IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WESLEY MEDICAL CENTER **APPELLANT**

VS. **CIVIL ACTION NO. G2008-466 W/4**

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

APPEAL FROM THE DECISION OF THE HINDS CHANCERY COURT, FIRST JUDICIAL DIVISION

REPLY BRIEF OF APPELLANT WESLEY MEDICAL CENTER

ORAL ARGUMENT REQUESTED

OF COUNSEL:

Kathryn R. Gilchrist, [redacted]
David W. Donnell, [redacted]
ADAMS and REESE LLP
111 East Capitol Street, Suite 350 (39201)
Post Office Box 24297
Jackson, Mississippi 39225-4297
Telephone: (601) 353-3234
Facsimile: (601) 355-9708

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REBUTTAL ARGUMENT

1. Introduction

FGH has proposed a project in its application that will cost millions of dollars and split its orthopedic service line in two, with 66% of its non-trauma services to be provided at the new location and 34% to remain at the current hospital facility. It will require duplicative staff, equipment and services at the current hospital facility and the proposed new facility. There is no evidence that the cost of healthcare will be lowered or that there will be any cost containment achieved. What's more, the hearing revealed that FGH has no hope of making a profit at the new facility at any time during the first three years of operation.

In short, this project is contrary to multiple dictates in the State Health Plan and the CON Review Manual, and nothing contained in FGH's response brief changes that assessment.

In addition, in a comparison of the application (certified to as true and correct by FGH CEO Bill Oliver) with the testimony presented at the hearing by FGH's own witnesses, one finds myriad inconsistencies and changes in position.

While FGH did present evidence at the hearing in support of its project, contrary evidence was also produced which must be considered. And at the end of the day, the evidence against granting the application far outweighed the evidence in favor of it. As is provided in statute, the decision under that circumstance must be one of disapproval. The Department and the Chancellor must be reversed.

2. The Standard of Review Requires Reversal

FGH presents the very familiar litany of cases on the issue of the standard of review of agency decisions and makes the very familiar argument on that topic – that there is a strong presumption in favor of the Department of Health's decisions, and that those decisions may not be overturned absent some violation of the statutorily mandated standard. Wesley does not

on that issue, just as she did on several others. And, when applied properly, the standard of review requires that her decision be reversed.

3. The Hearing Officer Erred in Finding the Application in Substantial Compliance with All Applicable Criteria.[2]

a. The Application's Proposal Is Not Economically Viable.

i. The Department's Criterion is Clear

If a CON applicant is unable to demonstrate that its proposed project will show a net income (profit) in the third year of operation, the Department says the application will not satisfy the requirement of economic viability and cannot be approved. Despite FGH's efforts to have this Court approve a watered down version, that is the standard. It is very clear, and there are no exceptions to it. There is no evidence in the record or any caselaw to indicate that the Department has ever made an exception to it. At the hearing, Sam Dawkins, testifying for the Department, stated as follows regarding the economic viability standard:

> Q. Tell me what the Department understands economic viability of a Certificate of Need application to be?
> A. Whether the proposed activity or service becomes self-sustaining, and has net income, and no losses over a period of time.
> Q. And you say no losses over a period of time, in this situation –
> A. By the – by the third year of operation.
> Q. Ok. . . . Does the Department . . . just look to that third year; doesn't really care about the first two years?
> A. Well, it primarily looks to the third year of operation and some indication that it is becoming economically viable over time, **over that three year period.**
>
> . . . .

[2] As Wesley pointed out in its initial brief, the Hearing Officer in this case adopted FGH's post hearing brief as her decision and recommendation. FGH takes issue with Wesley's pointing this fact out, stating that Wesley "well knows" that such is standard practice before the Department. FGH also recognizes, however, that the standard practice is not 100% adoption of a party's post hearing brief, but adoption with modifications as appropriate. FGH Brf. at 3, n.1. Here, the Hearing Officer made no modifications. She even adopted statements in FGH's document which were patently inconsistent with the record testimony/evidence and/or which were directly at odds with her own rulings during the hearing. As FGH well knows, such wholesale adoption of a party's proposed findings (even portions of such findings as incorrectly recount the evidence) is NOT standard practice in the Department, nor should it be permitted to carry the day here.

dispute the existence of or the standard of care, and it does not take issue with the content of the statute which sets that standard forth. What Wesley does dispute, however, is the mischaracterization of the standard in FGH's brief.

FGH argues essentially that anything said by one of FGH's witnesses in the hearing is gospel, and it must stand as gospel henceforth. FGH's argument leaves no room for consideration of contrary testimony or evidence – even if the contrary testimony came from the same witness. Specifically, Ed Tucker, FGH's Chief Financial Officer, certified to the accuracy of the financial projections in the application. He then testified on direct examination to the numbers contained in those projections. However, on cross-examination, as is set forth in detail in both Wesley's initial brief and this one, Tucker confirmed that many of the numbers contained in the projections were simply wrong. In the face of that testimony, however, FGH continues to argue that Tucker's first testimony should carry the day. That is not what the standard of review applicable here calls for.

The standard is very simply put: if the hearing officer (the Department) was arbitrary or capricious in her decision, if the manifest weight of the evidence is contrary to the decision she reached, if a constitutional right is violated by her decision, or if the decision is not supported by substantial evidence, then the decision may not stand. FGH contends that only the last portion of that standard is controlling; that we must discard the other parts and so long as there is a scintilla of evidence supporting the hearing officer's decision, then that decision may not be disturbed on appeal. FGH is wrong. It's assessment of the standard of review is self-serving and contrary to the clear language of the statute.

Here, on the issue of economic viability, Tucker contradicted his own initial statements. He corrected his own initial numbers. And in total, his testimony demonstrates that this application is not economically viable and that it cannot be approved. The hearing officer erred

Q. So, if Year 3 is positive, then the Department is fine?
A. Yes.

. . . .

Q. And if the evidence at the hearing . . . were to show that the projected utilization of this new facility is overstated, to the extent that year 3 does not show a profit, you would conclude that because it is not viable, it should be disapproved?
A. Yes. I'd say I would agree.
Q. If year 3 has a loss, just like years 1 and 2, then economic viability would not be met?
A. Yes. That's possible.
Q. Well, I understood you a few minutes ago to say that in year 3 if there's an operating in the positive, then the economic viability of the project is met. So I assume the converse of that is true as well? If there's no positive number in that column for year 3, the economic viability of the project is not met. And that's the period of time the Department gives you to –
A. Yes.
Q. -- show economic viability, right?
A. Yes.
Q. **So if there's a negative number at the end of year 3, then that requirement is not met?**
A. **No.**

Hrg. Tr. at 52-55 (emphasis added).

Dawkins's testimony is unequivocal. The criterion requires every applicant to show that it will make a net profit in year three. Moreover, just as the Department does not require applicants to offset losses in the first two years with monies brought in year three, it also does not give applicants credit for a decreasing rate of loss over the three-year period. Year three stands on its own, and the number at the end of the day, after all expenses are properly accounted for, must be a positive number. There is no room for exception under the Department's application of its own rules – either an applicant demonstrates a third-year profit, or it fails to satisfy the economic viability requirement, and the application must be disapproved.

Incredibly, following this unconditional testimony by Dawkins, the Department's own attorney asked a series of questions suggesting that perhaps an application could be deemed economically viable even if it did not show a profit in year three, if an operational trend were

extended out several more years and a profit were shown in year four, five, or six. Hrg. Tr. at 85. FGH refers to this testimony as support for its position that this application is economically viable. There are two fatal flaws with FGH's position. First, there is nothing in the State Health Plan or the CON Review Manual to support the idea that if an application ever shows a profit (in any year after year three) it should be deemed economically viable. Rather, as Dawkins confirmed, the Department's practice has always been to look at the third year of operation. Neither the Department nor FGH established any reason why this project should be the basis for a first ever exception to that rule.

Even if there were some legitimate basis upon which the Hearing Officer could have legitimately extended the financials of FGH's project out beyond the third in order to find some evidence of economic viability, that standard could not apply here because FGH did not provide numbers extending out that far. (*See* Dawkins's testimony at p. 84 of the Hrg. Tr. to the effect that the projected operating statement provided by FGH in the application covered only three years). To make an assessment of years four, five, six or beyond without evidence as to costs, revenues, inflation rates, etc., would constitute nothing short of rank speculation. To the extent speculation about years four, five, or six formed the basis of the Hearing Officer's decision, she acted arbitrarily and capriciously, and her decision should be overturned.

Equally concerning in the Department's examination of Mr. Dawkins was the suggestion from Department counsel that this possibility of future economic viability somehow hinged on the decrease over time in the cost of the space lease that FGH testified will be in place between it and SBJ. It is crucial to note, however, that, despite the Department's requirement of same, no space lease (or even a valid draft space lease)[3] was ever provided for review by the Department

[3] A "draft" lease was produced by FGH during the pre-hearing period. However, SBJ CEO, David Burckell, testified that the draft lease was not valid. "I got a lot of smiles about [that lease] from Forrest General because it was obviously weighted to our advantage," Burckell said. Hrg. Tr. 218. He stated

in connection with this application. CON App. at I-6 (Hrg. Ex. 2) (in response to requirement to provide lease document, Forrest General responded "not applicable"). Indeed, quite to the contrary, when FGH and SBJ representatives were cross-examined concerning the terms of the as-yet-to-be-negotiated lease, the responses were that they basically had no idea what the terms of the lease would be. Hrg. Tr. (Burckel) 218; Tucker 343-344 (R.E. 4). Not only should this absence of vital (and required) information have called the economics of this project into serious question, it clearly left the Hearing Officer with no basis whatsoever upon which to conclude that this project would become viable at any point in time in the future.

ii. FGH Seeks Approval Based on a Less Demanding (and Non-Existent) Criterion

Despite the consistency with which the Department has applied the economic viability criterion in the past, FGH desperately seeks approval by this Court of a lower standard for economic viability for this application. Specifically, FGH wants the standard for this project to be one that finds the economic viability requirement is met simply by a showing that the proposed project will be "more feasible than the current operation." FGH Rsp. Brf. at 15. Repeatedly in its response brief, FGH argues for this lessened requirement. This project, FGH asserts, "offers an opportunity for economic improvement"; it will be "a significant economic improvement" for FGH; it will be "in the best interest" of FGH; it "may enable FGH to cut [its] financial losses" currently being experienced in its orthopedic service line. *See* FGH Response Brf. at 16, 17, 18.

Replacing an existing service that is losing a lot of money with a new service that loses less money, but still loses money (as of the third year of operation), does not accomplish the Department's definition of economic viability. Making significant economic improvements does

---

further that "it hasn't gone anywhere since then, so that's why the big DRAFT is written on the top of it. So that's really all it is, it's a proposal that we made initially, and nothing has come of it since then." *Id.* Tucker also confirmed that what SBJ had proposed was not acceptable to FGH. Hrg. Tr. at 344.

not equal economic viability. The possibility of cutting existing financial losses does not satisfy the requirement to show economic viability.

In *St. Dominic-Jackson Memorial Hospital v. Mississippi State Department of Health*, 728 So. 2d 81, 85 (Miss. 1998), this Court held that St. Dominic could not gain approval of its CON application where the Department and the Chancery Court had both applied a lessened standard for need. The same must hold true here. Where the Department has defined its own rule, it must abide by that rule and apply that rule in an even-handed manner. The test for economic viability is an entirely objective one – make money in year three. As the evidence presented by FGH's own primary witness – its own Chief Financial Officer – showed at the hearing, this project will not make money in year three. As a result, the application must be disapproved.

iii. FGH's Own CFO's Testimony Demonstrates Lake of Economic Viability

FGH takes the position in its Response Brief that Wesley has misrepresented the record in its assertions that Tucker, FGH's CFO, admitted that certain expense items were omitted altogether. FGH apparently assumes that this Court will not go to the trouble of reading the record from the hearing.

1. Numerous Expense Items WERE overstated or omitted (per Tucker).

FGH makes light of the issue of its erroneous financial statement by stating in its response brief that Wesley attempted to characterize Tucker's testimony regarding the financial statement as "speculative" and that Wesley "quibbles" with the assumptions in that financial statement. In fact, in its initial brief Wesley stated without reservation that Tucker's financials were speculative and, as a result, wrong. The point, however, is not what Wesley thinks of

FGH's proforma – the point is that Tucker himself testified that the proforma is wrong on many points.

Specifically, Wesley pointed out more than ten categories of expenses which Tucker admitted were either understated or otherwise incorrectly included in his calculations. *See* pp. 12-17 of Wesley's initial brief. This was not testimony by a partisan Wesley person. It was testimony from FGH's Chief Financial Officer – the same man who reviewed and signed off on the financials and subsequently supposedly performed a financial analysis on the application.

And when Tucker's own changes to the numbers in his financial statements were used to perform the calculations, the result was a loss in year three, just like in years one and two.[4]

FGH opted not to address the very specific list of items that Tucker testified had been misstated in the financial statement. Instead, FGH provided numerous conclusory and self-serving statements with no support about how reliable its financial proforma was. Tucker's testimony must be reviewed by this Court in its entirety – and not just the first ten pages. Once that review is made, it will be apparent that this application does not comply with the Department's economic viability requirement.

iv. Overstreet's Credentials and Testimony Are Not in Question.

FGH again calls into question the credentials, and thus the testimony, of Charles Overstreet, Wesley's expert witness who testified in the hearing. FGH suggests that Overstreet's

[4] The recalculations were performed by Wesley's expert witness, Charles Overstreet, FGH continues to take issue with Overstreet's qualifications as an expert and goes so far as to insist that Overstreet's experience and expertise are "limited and significantly less" than that of Tucker. FGH Rsp. Brf. at 17, n.6. In fact, despite the objections to Overstreet that were voiced by counsel for both FGH and the Department, the Hearing Officer accepted Overstreet as an expert in all three areas in which he was tendered, and with no commentary. In fact, at no time during the hearing did the Hearing Officer ever call Overstreet's experience or expertise into question. *See* Hrg. Tr. at 586. Furthermore, the bulk of the work Overstreet did was to take Tucker's corrected numbers (identified by Tucker in his testimony) and do the addition, subtraction and multiplication necessary to recalculate FGH's "bottom line" for years one, two and three of operation. FGH can attack Wesley and Overstreet to its heart's content. But the numbers that doom this application to disapproval are the numbers provided by FGH's own Chief Financial Officer.

qualifications are questionable simply because counsel for both FGH and the Department conducted some significant *voir dire* of him. *See* FGH Rsp. Brf. at 17, n.6. In fact, however, following said *voir dire* (in which numerous questions were posed which called Overstreet's qualifications into question), the Hearing Officer accepted Overstreet as an expert in all three areas in which he was tendered. There was no mention by the Hearing Officer of any question in her mind as to Overstreet's qualifications, education, experience or expertise.[5] She simply overruled all the stated objections and qualified him as an expert. FGH's implications in its brief to the contrary are false and intended to mislead.

In addition, FGH suggests in its brief that Overstreet's testimony was somehow inherently flawed, and so his conclusions cannot be relied upon by this Court. Again, FGH misstates the record evidence. Overstreet's primary conclusion – that the FGH application is not in compliance with the requirement of economic viability – was based almost entirely on his simple recalculation of FGH's financial projections using the numbers previously corrected by tucker in his hearing testimony. The substance of Overstreet's testimony on the volume of expenses that were either understated or omitted from the three-year proforma submitted by FGH was essentially lifted directly from Tucker's statements on cross-examination. *See* Hrg. Tr. at 582-622. He then performed simple mathematical calculations to correct FGH's bottom line projection for year three to be consistent with what Tucker had said.[6] The correction resulted in

---

[5] It is worth noting yet again that while the Hearing Officer overruled all objections to Overstreet's expert qualifications and accepted him as an expert in every area tendered, she nonetheless criticized his experience and expertise in her Findings and Conclusions. Compare Hrg. Tr. at 586 with Hrg. Officer's Findings and Conclusions at 30 (R.E. 3). Her respective positions regarding Overstreet are in direct conflict with one another. The obvious reason for the conflict is the simple fact that the Hearing Officer blindly adopted FGH's post-hearing brief as her entire decision. The criticism of Overstreet in that decision should be disregarded.

[6] It is important for the Court to know that Overstreet actually prepared two separate "recalculations" of FGH's financials, using Tucker's corrected figures from his hearing testimony. The second recalculation was done, not because Overstreet was uncertain about his process, but because FGH has throughout this process vacillated between two different average length of stay figures – one higher one (yielding higher revenues) and one lower one (indicating better more efficient healthcare). Overstreet prepared a

a large loss in year three, just as FGH had originally projected for years one and two.[7] Hrg. Tr. at 611-612.

4. Partial Relocation Issue

Because this argument is fully briefed in Wesley's initial appeal brief, it will not be repeated here. A few points raised by FGH are deserving of comment, however. Contrary to FGH's assertion, the Department's Staff absolutely issued its Staff Analysis recommending approval of this application based on its belief that FGH was proposing to relocate the entirety (i.e. all beds) of its orthopedic service. And the Staff's assumption to that end was not an unreasonable one, given the repeated statements to that effect in the application.

Second, Sam Dawkins testified that, had he known only a portion of the service was to be relocated, it would have changed his assessment of the application. FGH contends Wesley was being disingenuous in taking the position that Dawkins would have found differently had FGH been forthright in describing its plans to relocate only 30 of its 37 orthopedic beds and only 66% of its orthopedic surgeons' caseloads to the new location. Wesley stands by its statements in its first brief. Dawkins issued a Staff Analysis recommending approval. He indicated that had he

---

recalculation using Tucker's revised numbers for each ALOS applied by FGH. Both reports yield significant financial loss in year three.

[7] In response to Overstreet's testimony, the only argument FGH could formulate was to contend that Overstreet inappropriately chose not to inflate FGH's revenues projections over the three year proforma as he inflated the projected expenses. FGH argues desperately here that that decision by Overstreet is a fatal flaw in Overstreet's analysis. FGH's position is, however, eroded when one considers the key fact that FGH insists on omitting from its discussion of this point. In response to cross-examination from counsel for FGH, Overstreet explained that he chose not to inflate revenues for two separate reasons – first, FGH had already inflated its revenue projections by approximately 12%, based on its own documents. So, while expenses were understated or omitted (and inflation was omitted entirely), FGH had included an inflation factor in its revenues from the start). Specifically, FGH's records showed that an average per case income for orthopedics was $9,000. However, for purposes of the financials for this project, FGH projected income on a per case basis of $10,000 – and increase of 11.1%. Hrg. Tr. at 631, 642. There was no need for Overstreet to inflate revenues (even if that were appropriate – which it was not as shown below), because FGH had taken care of that already. Secondly, as Overstreet testified, Medicare reimbursements are not increasing. Tucker confirmed that the most recent changes to Medicare reimbursement for orthopedic procedures were "revenue neutral." Hrg. Tr. at 662. There was no evidence presented in the hearing to support a contention otherwise.

known the relocation was only partial, his assessment would have changed. There are only two recommendations the Staff can make – approval or disapproval. Dawkins's testimony speaks for itself.

Third, and finally on this point, FGH contends that to adopt Wesley's position regarding the meaning of the language concerning the relocation of a service or of all or part of a healthcare facility would require the Court to add language to the existing provision in the CON Review Manual. Wesley contends that the opposite is true. It is certainly possible that to make either decision would require the addition of a word or two to avoid future arguments like this one.[8]

The key here, however, must be what interpretation is consistent with the remainder of the language in that provision. And the only way to have consistency in the language is to adopt the interpretation forwarded by Wesley – that where "part" of a facility is referenced, "part" of a service would have been referenced as well had that been the intended meaning.

5. FGH's Participation in the Statewide Trauma System Is a Red Herring.

FGH contends that this project is needed in part to allow FGH to continue its participation in the Statewide Trauma System. For any number of reasons, participation in the Trauma system should have been deemed irrelevant to this application by the Hearing Officer. Two primary matters must be brought to the Court's attention regarding FGH's assertions, however. Trauma had nothing to do with FGH's original plans for this project, and the CON application makes that very clear. And to the extent there was an issue with Trauma for FGH, the Legislature has resolved it post-hearing so that it is no longer a concern.

a. FGH Never Mentioned Trauma as a Factor in this Project in the Application.

In the CON application, FGH states its reasons for pursuing this project. It also sets forth

[8] *See* Wesley Initial Brf. at 23; FGH Rsp. Brf. at 22.

in great detail the bases for its assessment of need for the proposed orthopedic facility. In particular, in the application FGH stated that its "primary goal" for the new facility is to "develop a stronger continuum of care for orthopedic specialty services on a new Orthopedic Institute campus. . . . This campus will enhance accessibility for our patients needing specialized orthopedic services." CON App. at II-1 (Hrg. Ex. 2). FGH stated its "secondary goal" as being "to provide synergies for the expansion of the orthopedic clinical service line into more sub-specialties in orthopedics. . . . The investment in expanding our orthopedic clinical service line is targeted on recruiting new and expanded orthopedic sub-specialists into our market." *Id.* FGH went on to state that this project will serve to keep "the overall profitability of the orthopedic service line healthy economically."[9] There is no mention of trauma care in the entire discussion by FGH of its intent and goals related to this project.

Similarly, FGH omits any mention of its participation in the Trauma System as part of the basis for the need for this project. *See* CON App. at II-2 and III-1 through III-7 (Hrg. Ex. 2). Indeed, it is notable that FGH asserts on page III-1 that it has "engaged in an extensive review and evaluation of the Hospital's immediate and long-term needs" and has compiled a list of all of the reasons why this project is necessary. FGH lists ten reasons (one of which has four sub-parts), but trauma system participation is never mentioned. *Id.*

Trauma is not mentioned as part of the application for this project because it was never part of the reason for the project. Trauma did not enter the discussion about this application until the hearing started. FGH's insistence since the hearing that it must have this project in order to

[9] FGH's positions on the financial health of its orthopedic service are entirely internally inconsistent. In the application, they take the position that the service is healthy and this project will "keep" it that way. In the hearing, however, that position completely changed to one which said that the service is losing $3 to $4 million annually, and that this project is designed to help improve that bottom line and keep FGH afloat (the implication being that absent this project, FGH's contribution to trauma care in this State will be lost). At the very least, this inconsistency undermines FGH's position and demonstrates that the trauma argument was a late (and disingenuous) addition to FGH's repertoire.

continue its participation in the Trauma network is an argument concocted for public relations purposes and nothing more.

b. The Legislature Has Resolved the Trauma Issue (If There Ever Was a Trauma Issue).

This Court may take judicial notice of the passage of legislation which wholly resolves any concern previously voiced by FGH regarding its participation in the Trauma System. In short, there is now a statutory requirement that every hospital must participate fully in the Trauma System. *See* Miss. Code Ann. §41-59-5(5). So, regardless of this project, FGH will participate, and Wesley will participate as well.[10] Even if this project had actually been motivated by some concern about Trauma System Participation, which it clearly was not, that concern would stand resolved.

CONCLUSION

FGH contends that its reasons for initiating this project included the achievement of "greater operational efficiencies, lower health care costs, and improve[d] patient care." FGH Rsp. Brf. at 5. FGH further asserts that through this project it will achieve "greater operational efficiency, reduced length of stay and enhanced savings on the ordering and use of medical devices." FGH Rsp. Brf. at 7. The facts brought to light in the hearing, together with the assertions in FGH's CON application, testify to the falsity of these statements.

First, it is illogical to conclude that moving part of a service, along with all of the physicians who will be tasked with directing and providing call coverage for FGH's trauma care program, to the other side of Hattiesburg will promote "operational efficiency." Instead, the

[10] The term "participate" insofar as the Trauma System goes means either paying or playing. In other words, every facility in the State will have to either pay or play as a trauma care provider at a level to be determined by the Department. Thus, FGH's concerns about being the only trauma provider in the Hattiesburg area is resolved, as is its concern about not being reimbursed for trauma care it provides. The pay or play system is designed to insure that the right number of providers play, and that the rest of the providers pay enough money into the system to provide compensation to the players for the care that they provide. Miss. Code Ann. §41-59-5(5).

evidence in the hearing showed that FGH will have to ADD personnel, ADD equipment, and will have its orthopods traveling back and forth from the new location to the main campus every time a trauma patient is brought in. There was no evidence to contradict these facts – and these facts simply do not add up to efficiency.

Second, while FGH makes conclusory statements about a reduced length of stay which it claims in its legal briefs will result from this project, all of its financials are based on an increased length of stay at the new facility. It is understandable that FGH would, on the one hand, want the Court to believe that patients will require fewer days in the hospital at this new center because that would seem to equate to better patient care, lower healthcare costs, etc. It is equally understandable that FGH would want to take advantage of projections for increased lengths of stay at the new facility because the longer the stay of the patients, the more revenues each patient will generate, and the better FGH's bottom line will look in its application.

The problem FGH faces is obvious – you simply cannot have it both ways. Either the ALOS will be shorter, demonstrating greater efficiencies – or, as the application and FGH's financials assert, it will be longer, producing higher dollar figures, but demonstrating even lower efficiencies than currently exist in FGH's failing orthopedic program. It is impossible to determine which assertion is the more reliable – but one thing is certain: this application cannot be properly assessed in terms of its economic viability or its potential for benefits of patient care and efficiencies absent that determination. And it cannot be both ways.

Third, FGH contends that the operation of this project will allow it to achieve greater cost savings through deals with vendors of medical devices. This statement in the brief is, according to the testimony of CFO Tucker, completely untrue. Tucker testified that all available cost savings from vendors has already been accomplished by FGH. Tucker at 308-310 (R.E. 4). The approval of this facility cannot bring about things that already have been accomplished.

The fact is, none of FGH's reasons for this project are legitimate. They are all based on misrepresentations of the record. Instead, the reason FGH wants this project is twofold: to shore up its financial situation in orthopedics, and to solidify its relationship with the orthopods in the Southern Bone and Joint Group. *See* CON App. at II-1, III-4 (Hrg. Ex. 2). Neither of these satisfies the requirements of the State Health Plan or the CON Review Manual.

Wesley put on abundant evidence, primarily through FGH's own witnesses and administrative officials, which clearly demonstrates that this application is not economically viable, among other failures. The Hearing Officer acted arbitrarily in choosing to ignore that evidence, and the Chancellor erred as well. If this decision is affirmed and this application approved, the precedent established by such ruling will swing wide the doors for any and every applicant to simply throw some numbers on paper and be approved. The CON laws in Mississippi have been challenged repeatedly in the last ten to fifteen years. Thus far, the Legislature has seen fit to leave them in place. FGH must be held to them just as other healthcare providers are. Neither the Department nor the Chancery Court has been willing to do that thus far.

For all of these reasons, along with those reasons set forth in more detail in Wesley's initial brief, this application must be disapproved.

Dated this the 28th day of May 2009.

Respectfully submitted,
WESLEY MEDICAL CENTER

By: _____
One of Its Attorneys

OF COUNSEL:

Kathryn R. Gilchrist,
David W. Donnell,
ADAMS and REESE LLP
111 East Capitol Street, Suite 350 (39201)
Post Office Box 24297
Jackson, Mississippi 39225-4297
Telephone: (601) 353-3234
Facsimile: (601) 355-9708

CERTIFICATE OF SERVICE

I, David W. Donnell, do hereby certify that I have served the foregoing, by placing a true and correct copy of the same in the United States Mail, First Class postage prepaid, and properly addressed to the following:

Barry K. Cockrell, Esq.
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
Post Office Box 14167
Jackson, Mississippi 39236

Bea M. Tolsdorf, Esq.
Special Assistant Attorney General
Mississippi Department of Health
P.O. Box 1700
Jackson, Mississippi 39215

Chancellor Patricia D. Wise
Hinds County Chancery Court
316 S. President St.
Jackson, MS 39201

This the 26th day of May 2009.

David W. Donnell