair's Resp. to Mot. to Dismiss as Exhibit G; Request for Contested Case Hearing, attached to Belfair's Resp. to Mot. to Dismiss as Exhibit H.)

IV. DISMISSAL WITHOUT A CONTESTED CASE HEARING

The contested case was assigned to the Honorable H.W. Funderburk, Jr., on September 24, 2020. (Notice of Reassignment.) Judge Funderburk ordered the parties to submit prehearing statements on September 28, 2021, and Appellant and Respondents each submitted prehearing statements on October 28, 2021. Neither Respondent filed a motion to dismiss before submitting their prehearing statements. The ALC entered a Scheduling Order providing, among other things, that discovery was to be completed by March 15, 2021. Belfair promptly served written discovery requests on BMH, but BMH never provided any responses.

Instead, BMH filed a Motion to Dismiss the contested case action on January 8, 2021. A hearing on the motion to dismiss was held on March 16, 2021, and the ALC issued an Order Granting the Motion to Dismiss on March 30, 2021 (the "Order"). In that order, the ALC held that (1) the ALC had jurisdiction over the contested case hearing, (2) Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure were not appropriate avenues to dismiss the case, but summary judgment was appropriate, even though no notice of converting the motion to dismiss to a motion for summary judgment was given, and (3) there was no genuine issue of fact as to the cost of the relocation of the MRI, which was $125,000 (as claimed by BMH), and therefore the cost to relocate did not exceed the $600,000 threshold.

Belfair filed a timely Motion to Alter or Amend the Order Granting the Motion to Dismiss on April 9, 2021. In that motion, Belfair argued: (1) the Rules of Civil Procedure require the Court give Belfair proper notice before converting the motion to one for summary judgment and no notice was given; (2) Belfair demonstrated the need for discovery to establish the facts necessary to support its claim; (3) the facilities at issue are "healthcare facilities"; (4) the Order Granting the Motion to Dismiss failed to address BMH's improper cost splitting; (5) relocation of the MRI was an acquisition needing CON review; and (6) CONs, NADs, and written exemptions are location specific.

In response, on May 14, 2021, the ALC issued a new Order granting in part and denying in part the motion to alter or amend (the "Final Order"). In the Final Order, the ALC failed to address the significant case law requiring notice before converting a motion to dismiss to a motion for summary judgment. In addition, the Final Order held that discovery to determine the cost of the relocation would not establish a material issue of fact because the relocation was not an acquisition. Third, the Final Order held that the facilities at issue were not "health care facilities" under the

applicable code and regulations. Finally, the Final Order held that there was no impermissible cost-splitting and that NADs are not location specific. As demonstrated herein, the Final Order should be vacated, and Belfair should be given the opportunity to conduct discovery.

STANDARD OF REVIEW

"Summary judgment is a drastic remedy to be invoked cautiously and must be denied if [the non-moving party] demonstrates a scintilla of evidence in support of [it's] claims." *Abdelgheny v. Moody*, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (Ct. App. 2020). An appellate court "review[s] the granting of summary judgment under the same standard applied by the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure." *Bennett v. Carter*, 421 S.C. 374, 379, 807 S.E.2d 197, 200 (2017). Pursuant to Rule 56(c), SCRCP, summary judgment is only appropriate where there is "no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law." "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005).

"[S]ummary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom." *Gadson v. Hembree*, 364 S.C. 316, 613 S.E.2d 533 (2005); *see also Miller*, 365 S.C. 204, at 220, 616 S.E. 2d at 729 ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.") (citing *Gadson*, 364 S.C. 316, 613 S.E.2d 533). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004) (citing *Schmidt v.*

Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003)). "[T]he question of existence or nonexistence of evidence is one of law." *Mims v. Coleman*, 248 S.C. 235, 237, 149 S.E.2d 623, 624 (1966).

Moreover, issues of statutory interpretation are legal questions reviewed by the appellate court *de novo*. *Hueble v. South Carolina Dept. of Natural Resources*, 416 S.C. 220, 228, 785 S.E.2d 461, 465 (S.C. 2016). "In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." *Id.* at 467, 636 S.E.2d at 605–06.

SUMMARY OF ARGUMENT

BMH attempted to avoid CON review for the placement of a brand-new MRI at its brand-new Okatie Facility by splitting the cost into at least two NAD requests: one for "replacement" of the obsolete MRI at the Port Royal Facility with a new MRI and another for "relocation" of that very same new MRI to the Okatie Facility. Based on the limited record before the ALC, two important things are undisputed. *First*, BMH admits in its own submissions to DHEC that BMH's plan all along was to locate the new MRI in Okatie, not to replace the MRI in Port Royal. *Second*, had BMH forthrightly presented the purchase of a new MRI for the Okatie Facility as a single project (instead of deceptively splitting the purchase and relocation into separate NAD requests), a Certificate of Need would have been required. The core question presented by the this appeal is whether the BMH two-step of separately requesting an NAD for "replacement" and then immediately thereafter a second NAD for "relocation" of the same piece

of expensive medical equipment is a permissible means of circumventing the CON laws, or whether this practice violates the clear prohibition against cost-splitting set forth in S.C. Regs. 61-15 § 102(2).

This question matters because the order below provides a clear roadmap to health care providers seeking to avoid CON review: simply "replace" a piece of equipment in an unfavorable location and then get a second NAD to move the equipment to any location the provider deems more favorable, no matter the need or other project review criteria applicable to the new location. Allowing this practice flies in the face of the plain text of the CON regulations and utterly subverts the purposes of the CON Act. The CON regulations state that an applicant may not "split . . . one expenditure into two or more expenditures for the purpose of avoiding [CON] review." S.C. Code Ann. Regs. 61-15 § 102(2). Yet that is *exactly* what BMH did here—it intentionally split the real project (acquiring a new MRI in Okatie) into two expenditures (one for purchasing the MRI as a "replacement" and another for relocating the MRI) to avoid CON review. Moreover, allowing such a split means that BMH can locate a brand new piece of equipment costing well above the $600,000 threshold in a location that DHEC has never reviewed for need, accessibility, financial feasibility, adverse impact, or any of the project review criteria set forth in the CON regulations.

The BMH two-step makes a mockery of the CON system, and it was error for the ALC to permit it at all, much less on a pre-discovery motion to dismiss that the ALC converted into a motion for summary judgment without notice to Belfair. Indeed, the ALC's conversion of BMH's motion to dismiss into a motion for summary judgment was procedurally improper because Belfair was not given notice and an opportunity to develop the factual record at all before summary judgment was entered against it. Moreover, despite being denied notice

required under the law, Belfair did present significantly more than a scintilla of evidence supporting its claims. Accordingly, the Order should be vacated, and Belfair should be permitted to take discovery on whether BMH impermissibly split the costs of the project for purposes of avoiding CON review. While that conclusion seems obvious from the limited pre-discovery record available, Belfair has little doubt that discovery will make that conclusion incontrovertible and place the ALC in a position to render a reasoned decision on that point backed by a full factual record.

In addition to condoning cost-splitting that the CON regulations specifically prohibit, the ALC's order also erred in holding that moving medical equipment from one location to another is not an "acquisition" as to the new location subject to CON review, and in holding that the Okatie Facility is not a "healthcare facility" required to obtain a CON for expenditures in excess of $2,000,000. For all of these reasons, the order below should be vacated and the case remanded to ALC to permit discovery.

ARGUMENT

I. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER BMH IMPERMISSIBLY SPLIT OUT THE "RELOCATION" COSTS TO AVOID CON REVIEW.

The ALC failed to meaningfully address BMH's clear splitting of expenditures into multiple NAD requests to circumvent CON review. The CON regulations provide in relevant part that, "**[a]n applicant may not split or combine one expenditure into two or more expenditures for the purpose of avoiding Certificate of Need review**." S.C. Code Ann. Regs. 61-15 § 102(2) (emphasis added). The "total project cost" is defined as "the estimated total capital cost of a project including land cost, construction, fixed and moveable equipment, architects' fees, financing cost, and other capital costs properly charged under generally accepted

accounting princip[le]s as capital costs." *Id.* § 103(24). "The calculation of total project cost [] is part of the mechanism by which the CON Act achieves its goal of cost containment." *MRI at Belfair, LLC v. S.C. DHEC,* 392 S.C. 314, 319, 709 S.E.2d 626, 629 (S.C. 2011). "The CON regulations require DHEC to use common practice and common sense in determining whether a proposal presents a single expenditure for the purposes of the [monetary thresholds.]" *Id.* BMH, however, has done exactly what is prohibited by the regulations—attempted to split the expenditure of the new MRI for Okatie into multiple different "projects" to avoid CON review. DHEC erroneously accepted this nonsensical and arbitrary split.

BMH first submitted the original NAD request in 2019. In that request, BMH claimed that the MRI was purchased to replace an old MRI at the Port Royal facility. BMH, however, did not disclose the actual scope of the project or its intent to improperly split project costs, and because of that deception, NA-19-03, standing alone, drew no objections.

Only when BMH submitted the 2020 NAD request was the broader scope of the project revealed to include ***both*** the purchase of the MRI ***and*** placement of the new MRI at the brand new Okatie Facility.[4] In that request and for the first time, BMH submitted evidence that the alleged "replacement" of the MRI at the Port Royal facility was merely an attempt to avoid CON review, since the MRI was purchased for the express purpose of installing it at the brand new Okatie Facility. (*See* Request for NAD at 20 (a capital expense request included in the 2020 NAD request showing that the 1.5T MRI was purchased to "move to new Bluffton MOB")). The 2020 NAD request was a clear attempt to impermissibly split the total project cost of the new MRI purchased for the new Okatie facility into two projects: the purchase and the placement

[4] Review of this NAD Request also led to the discovery of the further deception at play regarding the entire imaging center that has been split into an unknown number of "projects" in an attempt to avoid CON review.

at Okatie. It was not until the 2020 NAD request that the improper splitting occurred and the attempt to circumvent the CON review was revealed. Thus, the Court should vacate the Final Order and hold that the 2020 NAD is in violation of applicable statutes and regulations and BMH must be required to submit to a CON review. *See MRI at Belfair, LLC v. SC DHEC and Southern MR, LLC*, 392 S.C. at 321-22, 709 S.E.2d at 630 ("Where, as here, DHEC's chosen method has no basis in the facts of the proposal and arbitrarily allows a potential applicant to avoid the CON review process, it is contrary to the purpose of the CON Act and therefore an error of law.").

Moreover, BMH is also attempting to impermissibly split the costs of an entirely new imaging center in the brand new Okatie facility by parceling out each piece of equipment as a separate project. Publicly available evidence has also indicated that NA-20-04 is a part of this impermissible cost splitting for the much more significant project—a brand new imaging center. (Platt Aff. ¶ 10.) By failing to recognize this clear violation of law, the ALC has opened the door for the blatant disregard for CON laws and eviscerated the authority of DHEC to oversee healthcare in South Carolina. For these reasons, the Court should vacate the Final Order and hold that the 2020 NAD constitutes impermissible cost-splitting under the CON Act and that the project requires CON review, or, at the very least, permit Belfair the opportunity to conduct discovery to further establish these facts.

II. THE ALC ERRED IN FAILING TO PROVIDE BELFAIR WITH PROPER NOTICE BEFORE CONVERTING THE MOTION TO DISMISS TO ONE FOR SUMMARY JUDGMENT.

The ALC also committed reversible error erred by converting BMH's motion to one for summary judgment without providing the necessary notice and opportunity to respond. Rule 12(b), SCRCP, provides that while a court may treat a motion to dismiss for failure to state a claim as

one for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." No such opportunity was given here. Converting a motion to dismiss to one for summary judgment without providing proper notice to the plaintiff is reversible error. *BPS, Inc. v. Worthy*, 362 S.C. 319, 331, 608 S.E.2d 155, 162 (Ct. App. 2005) ("The circuit judge committed reversible error in proceeding to consider and convert the initial Rule 12(b)(6) motion to a motion for summary judgment without giving [plaintiff] adequate and reasonable opportunity and time to present all materials pertinent to a Rule 56 motion.").

Even under the summary judgment standard, however, Belfair has presented more than sufficient evidence to establish the existence of genuine issues of material fact, and Belfair must therefore be given the opportunity to conduct discovery to rebut the factual allegations in BMH's Motion to Dismiss. The standard for granting summary judgment was simply not met here. Rule 56(f) states:

> [s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP. Moreover, "[s]ummary judgment is a drastic remedy to be invoked cautiously and must be denied if [the non-moving party] demonstrates a scintilla of evidence in support of [it's] claims." *Abdelgheny v. Moody*, 432 S.C. 346, 349, 852 S.E.2d 225, 227 (Ct. App. 2020).

As the Final Order recognizes, prior to the ALC issuing the Order, Belfair was unaware of any intent to convert the motion to one for summary judgment, as Beaufort Memorial did not request that the motion be converted, nor did the Court intimate its intention to do so. (*See* Final

Order at 4.) Belfair had no pleading from which to rely on, since the complaint here is an informal letter and notice for a contested case hearing, rather than a traditional complaint. Nonetheless, because BMH's motion was filed as a motion to dismiss under SCRCP 12(b)(6), Belfair's submissions and arguments focused on the pleading standard under Rule 12(b)(6) and not on the generation of evidence required to respond to a Rule 56 motion. The affidavit Belfair attached to the brief responding to the 12(b)(6) motion was merely an initial statement from Belfair's expert to support the claims, not an affidavit in response to a motion for summary judgment (though, notably, Belfair is the only party that submitted an affidavit at all). In fact, that affidavit set forth the need for discovery to establish the material facts of the case and therefore fulfilled the requirements of Rule 56(f), SCRCP. (*See* Platt Aff. ¶¶ 7-12.) Specifically, Belfair's expert provided opinions that the costs claimed in the 2020 NAD did not include the actual total project costs, including but not limited to the value of the equipment, the cost of construction, design, or other costs associated with building and outfitting the facility for the use of the equipment [and] a prorated portion of the value of the new medical facility." (Platt Aff. ¶ 8-9.) She also clearly stated that she needed the benefit of discovery to provide the actual total project costs. (*Id.* ¶¶ 9-10.)

However, Belfair was not given reasonable opportunity and time to present <u>**all**</u> materials relevant to a summary judgment motion. Accordingly, the ALC erred in granting summary judgment and the Court should reverse the Final Order. *See BPS, Inc. v. Worthy*, 362 S.C. at 331, 608 S.E.2d at 162. Moreover, pursuant to SCRCP 56(f), Belfair has presented more than sufficient evidence to defeat summary judgment and the Court should require the ALC to permit Belfair the opportunity to develop the facts in discovery. The ALC's holding that, in this case, "Rules 12(b)(1) and (6) are inappropriate," should stand. (*See* Final Order at 4.) Since motions

under Rules 12(b)(1) and (6) are inappropriate in the context of this contested case hearing, the Court should vacate the dismissal and permit Belfair to conduct discovery.

III. THE "RELOCATION" IS AN ACQUISITION AND/OR EXPENDITURE SUBJECT TO CON REVIEW.

Even if BMH had not impermissibly split the project costs into two NAD requests (and it did), the "relocation" of the MRI, standing alone, is subject to CON review because the prior CON / NADs cannot transfer to a new location. The Final Order incorrectly held that the relocation of the MRI was not an "acquisition" as a matter of law and that discovery was therefore unnecessary. (Final Order at 4.) This holding is in error because: (1) the relocation of expensive medical equipment requires CON review simply because a CON/NAD cannot transfer to a new location; (2) the "relocation" was an acquisition exceeding the regulatory threshold amount; and (3) the total expenditure exceeds the threshold under applicable regulations.

A. <u>A "Relocation" requires CON review because CONs, NADs and Written Exemptions are location specific.</u>

CONs, NADs, and written exemptions are location specific, and cannot be carried to a new location. The applicable regulations provide that a CON or NAD is required, as applicable, for a service or equipment that is being relocated, even if it is already in existence, operational and providing services in a particular service area and even if the service or equipment received the approval required when they first came into service. S.C. Code Regs. Ann. 61-15 § 102(4) ("These provisions [requiring CON Review] do not apply to acquisitions or changes of ownership of health care facilities, services, and equipment that are already in existence, operational, and providing services. . . **so long as the facility or service is not being relocated."** (emphasis added)). Likewise, the 2020 State Health Plan specifically provides that, "[*a*] *Certificate of Need is required to transfer or exchange beds, services and/or equipment.*" *See*

DHEC, 2020 South Carolina Health Plan, available at https://scdhec.gov/sites/default/files/media/document/2020_South_Carolina_Health_Plan-June_12_2020_0.pdf, at 10 (Mar. 13. 2020). The Health Plan specifically requires the review of a transfer of equipment *even within the same service area*. *Id.*

Further, the regulations contemplate the need for CON review where a service is being relocated by specifying that an applicant seeking a relocation CON must supply location specific demographic information. *See* S.C. Code Ann. Regs. Ann. 61-15 § 802(2)(d) ("[i]n the case of a reduction, **relocation,** or elimination of a facility or service, the applicant should address the need that the population presently has for the service, the extent to which that need will be met by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other underdeveloped groups, to obtain needed healthcare." (emphasis added)). If a "relocation" did not require regulatory review, as the ALC erroneously held, then §§ 102(4)'s and 802(2)(d)'s references to relocation would be entirely without meaning. The fact that the DHEC chose to provide specific requirements for a relocation request demonstrates that a relocation of equipment requires a CON. Thus, the relocation of equipment, which otherwise requires a CON review (*i.e.* where the **total** project cost is more than $600,000 or the total expenditure is more than $2,000,000), requires a CON review to ensure regulatory oversight into the effect of such a relocation on the relevant communities.[5]

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[5] In addition to other regulatory references to the location specific nature of a CON, the CON process itself demonstrates that it is location-specific. A CON is granted on the basis of a thorough application process which includes, in part, submission of significant information about the location of the facility, service and/or equipment, the need of public in the service area, and

Further, any conclusion other than the need for CON review for a relocation would be contrary to the purposes of the CON Act. The purpose of the CON Act "is to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure high quality services are provided in health facilities in this state." S.C. Code Ann. § 44-7-120 (emphasis added). In other words, the General Assembly enacted the CON Act to ensure that health services were not unnecessarily grouped in overserved areas, leaving other areas without access to the same quality of services. To that end, the relocation of valuable equipment providing valuable services necessarily requires a CON review for DHEC to determine the impact on the access to healthcare in the affected areas.

Here, the original CON under which the old MRI was presumably installed at the Port Royal Facility was specific to that facility, and cannot be transferred or imputed to the new Okatie Facility. Similarly, the NAD granted to BMH for replacement of the old MRI with the 1.5T MRI in 2019, NA-19-03, was specific to the Port Royal Facility—otherwise, it would not be a "replacement". Thus, the relocation of equipment or the expenditure of moving and installing equipment in a new facility cannot be piggy-backed onto the old CON or NAD, as it would strip DHEC of the authority and obligation to ensure reasonable access to quality health services. If the MRI is moved without CON review, the need for the services will have never been assessed for the new facility, nor will the effect of the removal of the service in the Port Royal area. To do so would deprive the public of the benefit of the CON Act. To so hold would have the effect of creating an unregulated exemption to the CON Act that would render it without teeth, an exemption the General Assembly has not created. If entities were permitted to

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an endorsement from the community, all of which are location specific. S.C. Code Ann. Regs 61-15 §§ 202(2)(a-c).

purchase valuable equipment under a CON, NAD, or exemption issued to a facility in an underserved area and merely wait 12 months before moving the equipment wherever it pleases (as BMH has done here), the CON Act's purpose will be undermined. For these reasons, the Court should hold that a relocation (within or outside of a service area) requires CON review if otherwise applicable and that the 2020 NAD, which clearly attempts to do just that, is unlawful and must be reversed.

In addition, there is no defined service area in the context of CONs for acquisition of an MRI or expenditure of an imaging center, and to the extent a service area can be defined, the Port Royal and Okatie Facilities are in different ones. Neither type of project is covered specifically under the State Health Plan, which establishes services areas for various types of services. Thus, there is no established "service area," and the ALC failed to define or otherwise explain the holding that the Okatie and Port Royal facilities are within the same service area, ***because there is no explanation or factual support for this erroneous conclusion***. At the very least, Belfair should have been permitted to take discovery to establish whether the facilities are in the same service area.

Indeed, the only evidence presented regarding service areas was the opinion of Belfair's expert witness, who stated that "a service area is not determined by county lines, but by the communities served in each area [and b]ased on [her] experience, the communities of Port Royal, South Carolina and Okatie, South Carolina would not be in the same service area, as they are very different communities, and their health facilities serve different populations." (Platt. Aff. ¶ 11.) Therefore, even if the Court considers the service area as a factor (and it should not), Port Royal and Okatie are distinct service areas with vastly different demographics and access to

healthcare. As noted above, the two areas are vastly different communities with distinct needs. (*See* Platt Aff. ¶ 11.)

Here, the requested "relocation" constitutes the introduction of a new service (MRI imaging) to a new facility and a new healthcare community, which substantially changes the evaluation of the introduction of the equipment into the service area that was presumably reviewed by DHEC in the original CON. As a result, even by BMH's standards, the proposed project requires a CON review. Therefore, even if there were some exemption for relocations within a service area (and clearly there is not), the relocation at issue here is not within the same community and likely not within the same service area, to the extent that can be defined here. Importantly, had a CON application been filed, DHEC would have necessarily evaluated not only the need for an additional MRI in Okatie, but the impact of reduced access to the now absent MRI in the under-served community of Port Royal. As it stands, however, DHEC has not evaluated either.

Accordingly, the Court should reverse the findings that a relocation within a service area is somehow exempt from CON review and that the Okatie and Port Royal Facilities are within the same service area. Instead, the Court should hold that the relocation requires a CON review, and, at the very least, Belfair must be given the opportunity to conduct discovery.

B. The "Relocation" is an acquisition.

Further, the alleged "relocation" qualifies as an acquisition, the cost of which exceeds the threshold and requires CON review. The Final Order incorrectly classified the acquisition of the 1.5T MRI by the new Okatie facility as something other than an acquisition. (Final Order at 6.) Without any citation or explanation, the Final Order concluded that no CON review was required for a relocation. In doing so, the ALC ignored the plain language of the regulations.

Although BMH classifies this transaction as a "relocation," the transaction actually involves the acquisition by a brand new facility of an almost new 1.5T MRI. A "person or health care facility [] is required to obtain a [CON] from [DHEC] before undertaking . . . [t]he acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of [$600,000]." S.C. Code Ann. § 44-7-160(3) and (6); S.C. Code Ann. Regs. 61-15, § 102(1)(c) and (f). "Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute." *Alltel Communications, Inc. v. S.C. Dept. of Revenue*, 399 S.C. 313, 320, 731 S.E.2d 869, 873 (2012) (*quoting S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010)). Black's Law Dictionary defines "acquisition," as relevant here, as "[t]he gaining of possession or control over something; esp., the act of getting land, power, money, etc. . . . [or] [s]omething acquired; esp., something one has obtained by buying it **or being given it**." Black's Law Dictionary (11th ed. 2019) (emphasis added). The "total project cost" is defined as "the estimated total capital cost of a project including land cost, construction, fixed and moveable equipment, architects' fees, financing cost, and other capital costs properly charged under generally accepted accounting princip[le]s as capital costs." S.C. Code Ann. Regs 61-15 § 103(24). The total project costs necessarily includes a portion of the capital costs associated with the new Okatie Facility and imaging center. *MRI at Belfair, LLC v. SCDHEC*, 392 S.C. 314, 709 S.E.2d 626 (evaluating the method of determining allocation of capital costs of a building to an MRI acquisition).

Here, in common parlance, the Okatie Facility is "acquiring" a new MRI. The Okatie Facility is "gaining possession or control over" and/or "obtaining" the MRI. The Okatie Facility is therefore "acquiring" the 1.5T MRI, and the 2020 NAD should have been a CON review

proposal for an acquisition. Further, the total project costs of acquiring the MRI includes, among other things, the cost of the equipment itself, the prorated cost of the construction of the new facility, the cost to up-fit the space where the MRI will be located, and the cost to move and install it, at a minimum. Virtually none of these costs were included in BMH's request for an NAD or even acknowledged by BMH. Instead, BMH included only the cost of an outdoor chiller and a long-expired quote for labor to move the MRI to an unknown location. (Request for NAD at 5 and 15 (dated Dec. 14, 2018, valid for 60 days from that date, and noting that "final pricing [is] to be determined after review of new location.").) Clearly the total project cost must include significantly more than these two costs, such as the value of the MRI, the cost to outfit the room for an MRI, the prorated construction cost of the facility, etc. Without the benefit of discovery, however, the exact additional cost is unknown (although the value of the virtually brand new MRI is likely not significantly lower than the cost to purchase it a few months early – $1,229,037.00). (*See also* Platt Aff. ¶¶ 7-9 (opining that based on her experience the project costs would exceed $600,000).) For these reasons, Belfair has presented much more than a scintilla of evidence establishing that the purported "relocation" is, by any reasonable interpretation, an acquisition over $600,000, and the Court should vacate and remand to allow Belfair an opportunity to establish these costs in discovery.

C. <u>The project is An Expenditure over $2,000,000.</u>

Further, the cost of the entire expenditure made by the Okatie facility on a new imaging center exceeds the regulatory limit and therefore requires a CON. A "person or health care facility [] is required to obtain a [CON] from [DHEC] before undertaking . . . [a]n expenditure by or on behalf of a health care facility in excess of []$2,000,000." S.C. Code Ann. § 44-7-160(3)

and (6); S.C. Code Ann. Regs. 61-15, § 102(1)(c) and (f). The definition of the total project costs is the same as defined above for an acquisition.

Here, BMH is making an expenditure on behalf of itself and the Okatie Facility that appears to exceed the $2,000,000 threshold. The total project cost of the expenditure being made includes, at a minimum, the costs described above regarding the MRI (which clearly at least approaches $2,000,000, or exceeds it). Moreover, public information reveals that BMH is, in reality, developing a brand new imaging center which contains significantly more equipment than the just MRI alone. Thus, the project costs also include the cost of other imaging equipment, the cost to design and construct the appropriate area for the imaging center, and some prorated portion of the total value of the facility as to that equipment. (*See* Platt Aff. ¶ 10 ("I believe that the total project cost of the new imaging center at Okatie is more than $2,000,000.").)

Either viewed as an acquisition or expenditure, there is a clear dispute of fact as to the actual total project costs of the project proposed by BMH, *w*hich goes to the heart of whether a CON review is required. Accordingly, under Rule 56(f) the Court should vacate and deny the motion to dismiss, or at the very least, must permit Belfair the opportunity to conduct discovery before ruling on summary judgment. The Order granting the drastic remedy of summary judgment cannot stand when Belfair has demonstrated far more than a scintilla of evidence to support its claims and has been denied the opportunity to seek discovery on the issues the ALC has claimed are not in dispute. To the contrary, the project costs involved are very much disputed, and summary judgment was improper.

IV. THE FACILITIES AT ISSUE ARE "HEALTH CARE FACILITIES" UNDER THE APPLICABLE CODE AND REGULATIONS.

The Final Order also erroneously held that neither facility involved is a "health care facility" as defined in S.C. Code Ann. § 44-7-130(10) and S.C. Code Regs. 61-15 § 103(12). Both define a "health care facility" as:

> acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, intermediate care facilities for persons with intellectual disability, narcotic treatment programs, and any other facility for which Certificate of Need review is required by federal law.

S.C. Code Ann. § 44-7-130(10). The Attorney General has clarified that the term "should be construed broadly to include hospital owned and leased buildings, thoroughfares, [and] parking lots…" S.C. Op. Att'y Gen., 2005 WL 2652377 (September 27, 2005). Further, according to BMH's website, the Okatie facility offers rehabilitation faculties and radiation therapy, and is therefore a "health care facility" under the law. Therefore, the Court should vacate the holding and either find that the Okatie facility is a "health care facility" or at least allow Belfair an opportunity to prove as much following discovery.

Moreover, the relevant statute requires "a person **or** health care facility . . . to obtain a [CON] from the department before undertaking" various actions. S.C. Code Ann. § 44-7-160 (emphasis added). Thus, even if neither the Okatie nor Port Royal facilities are "health care facilities" (and clearly they are), the CON Act would still apply to both as "persons" when they (1) undertake to acquire medical equipment with a cost of more than $600,000; and/or (2) make an expenditure over $2,000,000 on behalf of a health care facility. *See Id.*; S.C. Code Regs. 61-15 § 102(c) and (f); *see also* Okatie Medical Pavilion, https://www.bmhsc.org/location/okatie-

medical-pavilion (last visited April 6, 2021). Therefore, BMH was required to get a CON for the "relocation" of the MRI, whether it is a "health care facility" or not.

CONCLUSION

For the foregoing reasons and any others in the record or presented in any other briefing or at a hearing, if any, Appellant respectfully submits that the Final Order granting dismissal in favor of Respondents should be REVERSED.

Respectfully submitted,

Dated: September 7, 2021

By *s/Henry W. Frampton, IV*

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Docket No. 20-ALJ-07-0235-CC

MRI at Belfair, LLC, d/b/a 3T MRI at Belfair, Appellant,

v.

South Carolina Department of Health
and Environmental Control and
Beaufort Memorial Hospital, Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant MRI at Belfair, LLC, d/b/a 3T MRI at Belfair on the South Carolina Administrative Law Court and Respondents South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital, via E-mail, upon their respective attorneys of record as properly addressed below this 7th day of September, 2021:

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September 7, 2021

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Re: *MRI at Belfair, LLC, d/b/a 3T MRI at Belfair v. South Carolina Department of Health and Environmental Control and Beaufort Memorial Hospital*
Case No.: 2021-000617

Dear Ms. Kitchings:

Please find enclosed for filing, Appellant's Initial Brief with Proof of Service and Appellants Designation of Matters to be Included in the Record on Appeal with Proof of Service. Please file all and forward a file-stamped copy for our records. We appreciate your assistance in this matter and please do not hesitate to contact me should you need anything further.

With kind regards, I am,

Very truly yours,

GORDON REES SCULLY MANSUKHANI, LLP

Henry W. Frampton, IV

HWF/sas
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