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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, LLCRespondent,
v.

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

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

Grand Strand Regional Medical Center, LLCRespondent,
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 REHEARING OR REVIAL OF DENIAL OF SUPERSEDEAS
PENDING FINAL RESOLUTION OF APPEALS PROCESS

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The Appellant, Carolina Regional Cancer Center, LLC (“CRCC”) submits this reply to the Return filed by Respondent Grand Strand Regional Medical Center, LLC (“Grand Strand”) on January 7, 2015. CRCC incorporates in full the Petition for Supersedeas Pending Final Resolution of Appeals filed October 9, 2014, as well as the Reply in Further Support of the Petition and the Petition for Rehearing or Review of Denial of Supersedeas filed on December 30, 2014. As the Court’s file is now replete with briefing on the matter of supersedeas, CRCC seeks only to respond to matters raised or challenged in Grand Strand’s Return.

A. Principles of Statutory Construction Support CRCC’s Position

Grand Strand is simply wrong to claim that CRCC “tortures statutory language and misapplies the rules of statutory construction,” as the principles cited (and case law on point) speaks for itself. Return, 2. The posture of this case and the result should the Court refuse to impose the stay after payment of a \$489,413.25 bond is an absurd and unconstitutional application of South Carolina Code Annotated Section 44-7-220(B). The South Carolina Supreme Court explained in *Tempel v. S.C. State Election Com’n*, 400 S.C. 374, 377-78, 735 S.E.2d 453, 455 (2012):

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. The statutory language must be construed in light of the intended purpose of the statute. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.

Id. (internal citations omitted). In *Palmetto Co. v. McMahon*, 395 S.C. 1, 5, 716 S.E.2d 329, 331 (Ct. App. 2011), this Court explained:

All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers. An appellate court will reject the

interpretation of a statute that would lead to an absurd result the legislature could not have intended.

Id. (internal citations omitted). CRCC submits that the only practical, reasonable, and fair interpretation of the bond requirement in S.C. Code Ann. § 44-7-220(B), in light of the intended purposes of the CON Act as clearly set forth in S.C. Code Ann. § 44-7-120, is that the payment of the bond stays the approved project during the appeal.

As briefed by CRCC, this position is supported not only when viewing all subsections of Section 220 together, but also in light of the express purposes set forth in the CON Act. Grand Strand's argument that--rather than view the CON Act as a whole to guide the analysis, this Court should revert to provisions within Title One, Article 23 of the Code (applicable to any and all administrative agency contested case proceedings), is non-sensical and unsupported. The references to the automatic stay and lifting of stay found in Title One, Chapter 23, are applicable to all contested case proceedings as defined by Section 1-23-600(A) prior to a decision in the Administrative Law Court. This broad class of proceedings is not subject to the bond of Section 44-7-220(B), which is applicable only to affected persons appealing an ALJ's approval of a CON application. To understand the Legislative intent of the bond requirement, this Court should harmonize it with the CON Act in its entirety, and not resort to the scattered and disjointed comparison made by Grand Strand in its Return. The rule of statutory construction that demands harmony requires that the statute's words "must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (internal quotation omitted). The bond requirement must be harmonized with the intended purpose of the

CON Act and accord with those stated purposes. S.C. Code Ann. § 44-7-110. The CON Act's subject matter is wholly distinguishable from that of Adjudication of Contested Cases by the ALJ, as is the subject matter of Article Six in Chapter 23 of Title One. As explained in the Petition, the purposes of the CON Act focus on preventing unnecessary duplication, ensuring quality of care, and promoting cost containment. Constructing unnecessary facilities are inconsistent with these purposes. Therefore, imposing a stay on an appealed project is consistent with the purposes while allowing respondents to be compensated for that delay if the appeal fails. Grand Strand's flawed analysis that the statute allows a windfall to successful respondents must be dismissed.

B. Grand Strand's View That the Legislative Intent of the Bond Requirement was to Discourage Appeals Would Violate the Separation of Powers Doctrine.

Grand Strand makes the unwarranted conclusion that the bond requirement of the CON Act, in which this Court no longer has discretion and now is required to award the full amount of the bond should an appeal of an approved project fail, was intended by the Legislature "to operate as a deterrent, to help bolster the purpose of the CON Act¹ by discouraging unwarranted appeals once an impartial tribunal has determined that a health care service is needed." Return at 3. This rather shocking conclusion then means that the

¹ Grand Strand by footnote chastises CRCC for not explaining how allowing its project to proceed during appeal and constructing an expensive and unnecessary health service impacts the public or health care costs, yet then proceeds to make unsubstantiated statements about the necessity of its project using only the appealed Amended Final Order in support. Return at n.3. While understandably the appealed Amended Final Order is the only support for Grand Strand's position, given that the decision of DHEC and the substantial evidence in the Record supports CRCC's position that the Grand Strand project should not have been approved, Grand Strand's attempt to throw unsubstantiated statements into the briefing of the Petition is unwarranted. As explained in the Initial Brief, the Amended Final Order is contradicted by the evidence in the Record, and Grand Strand's inflammatory comments depict only one side of the evidence and offers no comparison, for example, to the employment of physicians by Grand Strand, its intended referral sources, or the employment of a substantial number of other referring physicians in the market by the other radiation therapy service provider serving Horry County, when discussing the employment of Atlantic Urology Clinics, LLC, by 21st Century Oncology.

Legislative Branch has decided that, in CON contested case proceedings, an affected person who disagrees with the final agency decision of the Executive Branch as to an approved project should be deterred (read: punished) from seeking judicial review by the Courts. First and foremost, CRCC is afforded the constitutional guarantees of, *inter alia*, judicial review under Article I, Section 22 of the South Carolina Constitution, or equal protection under the law as provided by the Fourteenth Amendment of the United States Constitution and the South Carolina Constitution. These rights are guaranteed by the Constitution and the Legislature has no authority to enact laws inconsistent with these guarantees. To impose such a substantial penalty on an appellant does deter parties from seeking judicial review. It is not supported anywhere, except in Grand Strand's speculative attempt to explain its position, that the Legislature intended to curtail or deter judicial review of Executive branch decisions in CON appeals and make the Administrative Law Court the final arbiter in CON decisions. "A usurpation of powers exists, for purposes of the constitutional separation of powers doctrine, when there is a significant interference by one branch of government with the operations of another branch." *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) (internal quotation omitted). If the Legislature intended such a result, it would not be consistent with the CON Act and would violate the Constitution. The more reasonable interpretation is that the Legislature intended to compensate prevailing parties in appeals from sustaining damage from a delayed project which occurs with a stay during appeal.

More pointedly, the posture of this case is an administrative law judge decision that *reversed* the decision of the specialized agency that makes initial decisions on CON matters. That Grand Strand 'won' on its appeal to the ALJ by reversing the Department's

decision to issue a CON (which CRCC argues is a decision unsupported by substantial evidence), does not suggest that the ALJ should be considered an “impartial tribunal” of whom no judicial review is necessary or that CRCC’s appeal is “unwarranted.” There is no evidence or argument to support that CRCC’s right to judicial review of the final agency decision should be deterred or subject to draconian penalty in the form of a half million dollar bond.

C. A Supersedeas Under Rule 241(c), SCACR, is Appropriate.

Grand Strand disagrees with CRCC’s documented contention that absent the supersedeas, future relief may be ineffectual. Pet. for Reh’g, 10. Again by footnote, Grand Strand argues the inapplicability of *Levine v. Spartanburg Reg’l Svcs. Dist.*, 367 S.C. 458, 626 S.E.2d 38 (Ct. App. 2005). Return, n.4. To do so, Grand Strand can only offer speculative assertions with regard to the future of the referral patterns in the service area should Grand Strand’s project be closed down. Grand Strand has no ability to predict whether, once redirected away from CRCC, the major referral source of the medical oncologists will return referrals to CRCC, or may instead elect alternative treatment options or shift referrals to the other existing provider, Georgetown Hospital System.²

D. Grand Strand Overlooks or Misapprehends the Constitutional Concerns and thus Cannot Reconcile the Statute with the Constitution.

It is unbelievable that Grand Strand submits that CRCC is not deprived of property upon the payment of nearly one half million dollars for permission to appeal the administrative CON decision. Return, 6. In *Ross v. Medical University of South*

² Notably, in the approved but appealed relocation application of Georgetown Hospital System, seeking to relocate its existing service to the Horry County border, the application states that the majority of the existing patients come from the population in that area. Joint Ex. 14, 0009.

Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997), a tenured professor's continued employment was a property interest entitled to due process, yet Grand Strand suggests nearly one half million dollars is not. *See id.* at 328 S.C. at 66, 492 S.E.2d at 70. Grand Strand continues by suggesting that any constitutional concern would be for the impoverished affected person, as opposed to a corporation that had the financial resources to arrange payment of the bond. *Id.* Finally, Grand Strand appears to assert that the fact that CRCC timely paid the bond amount, *as required by the CON Act* at S.C. Code Ann. § 44-7-220(B), should somehow be construed prejudicially to CRCC in the constitutional issues faced by this Court. All such arguments are unavailing.

CRCC's constitutional argument in opposition to the statute as interpreted by Grand Strand is twofold. First, to impose such a substantial punishment and/or deterrence upon an appellant curtails the constitutional right to judicial review guaranteed by the South Carolina Constitution. S.C. Const. art. I, § 22. Second, the imposition of such a substantial bond violates the equal protection clause and due process clause of both the South Carolina and United States Constitutions, because it is an absolute bar to judicial review for appellants who cannot afford the substantial bond requirement and is a taking without any rational relation to the purposes of the CON Act. This is because under Grand Strand's analysis, there is no impact to the Respondent; the applicant receives its CON and can proceed with building its project and, if the appeal is not successful in reversing the result below, the Respondent is paid a handsome windfall payment at the end of the appeal. Such a result must violate the constitutional guarantees of equal protection and due process.

With regard to the constitutional concerns, Grand Strand confuses the issues with

the bond requirement in the CON Act as interpreted by the ALC and this Court in the single judge Order, with the supersedeas rule. CRCC does not challenge the constitutionality of Rule 241, SCACR. CRCC submits that Rule 241, SCACR, is a remedy available to this Court to address the circumstances faced here where a substantial bond has been paid, of which the Court has no discretion and must award to Grand Strand should the appeal be unfavorable to CRCC, and Grand Strand also is allowed to proceed with its project unaffected by any delay pending resolution of the appeal. In the alternative, CRCC asks this Court to address the constitutionality of the bond requirement as set forth in S.C. Code Ann. § 44-7-220(B), as the circumstances herein violate the constitutional provisions identified by CRCC in the Petition for Rehearing or Review. Given that Grand Strand impugns CRCC for not cluttering this briefing with constitutional legal citations in support of the challenge, it is apparent additional briefing of the issue would be appropriate in the Court's discretion.

E. To Return the Bond and Proceed with the Appeal Acknowledges the Validity of Constitutional Attack.

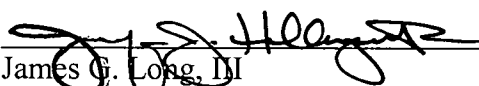
Finally, Grand Strand suggests in conclusion that a remedy available to this Court is to return CRCC's bond and allow the appeal to proceed (as well as Grand Strand's project). This remedy requires the Court conclude that the effect of the bond requirement in the CON Act violates the constitutional rights of affected persons like CRCC. While return of the bond money would be appropriate if the statute is unconstitutional, CRCC submits that the Court should first presume the constitutionality of the bond requirement. The obvious way to recognize the legality of the mandatory bond requirement is to impose a stay on the appealed project. "Where there are two possible constructions, one

rendering the statute unconstitutional and the other constitutional, it is the duty of the court to adopt that construction which will uphold the validity of the statute, for it is always presumed that the Legislature intends a statute to have meaning and effect consistent with the Constitution.” *Peoples Nat. Bank of Greenville v. S.C. Tax. Comm’n*, 250 S.C. 187, 190-91, 156 S.E.2d 769, 771 (1967) (internal quotation omitted). To uphold the statute, this Court must impose the stay requested by CRCC.

CONCLUSION

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

RESPECTFULLY SUBMITTED,


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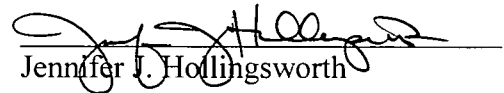
Of whom Carolina Regional Cancer Center is the.....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on January 12, 2015, she caused a copy of Appellant's Reply in Further Support of Petition for Rehearing or Review of Denial of Supersedeas Pending Final Resolution of Appeals Process to be served to the following addresses via hand-delivery:

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Member
Admitted in SC

January 12, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbot Kitchings
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JAN 12 2015
SC Court of Appeals

**Re: *Grand Strand v. DHEC (Carolina Regional Cancer Center
Appellate Case Tracking No. 2014 000973***

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellant's Reply in Further Support of Petition for Rehearing or Review of Denial of Supersedeas Pending Final Resolution of Appeals Process in the above-referenced matter. Please file the originals and return a clocked copy to me via our courier.

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

Charleston

Charlotte

Columbia

Greensboro

Greenville


Hilton Head

Myrtle Beach

Raleigh

The Honorable Jenny Abbot Kitchings
January 12, 2015
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Very truly yours,

A handwritten signature in black ink, appearing to read "Jennifer J. Hollingsworth". The signature is fluid and cursive, with the first name "Jennifer" being more prominent.

Jennifer J. Hollingsworth

JJH/ect
Enclosures

cc: William R. Thomas, Esquire (via Hand Delivery)
Walter H. Cartin, Esquire (via Hand Delivery)
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