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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
J. Michael Baxley, Circuit Court Judge

Case No. 2005-CP-40-02925

T.R., P.R., K.W., and A.M., on behalf of
themselves and others similarly situated; and
Protection and Advocacy for People with Disabilities, Inc., Respondents,

v.

South Carolina Department of Corrections; and
William R. Byars, Jr., as Director of the
South Carolina Department of Corrections, Appellants.

**REPLY MEMORANDUM IN SUPPORT OF
PETITION FOR WRIT OF SUPERSEDEAS
OR STAY PENDING APPEAL**

Appellants SCDC and its Director (collectively "SCDC") submit the following in reply to Respondents' (Plaintiffs') Return to the Petition for Supersedeas or Stay. Appellants would first note that on July 2, 2104, the parties submitted a joint motion to stay Judge Baxley's Order, pending an ongoing

mediation between the parties. If the Court grants that joint motion, there would be no need to consider the current Petition for Supersedeas unless or until an impasse is declared in the mediation. Moreover, if an impasse is ultimately declared, the Motion to Stay contemplates that the Petition for Supersedeas and the response thereto would be updated and re-filed.

ARGUMENT

The most noteworthy aspect of Plaintiffs' Return is its failure to address a number of the issues set forth in the Petition for Supersedeas. For those issues that actually are addressed, Plaintiffs' general approach is to cite the Order itself as authority for their claims, rather than addressing the many deficiencies in the Order as pointed out by SCDC. The net result is that the issues in the Petition for Supersedeas remain largely unaddressed by Plaintiffs. As a result, SCDC respectfully submits that if the Court elects to deny the Motion to Stay and to decide the Petition for Supersedeas, the Petition should be granted, for the reasons set forth herein and in the Memorandum in Support of the Petition.

1. The need for a stay until appellate review has been completed.

SCDC has pointed out that the requirement in the Order that a remedial plan be devised by SCDC is in itself an expensive undertaking that would probably involve contentious issues that, unless the Order is stayed, would be ongoing during the pendency of the present appeal. Memorandum in Support of Petition

for Supersedeas at 6-9. Plaintiffs make a conclusory and counterintuitive argument that the detailed plan described by the Order would not be expensive. Plaintiffs do acknowledge that the circuit court “could either accept the plan or modify it, presumably with further input from the parties.” Return at 3. In other words, they tacitly agree that the contents of the remedial plan could be subject to additional litigation and a likely companion appeal. This litigation would occur before a successor judge who would be largely unfamiliar with the case, and would also occur during the pendency of an appeal involving such issues as whether Plaintiffs had proven any constitutional violations and whether there is even a plaintiff with standing still left in the case. In short, SCDC suggests that it may be an inefficient use of judicial resources for a successor judge to take the time to learn the extensive record for this litigation in order to review, approve and/or modify a remedial plan that depending on the outcome of this appeal may never be implemented.

Finally, Plaintiffs on July 3, 2014, jointly moved with SCDC to stay implementation of the Order, including the preparation of a remedial plan. Since Plaintiffs have effectively agreed that a plan is not necessary during the present mediation process, SCDC reiterates that the Order should be stayed pending appeal.

2. Absence of a transcript and briefs

Plaintiffs almost completely ignore SCDC's contention that the Order was seriously flawed because it was prepared in the absence of a transcript and briefing by the parties. This effectively concedes the inadequacy of the Order on those grounds. Plaintiffs do suggest in a footnote that Judge Baxley could reasonably have decided that post-trial briefing was not necessary. Return at 20 n. 9. This is an absurd argument, because none of the prior briefs pertained to the merits issues that were the subject of the lengthy trial. It should also be noted that there were no pre-trial briefs on the merits either.

3. Lack of factual and legal support for the Order's findings

As already indicated, SCDC has pointed out a number of instances in which the Order makes conclusory findings that cite neither the record in the case nor legal authority. Memorandum in Support of Petition for Supersedeas at 25-33. In response to this, Plaintiffs merely make repeated quotes of portions of the Order. Return at 10-20. Needless to say, when a document is challenged on the basis of being conclusory, the challenge is not effectively addressed by simply quoting back the conclusory parts of the Order.

Plaintiffs should have, but apparently could not, refer this Court to specific parts of the record that support the conclusions in the Order. Plaintiffs' non-response is particularly indefensible in light of the current availability of the trial

transcript, although the transcript was not completed until months after the issuance of the Order.

Plaintiffs likewise offer little in response to SCDC's contention that there is literally no case law in the Order discussing similar factual scenarios that were deemed cruel and unusual punishment by another court. Plaintiffs cite the Order and the prior Standards Order as referencing general case law holding that systemic deficiencies (if proven) can show an unreasonable and substantial risk of serious future harm to inmates. Return at 10. However, such general statements are no substitute for specific legal authority holding that a given set of facts should be deemed to amount to cruel and unusual punishment. Again, the Order is not just somewhat deficient in this regard, it is completely deficient, because not a single case is cited to show that any specific set of facts is unconstitutional.

4. Applicable standard

With regard to the applicable constitutional standard, as opposed to the one effectively applied by Judge Baxley throughout the trial and in the Order, Plaintiffs prefer to engage in a lengthy discourse about the difference between objective and subjective components, an issue that was not discussed in SCDC's Petition. Return at 6-10. Plaintiffs continue to ignore their burden to show the kind of "extreme deprivations" that amount to cruel and unusual punishment. *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir.1995). The standard as Judge Baxley saw it in his

2010 Standards Order, and throughout the trial as well, was stated in the Standards Order as follows:

This Court finds that the analysis under the Article XII, § 2 claim, however, is fundamentally different. The plain meaning of the terms "cruel and unusual" and "minimally adequate" connote disparate concepts. The subjective and objective tests under the Eighth Amendment are not identical to the obligations imposed by Article XII, § 2 . . . Thus, this Court holds that the issue under the Plaintiffs' Article XII, § 2 claim is whether the SCDC's system for delivering mental health services is minimally adequate.

2010 Standards Order, Exhibit B to Return, at 22. As SCDC has previously discussed, Judge Baxley has made it clear that he tried the case, and reached his decision, on the erroneous basis that the issue was "whether the SCDC's system for delivering mental health services is minimally adequate." Plaintiffs have not shown otherwise.

5. Reliance on non-legal standards

SCDC noted that the Order erroneously placed extensive reliance on the opinions of experts and American Correctional Association Standards, both of which have been held by the United States Supreme Court not to establish the constitutional minima. Memorandum in Support of Petition at 17-20. SCDC also noted that Congress, in the Prison Litigation Reform Act of 1996, effectively ended the practice of judges

imposing remedies intended to effect an overall modernization of local prison systems or provide an overall improvement in prison conditions by limit[ing] remedies to those necessary to remedy the proven violation of federal rights.

Memorandum in Support of Petition at 19.

Plaintiffs' response to this is total silence. They cannot deny that the Order relies primarily on expert opinion and on professional standards that "do not establish constitutional minima." *Bell v. Wolfish*, 441 U.S. 520, 543 (1979). They accordingly have no answer to SCDC's assertion that the Order injects the courts much too deeply into prison management, on issues not related to cruel and unusual punishment, and with no basis other than "opinions of experts as to desirable prison conditions." *Rhodes v. Chapman*, 452 U.S. 337, 350 (1981).

6. Standing

With regard to standing, Plaintiffs appear to argue that the issue was settled in this case long before the trial. Return at 20. However, Plaintiffs overlook the need for standing to persist throughout the course of the case. Thus, even if the original individual Plaintiffs actually had standing at the outset of the case, all but one of them had dropped out of the case by the time of trial, and the one remaining Plaintiff clearly had no standing by the time of trial. *See* Memorandum in Support of Petition at 20-21.

As the Court of Appeals has held, “[a] threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy.” *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). An “actual controversy” must exist not only “at the time the complaint is filed,” but through “all stages” of the litigation. *Already, LLC v. Nike, Inc.*, ___ U.S. ___. 133 S.Ct. 721, 726 (2013). This, in turn, means that it is not enough for the plaintiff or plaintiffs to have standing only at the time the case was filed. Instead, “[t]he requisite personal interest [*i.e.*, standing] that must commence at the outset of the litigation ... must continue throughout its existence.” *U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 403 (4th Cir. ,2013), citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22 (1997).

Plaintiffs do not address the fact that the sole remaining individual Plaintiff, T.R., is in the Gilliam inpatient hospital and is unlikely ever to move from there. Plaintiffs rely on the conclusory holding of the Reconsideration Order that T.R. is subject to substantial risk of serious harm, Return at 20, but the record indisputably shows otherwise.¹

¹ Plaintiffs mention the issue of “public importance” standing, Return at 21, but do not respond at all to the detailed discussion of the inapplicability of that doctrine in the Memorandum in Support of Petition for Supersedeas at 25, n.17. Plaintiffs also claim that some of the “public importance” cases involved disputed issues of fact, but no factual issues are apparent in the three cases cited by Plaintiffs for this proposition.

7. **Alleged powers of the Circuit Court, as sentencing court, over prison conditions, and to “do justice”**

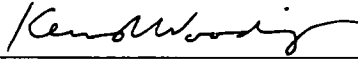
Still another point for which Plaintiffs have offered no response is the Order’s erroneous conclusion that a sentencing judge “has the inherent power – and responsibility – to see that the imprisonment of that inmate complies with constitutional mandates,” and that to “do nothing could be a great miscarriage of justice,” although again without ever citing a single specific case. Order at 37. Plaintiffs do offer a meek response on the issue of whether the Order was driven more by emotion than by law. Return at 21-22. However, that response consists of nothing more than a series of quotes from the Order, none of which contain any legal citations. Plaintiffs have therefore not rebutted SCDC’s contention that the court below undertook, [e]ven leaving the Constitution out of it,” to “do justice,” as the court stated at the hearing on the Motion to Reconsider. *See* Memorandum in Support of Petition at 14-15.

CONCLUSION

For the reasons set forth above, the Appellants respectfully submit that once a full appellate review occurs, the conclusions of the court below should be reversed. Accordingly, and in order to prevent large expenditures of public funds on remedies for which no constitutional need has been shown, SCDC respectfully reiterates that the Order of the Circuit Court should be superseded or stayed until the merits of this case are finally adjudicated on appeal.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
DANIEL C. PLYLER
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellants

Columbia, South Carolina

July 11, 2014

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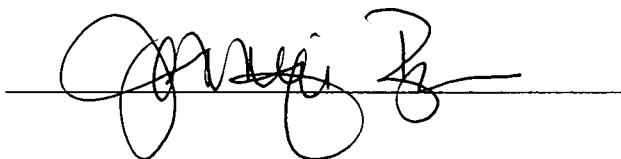
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William R. Byars, Jr., as Director of the
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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellants, does hereby certify that service of the **Reply Memorandum in Support of Petition for Writ of Supersedeas or Stay Pending Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 11th day of July 2014:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley
& Scarborough, LLP
Post Office Box 11070
Columbia, South Carolina 29211

A handwritten signature in black ink, appearing to read "Stuart M. Andrews, Jr.", is written over a solid horizontal line. The signature is cursive and stylized, with a large initial 'S' and a prominent 'A'.