THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

RECEIVED

OCT 2 4 2014

SC Court of Appeals

Case No. 2012-ALJ-07-0090-CC

Grand Strand Regional Medical Center, LLC .....Respondent,

v.

South Carolina Department of Health and
Environmental Control.....Respondent below.

Case No. 2012-ALJ-07-0091-CC

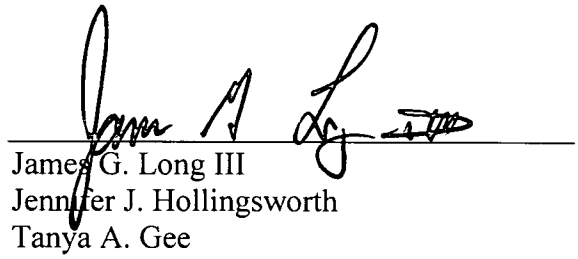
Grand Strand Regional Medical Center, LLC .....Respondent,

v.

South Carolina Department of Health and
Environmental Control and Carolina Regional Cancer Center..... Respondents below,

Of whom Carolina Regional Cancer Center is the.....Appellant.

APPELLANT'S REPLY IN FURTHER SUPPORT OF PETITION FOR SUPERSEDEAS PENDING FINAL RESOLUTION OF APPEALS PROCESS



James G. Long III
Jennifer J. Hollingsworth
Tanya A. Gee
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
803.771.8900

E. Wade Mullins III
BRUNER POWELL
1735 St. Julian Place, Suite 200
P.O. Box 61110 (29260-1110)
Columbia, SC 29204

Attorneys for Appellant
Carolina Regional Cancer Center

ARGUMENT

Respondent Grand Strand Regional Medical Center ("Grand Strand") seeks to rewrite the rules in an effort to benefit at Petitioner Carolina Regional Cancer Center's ("CRCC's") expense. As explained in CRCC's Petition, Rule 241(c), SCACR, allows for the imposition of a supersedeas as to matters decided in a decision on appeal. While Grand Strand correctly points out that appeals from administrative tribunals generally are excepted from the general rule that the service of a notice of appeal acts to automatically stay matters decided by the lower court, the Appellate Court Rules just as clearly allow for application of supersedeas of an administrative tribunal's decision pending appeal. Rule 241(b)(11), (c)(1), SCACR.

A. A Supersedeas is Appropriate in Light of the Substantial Bond Requirement of Section 44-7-220 of the CON Act.

In accordance with Section 44-7-220 of the State Certification of Need and Health Facility Licensure Act ("CON Act"), CRCC filed a $489,431.25 bond along with its Notice of Appeal. The effect of posting this bond, ***as is true for all appellate bonds***, was to stay the underlying order on appeal. Yet, as reflected in its Return, Grand Strand argues that CRCC receives nothing in return for posting a bond. According to Grand Strand, appeals from CON cases have a higher filing fee, and by higher, Grand Strand claims unflinchingly that ***the filing fee is nearly half a million dollars higher than all other appeals***. Such an interpretation of Section 44-7-220 is not only absurd, it renders the statute unconstitutional.

As CRCC explained more fully in its Motion to Stay, the statute is not unconstitutional because CRCC receives something in exchange for its posting of an

appellate bond – a stay of the order below. To this argument, Grand Strand's rejoinder – its only rejoinder – is that the language of the statute "does not specify the General Assembly's intended purpose for requiring the bond." Yet, Grand Strand utterly fails to offer any alternative explanation for why a bond would be required. Its failure to do so reflects that the only plausible reading of the statute requires that a stay accompany the bond.

The CON Act was amended in 2010 to include, *inter alia*, a substantial bond requirement for aggrieved persons who desired to obtain judicial review of an administrative law court's decision. Act 278, 2009-2010 Leg., 118th Sess. (SC 2010). The bond requirement of "an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars" is an enormous burden on aggrieved persons who seek to otherwise properly protect their valuable interests by engaging in the appellate review process. *Id.*; S.C. Code Ann. § 44-7-220 (2010 Supp.). Despite the lack of the word "stay" in the newly enacted bond provision, the remainder of the section clearly recognizes that a delay would ensue for the appealed project and, as a result, the bond amount is awarded to the applicant should the appealed decision be affirmed. *Id.* This substantial sum of the bond amount may be further supplemented by an award of attorney's fees and costs incurred in the appeal by the party subjected to the appeal. *Id.* Grand Strand's suggestion that this Court should construe the statute in such a way that the party posting such a significant bond would not receive anything in return is absurd. Clearly, the proper mechanism for Grand Strand to stay CRCC's project was to file a notice of appeal as provided by Rules 201 and 203, SCACR, and to post the statutorily

required bond.

Grand Strand attempts to diminish the impact of the bond requirement based on its own opinion that nearly half a million dollars is an insignificant sum of money. While this may be true for Grand Strand, whose 2012 year-end total assets exceeded $176 million, the bond requirement of Section 220 is not a paltry sum to most other aggrieved persons subject to the restriction on the right to judicial review. Moreover, the amount of the bond has been legislatively dictated, so to the extent Grand Strand believes the bond is not high enough, that argument should be directed to the members of the General Assembly, not the judiciary.

B. Supersedeas is Appropriate Pursuant to Rule 241(c), SCACR.

Grand Strand is simply wrong when it argues that the Order below is not stayed on appeal. While Rule 241, SCACR sets forth the general rule that "[a]ppeals from administrative tribunals" are not automatically stayed on appeal, this general rule is trumped by the separate and specific legislation enacted to impose a bond requirement in Section 220 of the CON Act. This specific legislation provides that certain CON appeals are treated differently from the general class of administrative appeals identified in Rule 241(b)(11), SCACR. *See, e.g., Wooten ex rel. Wooten v. S.C. Dept. of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) ("A specific statutory provision prevails over a more general one."). Indeed, Rule 241 itself acknowledges that the "general rule" may be altered with the filing of an appropriate petition. Rule 241(c)(1), SCACR.

C. Irreparable Harm will Result.

Furthermore, even if the legislature did not carve out special rules for certain types of CON appeals, which it has, a supersedeas is appropriate pursuant to the sound

reasons set forth in its Petition. CRCC and South Carolina healthcare patients face severe consequences should Grand Strand be allowed to proceed with its project pending appeal.

Grand Strand asserts that construction of its project while the appeal is pending comports with the purposes of the CON Act. Grand Strand is wrong. In fact, to allow Grand Strand to proceed with a project three miles from CRCC's existing operations costing $9,788,625, of which $8,344,556 is the construction of and equipment for a highly specialized vault for which no other reasonable healthcare use is appropriate given the substantial cost, such conduct is wholly irresponsible given the primary purposes of the CON Act are to promote cost containment and prevent unnecessary duplication of health care services. (Joint Ex. 2); S.C. Code Ann. § 44-7-120. As predicted by DHEC in the decision approving CRCC and denying Grand Strand's application, Grand Strand's project will have an adverse impact on existing providers in the service area, including CRCC. (Joint Ex. #2, 939-940.)

Grand Strand's attempt to diminish the impact of its intent to expand radiation therapy services in the service area wholly ignores not only the other provider of radiation therapy services in the service area – Georgetown Hospital System – but also blithely ignores that its ten million dollar program will be *three miles* from CRCC's existing operation, and is based on redirecting referrals from CRCC's *largest referral source*, the medical oncology group located on Grand Strand's campus. CRCC appealed the ALC's reversal of the Department's decision not to delay the project, but to take every effort to save its program from the devastating effect that the over-proliferation of services mere minutes from CRCC's facility will have if Grand Strand is permitted to proceed.

With regard to Grand Strand's attempt to extort a greater fee from CRCC by arguing entitlement to millions of dollars to participate in what is clearly proper judicial process, the demand for three million dollars in addition to the half a million dollars already paid, ignores that Grand Strand is not similarly required to lay out the entire ten million dollars at once to construct its project. The logic that somehow Grand Strand should be permitted to save and invest the ten million dollars purportedly earmarked to implement the radiation therapy project, but also be paid an additional three million dollars that was forecasted to be earned some five years down the road, is simply absurd and abusive.

D. CRCC has Asserted Meritorious Defenses.

There is no legal basis to assert that the burden to obtain supersedeas of the ALC's Final Order is any different than any other exception to the general rule of the automatic stay. Grand Strand's attempt to assert a "high burden" on CRCC to obtain the relief of supersedeas should be dismissed for the baseless allegation it represents. Moreover, it is patently absurd for Grand Strand to argue that the unrelated opinion in *Spartanburg Regional Medical Center v. Oncology & Hematology Associates of South Carolina* is "directly on point with the instant case" when the issue of remand ***was not even raised*** in that case. It is not for the parties or the Court to surmise why the aggrieved party in *Spartanburg* chose not to assert that remand was required following the ALC's reversal of the Department's decision in that competing application case. Wholly different in this matter, however, is that CRCC has properly raised this issue on appeal and is supported by the black letter law of the CON Act in its position. Thus, the exact opposite of Grand Strand's statement is true – the *Spartanburg* case is not factually

or procedurally on point with this case.

With regard to the footnote reference to "an endless cycle of appeal and remand" should this Court agree that the ALC was in error to act as the initial decision-maker on the CON application filed by Grand Strand, in fact the sky would not fall should the proper procedure be followed. The circumstance arises only where applications are deemed competing and only the application which most fully complied with the applicable authority is awarded a CON. In that instance, an initial staff decision may or may not have been made as to the independent approvability of the applications not approved – as here, in that DHEC did not determine Grand Strand's application was approvable. The ALC's decision to reverse the Department required a remand for DHEC to analyze and make an initial determination on Grand Strand's CON Application. The CON Act mandates that "[t]he [D]epartment is designated the sole state agency for control and administration of the granting of [CON] . . . ." S.C. Code Ann. § 44-7-140. The CON Act further states that "[o]n the basis of staff review of the application, the staff shall make a staff decision *to grant* or deny the [CON] . . . ." *Id.* at § 210(C) (emphasis added). Grand Strand's position on this issue renders the Legislature's designation of DHEC as the agency possessed with the authority to make the initial CON application decision meaningless. "This Court must presume the legislature intended to accomplish something with each statute and not to engage in a futile action." *Purvis v. State Farm Mut. Auto. Ins. Co.*, 304 S.C. 283, 288, 403 S.E.2d 62, 666 (Ct. App. 1991) (internal quotation omitted).

E. Grand Strand is Not Entitled to a Stay.

It is unclear why Grand Strand continues to assert that playground rules apply to

formal appellate proceedings, as it repeatedly does by complaining that the proper stay of its project must somehow similarly apply to the approved and unappealed project of CRCC to expand to Conway. There is no basis in law for this assertion. In its Return, Grand Strand literally adds a word to the Rule implicated by the Petition. Rule 241(c)(1) expressly states: "In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal." Rule 241(c)(1), SCACR. The word "all" is not found before the word "matters" within the Rule. This is for good reason. By way of example, consthe appellant in a family court matter who seeks an order superseding only that portion of a divorce decree awarding the other party unsupervised visitation. If Grand Strand's "rule" were followed, the appellant's petition for supersedeas, if successful, would not only stay the visitation portion of the underlying order, it would also stay the provisions of the order awarding spousal and child support. That is not how Rule 241 operates.

CRCC has properly petitioned for supersedeas only that portion of the ALC's Final Order that reversed the Department's decision not to award a CON to Grand Strand. Grand Strand elected not to appeal the affirmance of the Department's decision to award a CON to CRCC, and thus, the law of the case is complete on that matter. Because Grand Strand failed to file a notice of appeal, it is now foreclosed from seeking supersedeas under Rule 241(c), SCACR.

CONCLUSION

For the reasons set forth herein, CRCC respectfully requests that this Court grant the relief set forth in the Petition for Supersedeas Pending Final Resolution of the Appeal.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

Case No. 2012-ALJ-07-0090-CC

Grand Strand Regional Medical Center, LLC .....Respondent,

v.

South Carolina Department of Health and
Environmental Control.....Respondent below.

Case No. 2012-ALJ-07-0091-CC

Grand Strand Regional Medical Center, LLC .....Respondent,

v.

South Carolina Department of Health and
Environmental Control and Carolina Regional Cancer Center..... Respondents below,

Of whom Carolina Regional Cancer Center is the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on October 24, 2014, he caused a copy of Appellant's Reply in Further Support of Petition for Supersedeas Pending Final Resolution of Appeals Process to be served to the following addresses via hand-delivery:

William R. Thomas, Esquire
Walter H. Cartin, Esquire
Parker Poe Adams & Bernstein, LLP
1201 Main Street, Suite 1450
Columbia, SC 29201

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, SC 29201

James G. Long, III

NEXSEN|PRUET

Jennifer J. Hollingsworth
Member
Admitted in SC

October 24, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Grand Strand v. SCDHEC (Carolina Regional Cancer Center)
Appellate Case Tracking # 2014-000973

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of Appellant's Reply in Further Support of Petition for Supersedeas Pending Final Resolution of Appeals Process in the above-referenced matter. Please file the originals and return the clocked copies to me via our courier.

By copy of this letter, I am hereby serving copies of the same on opposing counsel.

Very truly yours,

James G. Long, III

JLG/ect

cc: William R. Thomas, Esquire (via Hand Delivery)
Walter H. Cartin, Esquire (via Hand Delivery)
Ashley C. Biggers, Esquire (via Hand Delivery)
Vito M. Wicevic, Esquire (via Hand Delivery)

1230 Main Street
Suite 700 (29201)
PO BOX 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2112
F 803.727.1446
E JHollingsworth@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law