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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

Appellate Case No. 2014-000973

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.

**REPLY BRIEF OF APPELLANT CAROLINA REGIONAL CANCER CENTER
TO BRIEF OF RESPONDENT GRAND STRAND REGIONAL MEDICAL
CENTER, LLC**

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case.....	1
Argument	1
Conclusion	11

TABLE OF AUTHORITIES

Cases

<i>Herron v. Century BMW</i> , 395 S.C. 461, 719 S.E.2d 640 (2011)	6
<i>McCall v. State Farm Mut. Auto. Ins. Co.</i> , 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004).....	9
<i>Murphy v. S.C. Dept. of Health and Envtl. Control</i> , 396 S.C. 633, 723 S.E.2d 191 (2012)	5
<i>Rumpf v. Mass. Mut. Life Ins. Co.</i> , 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004).....	9
<i>Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assoc. of S.C., LLC</i> , 387 S.C. 79, 690 S.E.2d 783 (2010)	7
<i>Sulton v. HealthSouth Corp.</i> , 400 S.C. 412, 734 S.E.2d 641 (2012)	6

Statutes

S.C. Code Ann. § 44-7-140.....	5
S.C. Code Ann. § 44-7-180(B)	4
S.C. Code Ann. § 44-7-220(B)	9
S.C. Code Ann. § 44-7-225.....	4
S.C. Code Ann. §§ 44-7-200, -210	5

Regulations

24A S.C. Code Ann. Regs. 61-15 §§ 305, 306, 308, 504	5
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Other Authorities

<i>2010-2011 South Carolina Health Plan</i>	<i>passim</i>
<i>2012-2013 South Carolina Health Plan</i>	<i>passim</i>

STATEMENT OF THE CASE

The Respondent Grand Strand Regional Medical Center, LLC (“Grand Strand”) filed an Initial Brief on November 5, 2014. The Appellant Carolina Regional Cancer Center, LLC (“CRCC”) files this Reply to the Response. To the extent the facts asserted by Grand Strand are inconsistent with those set forth by CRCC in its Initial Brief, CRCC craves reference to the Statement of the Facts set forth in its Initial Brief for an accurate summary of the factual matters in dispute.

ARGUMENT

A. Grand Strand’s Statement of the Facts is Misleading and Erroneous in Numerous Respects.

The Brief of Grand Strand includes in its Statement of Facts a number of inaccurate and misleading statements regarding the purported facts established in the proceedings below. For example, Grand Strand makes much of the employment relationship of the urology practice with CRCC’s parent entity and the brief but substantial referral increase in 2011 after 21st Century Oncology purchased CRCC from its prior owner, Dr. Stephen Bass. Unfortunately, and misleadingly, Grand Strand makes no disclosure of the highly fractured relationship that existed between Dr. Bass and the urology practice prior to the purchase by 21st Century Oncology that had existed for a number of years after a prior CON dispute over linear accelerator services. Grand Strand’s own long-time CEO, Doug White, testified that he personally witnessed the animosity between the urologists and Dr. Bass and described the relationship as “nasty.” (R. p. 436, line 25 – p. 438, line 10). According to Patricia Price, who has been employed at CRCC since the practice opened over thirty years ago, the urologists ceased referring patients to Dr. Bass and once 21st Century Oncology purchased the practice and

Dr. Bass retired, the urologist began referring patients to CRCC again. (R. p. 1641, line 8 – p. 1642, line 17).

Not only does Grand Strand make no mention of this highly fractured relationship prior to the change in ownership of CRCC, but Grand Strand also impugns 21st Century Oncology's business model of employing physicians to provide integrated and comprehensive cancer care, which has occurred in both Horry and Georgetown County by the existing providers. Employment of physicians by providers is common and legal. Grand Strand makes its disparaging commentary without describing to this Court Grand Strand's own repeated but unsuccessful attempts to similarly employ physician groups in the area. For example, introduced at trial was an e-mail from Mr. White's superior within the HCA organization explaining that a linear accelerator was available in the coming South Carolina Health Plan and that, as part of the strategy to acquire this service and oppose market activities of the existing providers, "Employing the medical oncologists might be a part of this progression." (R. p. 4648). Grand Strand's internal strategic plan overview for 2011 anticipated its linear accelerator program would be "with medical oncologists." (R. p. 4700). Grand Strand instead once again tries to dismiss the intensity of its proposed partnership with CRCC's largest referral source – in the face of clear documentation and discussions to the opposite. (R. pp. 4649, 4651, 4656).

In addition to the misleading nature of the facts presented by Grand Strand, its Brief also wholly misstates the situation when discussing and accusing CRCC of employing a strategy of "delay" and "tying up" applications. Specifically, Grand Strand wrongly asserts that CRCC has communications in September 2009 regarding the potential appeal of an application by Georgetown Memorial Hospital. (Grand Strand Br.

9). In fact, CRCC was not acquired by 21st Century until May 2010, and the immediate discussions held on strategy were of how best to distribute the clustered machines in Myrtle Beach into the service area to where the patients were located. (R. pp. 2636-2638; R. p. 1373, line 1 – p. 1374, line 12; R. p. 1842, line 8 – p. 1843, line 3; R. p. 4615). As a new provider in the market, CRCC corporate decision-makers did ask local consultants for information about the regulatory process for CON approvals in South Carolina, and received advice regarding the approval process. (R. pp. 4456). Unlike CRCC's corporate team, being new and unfamiliar with the CON application process, Grand Strand is well aware of the regulatory process for project approvals in South Carolina and clearly strategized ways to thwart CRCC and other area providers of cancer services. "Grand Strand's desire to offer full time radiation therapy services¹ is ***largely driven by the surrounding competitive environment***, and the hospital believes that failure to begin a radiation therapy services program would result in loss of market share to competitors on the northern, southern, and western ends." (R. pp. 4622-4623 (emphasis added)). Moreover, documentation of internal conversations among major leadership within HCA and Grand Strand evidence the plan to significantly impact the existing market by partnering with the medical oncology group that controls 74% of referrals and obtaining 300² procedures in 2013, which is not aggressive, even though Grand Strand doesn't "control urology (we do gen[eral] surg[ery] and neuro[logy])." (R. p. 4744).

¹ Notably, this same strategic planning document of Grand Strand explains that "[c]urrently the hospital refers its cancer patients needing radiation therapy to 21st Century Oncology, located just miles away from the hospital on Oleander Drive." (R. p. 4622). Grand Strand's own internal documentation supports that the services sought by Grand Strand are already provided by CRCC to its own patient population.

² This forecast of 300 procedures will put Grand Strand well above the 5,525 treatment tipping point identified in the Amended Final Order, regardless of whether the average treatment volume estimate is 21 or 25 treatments per patient. And despite the ALC's findings otherwise, Grand Strand believes 25 treatments per patient is "conservative" and 21 treatments per patient is "ultra conservative." (R. p. 4743).

B. The ALC's Reliance on the 2012-2013 South Carolina Health Plan to Approve a Fifth Linear Accelerator was in Error.

As fully briefed in CRCC's Initial Brief at pages 13 to 18, the ALC improperly considered and essentially determined that the additional linear accelerator published in the 2012-2013 South Carolina Health Plan should be awarded to Grand Strand. Grand Strand erroneously argues that the point of appeal that the ALC exceeded its authority and was controlled by an error of law in awarding the fifth linear accelerator under the later enacted Health Plan "would eviscerate section 44-7-225 and render it meaningless." (Grand Strand Br. 15.) Grand Strand does protest too much. In fact, CRCC's position with regarding to Section 44-7-225 of the CON Act comports with the statutory framework under which the CON program is designed to operate. Section 44-7-225 provides that the ALC "shall consider the South Carolina Health Plan in place at the time the application was filed and may consider the current South Carolina Health Plan when making its decision." S.C. Code Ann. § 44-7-225 (emphasis added). The CON Act mandates that the Department must prepare a South Carolina Health Plan that includes, at a minimum, an inventory of existing facilities and services, projections of need, standards for distribution of facilities and services, and a general statement as to project review criteria most important in evaluating a CON application. S.C. Code Ann. § 44-7-180(B). It is wholly appropriate that the ALC "may consider" changes to a later approved Health Plan that may impact a contested case proceeding before it. In fact, Grand Strand points out a change in the 2012-2013 South Carolina Health Plan applicable to its own project, as Standard 8 no longer requires applicants for linear accelerator projects to quantify expected annual referral volumes. (Grand Strand. Br. n.4; R. pp. 4392, 4423). This

revision to the later enacted Health Plan is clearly appropriate for consideration by the ALC in reviewing a challenge to a decision of the Department.

Unlike a revision such as the removal of a requirement to quantify expected referrals, or perhaps a reordering of criteria importance, the argument that the same consideration should be given to a subsequently enacted Health Plan that alters projected need and goes so far as to award that need to an applicant that did not file under that Health Plan is improper and an error of law. The Department is the sole agency for the control and administration of the granting of CONs. S.C. Code Ann. § 44-7-140. The Department had no ability to analyze any application submitted for the linear accelerator published in the 2012-2013 South Carolina Health Plan, nor did any affected persons have an opportunity to challenge the awarding of this machine to Grand Strand. As such, the ALC's decision clearly violated the CON Act and Regulations. *See e.g.* S.C. Code Ann. §§ 44-7-200, -210; 24A S.C. Code Ann. Regs. 61-15 §§ 305, 306, 308, 504. The Department similarly analyzed these applicable rules and regulations and, in opposing Grand Strand's Motion for Partial Summary Judgment on this issue below, stated: "Following Grand Strand's argument and declaring the applicants as non-competing applicants pursuant to the *2012-2013 Plan* would deprive affected parties from the Service Area from being able to apply for radiotherapy services under the *2012-2013 Health Plan* and/or oppose Grand Strand's effort to be awarded a CON for radiotherapy services under the *2012-2013 Plan*. Such a result would be absurd, and Grand Strand's argument should be rejected." (R. p. 206). The Department's analysis of this issue under its own governing rules and regulations is entitled to deference. *Murphy v. S.C. Dept. of Health and Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012).

C. Grand Strand’s Argument on Issue Preservation is Meritless and the ALC Should Have Remanded the Grand Strand Application to DHEC for Approval.

Grand Strand argues that CRCC failed to preserve the question of remand and therefore cannot assert the issue on appeal. To support its argument, Grand Strand quotes to approximately two sentences of counsel made during an opening statement beginning a nine-day hearing that culminated in a 2,365-page transcript claiming these two sentences constitute a waiver. The argument is absurd and should be rejected outright. First, Grand Strand concedes as it must that CRCC clearly set forth the question of remand in its Motion to Alter or Amend filed with the ALC on March 20, 2014. In fact, CRCC devotes four pages of argument to the matter in its Memorandum in Support. (R. pp. 251-254). In response to the Motion, the ALC addressed the argument in its Reconsideration Order and ultimately issued an Amended Final Order, although disagreeing with CRCC’s position on remand. (R. pp. 36-38). Thus, the issue was clearly ruled on below and is appropriate for review. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (“At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.”) Moreover, the statements of counsel in an opening argument should not be considered factual statements or evidence on which Grand Strand may rely. *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 645-46 (2012) (holding that arguments of counsel are not evidence).

In the alternative to the meritless preservation argument, Grand Strand argues that the ALC’s decision should be affirmed as it “is on all fours with this case—both factually and procedurally—and the *Spartanburg* case supports the ALC’s order.” (Grand Strand

Br. 24.) As explained by CRCC in its Initial Brief at pages 18-23, the ALC's analysis and approval of Grand Strand's CON application was flawed and erroneous. The statutory and regulatory framework set forth in the Initial Brief evidences that remand was the proper vehicle by which the ALC should have sought to have the Grand Strand CON approved. Particularly in light of the reliance on the need published in the 2012-2013 South Carolina Health Plan, it was DHEC who is mandated to analyze the application for that published need, with input and participation of affected persons. What Grand Strand fails to disclose to this Court is that the issue of remand was never presented to the ALC or to any court on appeal. *Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assoc. of S.C., LLC*, 387 S.C. 79, 690 S.E.2d 783 (2010). Grand Strand simply cannot claim factual and procedural similarity where an issue is not even presented, much less ruled upon and rejected.

D. The Substantial Evidence in the Record Requires Reversal of the ALC's Decision to Approve Grand Strand's CON Application.

As expected, Grand Strand's Brief wholeheartedly agrees with the erroneous and unsupported findings of the Amended Final Order. As in the Order, Grand Strand ignores the substantial evidence that contradicts the Order's conclusions. With regard to the utilization and market share, Grand Strand ignores (as the ALC did) Grand Strand's own internal analysis of the expected redirection of Dr. Holt's practice to Grand Strand from CRCC – a redirection of CRCC's largest referral source of patients in 2012. (R. pp. 4495, 4744). It similarly ignores the CON Application itself – which discloses sensitive and proprietary information of Dr. Holt's practice that would only have come from the physician group itself and expressly informs the Department that Coastal Cancer Center

“anticipate[s] referring a **significant number of patients** to [Grand Strand’s] radiation therapy program, if approved.” (R. pp. 3340, 4220 (emphasis added)). With regard to the over-emphasis on CRCC’s relationship with employee-urologists, Grand Strand contradicts itself by first accusing CRCC’s expert of failing to “take into account that Grand Strand would not receive referrals from AUC,” but then arguing disingenuousness of CRCC’s expert for his market analysis assuming 100% of future referrals from the urologists employed by AUC would remain with CRCC (done in order to be overly conservative in the analysis of adverse impact). (Grand Strand Br. 11, 30). Even Grand Strand cannot help but be caught up in the inconsistency of the Amended Final Order and Decision.

Grand Strand simply parrots erroneous findings of the Amended Final Order regarding accessibility and adverse impact, again ignoring the wealth of evidence to the contrary, including that comprehensive cancer treatment is already in place in Myrtle Beach, with radiation therapy at CRCC, infusion services nearby at Dr. Holt’s main office, and hospital services at Grand Strand – all of which mirror the framework Grand Strand seeks to establish just three miles from CRCC. (R. p. 4741: “The chemo infusion service should be minimal. Dr. Holt does this in the building next door.”) Because radiation therapy is an outpatient service for the vast majority of patients, having the machine within the walls of the hospital has minimal importance, if any. (R. p. 686, lines 7-12). With most patients arriving on an outpatient basis for treatment, and Dr. Holt’s office performing the chemotherapy infusion services, there is no increase in accessibility offered by Grand Strand’s program. However, the impact on CRCC will be material and adverse, a fact that is clear from the Record and fully supported by substantial evidence.

(R. pp. 4495, 4554).

E. The Approval of CRCC's CON Application is the Law of the Case.

Grand Strand's alternative argument that this Court could reverse the unappealed approval of CRCC's CON application and affirm the approval of its project is improper. The Court must reject Grand Strand's attempt to seek an end run around its failure to appeal the approval of CRCC's CON application. Grand Strand did not appeal the approval of CRCC's CON Application and did not post the bond required by S.C. Code Ann. § 44-7-220(B). Therefore, the approval of CRCC's CON Application is the law of the case and must therefore be affirmed. *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004).

In contrast, CRCC appealed the decision of the ALC to approve Grand Strand's CON Application, posted the required bond, and did not appeal the question of whether the two applications are competing. CRCC's CON Application has been approved and the issue is not before the Court. "A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 378, 597 S.E.2d 181, 184 (Ct. App. 2004) (internal quotation omitted).

F. The ALC's Shifting of the Burden of Proof to CRCC was Improper.

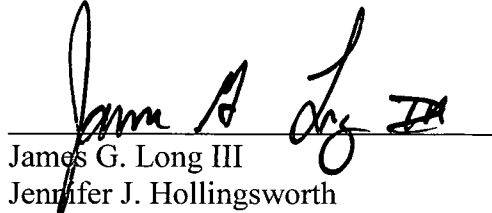
Grand Strand's final argument does no more than disagree with CRCC's issue on appeal, which properly argues that the ALC failed to assign the burden of proof correctly, resulting in a burden shifting to CRCC. CRCC directs this Court to its arguments at pages 32-34 of the Initial Brief, which Grand Strand does not fairly overcome in response. Given that the ALC created an independent need analysis, having no updated

analysis from Grand Strand, it stands to reason that the record lacked substantial evidence to support Grand Strand's position on the issue of need. Rather, the evidence reflects that Grand Strand expects 300 patients in its *first* year of operation (thus, even more anticipated by the third year), which will correspond to well more than the 5,525 treatments that will drive existing providers below the 80% threshold, whether using 21 treatments per patient (6,300) or 25 treatments per patient (7,500). As Grand Strand put it when confirming the higher expected market share capture, "are we bunting or trying to hit the ball?" (R. p. 4744). Grand Strand, and HCA, have every expectation that their linear accelerator service line will hit the ball, and have a substantial and material adverse impact on CRCC.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the ALC to issue a Certificate of Need to Grand Strand or, in the alternative, remand the issue of the approvability of the Grand Strand application to the Department.

Respectfully submitted,



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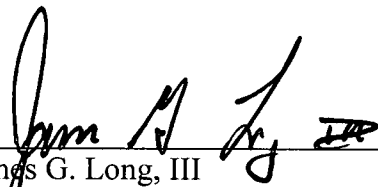
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CERTIFICATE OF COUNSEL

The undersigned certifies that the *Reply Brief of Appellant Carolina Regional Cancer Center to Initial Brief of Respondent Grand Strand Regional Medical Center* complies with Rule 211(b), SCAR.



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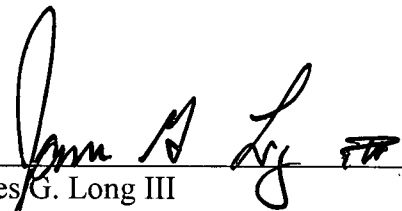
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PROOF OF SERVICE

I, James G. Long, III, hereby certify that on February 4, 2015, I caused a copy of
the *Reply Brief of Appellant Carolina Regional Cancer Center to Initial Brief of
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