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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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

Appellate Case No. 2021-000617
Case 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.

FINAL BRIEF OF
RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Did the Administrative Law Court correctly uphold the South Carolina Department of Health and Environmental Control's determination that the Project does not require a Certificate of Need because it is not an acquisition of medical equipment?

II. Did the Administrative Law Court correctly uphold the South Carolina Department of Health and Environmental Control's determination that the Project does not require a Certificate of Need because it is not an expenditure by or on behalf of a health care facility?

COUNTERSTATEMENT OF THE CASE

Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC") is the State agency responsible for administration of the State Certification of Need and Health Facility Licensure Act ("CON Act"), S.C. Code Ann. §§ 44-7-110, et seq., and Certification of Need ("CON Regulation"), Regulation 61-15. *See* S.C. Code Ann. § 44-7-140. A person or health care facility must obtain a Certificate of Need ("CON") from DHEC prior to, among other things: the acquisition of medical equipment which is to be used for diagnosis or treatment only if the total project cost is in excess of $600,000; or an expenditure by or on behalf of a health care facility in excess of $2,000,000, which under generally acceptable accounting principles, is considered a capital expenditure. S.C. Code Ann. § 44-7-160(3) and -(6); 3 S.C. Code Ann. Regs. 61-15 § 102(1)(c) and -(f). The CON Act and Regulation describe types of institutions and transactions that are exempt from CON requirements and for which CON requirements do not apply. *See* S.C. Code Ann. § 44-7-170; 3 S.C. Code Ann. Regs. 61-15 §§ 104 and 105. The CON Regulation provides a mechanism for requesting a formal determination as to the applicability of the CON requirements:

> When any question exists, a potential applicant shall forward a letter requesting a formal determination by the Department as to the applicability of the Certificate of Need requirements to a particular project. Such a letter shall contain a detailed description of the project including the extent of modifications, changes in services and total costs. Additional information may be requested as may be reasonably be

necessary to make such applicability determination. The Department shall respond within sixty (60) calendar days of receipt of the necessary information.

3 S.C. Code Ann. Regs. 61-15 § 102(3).

Respondent Beaufort County Memorial Hospital ("BMH") operates Beaufort Memorial Hospital, a licensed general hospital located in Beaufort County. (R. p. 250; R. p. 363, line 24-p. 364, line 4.) BMH also operates other healthcare services in Beaufort County, including an imaging center with magnetic resonance imaging ("MRI") in Port Royal, South Carolina. (R. p. 250; R. p. 364, lines 4-10; R. p. 376, lines 13-20.) Appellant MRI at Belfair, LLC ("Belfair") is a freestanding MRI service provider in Bluffton, South Carolina. (R. pp. 210 & 250.)

On July 31, 2003 and pursuant to Regulation 61-15 § 104(2)(h)[1], DHEC issued Exemption E-03-49 to Lowcountry Medical Group for the replacement of an existing 1.0T MRI at 300 Midtown Drive, Port Royal, South Carolina, with like equipment having similar capabilities to include the use of a temporary mobile service during the replacement period. (R. p. 259.) BMH thereafter acquired Lowcountry Medical Group, including the MRI scanner in Port Royal. (R. p. 251; R. p 393, line 17-p. 394, line 6.)

In 2019 and pursuant to Regulation 61-15 § 105(1)(a)[2], BMH requested a written Non-Applicability Determination for the replacement of its 1.0T MRI with a 1.5T MRI. DHEC thereafter issued NA-19-03 to BMH for the equipment replacement. (R. pp. 261-262.) Belfair did not oppose or otherwise appeal NA-19-03. (R. p. 251; R. p. 385, lines 14-17.) BMH notified DHEC in February 2020 that NA-19-03 was fully implemented. (*Id.*)

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[1] In 2003, Regulation 61-15 § 104(2)(h) stated, "The following are exempt from [CON]: . . . h. The replacement of like equipment with similar capabilities, or similar projects. Such exemptions must be obtained in writing from the Department." The CON Regulation was amended in 2012 to separate exemption determinations from determinations of non-applicability.

[2] Regulation 61-15 § 105(1)(a) provides that "[CON] review is not applicable to the following, but prior to undertaking the proposed project, a written determination of non-applicability from the Department is required: a. Replacement of like equipment with similar capabilities as defined by the Department in Section 103.16."

On April 21, 2020, DHEC received an email from BMH explaining its plans to relocate its 1.5T MRI from 300 Midtown Drive, Port Royal, South Carolina, to 122 Okatie Center Boulevard North, Okatie, South Carolina ("the Project") and requesting "written consent" from DHEC to proceed. (R. p. 264.) On June 8, 2020, DHEC received BMH's request for a non-applicability determination form for the Project. (R. p. 268.) On July 1, 2020, and in response to BMH's request, DHEC issued NA-20-04, stating that the CON Act "is not applicable to the [P]roject pursuant to S.C. Code § 44-7-170, S.C. Code Regs. 61-15, § 105 (2012) and related authority." (R. pp. 270-271.)

In a letter dated July 6, 2019, but received by DHEC on July 9, 2020, Belfair submitted notice that it was an affected person to the Project. (R. p. 273.) Belfair challenged NA-20-04 by filing a request for final review ("RFR") with the Board of Health and Environmental Control ("Board") on July 7, 2020, and supplemented its RFR on July 14, 2020. (R. pp. 275-278 & pp. 280-292.) The Board mailed notice of its decision not to conduct a final review conference on August 12, 2020. (R. pp. 55-56.)

Belfair filed a request for contested case hearing with the Administrative Law Court ("ALC") on September 9, 2020. (R. pp. 34-56.) BMH filed a Motion to Dismiss on January 8, 2021. (R. pp. 82-90.) After a hearing, the ALC granted the Motion by order dated March 30, 2021, properly concluding:

> As a matter of law, the relocation of the 1.5 Tesla MRI scanner from the physician's office or the office of a group of physicians in Port Royal to a similar office in Okatie is not subject to CON review under the Act as stated in DHEC Determination NA-20-04. The Department has properly determined that the Act does not apply to the relocation of this 1.5 Tesla MRI scanner.

(R. p. 19.) On April 9, 2021, Belfair filed a Motion to Alter or Amend the Order Granting Judgment in Favor of Respondents. (R. pp. 305-318.) On May 14, 2021, the ALC issued an Order

Granting in Part and Denying in Part Belfair's Motion to Alter or Amend and Granting BMH's Motion to Dismiss. (R. pp. 21-33.) Again, the ALC correctly concluded:

> As a matter of law, the relocation of the 1.5 Tesla MRI scanner from the physician's office or office of a group of physicians in Port Royal to a similar office in Okatie is not subject to CON review under the Act as stated in DHEC Determination NA-20-04. The Department Determination is proper.

(R. p. 32.) On June 11, 2021, Belfair filed and served its Notice of Appeal challenging the May 14, 2021 decision of the ALC. (R. pp. 352-356.)

In challenging NA-20-04, Belfair maintains the BMH Project requires a CON because:

(1) The Project involves an expenditure by or on behalf of a health care facility in excess of $2,000,000 which is considered a capital expenditure. *See* S.C. Code Ann. § 44-7-160(3); 3 S.C. Code Ann. Regs. 61-15 § 102(1)(c).

(2) The Project involves an acquisition of medical equipment which is to be used for diagnosis or treatment that is in excess of $600,000. *See* S.C. Code Ann. § 44-7-160(6); 3 S.C. Code Ann. Regs. 61-15 § 102(1)(f).

For the following reasons, the ALC correctly granted BMH's Motion.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

BMH's Motion cited SCALC Rule 19(A) and requested that the contested case be dismissed as a matter of law. The ALC determined the Motion invoked principles analogous to a motion for summary judgment and used such standards in reviewing and granting BMH's Motion. (R. pp. 26-27.) "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). Rule 56(c) of the SCRCP provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting *George v. Fabri*, 345 S.C. 440,

452, 548 S.E.2d 868, 874 (2001)). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). The ALC properly granted BMH's Motion and dismissed the contested case.

ARGUMENT

The ALC properly upheld DHEC's determinations. The material facts of this case are not in dispute. The Project does not involve acquisition of medical equipment. Instead, the Project involves relocation of a lawfully obtained replacement MRI scanner. The Project does not involve an expenditure by a health care facility, such as a hospital or nursing home. Instead, the Project involves relocating an MRI scanner from a physicians' office in Port Royal to a similar office in Okatie. While there may be disputes about the Project's total expenditures, such issues are not material. Accordingly, the Project does not require a CON and the ALC appropriately granted BMH's Motion.

I. THE PROJECT IS NOT AN ACQUISITION.

Belfair alleges BMH's Project requires a CON because it involves an acquisition of medical equipment which is to be used for diagnosis or treatment that is in excess of $600,000. *See* S.C. Code Ann. § 44-7-160(6) and 3 S.C. Code Ann. Regs. 61-15 § 102(1)(f). A threshold question to this CON trigger is whether the project involves an "acquisition of medical equipment." The challenged Project is a relocation of an MRI scanner, not the acquisition of medical equipment.

"The primary purpose in interpreting statutes is to ascertain and effectuate the intent of the legislature." *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). "Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of

statutory interpretation are not needed and the court has no right to impose another meaning." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). As a result, courts will "give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "Acquisition" is not defined by the CON Act or Regulation. As noted by the ALC, the dictionary definition of "acquisition" is "the gaining of possession or control over something." *Black's Law Dictionary* (11th ed. 2019); (R. p. 15.) The ALC correctly concluded, "Since BMH previously obtained the MRI scanner in question as replacement equipment pursuant to NA-19-03, no acquisition is involved in the current matter." (R. p. 15.) Because the meaning of the term "acquisition" is clear and unambiguous, no further analysis is needed.[3]

Belfair argues the Okatie facility is "acquiring" or "gaining possession or control over" the MRI scanner. This argument is mistaken. BMH at all times is in possession or control over the MRI scanner. Another person is not gaining possession or control over the MRI scanner. The Project simply involves BMH's physical relocation of the MRI scanner from one part of Beaufort County to another part. For these reasons, the Project is not an acquisition of medical equipment which is to be used for diagnosis or treatment and, accordingly, does not require a CON pursuant to S.C. Code Ann. § 44-7-160(6) and Regulation 61-15 § 102(1)(f).

II. THE PROJECT DOES NOT INVOLVE A HEALTH CARE FACILITY.

Belfair alleges the Project requires a CON because it is an expenditure by or on behalf of a health care facility in excess of $2,000,000 which is considered a capital expenditure. *See* S.C. Code Ann. § 44-7-160(3) and 3 S.C. Code Ann. Regs. 61-15 § 102(1)(c). A threshold question to

[3] If there were ambiguities, the Department's reasonable interpretation would properly prevail. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 22, 766 S.E.2d 707, 717 (2014) ("If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.").

this CON trigger is whether the expenditure is by or on behalf of a health care facility. The challenged Project involves equipment at physicians' offices[4], not health care facilities.

The CON Act and Regulation defines "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 [CON] review is required by federal law.

S.C. Code Ann. § 44-7-130(10); 3 S.C. Code Ann. Regs. 61-15 § 103(12). The Project involves relocation of BMH's MRI scanner from one physicians' office to another physicians' office. (R. p. 376, line 13-p. 377, line 13.) Physicians' offices are not "health care facilities." (*Id.*)

BMH operates a licensed hospital, which is a "health care facility." A "hospital" is defined as:

> a facility organized and administered to provide overnight medical or surgical care or nursing care of illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care is administered by or under the direction of persons currently licensed to practice medicine, surgery, or osteopathy.

S.C. Code Ann. § 44-7-130(12) and 3 S.C. Code Ann. Regs. 61-15 § 103(14). However, the Project is not by or on behalf of BMH's hospital, wherein overnight medical care is provided; instead, the Project is on behalf of BMH's physicians' office.

In the context of a hospital-owned urgent care center, the Supreme Court has found that the CON Act does not provide for different treatment of physicians' offices owned by hospitals. Specifically, the Supreme Court stated:

> The General Assembly did not choose to include an "urgent care center" in its statutory definition of a "health care facility." The only possible item the center

[4] Notably, the CON Act and Regulation explain that "the offices of a licensed private practitioner whether for individual or group practice" are exempt from CON review, but such exemption does not apply to the construction or other establishment of a new health care facility or 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. *See* S.C. Code Ann. § 44-7-170(A)(2) and 3 S.C. Code Ann. Regs. 61-15 § 104(4).

> could fall under is a "hospital," but the center clearly does not meet the CON Act's definition of a hospital because it does not offer medical and surgical services to its patients on an overnight basis. Thus, to *sua sponte* include an "urgent care center" within the statutory definition of a "health care facility" would be beyond the function of this Court. Moreover, we are concerned that [the Petitioner's] suggestion that we should treat physicians' offices owned by hospitals differently from those that are not would constitute an improper judicial restriction on a legislative provision, and it would effectively eviscerate the private business model, a result that we do not believe was ever intended by the General Assembly. The statutory and regulatory provisions regarding the exemption for a private physician's office contain the only restrictions set forth by the General Assembly and DHEC, respectively, and [the Petitioner] cannot independently engraft additional limitations that were not so specified by those authorities.

Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control, 403 S.C. 576, 597, 743 S.E.2d 786, 797 (2013). Analogous to the hospital-owned urgent care in *Amisub*, BMH's ownership of the physicians' offices in this matter is not a "health care facility."

Citing to the introductory sentence of S.C. Code Ann. § 44-7-160, which provides that "a person or health care facility . . . is required to obtain a [CON] before undertaking [various actions]," Belfair argues even if BMH's physicians' offices are not "health care facilities," the CON Act would still apply because the physicians' offices are "persons." BMH is a "person." *See* S.C. Code Ann. § 44-7-130(15) and 3 S.C. Code Ann. Regs. 61-15 § 103(18) (defining "Person" as "an individual, a trust or estate, a partnership, a corporation including an association, joint stock company, insurance company, and a health maintenance organization, a health care facility, a state, a political subdivision, or an instrumentality including a municipal corporation of a state, or any legal entity recognized by the State."). However, whether BMH is a "person" is not the relevant inquiry in determining whether a CON is required for a project pursuant to S.C. Code Ann. § 44-7-160(3) and Regulation 61-15 § 102(1)(c). As discussed above, the relevant inquiry is whether there is an expenditure by or on behalf of a health care facility. BMH's Project does not involve "[a]n expenditure by or on behalf of a health care facility," and, accordingly, does not require a CON.

CONCLUSION

For the foregoing reasons, DHEC respectfully requests the Court of Appeals affirm the ALC's granting of BMH's Motion.

Respectfully submitted,

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Certificate of Counsel

The undersigned does hereby certify that this Final Brief of Respondent DHEC complies with Rule 211(b), SCACR.

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