

**IN THE SUPREME COURT OF MISSISSIPPI**

**WESLEY MEDICAL CENTER**

**APPELLANT**

**VS.**

**NO. 2008-SA-01276**

**MISSISSIPPI STATE DEPARTMENT OF  
HEALTH and FORREST GENERAL HOSPITAL**

**APPELLEES**

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**APPEAL FROM THE CHANCERY COURT OF THE  
FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI**

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**JOINT BRIEF OF APPELLEES  
MISSISSIPPI STATE DEPARTMENT OF HEALTH AND  
FORREST GENERAL HOSPITAL**

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***ORAL ARGUMENT NOT REQUESTED***

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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5. Forrest General Hospital, Appellee
6. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
7. Barry K. Cockrell, Esq., Attorney for Forrest General Hospital
8. Mississippi State Department of Health, Appellee
9. Bea M. Tolsdorf, Esq., Attorney for Mississippi State Department of Health
10. Southern Bone and Joint Specialists, P.A.
11. Cassandra B. Walker, Esq., Hearing Officer
12. The Honorable Patricia D. Wise, Chancellor


Respectfully submitted,



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Respectfully submitted,



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## **I. STATEMENT OF THE ISSUES**

The following issues are presented in this appeal:

1. Whether there is substantial evidence in the administrative record to support the Department of Health's finding that the project proposed by Forrest General Hospital is economically viable?
2. Whether the Department of Health's decision to approve Forrest General Hospital's proposal to relocate thirty (30) existing orthopedic beds to an orthopedic institute campus was contrary to the Department's rules and regulations, or exceeded the Department's statutory authority?
3. Whether there is substantial evidence in the administrative record to support the Department of Health's finding that there is a need for the project proposed by Forrest General?
4. Whether there is substantial evidence in the administrative record to support the Department of Health's finding that the project proposed by Forrest General Hospital will promote cost containment?

## **II. STATEMENT OF THE CASE**

### **A. Course of Proceedings**

On December 1, 2005, Forrest General Hospital ("Forrest General") filed a certificate of need ("CON") Application (the "Application") with the Mississippi State Department of Health (the "Department"). In the Application, Forrest General proposed to relocate thirty (30) of its existing, licensed orthopedic beds from the Hospital's main campus to a site adjacent to Southern Bone and Joint Specialists, P.A. ("SBJ"), an orthopedic medical group in Hattiesburg, Mississippi. Under the proposed arrangement, a dedicated orthopedic institute would be constructed and operated as a satellite of Forrest General Hospital.

In February of 2006, the Department issued its staff analysis recommending approval of Forrest General's Application (the "Staff Analysis"). The Department's staff determined that the project substantially complied with all criteria and standards for Construction, Renovation, Expansion, Capital Improvements, Replacement of Health Care Facilities and Addition of Hospital Beds as contained in the *Fiscal Year 2006 Mississippi State Health Plan* (the "CON Construction Criteria"). (Ex.3). Additionally, the Department staff found that the Forrest General Application complied with the General Review Criteria in the *Mississippi Certificate of Need Review Manual* (the "CON Manual"), and all of the adopted rules, procedures and plans of the Department. (Ex.3).

The Forrest General Application was opposed by Wesley Medical Center ("Wesley"), another acute care hospital located in Hattiesburg. In response to a request filed by Wesley, an administrative hearing was conducted on the Forrest General proposal on August 14, 15 and 16, 2007. At the hearing, each party was represented by counsel and presented evidence and testimony in support of its respective position.



After the conclusion of the administrative hearing, an independent Hearing Officer reviewed and considered all of the evidence presented, and issued her Findings of Fact and Conclusions of Law, which recommended approval of the project. (R.E.3). In these Findings and Conclusions, the Hearing Officer determined that Forrest General's Application complied with all applicable CON criteria and standards.<sup>1</sup>

On February 28, 2008, the State Health Officer announced that he concurred with both the Department staff and the Hearing Officer, and concluded that a CON should be awarded to Forrest General. Accordingly, in a Final Order dated February 28, 2008, the Department of Health formally approved Forrest General's Application. (Appellees' R.E.1).

Pursuant to *Miss. Code Ann.* § 41-7-201, Wesley appealed the Department's Final Order to the Chancery Court of the First Judicial District of Hinds County, Mississippi. Following briefing, oral argument and supplemental briefing, the Chancery Court affirmed the Department's administrative decision on June 20, 2008. (R.E.2).

On July 21, 2008, Wesley appealed the Chancery Court's Final Judgment to this Court.

#### **B. Statement of Facts**

Forrest General Hospital is a 512-bed general acute care medical-surgical facility. Forrest General is a not-for-profit, tax-exempt institution, owned by Forrest County, Mississippi. The Hospital is accredited by the Joint Commission on Accreditation of Healthcare Organizations and is licensed by the Mississippi State Department of Health. (Ex.3).<sup>2</sup>

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<sup>1</sup> Wesley contends that the Hearing Officer's Report was a "near verbatim" copy of Forrest General's post-hearing brief. *Wesley Brief* at p.4, fn2. As Wesley well knows, it is a standard practice before the Department of Health for parties to submit proposed Findings of Fact and Conclusions of Law to the Hearing Officer, who then adopts one set of findings or the other, and modifies the findings as appropriate. This does not detract from the credibility of the Hearing Officer's Report, which should be assessed on its own merits.

<sup>2</sup> In this Brief, references to exhibits introduced at the administrative hearing are cited as "Ex.\_\_\_\_," and references to testimony at the administrative hearing are cited to the transcript page number as "T.\_\_\_\_."

Forrest General participates as a Level II hospital in the Mississippi Statewide Trauma Program. (T.112). A Level II trauma facility provides trauma coverage 24 hours a day, 7 days a week and has such specialties as neurosurgery, orthopedic surgery and general surgery. (T.112). As the only Level II trauma hospital in South Mississippi, Forrest General has very high trauma volume and provides trauma coverage for that entire region. (T.116-117).

Forrest General's mission is to provide accessibility to quality health care for the residents of the 17 counties that define the Hospital's service area in South Mississippi. (T.109). Forrest General accepts all patients, regardless of their ability to pay, and this year will provide approximately \$120 million in indigent and charity care. (T.109). The Hospital offers a multitude of community services and programs, including outreach screening, women's programs and education, a pharmacy assistance center for the underserved, and a rehabilitation program for the homeless. (T.109).

As one of the largest hospitals in Mississippi, Forrest General provides comprehensive health care services, such as cardiovascular surgery, cardiology, neurosurgery, orthopedics, behavioral health, psychiatric addiction, pediatrics and a cancer center. (T.111). Approximately 350 physicians serve on Forrest General's medical staff, representing a variety of medical specialties. (T.111-112).

In this proceeding, Forrest General has obtained a CON to construct and relocate/transfer thirty (30) existing orthopedic beds to a new freestanding satellite orthopedic institute campus. The facility will be located on a site adjacent to Southern Bone and Joint Specialists, a short drive from the main campus of Forrest General. The transfer of the 30 licensed inpatient beds from Forrest General to the orthopedic institute will come from an older wing of the Hospital. The current beds in that older wing are becoming physically and functionally obsolete. The transfer of 30 existing orthopedic service beds from the main campus to the new freestanding

orthopedic facility will enable the Hospital to consolidate inpatient nursing care into fewer buildings and thereby enhance access for families and nursing care. The older wings of the Hospital are narrower than the newer inpatient buildings. Forrest General determined that the reinvestment of large capital dollars into these buildings will not yield a good return on investment over the long term, due to the limitations of the older buildings. (Ex.3).

Forrest General proposes to develop the orthopedic facility through arrangements with SBJ or an affiliate of SBJ. Southern Bone and Joint Specialists is a medical group consisting of 10 orthopedic surgeons and other specialists. (T.212-213). Under the proposed arrangement, SBJ (or its affiliate) would construct the orthopedic institute on the SBJ campus, and lease the building to Forrest General for the operation of the orthopedic institute. (Ex.3). Due to the fact that the developer will incur construction costs "on behalf of" Forrest General, the capital expenditure associated with the construction is subject to CON review. (Ex.3). The proposed capital expenditure for the project is \$31,264,770. (Ex.3).

As discussed in detail below, Forrest General developed this proposal in order to realign its orthopedic services and thereby achieve greater operational efficiencies, lower health care costs, and improve patient care. The Orthopedic Institute proposed by Forrest General will greatly benefit the health and welfare of the citizens of South Mississippi.

### **III. SUMMARY OF THE ARGUMENT**

This is an appeal of an administrative decision of the Department of Health. Forrest General has proposed the establishment of a dedicated Orthopedic Institute through the relocation of thirty (30) existing, licensed orthopedic beds. Consistent with the requirements of the Mississippi Certificate of Need Law, *Miss. Code Ann.* §§ 41-7-171, *et seq.*, Forrest General filed a CON Application with the Department, and proceeded through an exhaustive administrative review of the proposal. As part of that process, a three-day public hearing was

conducted before an independent Hearing Officer. At the conclusion of the administrative process, the Department of Health staff, the independent Hearing Officer, and the State Health Officer all agreed that Forrest General's application complied with all applicable CON standards and criteria.

Following the administrative approval of the project by the Department of Health, Wesley Medical Center, a local competitor of Forrest General, appealed the administrative decision to Hinds County Chancery Court. The Chancery Court considered both written and oral arguments of counsel for all parties, and affirmed the Department's decision.

Wesley is now before this Court and asserts two basic lines of argument in its appeal. First, Wesley contends that there was not adequate evidence before the Department of Health to support the Department's decision in three areas: (1) the economic viability of the project; (2) the need for the project; and (3) cost containment. Secondly, Wesley advances a novel (and wholly unsupported) argument that a "partial relocation" of health services is illegal under the Mississippi Certificate of Need Law. These arguments are contrary to both Mississippi law and the evidence in the administrative record.

First, there is substantial evidence in the administrative record to support the Department's finding that the project proposed by Forrest General is economically viable. During the hearing, Forrest General's Chief Financial Officer testified extensively about the financial projections for the project and the economic viability of the Orthopedic Institute. He used a detailed financial exhibit to explain the economic assumptions and projections for the facility. Although Wesley questioned various assumptions in the financial model, it did not present any substantial or credible evidence to refute those assumptions. Instead, Wesley offered the testimony of a health care consultant who presented a fundamentally flawed economic model in an effort to challenge the financial viability of the project. In the end, the Administrative

Hearing Officer accepted the testimony of Forrest General's Chief Financial Officer as the more credible. Clearly, there is substantial evidence to support this administrative fact-finding, and that finding should not be disturbed on appeal.

Similarly, there was substantial and, in fact, overwhelming evidence presented at the administrative hearing to demonstrate the need for the project. A variety of witnesses, including Forrest General Hospital's Chief Executive Officer, a health care facility planner, two physicians, a physician clinic administrator and the chief of the Department's CON program, all testified about the need for the Orthopedic Institute. These witnesses discussed in detail why the project was needed to replace Forrest General's outdated orthopedic facilities, to enhance the offering of orthopedic services to the public, to improve clinical efficiency, to lower health care costs, and to significantly improve overall patient care. There was also considerable testimony about how the Orthopedic Institute would enhance Forrest General's participation in the Statewide Trauma Program as a Level II facility.

In its Brief, Wesley cites its own evidence in opposition to the project, but fails to acknowledge that Forrest General presented more than substantial evidence to demonstrate the need for its proposal. It is clear that this evidence substantiates the Department's decision to approve the Forrest General CON Application.

Additionally, there is substantial evidence in the administrative record to support the Department of Health's finding that the project will promote cost containment. Several Forrest General witnesses testified that the Orthopedic Institute would achieve cost savings through greater operational efficiency, reduced length of stay and enhanced savings on the ordering and use of medical devices. Additionally, the Department staff concluded that the construction cost of the facility is reasonable and consistent with the cost of other projects approved by the Department in the past. In contrast, Wesley did not present any substantial evidence to show that

the project will violate the policy of cost containment. One of Wesley's witnesses suggested that the project would add cost to the area's health care system, but did not explain how this would happen or offer any facts or evidence to support this claim. Once again, there is more than substantial evidence to support the Department's finding on this issue.

Finally, there is no merit whatsoever to Wesley's contention that the relocation of part of a health service is not permitted by the Mississippi CON Law. The CON Law has no such prohibition. The CON statute merely states that a CON is required for "the relocation of one or more health services from one physical facility or site to another physical facility or site." *Miss. Code Ann.* § 41-7-191(1)(e). Wesley insists that this language **must** be interpreted to mean that a partial relocation of services is not allowed. However, the statute does not state, or even suggest that. In fact, there is no way that such a meaning can be ascribed to that statute without adding more language to the statute. In effect, Wesley is asking the Court to add a new requirement to the statute; i.e., a prohibition against the partial relocation of health services. However, as this Court has made clear, the Court's function is to interpret statutes, and not to amplify the statutes with words and provisions not contemplated by the Legislature.

In conclusion, Wesley's arguments consist of (1) a flawed and unsupported legal theory, and (2) an improper request for this Court to re-weigh the evidence presented at the hearing, and to ignore the substantial evidence which supports the Department's findings. These arguments have no merit, and the Chancery Court's final judgment, which upheld the Department of Health's decision, should be affirmed.

#### **IV. ARGUMENT**

##### **A. The Scope of Judicial Review in Certificate of Need Appeals is Narrow and Limited.**

On numerous occasions, this Court has delineated the scope of judicial review in certificate of need appeals. As stated in *St. Dominic-Jackson Memorial Hospital v. Mississippi*

*State Department of Health*, 728 So. 2d 81, 83 (Miss. 1998), the State Health Officer's granting of a certificate of need is subject to judicial review, but it:

shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the Court finds that the order . . . is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the . . . Department . . . , or violates any vested constitutional rights of any part involved in the appeal.

*St. Dominic*, 728 So. 2d at 83 (citing *Magnolia Hosp. v. Miss. State Dep't of Health*, 559 So. 2d 1042, 1044 (Miss. 1990); *Miss. Code Ann* § 41-7-201(4) (Supp. 2000); see also *Miss. State Dep't of Health v. Miss. Baptist Med. Ctr.*, 663 So. 2d 563, 573 (Miss. 1995).

Similarly, in *Grant Center Hospital of Mississippi v. Health Group of Jackson, Mississippi, Inc.*, 528 So. 2d 804, 808 (Miss. 1988), the Court established clear limitations on judicial review of CON decisions by the Department of Health:

These restrictions put two hotly disputed points **outside our authority**. These are (1) **whether there is a need** for additional beds for psychiatric care of children and adolescents and (2) which applicant, all things considered, is best able to fulfill that need . . . .

*Grant Center*, 528 So. 2d at 808 (emphasis added). The Supreme Court has consistently emphasized that it is beyond the legal authority of a reviewing court to determine **whether there is a need** for a given health service by an applicant seeking a certificate of need. Instead, the role of the Court is to determine whether there is substantial evidence to support the Department of Health's decision. *Jeff Anderson Reg'l Med. Ctr. v. Miss. State Dep't of Health*, 798 So. 2d 1264, 1266 (Miss. 2001).

It is well-settled that the "[d]ecisions of administrative agencies are given great deference." *Jackson HMA, Inc. v. Miss. State Dep't of Health*, 822 So.2d 968, 970 (Miss. 2002). In these appeals, the "burden of proof rests on the challenging party to prove that [the Department of Health] erred." *Id.*

In the decision of *Attala County Board of Supervisors v. Mississippi State Department of Health*, 867 So.2d 1019 (Miss. 2004), the Supreme Court again emphasized the standards of judicial review when an appeal is taken from a Final Order of the Mississippi State Department of Health:

The decision rendered by the hearing officer and the SHO [State Health Officer] is "afforded great deference upon judicial review by the court, even though we review the decision of the chancellor." . . .

There is a rebuttable presumption in favor of the decision rendered by an agency. . . . "[T]he burden of proving to the contrary is on the challenging party." . . . This Court, as well as, chancery and circuit courts, cannot "substitute its judgment for that of the agency or reweigh the facts of the case." . . .

Our constitution does not allow for the courts to conduct a de novo retrial of matters on appeal from administrative agencies. . . . The judiciary is not permitted to make administrative decisions. . . . Therefore, this Court has recognized the strict limitation set out in Miss. Code Ann. § 41-7-201(2)(f) for appellate review in our courts as to decisions of the SHO and the MSDH.

867 So.2d at 1023-35 (citations omitted).

In the *Attala County Board of Supervisors* decision, the Court held that the methodology utilized by the Department staff in its review of competing CON applications was not arbitrary or capricious. Further, the Court noted that in previous certificate of need cases, it has emphasized the flexibility and discretion vested in the Department of Health in conducting CON review:

The methodology used in any given case should not be carved in granite; instead, some flexibility is required. It is prudent to utilize a methodology that will accommodate the various and sundry circumstances found in each individual case.

867 So.2d at 1024, quoting *HTI Health Services of Mississippi, Inc. v. Mississippi State Department of Health*, 603 So.2d 848, 853 (Miss. 1992).



In the same decision, the Court noted that an administrative agency's decision is deemed to be arbitrary only "when it is not done according to reason and judgment, but depending on will alone." 867 So.2d at 1024, quoting *Mississippi State Department of Health v. Natchez Community Hospital*, 743 So.2d 973, 977 (Miss. 1999). Further, an action is defined as being capricious when it is "done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles." *Id.*

**B. The Department of Health's Decision Should Be Affirmed When it is Supported by Substantial Evidence.**

In its Brief, Wesley discusses the standard of judicial review and attempts to draw a distinction between "substantial evidence" and "manifest weight of the evidence." Regardless of the nomenclature which is used, this Court's decisions over the course of many years reveal the true standard which applies to the judicial review of administrative agency decisions.

In the recent decision of *Greenwood Leflore Hospital v. Mississippi State Department of Health*, 980 So.2d 931 (Miss. 2008), the Court described the standard of review in CON appeals as follows:

This Court has stated that "substantial evidence" as used in Mississippi Code Annotated Section 41-7-201(2)(f) means "more than a scintilla or a suspicion." *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 977 (Miss. 1999) (citing *Miss. Real Estate Comm'n v. Anding*, 732 So. 2d 192, 196 (Miss. 1999)). Further, an administrative agency's decision is "arbitrary and capricious" when it is not made "according to reason and judgment. . . [but] in a whimsical manner." *Id.* at 977 (citing *Burks v. Amite County Sch. Dist.*, 708 So. 2d 1366, 1370 (Miss. 1998)).

*Id.* at 935. Similarly, in *Mississippi State Department of Health v. Baptist Memorial Hospital-DeSoto, Inc.*, 984 So.2d 967 (Miss. 2008), the Court emphasized throughout the opinion that a "presumption of validity" is attached to the Department's CON decisions, and that the key issue is whether "substantial evidence, i.e., 'more than a scintilla or a suspicion'" is present in the

administrative record to support the Department's findings. *Id.* at 975, quoting *Natchez Cmty. Hosp.*, 743 So.2d at 977. See also *Miss. State Dep't of Health*, 984 So.2d at 977-981.

In *Mississippi State Department of Health v. Rush Care, Inc.*, 882 So.2d 205 (Miss. 2004), this Court held that the Department of Health's decision should be affirmed where it is supported by substantial evidence and is not arbitrary and capricious, even if the Department used an imperfect analysis in its findings. *Id.* at 210-211. There, the Court found that the Department's findings were supported by substantial evidence, and that the Court should not substitute its judgment for that of the Department. *Id.* at 210.

The requirement of proof of substantial evidence does not charge the Court with reweighing the evidence, but rather determining whether the administrative agency itself had substantial evidence upon which to base its findings. *Miss. Employment Sec. Comm'n v. Culbertson*, 832 So.2d 519 (Miss. 2002). As long as there is substantial evidence in the record to support the agency decision, "the appellate court must affirm even were that court to feel that the preponderance of the evidence supported a different outcome." *Miss. Employment Sec. Comm'n v. Claiborne*, 872 So.2d 698 (Miss. Ct. App. 2004). For purposes of reviewing whether an agency's finding is supported by substantial evidence, "substantial evidence is not an especially large quantum." *Miss. Dep't of Transp. v. Rutland*, 965 So.2d 696, 703 (Miss. Ct. App. 2007). There may be substantial evidence in the record to support one party's view, and in the same record substantial evidence to support the opposite view. *Id.*

In summary, this Court and the Court of Appeals have clearly and consistently defined the standard of judicial review of administrative agency decisions. The Court does not reweigh the evidence or substitute its judgment for that of the administrative agency. The Court does not view the evidence in a light more favorable to one party than the other. Instead, the Court examines whether there is substantial evidence (i.e., more than a "scintilla" or "suspicion") to

support the ultimate findings made by the administrative agency. If so, the Court will affirm the agency's decision, as long as it is not otherwise arbitrary or capricious.

Applying those standards to the present appeal, Wesley bears the burden of overcoming the "presumption of validity" of the Department's decision and must prove that Forrest General presented no more than a mere "scintilla" of evidence or a "suspicion" to support the Department's findings on economic viability, the need for the project and cost containment. Wesley must prove that the Department's decision to grant the CON to Forrest General was reached "in a whimsical manner," with a "lack of understanding of or disregard for the surrounding facts."

**C. There is Substantial Evidence in the Administrative Record to Demonstrate that Forrest General's Proposal is in Full Compliance with All Applicable CON Criteria and Standards.**

Most of Wesley's Brief consists of re-arguing the evidence presented at the Department of Health hearing. Of course, Wesley cites its own evidence in support of its arguments. But the mere fact that the administrative record contains evidence in support of Wesley's position does not mean that the Department's decision should be reversed on appeal. As in all administrative hearings, there was evidence presented both in favor of and against Forrest General's Application. On appeal, the standard of review is whether there is substantial evidence in support of the administrative agency's ultimate decision. If so, the courts do not disturb that decision by re-weighing the evidence or second-guessing the agency's factual findings. To do so would violate dozens of Mississippi appellate decisions over the course of the last 20 years. Yet Wesley urges the Court to engage in that very process by adopting Wesley's factual assertions, and ignoring the substantial evidence which supports the agency's decision.

When the totality of the evidence at the hearing is reviewed, it becomes obvious that there is more than substantial evidence to support the Department's decision that Forrest

General's Application complies with the CON criteria and standards. Consequently, that decision should not be reversed by the Court.

**D. There is Substantial Evidence in the Administrative Record to Support the Department of Health's Finding That the Project Proposed by Forrest General is Economically Viable.**

Wesley asserts that the Department's finding that the Forrest General Application is economically viable, is "contrary to the manifest weight of the evidence." In fact, substantial evidence was introduced to demonstrate the economic viability of the proposed project.

Forrest General's Application included a detailed financial analysis and a Three-Year Projected Operating Statement for the proposed project. (Ex.2). The Staff Analysis concluded that Forrest General satisfied the requirement of economic viability. (Ex.3). Mr. Dawkins testified that Forrest General had provided a letter, signed by the Chief Financial Officer, attesting to the financial feasibility of the project. (T.10). Mr. Dawkins also noted that the Three-Year Projected Operating Statement presented by Forrest General showed losses in the first two years of operation, but projected net income of \$155,000 in the third year after completion of the project. (T.10). He testified that the projected financial losses were cut dramatically from Year One to Year Two, and that there would be growth in net income over the subsequent period in Years Three and Four. (T.53). The Department staff was satisfied that the project would be economically viable by the third year of operation, in compliance with General Review Criterion 4. (T.53).<sup>3</sup>

Mr. Ed Tucker, the Chief Financial Officer at Forrest General, testified in considerable detail about the financial projections for the project, and the economic viability of the orthopedic facility. (T.260-383; 654-663). Mr. Tucker has extensive experience in the area of health care

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<sup>3</sup> Mr. Dawkins further testified that, even if the Orthopedic Institute showed a net operating loss in Year 3, it could still be considered economically viable over the long-term useful life of the Orthopedic Institute building, and thereby comply with General Review Criterion No. 4 in the CON Review Manual. (T.83-86). He also agreed that it would be an economic improvement for Forrest General's orthopedic service line to move from an operating loss of \$2.3 million to a gain of \$155,000 over three years. (T.86).

accounting. (T.260-262). He has been a certified public accountant since 1970. (T.262). Mr. Tucker has served as an independent health care financial consultant, as well as Assistant Hospital Director of Finance for the University of Mississippi Medical Center, and Chief Financial Officer at Blue Cross and Blue Shield of Mississippi. (T.261). He has also served on the American Institute of CPA's Healthcare Committee, which establishes healthcare-specific accounting standards. (T.261-262). Mr. Tucker has worked as CFO at Forrest General since 2002. (T.261).

As Chief Financial Officer, Mr. Tucker was responsible for the Hospital's financial accounting. (T.262). He was involved in the financial planning for the proposed orthopedic facility. (T.263-264). Mr. Tucker testified that his objective in overseeing the financial planning for the project was to make sure that the Hospital had a sound financial plan and to see if the project was financially feasible, given the fact that the Hospital's orthopedic service line currently loses anywhere from \$2 million to \$3 million a year. (T.264). Mr. Tucker stated that the key question for him was whether the proposed orthopedic facility would be more feasible than the current operation. (T.264).<sup>4</sup>

In addressing the economic viability of the proposed project, Mr. Tucker prepared a report (Ex.12) (Appellees' R.E.2), which he used in explaining and clarifying the financial projections. (T.265-266). He specifically identified the assumptions that were used in making the financial projections, and how revenues and expenses were calculated. (T.267-297) (Appellees' R.E.3). Mr. Tucker discussed the source of each line item in the financial projections, and how the projections were based on historical utilization, revenues and expenses

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<sup>4</sup> Mr. Tucker explained that there are several reasons why Forrest General loses money on its orthopedic services. First, the patients are primarily Medicare beneficiaries, and Medicare's reimbursement for this type of service, which often involves expensive implant devices, is not adequate. (T.264-265). Second, Forrest General has not been able to standardize, to a sufficient extent, the different medical implants and prosthesis devices used on these patients, in order to obtain a lower cost. (T.265). Other factors include the length of stay of these patients and the fact that Forrest General has a wage index lower than the national average. (T.265). Since this wage index is used in the Medicare calculation, it has a negative impact on Medicare reimbursement. (T.265).

for orthopedic services at Forrest General. (T.267-297) (Appellees' R.E.3). He candidly acknowledged that the financial model assumed "pretty high growth rates," but noted that the basis for those rates included having more physicians in the area, the growth and aging of the population, and the obesity of the patient population. (T.269). Mr. Tucker characterized the overall financial projections as conservative. (T.269). Nevertheless, due to the problems with Medicare reimbursement and other factors, Mr. Tucker admitted that the stand-alone economic viability of the freestanding facility was "not a slam dunk, by any means." (T.296). At the same time, Mr. Tucker noted that Forrest General was already losing approximately \$3 million a year on its orthopedic service line, and that this project offered an opportunity for economic improvement, by containing costs through clinical and business efficiency, and attracting new patients to the facility. (T.296).<sup>5</sup>

In its Brief, Wesley attempts to characterize Mr. Tucker's testimony as "speculative." Wesley also quibbles with various assumptions in Forrest General's financial model, and suggests that Mr. Tucker admitted that many of the expense items were "understated."

These arguments are both inaccurate and misleading. At the outset of his testimony, Mr. Tucker noted that he did not personally prepare every item in the financial projections. (T.265; 319). Instead, he supervised the preparation of the financial analysis section of the Application, discussed the financials with his staff, and reviewed the projections to insure that they were reasonable and sound. (T.265; 319; 376; 381-382). Mr. Tucker acknowledged that various expense items could be subject to some adjustments up or down, based on various methods and approaches, but concluded that the financial projections on the whole were reasonable and realistic, while recognizing that there are different methods that can be used for economic forecasting, and that there is no "magic formula" that can be applied. (T.376; 381-

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<sup>5</sup> Mr. Tucker also confirmed that the financial projections do not include taking any orthopedic cases from Wesley. (T.296-297).

382). He also observed that even if Forrest General were to break even on the elective orthopedic cases being performed at the proposed institute, taken as a whole, that would be a significant economic improvement for Forrest General. (T.373). He stated that even though the project is a "stretch," it is still in "the best interest of Forrest General and, more importantly, the patients." (T.379).

Wesley challenged Forrest General's financial projections through the testimony of Mr. Charles Overstreet, a health care consultant. Mr. Overstreet was qualified as an expert in the areas of strategic planning, performance improvement and financial analysis. (T.586-587).<sup>6</sup>

In an effort to contest the economic viability of the project, Mr. Overstreet presented alternative financial scenarios. (T.596-612) (Exhibits 18 and 19). However, a fundamental flaw in these financial models was that he failed to inflate revenues, while inflating expenses. (T.631-632). As Mr. Tucker pointed out in rebuttal, this is not appropriate health care accounting, and results in a "mismatch" of the projections. (T.658-662). More specifically, by inflating expenses and not revenues, the economic models "would show an artificial low profit, or an artificially high loss." (T.661-662).

Having considered the testimony of both Mr. Tucker and Mr. Overstreet, the Hearing Officer found Mr. Tucker's testimony to be the more credible and persuasive. The Hearing Officer noted that at a minimum, Mr. Tucker sufficiently documented and explained the assumptions and rationales used by Forrest General in projecting the economic performance of the Orthopedic Institute, and **those projections showed positive net income in Year Three.** (R.E.3, p.30). As previously discussed, Mr. Tucker was quite candid in acknowledging the potential financial problems with the proposed facility. Nevertheless, the Hearing Officer

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<sup>6</sup> Counsel for Forrest General and the Department strongly objected to Mr. Overstreet's qualifications in the area of financial analysis. Although Mr. Overstreet was allowed to testify as an expert in that area, his experience and expertise in health care accounting and financial issues are limited, and significantly less than the financial expertise and experience of Mr. Tucker.

determined that Mr. Tucker's testimony reflects a cautious and credible approach in evaluating the economic viability of the project. (R.E.3, p.30). There is substantial evidence in the record to support this administrative finding.

In the end, financial projections are exactly that: projections. It is not unusual in these hearings for an opponent's financial expert to offer an alternative economic model and, by changing a few assumptions, to convert a positive income statement into a negative bottom line. The real issue is whether the applicant's financial projections are so flawed that they warrant the disapproval of a project which is otherwise in compliance with the applicable criteria. In this case, there is no basis for rejecting the substantial evidence supporting Forrest General's financial analysis, as presented by Mr. Tucker, particularly since Mr. Overstreet's own economic models were flawed.

Moreover, this project presents a unique situation, in that Forrest General is already experiencing substantial economic losses on its orthopedic service line. The development of the Orthopedic Institute may enable Forrest General to cut these financial losses, while maintaining its ability to participate in the Statewide Trauma Program.

In short, there is clearly substantial evidence in the record to support the Application's compliance with General Review Criterion 4, and to show that the project is economically viable.

**E. The Department of Health's Decision to Approve Forrest General's Proposal to Relocate Existing Orthopedic Beds Was Perfectly Consistent With the Department's Regulations, and Clearly Within the Department's Statutory Authority.**

Wesley contends that the relocation of a "portion" of a health service is not permitted by the Mississippi CON Law or the Department's regulations. Wesley also alleges that the Department of Health's review of Forrest General's Application was based on the erroneous assumption that Forrest General intended to relocate its entire orthopedic service line. In addressing these arguments, we first must look to the administrative record in order to clear up



Wesley's factual assertions, and then respond to Wesley's novel and wholly unfounded interpretation of the Mississippi CON law.

**1. The Department's Decision Was Not Based on an Erroneous Assumption.**

Wesley is incorrect in its contention that the Department's CON approval was based on a misunderstanding of the services proposed to be relocated. Forrest General's CON Application specified that thirty (30) orthopedic beds would be relocated to the Orthopedic Institute, and the Department staff reviewed and evaluated the proposal as a request to relocate those thirty (30) beds. (Ex.3; T.7). The question of whether or not Forrest General would retain a limited level of orthopedic services on its Main Campus was not material to the Department's recommendation of approval. In fact, Mr. Dawkins, the Department's representative, testified that he would not be concerned about Forrest General's maintaining orthopedic surgery capabilities on its Main Campus in order to fulfill its role as a regional trauma center. (T.28)<sup>7</sup>

In its Brief, Wesley contends that "the Department's own representative testified that a portion of a service area, such as orthopedics cannot be relocated under the State Health Plan and the Certificate of Need Review Manual." *Wesley Brief* at 6. This statement is simply untrue, and it is noteworthy that Wesley did not provide a quotation of that testimony. Here is the actual exchange between Mr. Dawkins and Wesley's counsel on this matter:

Q. If you will, look with me at the application, Page Roman Numeral III-3. Do you see the statement there, the top partial paragraph, where it says: "This will also consolidate inpatient nursing care to fewer buildings and thereby enhance access for families and nursing care"? Do you see that statement?

A. Yes.

Q. Well, let me ask you this question before we get into that. If the evidence presented at this hearing establishes that

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<sup>7</sup> Forrest General's CEO, Bill Oliver, noted that as a trauma center, Forrest General is legally required to keep an orthopedic surgery room available. (T.123).

Forrest General will not actually relocate its entire orthopedic practice, but a portion of that orthopedic practice will remain on the main campus, and I'm talking about a portion other than trauma patients, that would impact your opinion of this application, wouldn't it?

A. Yes.

Q. Because the Court system has said that a relocation of part of a service is not – is not the same thing. We don't look at that the same way as relocation of the entirety of the service, true?

A. True.

Q. If Forrest General is not going to relocate the entirety of its orthopedic service, you would agree with me that the statements here on Page Roman Numeral III-3 would not be accurate; it would not be a consolidation of service? It would be creating a new location for service. Is that right?

A. You're referring to the consolidation of inpatient nursing care?

Q. Right.

A. In procured buildings?

Q. Right. And specifically just with regard to orthopedics.

A. I really – I can't equate it to you. I don't really know how that – what that really means regarding this relocation proposal.

(T.62-64).

Several obvious conclusions can be drawn from this exchange. First, the context of this area of cross-examination was Forrest General's statement, in the Application, that the project would "consolidate inpatient nursing care." It did not concern the legality of moving a portion of a health service. Second, Mr. Dawkins never said, as claimed by Wesley, that a portion of a service line "cannot be relocated under the State Health Plan and the Certificate of Need Review Manual." Third, Mr. Dawkins also did not state that he would have recommended disapproval of Forrest General's Application if it had been clear to him that Forrest General intended to retain

limited orthopedic services on its Main Campus. He simply agreed with the statement of Wesley counsel that it "would impact" his opinion. (T.63). As previously discussed, Mr. Dawkins clarified that he would not take issue with Forrest General's maintenance of orthopedic services on the Main Campus in order to serve as a trauma center. (T.28).

As a point of fact, Wesley's entire line of argument on this point is built on a deceptive premise. It is misleading for Wesley to contend that Forrest General intends to move only a "portion" of its orthopedic services. Forrest General's clear goal is for all non-trauma (i.e., elective) orthopedic surgeries to be performed at the Orthopedic Institute; however, Forrest General, as a public, community hospital, will not prohibit physicians from performing orthopedic surgery on the Main Campus, if they so choose. (T.146-148; 190). This is a far cry from the suggestion that Forrest General will relocate only a "portion" of this service.

Finally, even if the Department staff was initially confused about Forrest General's intent to maintain a limited level of orthopedic services on the Main Campus, that matter was completely addressed and resolved during the course of the hearing. As discussed above, Forrest General's Chief Executive Officer explained that, as a major trauma center, Forrest General had to maintain a certain level of orthopedic services on its Main Campus, in order to provide comprehensive and appropriate care to trauma victims. Additionally, as a community hospital, Forrest General is expected to allow physicians open access to its facility. Consequently, it would not be appropriate for Forrest General to prohibit local orthopedic surgeons from practicing on its Main Campus, if they desire to do so, or consider it to be in the patient's best interest.

Both the Hearing Officer and the State Health Officer considered all of this evidence, and made fully informed decisions on Forrest General's proposal to relocate 30 orthopedic beds, while maintaining a certain level of essential orthopedic services on its Main Campus. There

was no confusion or misunderstanding about this proposal when the final administrative decision was made.

**2. Wesley's Legal Argument is an Improper Attempt to Add Words and Requirements to the CON Law.**

Contrary to Wesley's creative but flawed theory, there is absolutely nothing in the Mississippi Certificate of Need Law which remotely suggests that a hospital cannot relocate a portion of its acute care beds or services.<sup>8</sup> *Miss. Code Ann.* § 41-7-191 merely requires a CON for the "relocation of one or more health services from one physical facility or site to another physical facility or site." This statute does not state or even imply that a hospital must relocate "all" of a particular type of health service in order to obtain a CON. This "all or nothing" interpretation was created out of thin air by Wesley's counsel, and there is no basis for that interpretation in the language of the statute itself.

Nevertheless, Wesley wrongly insists that the statute **must** be interpreted to mean that a partial relocation of health services is not allowed, despite the obvious fact that there is no way that such a meaning can be ascribed to that statute without adding more language to the provision. Clearly, Wesley is asking the Court to add a new requirement to the statute; i.e., a prohibition against the partial relocation of health services. Even under the most liberal construction of this language, there is no possible way to arrive at the interpretation offered by Wesley. Moreover, this type of unfounded statutory manipulation, if accepted, would allow private parties to write in other prohibitions to the CON Law which suit their interests but which were never contemplated by the Legislature in adopting the CON Law.

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<sup>8</sup> As discussed above, this argument is essentially a "red herring," since Forrest General plans to move all non-trauma orthopedic services to the Orthopedic Institute, with limited exceptions. Nevertheless, the following discussion will demonstrate that Wesley's argument is legally flawed, even if Forrest General relocates less than 100% of its orthopedic services to the new campus.

The interpretation of the CON statute that actually counts is the interpretation of the Department of Health, which is charged by law with interpreting, administering and enforcing the Mississippi CON law. As this Court has emphasized on numerous occasions, the Department of Health is entitled to great deference in its interpretation of the CON statutes and regulations under which it works on a daily basis, and that interpretation will not be disturbed on appeal unless it is arbitrary or capricious. *See, e.g., Grant Center Hospital of Mississippi, Inc. v. Health Group of Jackson, Mississippi, Inc.*, 528 So.2d at 810 (when administrative “agencies speak, courts listen”). In this case, the Department of Health staff, an independent Hearing Officer, and the State Health Officer all agreed that Forrest General’s relocation should be approved under the Mississippi CON law, as well as the relevant CON criteria and standards.<sup>9</sup> The Department’s position is that this statute does not differentiate between total and partial relocations, so that **any** relocation of a health service – 10%, 50% or 100% -- is subject to CON review. This reasonable and rational interpretation should be upheld. *See, e.g., Grant Ctr. Hosp. of Miss.*, 528 So.2d at 810 (Miss. 1988).

In short, Wesley has not met its burden of demonstrating that the Department of Health’s interpretation of the CON statute, under which it operates, is arbitrary or capricious. The Department of Health reasonably interpreted Forrest General’s partial relocation of orthopedic services to trigger CON review (along with the other subsections of the statute that required CON review). There is no direct or indirect statutory ban on a partial relocation of health services, nor is there any case law or regulation in support of Wesley’s position.<sup>10</sup>

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<sup>9</sup> Wesley suggests that if the Court affirms the Department’s decision to authorize this relocation project, it will be “adding language” to the CON statute. In fact, precisely the opposite is true. Since the CON statute does not require a hospital to relocate “all” of a health service to get a CON, it would be improper for the Court to add that requirement to the statute.

<sup>10</sup> In its Brief, Wesley fails to mention that the Department of Health reviewed Forrest General’s Application under **four** different provisions of the CON Law, including (1) a “relocation of a health care facility or portion thereof,” (2) “the relocation of one or more health services from one physical facility or site to another physical facility or site,” (3) the “acquisition or otherwise control of any major medical equipment for the provision

### 3. The *Singing River* Case Has No Bearing on this Proceeding.

In its Brief, Wesley suggests that the decision of *Singing River Hospital System v. Biloxi Regional Medical Center*, 928 So.2d 810 (Miss. 2006), is applicable to this proceeding. However, that decision has absolutely no bearing on the issues in this appeal.

In the *Singing River* case, this Court noted that “the issue before the Court is whether the Singing River beds proposed to be relocated to Ocean Springs are ‘additional’ beds.” *Id.* at 812. In reaching the conclusion that the beds were “additional” beds and not “relocated” beds, the Court noted that the CON statute did not refer to the relocation of beds. Rather, the statute refers only to the relocation of health services, or a health care facility or a portion thereof. *Id.* at 813. Consequently, the Court determined that since the CON statute did not address the relocation of *beds*, the beds proposed to be placed at Ocean Springs Hospital must be considered additional beds, as opposed to relocated beds.

The point of all of this discussion by the Court was to determine whether the Department of Health applied the proper State Health Plan criterion. Based on the foregoing analysis, the Court concluded that the Department should have applied the Need Criterion which dealt with the addition of beds. **In reaching that conclusion, the Court did not state that the addition of beds was prohibited.** The Court simply ruled that the Department of Health should have applied a different Need Criterion in reviewing the Singing River Hospital System proposal to add beds. Under Wesley’s theory, the Supreme Court should have held that Singing River’s proposal to add beds was **prohibited** by the CON Law. But that was not the Court’s ruling. The Court did not hold that Singing River was prohibited from adding beds under the CON statute.

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of medical services and (4) a “capital expenditure or deferred capital expenditure by or on behalf of a health care facility.” (Ex.3 at p.3; T.7-8). Thus, putting aside Wesley’s “partial relocation of services” argument, the Department reviewed and approved Forrest General’s Application under three other, independent provisions of the CON Law.

The Court just determined that a proposal to add beds required review under a different Need Criterion than the one applied by the Department.

There are other reasons why the facts and circumstances in *Singing River* present an entirely different situation than the one presented in this appeal. In the *Singing River* case, the CON statute did not mention “relocated beds” at all. In the present appeal, it is undisputed that the statute requires a CON for the “relocation of one or more health services from one physical facility or site to another physical facility or site.” It is also undisputed that Forrest General Hospital proposes the relocation of orthopedic services to a new campus, while maintaining a certain level of orthopedic services at its main hospital facility. Unlike the situation in *Singing River*, where relocated beds were not mentioned at all, the CON statute specifically mentions “relocated services.” The only question is whether that statute prohibits a partial relocation of services, as suggested by Wesley. For the reasons already discussed, the language of the statute does not support that interpretation.

In conclusion, it is worth noting that a key statement in the *Singing River* case actually supports the position of Forrest General and the Department of Health. Specifically, the Court stated as follows:

The duty of this Court is to interpret the statutes as written. It is not the duty of this Court to add language where we see fit. “[O]ur primary objective when construing statutes is to adopt that interpretation which will meet the true meaning of the Legislature.”

928 So.2d at 813, quoting *Mauldin v. Branch*, 866 So.2d 429, 435 (Miss. 2003) (quoting *Stockstill v. State*, 854 So.2d 1017, 1022-23 (Miss. 2003)). By urging this Court to interpret the CON statute to impose a ban on partial relocation of services, Wesley is actually requesting the Court to add words and requirements to the statute. Such a result would be directly contrary to the Supreme Court’s holding in *Singing River*, as well as a number of other decisions.

**F. There is Substantial Evidence in the Administrative Record to Support the Department of Health's Finding That There is a Need for the Project Proposed by Forrest General.**

Wesley contends that the evidence at the hearing "established there is no need for this project." In making this assertion, Wesley completely ignores extensive testimony presented by numerous Forrest General witnesses concerning the need for the proposed project. Moreover, the Department of Health representative testified that there was a need for the project, and that the Application was in compliance with the applicable need criteria in the State Health Plan and the *Certificate of Need Review Manual*. The mere fact that Wesley offered evidence challenging the need for the project (as all opponents do) does not mean that substantial evidence to the contrary should be ignored. As discussed below, there is more than substantial evidence to support the Department's finding that the project is needed.

Before discussing the extensive evidence which supports the need for the project, it is appropriate to review the actual Need Criterion which governs the review of this Application. The CON Construction Criteria actually have two (2) alternatives under the Need Criterion. (Ex.5). The first, Need Criterion 1(a), is applied to projects which do not involve the addition of any acute care beds. (Ex.5). The second, Need Criterion 1(b), is applied to projects which involve the addition of beds. (Ex.5). Mr. Dawkins testified that the Department staff applied Need Criterion 1(a) to the Forrest General Application because the project does not involve the addition of beds. (T.18-19). There was no evidence presented at the hearing to suggest that Need Criterion 1(b) should be applied to this proposal. Accordingly, the Department staff properly selected Need Criterion 1(a) as the relevant standard.<sup>11</sup>

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<sup>11</sup> As an aside, Wesley asserts in a footnote in its Brief that the Department should have applied Need Criterion 1(b), which requires a hospital to have a 70% occupancy rate when the hospital proposes an "addition of" acute care beds. In support of this argument, Wesley cites *Singing River Hospital System v. Biloxi Regional Medical Center*, 928 So.2d 810 (Miss. 2006). However, in that case, the Supreme Court determined that the project involved the "addition of" beds because Singing River Hospital System proposed the relocation of **unused** beds from Singing River Hospital to Ocean Springs Hospital, thereby resulting in additional beds at Ocean Springs Hospital. *Id.* at 812-814. Under that proposal, Ocean Springs Hospital's licensed beds would have increased from 136 to 196 beds.



Need Criterion 1(a) states as follows:

The applicant shall document the need for the proposed project. Documentation may consist of, but is not limited to, citing of licensure or regulatory code deficiencies, institutional long term plans (duly adopted by the governing board), recommendations made by consulting firms, and deficiencies cited by accreditation agencies (JCAHO, CAP, etc.). In addition, for projects which involve construction, renovation, or expansion of emergency department facilities, the applicant shall include a statement indicating whether the Hospital will participate in the statewide trauma system and describe the level of participation, if any.

(Ex.5). During his testimony, Mr. Dawkins characterized this criterion as “an institution-specific standard.” (T.20). In other words, there is not a specific formula which has to be met by the applicant. (T.20). Instead, the Need Criterion is more flexible in requiring the applicant to come forward and demonstrate why the project is needed, including, but not limited to, a showing based on the items listed (licensure or regulatory code deficiencies, institutional long-range plans, recommendations made by consulting firms, etc.). As discussed below, a variety of substantial evidence was offered to demonstrate and document the need for this proposal, based on the standards set forth in Need Criterion 1(a).

#### 1. Testimony of Department of Health Witness

First, Mr. Dawkins, on behalf of the Department, confirmed that Forrest General’s Application met the requirements of Need Criterion 1(a) by properly documenting the need for the project. Mr. Dawkins testified that there would be numerous clinical and operational benefits to be derived from the development of the proposed orthopedic facility. (T.23). Forrest General properly justified its proposal by citing existing constraints in the current physical plant of the Hospital, which did not lend itself to on-site renovation and expansion. (T.23). The orthopedic

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*Id.*. The Court made it clear that this was the determinative factor in that appeal.

In contrast, Forrest General’s proposal does not involve unused “phantom” beds. The evidence was undisputed that Forrest General is moving **fully operational** orthopedic beds. Moreover, the project will not result in any increase in Forrest General’s licensed beds. The Hospital’s licensed bed capacity will remain exactly the same. For these reasons, the *Singing River* holding is not applicable here.

service line at Forrest General needs larger and more specialized patient rooms, and operating rooms equipped with higher and more specialized technology. (T.24). The existing orthopedic unit at Forrest General creates particular problems for orthopedic patients, many of whom use wheelchairs and walkers. (T.24). As a result, patients have difficulty accessing the bedroom facilities in these rooms, due to inadequate size. (T.24). The development of the orthopedic institute in a freestanding building will enable the patient rooms to be designed and constructed according to industry standards that will better serve the clinical needs of the orthopedic patients at Forrest General Hospital. (T.24-25). Mr. Dawkins testified that all of these factors, including clinical benefits and replacement of outdated facilities, are appropriate justifications to document compliance with Need Criterion 1(a). (T.25-26). In fact, these are the primary reasons for renovation or replacement projects. (T.25-26).

Mr. Dawkins also agreed that the proposal further satisfied the Need Criterion by providing a more optimized patient care environment through the establishment of a facility in close proximity to a large orthopedic surgery group. (T.26-27). The development of the orthopedic institute will enable the physicians to respond more quickly and efficiently to the needs of their patients, thereby enhancing access to care. (T.26-27).

## **2. Testimony of Forrest General Witnesses**

Mr. Bill Oliver, the Chief Executive Officer of Forrest General, spent a considerable amount of time discussing the need for the proposed project. Mr. Oliver explained that the concept of the orthopedic institute originated a number of years ago in conjunction with Forrest General's assessment of its trauma program. (T.117-118). Forrest General started its trauma program in 1999, and its physicians made a commitment to provide coverage for the program, knowing that it would be a significant and demanding requirement. (T.117). By 2001, Forrest General recognized that the physicians were getting overloaded from trauma coverage, in view of the hours involved and the effect on their normal practices. (T.117-118). That same year, Mr.

Oliver and other representatives of Forrest General met with the physicians and began to look at alternatives. (T.118). By 2004, the number of trauma cases at Forrest General had doubled from the volume in 1999. (T.118). Consequently, the Hospital began to consider the alternative of treating elective orthopedic cases away from the main campus. (T.118-119).

In consultation with the physicians, Forrest General assessed whether an off-campus, freestanding facility could provide better benefits to patients, from the standpoint of accessibility and superior management of cases. (T.119). Forrest General representatives, as well as physicians, made site visits to other hospitals that operated dedicated orthopedic facilities. (T.119).

At the same time, the Hospital considered the fact that the orthopedic floor was opened in 1978, prior to the Americans with Disabilities Act. (T.119). The size of the rooms was a problem, and the orthopedic floor was located in the middle of the Hospital's front tower. (T.119). Mr. Oliver testified that to relocate the orthopedic floor within the Hospital while maintaining the high volume that the Hospital was experiencing, would have been a real challenge. (T.119). Consequently, in addition to looking at alternatives within the main facility, Forrest General looked at alternatives nearby, as well as locations away from the main campus. (T.119-120).

Ultimately, Forrest General came to recognize that locating an orthopedic facility in close proximity to the Southern Bone and Joint Group would have significant benefits, including ease of practice for those physicians, being able to keep the Hospital's trauma program intact by dedicating space on the Hospital campus to those patients, and improving the overall level of care at both locations. (T.119-121). Mr. Oliver noted the success of several of these types of programs, as well as the success of Pine Grove, Forrest General's freestanding behavioral health facility. (T.120).

In order to conduct a full evaluation of alternatives, Forrest General engaged John Sierra, a facilities planning consultant. (T.121). Mr. Sierra developed Forrest General's long-range facilities plan, and was requested to evaluate options for orthopedic services. (T.121-122). Forrest General also continued to consult with the SBJ physicians concerning the potential project. (T.122).

As a result of this process, Forrest General concluded that there would be a number of benefits to the development of an off-campus freestanding orthopedic institute. The new facility would allow for the reallocation of space on the main campus in buildings that are 50 to 55 years old, and that are primarily designed for medical and not surgical use. (T.123). This would also enable Forrest General to avoid having to renovate the orthopedic wing, which would pose a challenge with patients during the construction period. (T.123). Additionally, in view of the high volume of the Hospital's trauma program, it would be difficult to insure that adequate orthopedic surgery capacity would be available during any renovation of the existing orthopedic floor. (T.123).

Additionally, the construction of a freestanding facility would be one of the quickest ways for the Hospital to free up operating room capacity on the main campus. (T.123-124). Another important benefit is that the establishment of the orthopedic facility would greatly enhance the ease of practice of the SBJ surgeons, who are the primary deliverers of trauma coverage at the Hospital. (T.124). The creation of greater clinical efficiency at the orthopedic institute, in close proximity to the SBJ offices, would counter-balance the extreme demands being placed on those orthopedic surgeons as a result of Forrest General's trauma program. (T.124-125).

Mr. Oliver addressed, in detail, the other alternatives that were considered by the Hospital. First, Forrest General considered renovating the existing orthopedic floor, but the

problem was where to move the patients during the construction period. Most of the space that was available was in 50-year old space, which was even smaller than the orthopedic wing. (T.125-126). Forrest General also considered a location in a medical plaza across the street from the Hospital, but rejected that approach due to problems with parking, and the costs associated with constructing a parking garage to accommodate patient volume at that location. (T.126). Forrest General also looked at land near the Hospital, but it was deemed to be too narrow. (T.126-127).

After reviewing these options, Forrest General determined that the Southern Bone and Joint campus made the most sense. (T.128). That location is in a growth pattern for Forrest County, and is easily accessible from Highway 49 and Interstate 59. (T.127). Of course, the location also would provide immediate access to the orthopedic surgeons at Southern Bone and Joint. (T.127). By establishing the orthopedic facility near SBJ, the orthopedic surgeons associated with that group would be more productive with their elective cases, when they were not on trauma call. (T.128).

Mr. Oliver concluded that the proposed project will enhance orthopedic care and benefit the community through the development of a strong orthopedic facility. (T.128).

Dr. Douglas Rouse, an orthopedic surgeon affiliated with Southern Bone and Joint, also testified in support of the project. Dr. Rouse, a sports medicine specialist, is the senior partner of SBJ. (T.195). He practices at both Wesley and Forrest General. (T.195).

Dr. Rouse testified that the proposed orthopedic institute would have "tremendous benefits to our patients." (T.197). To Dr. Rouse, numbers and statistics are less important than patient needs. (T.197). The proposed orthopedic facility would enable the physicians to take better control of the patient environment, and reduce the risk of patient complications by allowing elective surgery patients to be treated in a more appropriate setting. (T.197-198). The

project, in Dr. Rouse's opinion, would result in "monumental savings and improvement for our patient care." (T.198).

The orthopedic facility also would enable SBJ to recruit additional orthopedic surgeons. (T.198). The facility would be unique in Mississippi, and would likely result in attracting patients from a wider area. (T.198).

Dr. Rouse also agreed that the project would help alleviate some of the demands and stress of SBJ physicians who provide trauma coverage at Forrest General. (T.200-201). By enabling the physicians to do elective cases closer to the physicians' office, their ease of practice would be enhanced. (T.200-201). Nevertheless, the real reason for the project would be better control, better monitoring and better provision of patient care to orthopedic patients. (T.201).

Mr. David Burckel, the Chief Executive Officer of Southern Bone and Joint, testified that the project would be beneficial by enhancing the quality of care provided to SBJ patients, as well as assisting SBJ in its physician recruitment efforts. (T.214-216). Mr. Burckel noted that a study conducted in 2000 or 2001 by Horne LLP indicated the need for approximately 25 or 26 orthopedic surgeons in the area. (T.214-215). Currently, there are only 15 orthopedic surgeons practicing in Hattiesburg. (T.215). He believes that the orthopedic facility would create a beneficial environment for patients, and establish a mechanism to attract more orthopedic surgeons to the region, in order to serve existing and future patient demands. (T.214-216).

Another Southern Bone and Joint physician, Dr. Keith Melancon, described a number of the problems and challenges facing health care providers in offering orthopedic services in South Mississippi. First, SBJ and Forrest General are getting patients from a huge area, including such places as McComb and Natchez. (T.237). He agreed with prior testimony that the new orthopedic institute would facilitate recruitment of orthopedic surgeons to help with this current and growing demand. (T.237).

Dr. Melancon also gave specific examples of the problems with the current orthopedic patient rooms at Forrest General, including the undersized bathrooms. (T.238). He believes that the existing orthopedic floors at Forrest General do not provide a proper level of patient care. (T.238-239).

Dr. Melancon testified that the orthopedic institute would result in a number of clinical benefits, including a higher level of care for patients, reducing the number of complications, and creating greater operating efficiency. (T.238-239). The facility also would enhance the efforts of Southern Bone and Joint physicians to work with Forrest General in controlling medical supply costs through a closer coordination of the services provided to SBJ patients. (T.240-243). Dr. Melancon concurred that the facility would assist Forrest General in its continued participation in the statewide trauma program by enabling the SBJ physicians to be more efficient in their practices, and allowing the nursing staffs at each location to be dedicated to trauma and non-trauma services. (T.245-246).<sup>12</sup>

Mr. John Sierra testified as an expert witness in health care facility planning. (T.389). Mr. Sierra has been involved in health care facility programming and design for 20 years. (T.387). He has been involved in approximately 400 health care facility projects. (T.387). Mr. Sierra has worked with Forrest General for 10 years. (T.388).

Mr. Sierra was first engaged by Forrest General in connection with the orthopedic institute project in January of 2005. (T.390). He testified, in detail, about how he worked with the Hospital in conducting a comprehensive review of orthopedic services and available options. (T.390-405). Mr. Sierra addressed the physical problems with the existing Forrest General

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<sup>12</sup> On page 24 of its Brief, Wesley asserts that Forrest General's trauma system argument is now "moot" because the State has adopted a "play or pay" arrangement, pursuant to which hospitals must either participate in the trauma system or pay for the privilege of non-participation. This argument misses the entire point. Forrest General desires to **actively participate** in the State Trauma System as a Level II facility, in order to serve as a critical, life-saving medical resource in South Mississippi. The undisputed testimony showed that the Orthopedic Institute will facilitate this goal.

orthopedic floors, including the inadequate size of rooms, bathrooms and operating facilities, and structural problems in attempting to renovate that area. (T.393-395). The orthopedic wing of the Hospital was built in 1977, and was constructed according to standards existing at that time. (T.396). However, those are not the standards of today. (T.396). According to Mr. Sierra, the orthopedic operating rooms are undersized and smaller than current recommended guidelines. (T.397). This creates potential problems for physicians. (T.397-398).

Mr. Sierra also addressed the other alternatives considered by Forrest General, and why those were not viable options. (T.399-404). He observed that there would be a number of potential problems and compromises on renovating the existing area of the Hospital. (T.401-402). That approach would disrupt Hospital operations and, in view of the location of the area to be renovated, could potentially cost even more than the construction of a freestanding facility. (T.401). Another major problem would be the timing on such a project. There would be about a three-year delay due to other construction projects that are ongoing at the Hospital. (T.400). Mr. Sierra also noted that it would not be feasible to add floors to the new tower of the Hospital, due to the logistics of shutting down the emergency room and the phasing of other projects. (T.401).

Mr. Sierra testified that in his opinion, the orthopedic institute is the most desirable option because it would enable the Hospital's orthopedic program to grow and "not be boxed in by facility constraints." (T.404). The facility would meet modern standards in terms of patient bedrooms, operating rooms and the patient preparation and recovery processes. (T.404). The project would also be beneficial from a timing standpoint, in enabling the new site to be developed and constructed quickly. (T.404-405). Finally, Mr. Sierra concluded that the orthopedic institute would be beneficial to the main campus of Forrest General in two respects. First, freeing up the orthopedic area would allow for the growth of other services, such as



vascular surgery and other growing specialties. (T.405). Additionally, by relocating orthopedic services off campus, Forrest General would be able to reconfigure existing patient areas of the Hospital in a more clinically appropriate manner, with better sized rooms and facilities. (T.405).

In summary, Forrest General Hospital offered substantial and detailed testimony from a variety of witnesses to justify the need for the project. These witnesses offered credible testimony concerning how the proposed project would address current problems at Forrest General, and also elevate the quality of health care to patients. As previously discussed, the Department staff agreed that these factors constitute reasonable and proper documentation of the need for the proposed project, in compliance with Need Criterion 1(a).

**G. There is Substantial Evidence in the Administrative Record to Support the Department of Health's Finding that the Project Proposed by Forrest General Will Promote Cost Containment.**

Wesley contends that the Forrest General proposal does not comply with the State Health Plan's policy of promoting cost containment. However, there is substantial evidence in the hearing record to demonstrate compliance with this policy.

First, Mr. Dawkins verified that the Department staff found the Forrest General project to comply with the policy of providing some cost containment. (T.35-36). He acknowledged that one of the goals of the orthopedic institute is to achieve cost savings through the development of a more efficient system for offering orthopedic surgical services. (T.35-36). Several Forrest General witnesses testified that they expected the orthopedic facility to provide cost savings through greater operational efficiency, reduced length of stay and enhanced savings on the ordering and use of medical devices. (Rouse Testimony, T.198; Melancon Testimony, T.240-243; Tucker Testimony, T.287; 310-311; 379-380).

Additionally, the Department staff concluded that the construction cost of the facility is reasonable and consistent with the cost of other projects approved by the Department in the past two years. (T.28-29). No evidence was offered by Wesley to challenge the reasonableness of

the facility's construction costs. Accordingly, the proposed capital expenditure for the project cannot be viewed as excessive or contrary to the goal of cost containment.

In fact, Wesley did not present any substantive evidence to show that this project will violate the policy of cost containment. Mr. Seal suggested that the project would add cost to the area's health care system, but did not explain how this would happen or offer any facts or evidence to support this claim. (T.517).

#### **H. The Chancery Court Properly Affirmed the Department's Decision.**

Wesley contends that the Chancellor erred in upholding the Department of Health's administrative decision. In fact, the Chancellor gave a thorough consideration to all issues raised by Wesley and, following initial briefing, oral argument and supplemental briefing, the Chancellor issued an Order and Opinion consistent with both the decisions of this Court and the evidence before the administrative agency.

In her decision, the Chancellor properly recognized the limited scope of judicial review, and considered the evidence in the administrative record with respect to each of the points raised by Wesley on appeal. She found that substantial evidence supported the Department's findings in approving a CON for the Orthopedic Institute. Consequently, the Chancellor concluded that the administrative decision should be affirmed on appeal.

Further, the Chancellor correctly rejected Wesley's argument that the CON Law does not permit a hospital to relocate part of a health care service. The Chancellor noted the obvious point that the "statute does not state that a hospital must relocate 'all' of a particular type of health service in order to obtain a CON." (R.E.2, p.6). She observed that "[i]n the case at bar, the Department of Health staff, an independent Hearing Officer, and the State Health Officer all agreed that Forrest General's proposal should be approved under the Mississippi CON law, as well as the relevant CON criteria and standards." (R.E.2, p.6).

In closing, it is absurd for Wesley to suggest that the Chancellor's 24-page opinion "flies in the face of logic." On the contrary, the Opinion is a thorough consideration of all points raised by Wesley on appeal. This Court has held that "the same deference due the department's finding must also be given to the chancellor who, on appeal, affirms and adopts the department's finding." *Greenwood Leflore Hosp.*, 980 So.2d at 934. The Chancellor's Order and Opinion in this case is well reasoned and firmly grounded on the administrative record and Mississippi law. This Opinion should be upheld.

#### V. CONCLUSION

On the basis of the foregoing arguments and authorities, the Mississippi State Department of Health and Forrest General Hospital respectfully request this Court to affirm the Final Judgment of the Chancery Court.

Respectfully submitted,

MISSISSIPPI STATE DEPARTMENT OF  
HEALTH

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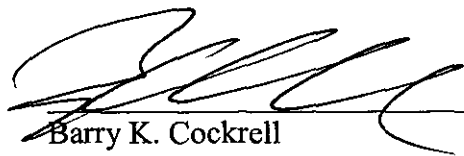
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served by United States mail, postage prepaid, a true and correct copy of the foregoing Joint Brief of Appellees to Honorable Patricia D. Wise, Chancellor of Hinds County, and to Kathryn R. Gilchrist, Esq., counsel for the Appellant, at their usual respective business mailing addresses.

DATED: April 8, 2009.

  
Barry K. Cockrell