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SC Court of Appeals

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.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING OR REVIEW OF DENIAL OF SUPERSEDEAS PENDING FINAL RESOLUTION OF APPEALS PROCESS

William R. Thomas
Walter H. Cartin
Amber B. Carter
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: 803.255.8000
Facsimile: 803.255.8017
E-mail: *willthomas@parkerpoe.com*
E-mail: *waltcartin@parkerpoe.com*
E-mail: *ambercarter@parkerpoe.com*
Attorneys for Respondent
Grand Strand Regional Medical Center, LLC

Respondent Grand Strand Regional Medical Center, LLC (Grand Strand) submits its Return to Appellant Carolina Regional Cancer Center's (CRCC) Petition for Rehearing or Review of Denial of Supersedeas Pending Final Resolution of Appeals Process (Petition). Grand Strand respectfully requests this Court deny CRCC's Petition because, as Chief Judge Few determined in his December 16, 2014 decision (Order), a supersedeas is not warranted in this case.

ARGUMENT

In an effort to avoid the duplication of arguments, Grand Strand fully adopts and incorporates herein its arguments and analysis set forth in its Respondent's Return to Appellant's Petition for Supersedeas, filed with this Court on October 17, 2014.

In its Petition, CRCC argues that a stay must be required under section 44-7-220(B) and asks this Court to insert that requirement into the statute. As an initial matter, CRCC failed to cite a single case or statute on point that supports its assertion that a simple posting of a bond imposes a stay. Instead, CRCC tortures statutory language and misapplies of the rules of statutory construction in its efforts to show that section 44-7-220(B) imposes a stay upon the posting of a bond. As Grand Strand argued in its Return to Appellant's Petition for Supersedeas—and as Chief Judge Few found in his December 16 Order (Order 3)—section 44-7-220(B) does not impose a stay. The language desired by CRCC is not in the statute, and CRCC's attempts to insert the language must fail.[1] CRCC improperly asks this Court to ascertain why the Legislature imposed a bond

[1] CRCC incorrectly analyzes sections 44-7-220(B) and (C) and attempts to convince this Court that sections 44-7-220(B) and (C) give the respondent double recovery of costs, attorney's fees, and damages due to delay if the appellant loses on appeal. (Petition 6.) CRCC fails to mention to this Court that section 44-7-220(C) allows the Court to award "damages incurred as a result of the delay, as well as reasonable attorney's fees and costs" only if the Court determines that the appeal was frivolous. Certainly, this section is intended to penalize the appellant for wasting the Court's and the parties' time and resources in bringing an unwarranted, frivolous action. Absent a frivolous contested case or appeal, section 44-7-220 only provides for the award of the bond if the appeal fails.

requirement in section 44-7-220(B) and suggests the Legislature either intended to compensate an applicant for losses sustained due to delay or to punish the appellant. More likely, however, is that the Legislature intended the bond to operate as a deterrent, to help bolster the purpose of the CON Act[2] by discouraging unwarranted appeals once an impartial tribunal has determined a health care service is needed.[3] All of this speculation, however, is irrelevant because the language of the statute is clear and unambiguous: the appellant must post a bond, and no stay is imposed. Certainly, "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). However, because the language of section 44-7-220(B) is clear and unambiguous, there is no need to attempt to discern the Legislature's intent in crafting that statute. *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014), *reh'g denied (Oct. 3, 2014)* ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."). As Chief Judge Few correctly recognized, section 44-7-220(B) does not impose a stay and it would be improper for this Court to write into the statute language that does not exist. (Order 3.)

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[2] The purpose of the CON Act is "to promote cost containment, prevent the unnecessary duplication of health care facilities and services which will best serve the public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120.

[3] CRCC asserts that imposing a stay supports the purpose of the CON Act because it would result in cost containment if CRCC is successful on appeal and Grand Strand is ordered to discontinue its linear accelerator program. This argument is a red herring, however. CRCC does not explain how Grand Strand's moving forward with its project has any impact on the public and an increase in health care costs. In fact, the ALC found that Grand Strand's project would result in price competition, and thereby promote cost containment, by the addition of a second provider of radiation therapy services. (*See* ALC Amended Order at 19–20.) Moreover, the ALC found that cost containment would be furthered by the addition of a radiation therapy provider whose referral sources have no financial interest in the radiation therapy provider to which they refer, unlike the affiliated AUC urologists who are financially incentivized to refer to CRCC. (*See* id. at 20.)

Furthermore, CRCC fails to consider that the General Assembly expressly references the imposition of an "automatic stay" with respect to contested cases such as the one presently before this Court. *See* S.C. Code Ann. §§ 1-23-600(2) & (4). If the General Assembly intended to impose an automatic stay upon the posting of a bond in section 44-7-220(B), it would have made its intention clear through express language, as it plainly did in section 1-23-600(2). More importantly, section 1-23-600(4) specifically allows the ALC to lift the stay prior to a contested case on the merits, which means the General Assembly contemplated that CON related projects could proceed in certain instances while an affected person challenged the project. The General Assembly would not have permitted the lifting of the automatic stay in CON cases only to have the stay reimposed by the Court of Appeals upon the posting of a bond by the party that failed to prevail on the merits at the contested case hearing. This would mean that a party approved for a CON could invest significant money in establishing a new health facility or service only to have it closed down at the appellate level by the losing party, merely because the losing party posted a bond equal to a small fraction of the project cost. This would indeed be an absurd result never intended by the General Assembly when it gave the ALC the power to lift an automatic stay prior to a hearing on the merits. *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (stating that the Court will not construe a statute in a way which leads to an absurd result or renders it meaningless). When section 44-7-220 is read along with sections 1-23-600(2) and (4), there can be no doubt that the General Assembly did not intend to impose a stay upon the filing of a bond. *See Ranucci*, 409 S.C. at 500, 763 S.E.2d at 192 (2014) (stating that a statute must be read as a whole and sections that are

part of the same general statutory law must be construed together, with each one given effect).

CRCC additionally asks this Court to impose a stay even if this Court finds that section 44-7-220(B) does not require one. The only other legal basis for the imposition of a stay is Rule 241(c), SCACR, which requires this Court to consider whether a supersedeas or stay is necessary to preserve the Court's jurisdiction or to prevent the issue from becoming moot. As argued in Grand Strand's Return to Appellant's Petition for Supersedeas, neither of these considerations is in play in this case. Chief Judge Few properly found that the contested issue in this case is not mooted by Grand Strand commencing construction, nor does this Court lose its jurisdiction over this case. (Order 2.) Although CRCC contends a stay is necessary to preserve its market share during the pendency of this appeal[4]—a consideration that Chief Judge Few found inappropriate (Order 3)[5]—it is likely that this Court will issue a ruling on this case before Grand Strand has completed construction and is ready to provide services to the public. Thus, mootness is not a valid argument in this case.

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[4] The case of *Levine v. Spartanburg Reg'l Svcs. Dist.*, 367 S.C. 458, 626 S.E.2d 38 (Ct. App. 2005), is an inappropriate comparison to this case by CRCC in its attempt to show that it will be irreversibly impacted if Grand Strand is not prohibited from operating until all appeals are exhausted. In *Levine*, the court noted that Dr. Levine would lose referral sources because she would no longer have hospital privileges and the referrals would be made to similarly specialized physicians with privileges. In this instance, even if Grand Strand were to establish its facility and begin seeing patients prior to this Court issuing an opinion—which is very unlikely—if the Court were to issue an unfavorable opinion to Grand Strand and Grand Strand were forced to close, any referral sources who switched to Grand Strand for radiation therapy would have only one option for radiation therapy in Horry County—CRCC. There is no likelihood that CRCC's referral base will "erode and potentially disappear" if it is faced with a single competitor during the appellate process, especially in light of the ALC's findings that both Grand Strand and CRCC would be well utilized if allowed to coexist in the market. (ALC Amended Final Order 24–27.) Furthermore, CRCC's argument is disingenuous given that more than 40% of its referrals come from a physician practice, AUC, that is affiliated with CRCC. (ALC Amended Final Order 14.)

[5] Additionally, the ALC found the increase in competition in the County would be beneficial to the public as it could result in decreased health care costs. (ALC Amended Final Order, 20.)

Finally, CRCC argues that section 44-7-220(B) is unconstitutional if it does not impose a stay along with the requirement of the bond. Again, CRCC cites no law in support of its sweeping assertions of myriad constitutional violations. CRCC's argument fundamentally misapprehends the proper analysis used by this Court and the ALC when determining whether a stay or supersedeas should be issued under Rule 241, SCACR: whether a stay is necessary to preserve the Court's jurisdiction or to prevent an issue from becoming moot. Chief Judge Few correctly determined neither of these concerns are present in the instant appeal. (Order 2.) The general considerations for determining whether a stay should issue are whether the requesting party will suffer irreparable harm and whether its appeal is meritorious. Because a stay is an injunction to suspend a judicial proceeding, *see* Black's Law Dictionary (9th ed. 2009) (defining "stay" as "A court order commanding or preventing an action" and defning "injunction" as "An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding"), the party requesting a stay must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Levine*, 367 S.C. at 464, 626 S.E.2d at 41. The ALC addressed these points in its September 26, 2014 Order Denying Stay Pending Appeal and properly found CRCC was not entitled to a stay. Importantly, CRCC provides no authority for its assertions that the required bond violates any constitutional right. The bond is not a governmental taking, it does not deprive CRCC of any property or liberty interests, nor is it so burdensome that it closes the courthouse doors to CRCC. In fact, CRCC ably and quickly satisfied the required bond to file its appeal. Thus, CRCC has failed to demonstrate any constitutional infirmities with the bond required in section 44-7-220(B) and its arguments should be dismissed.

However, if this Court determines that the section 44-7-220(B) is constitutionally problematic, the proper remedy is not to craft language and insert it into an unambiguous statute. Instead, the proper remedy would be for this Court to find that the requirement of a bond is unconstitutional and return CRCC's bond. In either case, whether the Court finds the statute constitutional and enforces it according to its plain language or the Court finds the statute unconstitutional, no stay should be imposed and Grand Strand should be allowed to proceed with its project as allowed under the law.

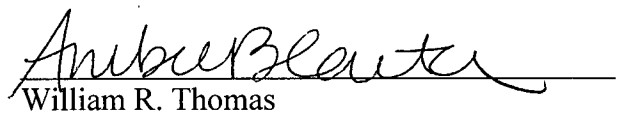
Finally, if this Court decides to uphold Chief Judge Few's Order that a stay or supersedeas is not warranted in this case, there is no need to set a briefing and hearing schedule on the constitutionality of section 44-7-220(B), as CRCC suggests. This Court, in reviewing CRCC's Petition and Grand Strand's Return, has been fully briefed on any potential constitutional issues. Further briefing would be duplicative and an unnecessary delay.

CONCLUSION

For the reasons set forth above, CRCC's Petition for Rehearing or Review of Denial of Supersedeas Pending Final Resolution of Appeals Process should be DENIED and this Court should decline to impose a stay or supersedeas.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



William R. Thomas
Walter H. Cartin
Amber B. Carter
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: 803.255.8000
Facsimile: 803.255.8017
E-mail: *willthomas@parkerpoe.com*
E-mail: *waltcartin@parkerpoe.com*
E-mail: *ambercarter@parkerpoe.com*

Attorneys for Respondent
Grand Strand Regional Medical Center, LLC

January 7, 2015

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

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

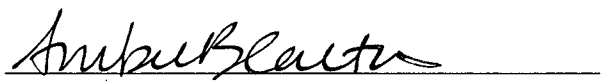
PROOF OF SERVICE

The undersigned hereby certifies that on January 7, 2015 s/he has caused a copy of Respondent's Return to Appellant's Petition for Rehearing or Review of Denial of Supersedeas Pending Final Resolution of Appeals Process to be served upon all parties of record by hand delivering a copy of the same, addressed as follows:

James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
Tanya A. Gee, Esquire
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202

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

Edward Wade Mullins, III, Esquire
Bruner Powell
1735 St. Julian Place, Suite 200 (29204)
Post Office Box 61110
Columbia, South Carolina 29260-1110



William R. Thomas
Walter H. Cartin
Amber B. Carter
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: 803.255.8000
Facsimile: 803.255.8017
E-mail: *willthomas@parkerpoe.com*
E-mail: *waltcartin@parkerpoe.com*
E-mail: *ambercarter@parkerpoe.com*

Attorneys for Respondent
Grand Strand Regional Medical Center, LLC

Parker Poe

Amber B. Carter
Associate
Telephone: 803.253.6866
Direct Fax: 803.255.8017
ambercarter@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

January 7, 2015

VIA HAND DELIVERY

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

Re: Appellate Case No. 2014-000973
Grand Strand Regional Medical Center, LLC v. South Carolina Department of Health and Environmental Control and Carolina Regional Cancer Center

Dear Ms. Kitchings:

Pursuant to Rule 240, SCACR, enclosed for filing please find an original and six (6) copies of Respondent Grand Strand Regional Medical Center, LLC's Return to Appellant's Petition for Rehearing or Review of Denial of Supersedeas Pending Final Resolution of Appeals Process with Proof of Service. Please return the file-stamped copy of the same to our courier.

As copied on this letter, and as evidenced by the Proof of Service, we are providing a copy of the Return to all counsel of record.

Should you have any questions regarding this matter, please do not hesitate to contact me. With best regards, I am

Sincerely,

Amber B. Carter

ABC/ccq
Enclosures

cc: James G. Long, III, Esquire (*with enclosure via hand delivery*)
Jennifer J. Hollingsworth, Esquire (*with enclosure via hand delivery*)
Tanya A. Gee, Esquire (*with enclosure via hand delivery*)
Edward Wade Mullins, III, Esquire (*with enclosure via hand delivery*)
Ashley C. Biggers, Esquire (*with enclosure via hand delivery*)
Vito Wicevic, Esquire (*with enclosure via hand delivery*)

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