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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2012-2013

2110812

**Florence Surgery Center, L.P., d/b/a Shoals Outpatient
Surgery, and SCA-Florence, LLC**

v.

**Eye Surgery Center of Florence, LLC; Valley Surgery
Center, L.L.C.; and Alabama State Health
Planning and Development Agency**

**Appeal from Certificate of Need Review Board
(Declaratory Ruling-141)**

MOORE, Judge.

Florence Surgery Center, L.P., doing business as Shoals
Outpatient Surgery, and its general partner, SCA-Florence, LLC

2110812

(hereinafter referred to collectively as "FSC"), appeal from a decision of the Alabama State Health Planning and Development Agency's Certificate of Need Review Board ("the CONRB") concluding that Eye Surgery Center of Florence, LLC ("ESC"), was not required to obtain a new certificate of need ("CON") for the operation of its ambulatory surgery center in Florence.

Facts and Procedural History

In 1999, the Alabama State Board of Health licensed Valley Surgery Center, L.L.C. ("Valley"), to operate an eye-only ambulatory surgery center; that license was to expire on December 31, 2011. In a letter to the Alabama Department of Public Health dated February 17, 2011, the president of Valley indicated that Valley had closed its ambulatory surgery center, effective February 1, 2011, and that the license it had been issued was enclosed with the letter.

In a letter dated December 29, 2011, counsel for ESC asserted to the executive director of the Alabama State Health Planning and Development Agency ("SHPDA") that ownership of the eye-only ambulatory surgery center that had been operated by Valley pursuant to CON 1602-ASC was changing. That letter

2110812

also stated that Valley had operated an eye-only ambulatory surgery center in Florence pursuant to that CON since 1999; that Valley had leased the building in which its eye-only ambulatory surgery center was located from Valley Properties, LLC; that Valley had discontinued its operations effective February 1, 2011; that ESC would enter into a lease agreement with Valley and Valley Properties, LLC, that would be effective no later than January 31, 2012, for all the assets composing Valley's eye-only ambulatory surgery center, including the building, real property, equipment, and the CON. The letter further asserted that, upon approval of the change of ownership, ESC would re-license Valley's eye-only ambulatory surgery center and recommence active operations no later than January 31, 2012. The letter further stated that the lease agreement included a purchase option for ESC to purchase all the leased assets. Finally, the letter stated: "Based on the fact that there will be no change in health service, conversion of beds, or increase in bed capacity, we respectfully request that you exercise your authority ... and determine that a Certificate of Need is not required for this change of ownership."

2110812

The executive director of SHPDA responded to ESC's counsel in a letter dated December 29, 2011. That letter stated, in pertinent part: "Based on the information provided in your letter, the Change of Ownership is approved and no further action is necessary from this agency."

On March 5, 2012, FSC filed a petition for a declaratory ruling from SHPDA, requesting that the CONRB declare that the change of ownership of the CON granted to ESC for the CON previously held by Valley be deemed null and void because the CON had been transferred or assigned in violation of Rule 410-1-11-.09, Ala. Admin. Code (SHPDA). FSC requested that the CONRB declare the change of ownership of the Valley CON null and void, that it declare that ESC must apply for and obtain a new CON in order to operate an ambulatory surgery center, and that it prohibit ESC from operating the ambulatory surgery center previously operated by Valley until it had applied for and received a CON. On March 13, 2012, ESC filed an opposition to FSC's petition for a declaratory ruling. On March 19, 2012, FSC filed a reply to ESC's opposition.

On March 23, 2012, the CONRB entered a procedural order informing the parties that it had voted to continue its

2110812

hearing on the petition for a declaratory ruling filed by FSC until April 18, 2012, to allow for further investigation. It also requested that ESC provide the CONRB with a copy of the lease between ESC and Valley and that each party provide the CONRB with, among other things, any other administrative or legal authority addressing the issue. ESC responded to the procedural order on April 4, 2012, attaching a copy of the lease and "examples of SHPDA's approval of change of ownership applications based on a facility lease." Also on April 4, 2012, FSC submitted a submission asserting that SHPDA had "not approved a change of ownership for the lease of a CON without the sale of any of the health care facility's assets." FSC attached a number of exhibits to its submission.

On April 13, 2012, ESC filed a response to FSC's additional submission, asserting that the exhibits attached to FSC's additional submission were actually "examples of SHPDA change of ownership approvals based solely on health care facility leases where none of the facility's assets were sold," which, ESC asserted, contradicted FSC's argument.

On May 3, 2012, the CONRB issued a ruling that stated, in pertinent part:

"1. Before the Certificate of Need Review Board (the 'Board') is a March 5, 2012 Petition for a Declaratory Ruling filed by Florence Surgery Center, L.P. d/b/a Shoals Outpatient Surgery and its general partner, SCA-Florence LLC (collectively referred to as 'FSC'), seeking a declaration that (1) the change of ownership granted to Eye Surgery Center of Florence, LLC ('ESC') for the Certificate of Need ('CON') held by Valley Surgery Center, LLC ('Valley') be deemed null and void because the Valley CON was transferred or assigned in violation of ALA. ADMIN. CODE r. 410-1-11-.09 (2011); (2) that ESC must obtain a CON in order to operate an ambulatory surgery center; and (3) that ESC is prohibited from operating the Valley ambulatory surgery facility until it has applied for and received a CON.

"2. On December 29, 2011, ESC, a newly-formed limited liability company wholly unrelated to Valley, submitted a 'change of ownership' request to SHPDA, stating that it was entering into a 'Lease Agreement' with Valley for all of Valley's facility assets, including 'CON 1602-ASC.' ESC's request for a change of ownership was acknowledged and approved by SHPDA's Executive Director in correspondence dated December 29, 2011. FSC claims the transaction violates ALA. ADMIN, CODE r. 410-1-11-.09, which provides, in pertinent part, that CONs are not 'transferable, assignable, or convertible, other than between members of a parent-subsidiary controlled corporate group.'

"3. In response, ESC contends that SHPDA has consistently interpreted the prohibition against transferring a CON, as set forth in ALA. ADMIN. CODE r. 410-1-11-.09, as not prohibiting the acquisition of the health care facility itself. In support of its argument, ESC provided documentation of multiple Agency determinations allowing an unrelated party to acquire 'ownership' of a CON through the purchase or

lease of substantially all of the assets of a health care facility.

".....

"5. The SHPDA statutes do not reference a specific procedure for approval of a 'change of ownership'; however, they do provide that a CON is non-transferable except between certain entities under common ownership and control. ALA. CODE §§ 22-21-270(e) and (f) (1975 as amended); ALA. ADMIN. CODE r. 410-1-11-.09 (2011). SHPDA has promulgated a regulation, ALA. ADMIN. CODE r. 410-1-7-.04 (2011), governing requests for 'approval' of a change of ownership, which provides that 'If there will be no change in service, conversion of beds, or increase in bed capacity, the Executive Director may determine that a Certificate of Need is not required.' ALA. ADMIN. CODE r. 410-1-7-.04(2) (2011). Such an opinion is, in essence, a reviewability determination. As stated above, ESC obtained such a determination from SHPDA on December 29, 2011.

"6. SHPDA has consistently interpreted the prohibition against 'selling' a CON, as set forth in ALA. ADMIN. CODE r. 410-1-11-.09 (2011) of the CON Rules, not to apply to the acquisition of CON rights associated with the acquisition of the actual health care facility. In addition, the record reveals that SHPDA has on several occasions treated a lease of substantially all of the assets of a health care facility as constituting an acquisition of the facility itself. Prior to the hearing, ESC produced a copy of the lease in the present case, which indeed encompasses substantially all of the assets used in providing ambulatory surgery at the facility. Based on prior practice, ESC's lease was due to be acknowledged and approved as an acquisition of an existing health care facility and thus not requiring a new CON.

2110812

"7. In light of the foregoing, FSC's Petition is denied. However, in a separate proceeding, the Board has published a proposed amendment to ALA. ADMIN. CODE r. 410-1-11-.09 (2011) to clarify the terms necessary for a lease to be deemed a bona fide acquisition of a health care facility and not an impermissible attempt to transfer a CON. Any rule amendment adopted by the Board will apply on a prospective basis only."

(Footnote omitted.) FSC filed a notice of appeal from the CONRB to this court on May 24, 2012. See § 22-21-275(6), Ala. Code 1975 ("Any aggrieved party to a final decision of SHPDA [Alabama State Health Planning and Development Agency] may appeal the final decision of SHPDA to the Court of Civil Appeals. An appeal shall be perfected by filing a written notice of appeal with the clerk of the Court of Civil Appeals within 21 days after the decision of the agency becomes final.").

Discussion

We begin our analysis by holding that a CON issued to a limited-liability company, like Valley, cannot be transferred through any means to a totally separate and unrelated limited-liability company, like ESC. Section 22-21-270, Ala. Code 1975, provides, in pertinent part:

"(e) A certificate of need shall not be transferable, assignable, or convertible, other than

2110812

between members of a parent-sub subsidiary controlled corporate group as defined in Internal Revenue Code, 26 U.S.C. § 1563(a)(1), and shall be valid solely to the person and purpose named thereon, except to such other member of the controlled group, or by change of name or merger with another corporation."¹

The first clause of § 22-21-270(e) clearly and unambiguously provides that a CON issued in the name of one person or entity cannot be transferred to another person or entity. See Black's Law Dictionary 1636 (9th ed. 2009) (defining "transfer" as "[a]ny mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance"). The second clause of § 22-21-270(e) plainly states that a CON shall be valid solely to the "person ... named thereon."² See IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992) ("If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the

¹Rule 410-1-11-.09, Ala. Admin. Code (SHPDA), tracks the language of § 22-21-270.

²"Person" is defined in § 22-21-260(11), Ala. Code 1975, to include "[a]ny person, firm, partnership, association, joint venture, or corporation" Valley would qualify as a "person" within the meaning of § 22-21-260(11).

2110812

legislature must be given effect."). Valley was the only entity designated on its CON, so its CON would be valid solely as to Valley and no other "person," as defined in § 22-21-260(11), Ala. Code 1975 (see note 2, supra), rendering any purported lease of the CON to ESC invalid, i.e., legally ineffective. See generally Opinion of the Justices, 251 Ala. 91, 36 So. 2d 475 (1948) (holding that lease terms that violated statutory law were without legal effect).

In reaching our conclusion, we recognize that Rule 410-1-11-.05, Ala. Admin. Code (SHPDA), states, in pertinent part, that, upon completion of the construction project contemplated in a CON,

"the [CON] shall be considered fully vested and not subject to revocation, modification, or further review by the state agency, except in instances involving actual fraud, and the approval granted pursuant to the CON shall be continued in full force and effect."

We find no conflict between Rule 410-1-11-.05 and § 22-21-270. Reading the two provisions together, once a CON becomes fully vested, it will be considered irrevocable and in full force and effect, but only as to the CON holder. Nothing in Rule 410-1-11-.05 provides that the CON would remain effective even if transferred to a person other than the person to whom the

2110812

CON originally had been issued, which would violate § 22-21-270. See Ex parte Jones Mfg. Co., 589 So. 2d 208, 210 (Ala. 1991) ("An administrative agency cannot usurp legislative powers or contravene a statute.").

Contrary to certain statements in the CONRB's ruling, the legislature has specifically addressed whether a change in the ownership of an existing health-care facility operating pursuant to a CON amounts to an illegal transfer of the CON. Section 22-21-270(f) provides:

"(f) The transfer of stock in, or change of name or merger of, a corporation which holds a certificate of need shall not constitute a transfer, assignment, or conversion of the certificate."³

(Emphasis added.) A change in the ownership of an underlying corporation occurs when the stock in that corporation is transferred to another corporation. See generally Andrews v. Troy Bank & Trust Co., 529 So. 2d 987 (Ala. 1988). In § 22-21-270(f), the legislature declared that such a change in ownership in a corporation holding a CON would not amount to a transfer of the CON. See Canterbury Nursing Home, Inc. v.

³The legislature added this subsection in 1998. See Ala. Acts 1998, Act No. 98-341, p. 597, § 1.

2110812

Alabama State Health Planning & Dev. Agency, 425 So. 2d 1103 (Ala. 1983) (case in which SHPDA asserted that a sale of stock in a nursing-home corporation constituted an impermissible attempt to transfer a CON). The legislature apparently recognized that, under such circumstances, despite the change in ownership of the corporation, the CON would actually remain with the same "person," i.e., the corporation originally issued the CON. The legislature thus specifically acted to clarify its intent that a change in ownership of a corporation would not affect the continuing validity of that corporation's CON.

We note that some states have expressly classified a lease of the assets of an existing health-care facility as a change in ownership requiring the issuance of a new CON. See, e.g., Zumwalt v. Jones Cnty. Bd. of Supervisors, 19 So. 3d 672, 675 (Miss. 2009) (recognizing that a change in ownership of a nursing home includes a lease arrangement); Scott v. Ashland Healthcare Ctr., Inc., 49 S.W.3d 281, 287 (Tenn. 2001) (noting that a lease can be considered a change in ownership for CON purposes under Tennessee administrative regulations). By exempting only one form of change in ownership -- the

2110812

transfer of corporate stock -- from the CON requirement, our legislature has implicitly adopted the same rule. Section 22-21-270(f) is in the nature of a proviso.

"'Provisos serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise.' 2A Norman J. Singer, Statutes and Statutory Construction § 47.08 (6th ed. 2000).

""[Provisos] are construed using the same general criteria of decision applied to other kinds of provisions. However, where there is doubt concerning the extent of the application of the proviso on the scope of another provision's operation, the proviso is strictly construed. The reason for this is that the legislative purpose set forth in the purview of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.""

"Pace v. Armstrong World Indus., Inc., 578 So. 2d 281, 284 (Ala. 1991) (quoting Sutherland Statutory Construction, § 47.08 (4th ed.))."

Chism v. Jefferson Cnty., 954 So. 2d 1058, 1067 (Ala. 2006) (emphasis added). The legislature did not intend that financial transactions other than transfers in corporate stock would fall within the purview of the § 22-21-270 proviso.

Moreover, the reasoning behind § 22-21-270(f) does not apply when a completely separate and distinct company leases

2110812

the assets of the company in whose name a CON issued. In that case, the CON holder does not change its name, merge with the lessee, or transfer its stock to the lessee so that the lessee can be considered the same "person" as the CON holder. Rather, the two companies maintain their separate identities, and, under the general rule established by § 22-21-270(e), the CON remains valid solely as to the CON holder and invalid as to the lessee company.

SHPDA has promulgated Rule 410-1-7-.04, which provides, in pertinent part:

"(1) Any change in ownership of an existing health care facility, other than a stock purchase only, shall require that a notice of change in ownership be provided to the State Agency by the acquiring entity at least thirty (30) days before the transaction occurs.

"(2) ... If there will be no change in service, conversion of beds, or increase in bed capacity, the Executive Director may determine that a Certificate of Need is not required."

(Emphasis added.) Rule 410-1-7-.04 purports to regulate the effect of changes in the ownership of an existing health-care facility on the CON process in all cases other than those involving the transfer of corporate stock. SHPDA relies solely on § 22-21-275, Ala. Code 1975, to support its

2110812

authority to adopt Rule 410-1-7-.04; however, § 22-21-275 relates solely to the procedure for reviewing CON applications. Rule 410-1-7-.04 bestows upon the executive director of SHPDA the substantive power to allow, in those circumstances enumerated in Rule 410-1-7-.04(2), a change in ownership of an existing health-care facility, other than a corporate-stock transfer, without the issuance of a new CON. In essence, Rule 410-1-7-.04 creates a new proviso to § 21-22-270(e) that the legislature did not expressly or impliedly authorize. Rule 410-1-7-.04 usurps legislative power and, thus, cannot stand. See Pleasure Island Ambulatory Surgery Ctr., LLC v. State Health Planning & Dev. Agency, 38 So. 3d 739 (Ala. Civ. App. 2008) (holding that an erroneous administrative interpretation of the law, even one of long standing, must yield to the prevailing terms of a statute). Because the CONRB relied on Rule 410-1-7-.04 as its basis for determining that ESC could lease the assets of Valley and operate an eye-only ambulatory surgery center without acquiring a new CON, its decision was in error.

The legislature has resolved that a CON should issue to any "new institutional health service," which includes "[t]he

2110812

... acquisition through lease ... of a new health care facility." § 22-21-263(a)(1), Ala. Code 1975. Based on the nature of the lease transaction at issue in this case, we conclude that ESC is not merely succeeding Valley as the same eye-only ambulatory-surgery-center provider previously servicing Lauderdale County; rather, ESC is attempting to provide new eye-only ambulatory-surgery-center services, albeit at the same location. Therefore, ESC must obtain its own CON in order to operate the eye-only ambulatory surgery center it contemplates. To allow ESC, through the subject lease transaction, to operate under Valley's CON, or without a CON, would be to permit ESC "'to accomplish by indirection what the statute forbids.'" Gulf State Park Auth. v. Gulf Beach Hotel, Inc., 22 So. 3d 432, 441 (Ala. 2009) (quoting Weill v. State ex rel. Gaillard, 250 Ala. 328, 334, 34 So. 2d 132, 137 (1948)).

Based on the foregoing reasoning, we conclude that the CONRB erred in its decision on ESC's March 5, 2012, petition for a declaratory ruling. We therefore reverse the CONRB's ruling, and we remand the case for the CONRB to declare the change of ownership granted to ESC for the Valley CON null and

2110812

void, to declare that ESC must obtain a CON in order to operate an eye-only ambulatory surgery center at the former Valley location, and to declare that ESC is prohibited from operating an eye-only ambulatory surgery center at the former Valley location until it has obtained a CON.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Pittman, Bryan, and Thomas, JJ.,
concur.