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VIRTUA HEALTH, INC. and CAPITAL
HEALTH SYSTEM, INC.,

Plaintiffs-Applicants,

v.

STATE OF NEW JERSEY and
CHRISTOPHER J. CHRISTIE IN HIS
OFFICIAL CAPACITY AS GOVERNOR OF
THE STATE OF NEW JERSEY

Defendants.

SUPREME COURT OF NEW JERSEY

No. S-38 September Term 2015
(077046)

CIVIL ACTION

ON EMERGENT MOTION TO VACATE OR
MODIFY STAY PENDING APPEAL

Sat Below:

Hon. Joseph L. Yannotti,
P.J.A.D.

Hon. Jerome M. St. John, J.A.D.

Hon. Douglas H. Hurd, P.J. Cv.

PLAINTIFFS-APPLICANTS' BRIEF IN SUPPORT OF EMERGENT MOTION TO
VACATE OR MODIFY THE APPELLATE DIVISION'S STAY PENDING APPEAL

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PRELIMINARY STATEMENT

On December 22, 2015 the trial court found P.L. 2015, c. 70 (the "Act") to be unconstitutional special legislation in violation of Article IV, section VII, paragraph 9 of the New Jersey Constitution because it awarded the right to provide emergency medical services ("EMS") primarily to one hospital in one city under the guise of coordinating the services through Level I trauma centers, without a rational basis for excluding other providers, including plaintiffs-applicants, from providing those services.

The State defendants ("State") requested that the trial court stay the implementation of its order pending appeal; however, the court found that the State had made no creditable showing that irreparable harm would occur if the statute did not go into effect and denied the motion. On December 29, 2015, however, the Appellate Division granted a stay, thus allowing the Act that the trial court found to be unconstitutional to take effect on January 2, 2016. As a result, applicant Virtua Health, Inc. ("Virtua") was statutorily required to terminate the advanced life support ("ALS") services it had provided in the City of Camden ("Camden") for the last 38 years, with that privilege instead being extended to Cooper University Hospital ("Cooper"), one of the state's three Level I trauma centers.

The Act also made Cooper the exclusive provider of basic life support ("BLS") services in Camden, bypassing the state requirement that Camden benefit from competitive bidding for the BLS contract. As the trial court correctly held, there is no rational basis for singling out Level I trauma centers to provide *pre-hospital* EMS services because the trauma center designation refers to treatment of patients *in the hospital*.

Because the trial court found that Virtua's ALS services in Camden were of undisputed high quality, the State's only argument to the Appellate Division for replacing Virtua was that it would be "preferable" for ALS and BLS to be provided by the same provider. But there has been no such consolidation for the past 38 years in Camden, and much of the State operates without that coordination. The trial court did not abuse its discretion, therefore, by finding that continuing the status quo of Virtua providing ALS services in Camden would not cause any harm, let alone substantial, immediate, and irreparable harm.

The State's only plausible attempt to show irreparable harm was its unsupported claim that BLS in Camden would be disrupted if the Act did not take effect. The undisputed record showed, however, that Camden could employ emergency contract procedures to quickly prevent any BLS interruption by contracting with Cooper or with any of three other BLS operators, including Virtua, who offered to provide BLS services to Camden

immediately at no cost to Camden. Thus, there was no irreparable harm with regard to BLS in Camden to justify a stay.

On the merits of the constitutionality of the Act, the State provided no new arguments to the Appellate Division to overcome the trial court's correct application of the high standard for showing that an act is unconstitutional, which led to the court's conclusion that "the rationale of limiting this legislation to Level I Trauma Centers bears no relationship to the purpose that is expressed in the Act. The conclusory statements put forth by the defendants are just that, and they do not provide a rational basis as required by the case law." T2 14:6-11. The State, therefore, did not establish a likelihood of success on the merits.

The Appellate Division did not find that the trial court had abused its discretion or offer any basis for its reversal of that court's refusal to grant a stay. Instead, the Appellate Division changed the status quo by allowing an unconstitutional statute to take effect, by replacing a BLS provider in Camden, and by terminating Virtua's ALS services in Camden. Because there was no basis below to conclude that irreparable harm would result absent a stay, this Court should vacate the stay, or in the alternative, modify the stay to allow Virtua to remain as the ALS provider in Camden as it has been for the past 38 years.

PROCEDURAL HISTORY

Plaintiffs-applicants filed a single-count Verified Complaint on July 27, 2015, in the Law Division, Mercer County, seeking a declaratory ruling that the Act is unconstitutional. (Da1)¹. Plaintiffs simultaneously filed a Motion to Proceed Summarily. The court entered a consent order on the Motion to Proceed Summarily, which granted the motion and set a briefing schedule. On September 14, 2015, the State moved to dismiss the complaint. The parties then agreed to a second order regarding a briefing schedule, which was entered by the court on October 6, 2015. Plaintiffs moved for summary judgment on November 6, 2015, and simultaneously opposed the State's motion to dismiss. (Da451). The State opposed plaintiffs' motion for summary judgment on November 20, 2015 (Da549), and plaintiffs filed a reply brief on November 24, 2015. (Da603).

The trial court heard oral argument on both motions on December 16, 2015 and reserved decision (T1). The court issued an oral opinion on December 22, 2015, in which it granted the plaintiffs' motion for summary judgment, denied the State's

¹ References to "Da" are to the State's appendix submitted to the Appellate Division in connection with its emergent application for a stay. The Clerk of the Supreme Court has advised counsel that that appendix may be relied on for the purpose of this motion.

motion to dismiss, and denied the State's motion for a stay pending appeal. (T2).

On December 23, 2015, the State was granted permission to file an emergent motion for stay with the Appellate Division. Plaintiffs opposed the motion. On December 29, 2015, the Appellate Division granted the stay. (Pa1). Plaintiffs then filed an application for permission to file an emergent motion to modify the stay with the Appellate Division. The Appellate Division denied permission to file the motion on December 30, 2015. (Pa2). That same day, plaintiffs made an emergent application to this Court, which by order dated December 31, 2015, directed the filing of this emergent motion. (Pa3).

STATEMENT OF FACTS

EMS is comprised of ALS and BLS services, which are pre-hospital forms of care provided at the scene upon the occurrence of an "emergency medical condition," first by emergency medical technicians ("EMT") providing BLS in a responding ambulance, and subsequently if needed, by paramedics providing ALS in Mobile Intensive Care Units ("MICU"). T2 5:2-6. Any acute care hospital, whether or not a trauma center, may qualify to provide ALS services and operate a MICU upon receipt of a Certificate of Need ("CN") from the Department of Health ("Department"), and the Department has promulgated regulations that ensure that ALS services are uniformly provided and MICUs are uniformly

outfitted and operated throughout the State, whether by a trauma center or an acute care hospital. T2 5:7-14.

In particular, the Department has adopted by regulation standing orders that all hospitals providing ALS must follow, and which are used for over 90% of the ALS services provided by a MICU. Id.; see N.J.A.C. 8.41-7.1-22. For conditions for which there are no standing orders, a medical command physician in the hospital's ED will provide direction to the paramedic or EMT on the scene. T2 5:17-25. The medical command physician is not required to be a trauma surgeon or a certified trauma specialist, and medical command does not differ whether provided by a trauma center or acute care hospital. Id.; see N.J.A.C. 8:41-9:5. The Department has also developed triage guidelines that all paramedics and EMT's must follow. T2 5:11-13.

Because of the uniformity in EMS services facilitated by the current regulatory structure with respect to ALS services and MICUs, Judge Hurd found:

Treatment response by MICU is the same as whether the operator is a Level I or Level II or an acute care hospital... The trauma center is not involved in the pre-hospital treatment of the trauma patient by the MICU providing ALS services except in rare and extraordinary cases... There are trauma surgeons at trauma centers, but that has nothing to do with the quality, expense or coordination of ALS and BLS pre-hospital services since trauma centers do not get involved in pre-hospital services. The record before me indisputably shows that the differences between Level I and Level II and acute care centers with an emergency department has no bearing on the quality,

expense, or coordination of ALS and BLS services because trauma surgeons are not involved in ALS or BLS services.

T2 5:14-16, 5:21-23, 6:13-16, 7:6-12.

A trauma center is a hospital that has been verified by the American College of Surgeons Committee on Trauma ("ACS-COT") as having the resources, e.g., a trauma surgeon, to provide in-hospital care to patients injured by violence or other forces. Plaintiffs' Statement of Undisputed Facts ("SUF"), ¶ 37 (Da496). The ACS-COT has developed standards to qualify hospitals as either Level I or Level II trauma centers, depending primarily on non-clinical factors, such as the size of the hospital and whether it is affiliated with a university. T2 7:1-6. The Department has incorporated the ACS-COT standards into the Department's regulations, including its CN requirements, and has designated three hospitals as Level I trauma centers, and seven hospitals Level II trauma centers. T2 6:1-6, SUF ¶ 42 (Da497).

Cooper in Camden, University Hospital ("University") in Newark, and Robert Wood Johnson University Hospital ("RWJUH") in New Brunswick are the three hospitals² that have been designated by the Department as Level I trauma centers. T2 6:20-23. Cooper

² Morristown Medical Center in Morristown meets the ACS-COT's criteria for a Level I trauma center, but has been certified by the Department as a Level II trauma center because the certificate of need regulations for new Level I trauma centers expired in 1997. T2 6:23-7:2 ("Morristown" incorrectly transcribed as "Moorestown").

is the only one that does not currently provide ALS services. T2 6:17-19. The City of Camden had an arrangement with University to provide its BLS services, which it apparently has cancelled. T2 19:20-22. The City of Newark has an arrangement with University also to provide BLS services there³, and RWJUH provides BLS services in New Brunswick. T2 6:22-23.

Virtua is a hospital system with three acute care hospitals in southern New Jersey, plus two additional emergency departments in Camden and Berlin. It has been providing ALS services in all of Camden and Burlington Counties pursuant to a CN for 38 years. T2 7:13-22. On November 17, 2015, the Department and the New Jersey Emergency Medical Services Council recognized Virtua's EMS department as the Outstanding Private EMS Agency of the Year for the entire state of New Jersey, among other distinctions for which Virtua's EMS program was recognized. T2 7:23-8:1. Capital has been designated by the Department as a Level II trauma center, and has been awarded a CN to provide ALS services in Mercer County. T2 7:13-22. Virtua and Capital provide their EMS services without taxpayer funds. Id.

³ Comments by Senator Rice indicate that Newark is considering terminating its relationship with University for BLS services. (Da108-9).

The Act⁴ provides three privileges applicable only to the three Level I trauma centers. First, it makes them the exclusive providers of ALS services in their respective municipalities. Second, it grants them each a right of first refusal to provide BLS services in their municipalities. Third, it affords them an abbreviated CN process to provide ALS services in a municipality in which they currently operate an acute care facility. T2 4:13-21. In addition, the State appropriated \$2.5 million in the FY2016 budget to fund Cooper's startup of an ALS and BLS system in Camden and \$2.5 million for Newark to provide BLS services. (Da443).

Cooper is the only Level I trauma center to benefit from the privileges of exclusivity and right of first refusal because University and RWJUH already provide those services. Indeed, as a result of the stay, Cooper has replaced Virtua as the ALS provider in Camden notwithstanding Virtua's award-winning services there, and despite Cooper not having a CN from the Department to operate a MICU providing ALS services, and never

⁴ The Act was first introduced as a bill in the Senate on June 8, 2015 and in the Assembly on June 11, 2015. The Assembly Health and Senior Services Committee heard the bill on the morning of June 15 and the Senate Health, Human Services and Senior Citizens Committee heard the bill on the afternoon of June 15. The bill was passed by the New Jersey Senate and the Assembly on June 25, 2015. It was then approved and signed by Governor Christie as P.L. 2015, c. 70 on July 6, 2015, and was to take effect 180 days from its enactment, or January 2, 2016.

having been an ALS provider. In addition, Cooper will receive \$2.5 million from the State to establish its EMS services in Camden, notwithstanding that Virtua provided those ALS services, and had offered to provide BLS services, at no cost to the Camden or state taxpayers. (Da442-3).

If this Court grants this motion and vacates or modifies the stay, Virtua is ready to recommence ALS services in Camden immediately, subject only to the time it would take to notify dispatching services to again dispatch Virtua's ALS units to calls in Camden. Certification of Scott A. Kasper at ¶¶ 4-5(submitted herewith).

ARGUMENT

The standard governing a stay pending appeal is the same as the standard governing injunctive relief. Garden State Equality v. Dow, 216 N.J. 314, 320 (2013). Those factors, from the seminal Crowe v. DeGioia, 90 N.J. 126, 139 (1982), include the prevention of irreparable harm, a reasonable probability of success on the merits, and a balancing of the relative hardships. Id. The party seeking the stay has the burden to prove each of the Crowe factors by clear and convincing evidence. Garden State Equality, 216 N.J. at 320.

The grant of a stay is discretionary with the trial court, absent an abuse of discretion. Avila v. Retailers & Mfrs. Distribution, 355 N.J. Super. 350, 354 (App. Div. 2002)

(denying application for stay pending appeal when trial court denied application). That discretion is abused only when "injustice would be perpetrated on the one seeking the stay, and no hardship, prejudice, or inconvenience would result to the one against whom it is sought." Id.

The State did not establish any Crowe factor - let alone all of them by clear and convincing evidence - to show that the trial court abused its discretion. In particular, no attempt was made to justify disrupting Virtua's long-standing provision of ALS services in Camden. This Court should accordingly vacate or modify the stay, at least to permit Virtua to remain as ALS provider in Camden pending the outcome of the appeal. There is no obstacle to this Court allowing only a partial stay to remain in effect. See, e.g., Courvoisier v. Harley Davidson of Trenton, 162 N.J. 153, 163 (1999) (recognizing partial stay of judgment); In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 445 (1992) (noting that Appellate Division had issued partial stay of judgment invalidating regulations); Borough of Glassboro v. Gloucester Co. Bd. of Chosen Freeholders, 98 N.J. 186, 190 (1984) (noting that single Justice granted partial stay pending review by full Court); Loigman v. Twp. Committee of Twp. of Middletown, 297 N.J. Super. 287, 294 (App. Div. 1997) (referring to Supreme Court grant of partial stay of trial court's order).

POINT ONE

THE STATE FAILED TO ESTABLISH IRREPARABLE HARM.

Irreparable harm requires more than simply not being able to proceed under the Act. "The abstract harm the State alleges begs the ultimate question: if a law is unconstitutional, how is the State harmed by not being able to enforce it?" Garden State Equality, 216 N.J. at 323 (citing Joelner v. Vill. of Wash. Park, 378 F.3d 613, 620 (7th Cir. 2004) ("no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute.") Injuries, however substantial, in terms of money, time, and energy expended absent a stay are insufficient to establish irreparable harm. Zoning Bd. of Adjustment of Sparta Twp. v. Service Elec. Cable Television Co. of N.J., Inc., 198 N.J. Super. 370, 381-82 (App. Div. 1985). Injunctive relief should be entered only when the threatened harm is "substantial, immediate, and irreparable." Subcarrier Communications v. Day, 299 N.J. Super 634, 638 (App. Div. 1997) (irreparable harm critical element of injunctive relief).

There was no contention before the trial court that irreparable harm would result if Virtua continues to provide the same ALS services in Camden it has provided for the last 38 years, and the Act does not affect ALS services in Newark and New Brunswick. With regard to Camden, the trial court specifically found that "by continuing with Virtua there we know

that's not a problem because they're doing a good job, which is undisputed." T2 at 24:12-14.

The State's only proffered rationale below for why the ALS portion of the trial court's order should be stayed was because ALS and BLS will continue to not be integrated under the same provider without implementation of the Act. T2 at 22:19-22. The State all but ignored any argument in the Appellate Division that allowing the ALS status quo to continue would constitute irreparable harm. Moreover, as discussed below, Camden could have created an integrated ALS-BLS system without the Act by awarding Virtua the BLS contract for Camden. Neither the State nor the Appellate Division provided any basis to show that the trial court abused its discretion in denying a stay with regard to ALS services in Camden.

The entirety of the State's application to the trial court was thus the limited argument that "there may be no emergency services BLS transport in the City of Camden," T2 at 20:7-9, based on the unsupported allegation that "University Hospital . . . has given notice to their employees of their termination because they're ending their BLS services in the City of Camden." Id. at 21:20-22. The State repeated this meritless argument to the Appellate Division, and the Appellate Division's apparent reliance on it was clearly erroneous.

The State's argument was based solely on speculation that "there may be no emergency medical services..." T2 at 20:7-9 (emphasis added). The trial court concluded that there had not "been any showing in front of me that the City of Camden can't, you know, have some type of emergency ordinance or resolution to provide a contract to provide those services." The State submitted certifications to the Appellate Division, such as the Certification of John Grembowiec of University, that continued the pattern of speculation, noting that "some" of the 37 employees retired and others sought employment elsewhere and that University did not have the staff "at this time" to adequately staff BLS services. Virtua believed that University would have continued to provide BLS services in Camden if requested to do so. See Certification of Scott A. Kasper, submitted to Appellate Division, ¶ 9. In any event, there was no evidence of irreparable harm beyond speculation.

Even if University was unable to provide BLS in Camden on January 2, 2016 (as a result of the inexplicable failure by University, Cooper and Camden to prepare for the possibility that the Act would be found unconstitutional)⁵, no irreparable

⁵ This inexplicable delay was sufficient to warrant the denial of a stay because the delay was caused by defendants. See, e.g., McKenzie v. Corzine, 396 N.J. Super. 405, 414-15 (App. Div. 2007) (denying injunctive relief where party could have taken action sooner to avert injury).

harm would have occurred because Camden could have simply awarded a temporary contract to a willing provider. While the Local Public Contracts Law ("LPCL") generally requires a competitive contracting procedure for EMS contracts, N.J.S.A. 40A:11-4.1, the LPCL and the City of Camden's Purchasing Manual Policies & Corresponding Procedures (the "Camden Purchasing Manual")⁶ provide for emergency contracts to be issued without competitive bidding. See N.J.S.A. 40A:11-6 and Section II.C., Camden Purchasing Manual.

Specifically, there is an exception to the procurement process "when an emergency affecting the public health, safety and welfare requires the immediate delivery of goods or performance of services" provided that the award is made following certain procedures. N.J.S.A. 40A:11-6. This would be a contract for less than one year, sufficient to address the emergency. Id.

Before the Appellate Division, the State and Mayor Redd conceded that Camden had emergency contracting procedures that could have been used:

Camden could declare an emergency and seek City Council's approval to enter into a contract with a BLS provider without the competitive bidding process.

⁶ Available online at <http://www.ci.camden.nj.us/business/Purchasing-Manualonline.pdf>.

Certification of Mayor Redd at ¶10. The State argued below that such a contract would likely result in a cost to Camden, but that statement, even if relevant, was simply not true. Following the trial court's decision and the State's argument below for a stay based on the asserted lack of BLS services in Camden, Virtua and two other BLS providers sent letters to Mayor Redd and the Camden City Council offering to provide BLS services to Camden at no cost to the taxpayers in the event that University Hospital ceased providing those services as of January 2, 2015. See Certifications of Scott A. Kasper, Robert W. Davis and Graham Dillaway (submitted to Appellate Division). This completely negated the arguments of Mayor Redd and the State that Camden would not have been able to obtain BLS services because it could not afford to pay for them. Moreover, if Camden were to have chosen Virtua for these services, then it would have exactly the same coordination of BLS and ALS services that the State has argued is the benefit of the Act because Virtua would be the provider of both.

Furthermore, vacating the stay with respect to BLS would benefit, not harm, Camden. In the short term, Camden may contract for Cooper to be its BLS provider, as would occur under the Act, on an emergency basis. If Cooper declines to enter into a contract, see Certification of Kathy Devine, ¶ 16, Camden may contract with Virtua or one of the other BLS providers

offering to provide those services. If the unconstitutionality of the Act is affirmed, Camden will have the benefit of the competitive bidding process to select its BLS provider. There is simply no harm - let alone irreparable harm proven by clear and convincing evidence - to the State or Camden from implementation of the trial court's decision.

Finally, this stay causes irreparable harm to plaintiffs. A constitutional injury is irreparable harm. Democratic-Republican Org. of New Jersey v. Guadagno, 900 F. Supp. 2d 445 (D.N.J. 2012) ("the Court assumes that Plaintiffs have satisfied the irreparable harm prong if they can demonstrate a constitutional injury"); Davis v. Dep't of Law & Pub. Safety, 327 N.J. Super. 59, 69 (Ch. Div. 1999) (constitutional injury "is sufficient in itself to give rise to a finding of irreparable harm.").

The trial court did not abuse its discretion in denying a stay, based on the State's failure to establish irreparable harm by clear and convincing evidence. The Appellate Division made no finding that irreparable harm would be caused by Virtua continuing to provide the same ALS services it provided for 38 years, or by Camden's reliance on its emergency contracting procedures to arrange for a BLS provider. The Appellate Division clearly erred, therefore, in imposing a stay over the trial court's denial.

POINT TWO

THE STATE DID NOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

The Crowe standards required the moving party to show that "its legal right is settled." Garden State Equality, 216 N.J. at 325 (emphasis in original). Thus, it was the State's burden to show, by clear and convincing evidence, that its legal right on the merits is settled. It failed to do so because the trial court properly concluded that the Act is unconstitutional.

The trial court issued a thorough oral opinion on the constitutionality of the Act. The State conceded that the trial court applied the correct legal standard to determine whether an act of the Legislature violates Article IV, section VII, paragraph 9 of the New Jersey Constitution. The Constitutional language provides that "The Legislature shall not pass any private, special or local laws... [g]ranting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever." The test to determine whether an enactment constitutes special legislation stems from Vreeland v. Byrne, 72 N.J. 292 (1976) and Jordan v. Horsemen's Benevolent and Protective Association, 90 N.J. 422 (1982). Under that test, the court looks to the purpose of the enactment, determines whether any persons are excluded who should be included and whether as applied the statute's classification can rest on any reasonable or rational basis relevant to the purpose and object

of the act. Vreeland, 72 N.J. at 300-01. The trial court acknowledged that before it could invalidate a piece of legislation as special legislation, it must clearly and irremediably be special legislation, and that the power to declare a statute unconstitutional should be sparingly used. T2 at 3:1-16. The court, therefore, applied the correct legal test.

As the trial court noted, the purposes of the Act, described in the bill as "the sponsor's belief," are to centralize medical oversight, facilitate high-quality pre-hospital care, and support a more cost-efficient system with respect to the delivery of ALS and BLS services. The trial court observed that the legislation had no statewide impact, T2 at 13:10-12, and would make Cooper the exclusive ALS provider in Camden without going through the CN process. T2 at 8:1-5.

One proffered basis for the Act is that ALS and BLS should be coordinated under Level I trauma centers in three cities. Below, the State attempted to use the ACS' 2008 Trauma Center Consultation Report (the "2008 Report") as a basis for this purpose. As a preliminary matter, there is no evidence that the Legislature considered the 2008 Report when enacting the Act or would consider them to be related. As the trial court recognized, the Legislature had already enacted different legislation in 2014 in response to the 2008 Report, establishing

a state-wide State Trauma System Advisory Committee to review and develop a state-wide trauma system plan. See N.J.S.A. 26:2KK-1 et. seq. The Committee was only recently formed and has yet to offer any recommendations, particularly not any that are the purported rationale for the Act. T2 8:25-9:6.

Moreover, the 2008 Report does not serve as a rational basis for exclusion of other providers by the Act. With regard to pre-hospital services, the 2008 Report made no distinction between Level I and Level II trauma centers and even commented favorably on the fact that New Jersey had 10 ACS-verified trauma centers and 100% ALS coverage. (Da 325). In addition, despite extensive and detailed recommendations on the State's trauma system, the 2008 Report never recommended combining ALS and BLS under the Level I trauma centers. (Da 328-330). T2 8:17-24.

The Report does not find or suggest anywhere that Level I trauma centers provide any better basis for effecting coordination of ALS and BLS than other hospital providers, and nowhere recommends that the coordination occur only in three cities. Consequently, none of the issues raised by the 2008 Report were actually addressed by the Act, and the 2008 Report does not provide a rational basis for benefits provided solely to Level I trauma centers by the Act. The trial court agreed with the statements in the Certification of Dr. Louis D'Amelio, who was an author of the 2008 study, that nothing in the 2008

Report recommends that ALS be provided by trauma centers and that none of the 2008 Report's recommendations link ALS and BLS services under Level I trauma centers. T2 at 11:13-19.

The trial court found no rational basis to distinguish between Level I and Level II trauma centers with respect to the provision of pre-hospital clinical services. The trial court particularly observed the facts relating to Morristown Hospital, which is verified as a Level I trauma center by the American College of Surgeons but only holds a Level II CN from the Department. Morristown is thus as qualified as Cooper, RWJUH and University Hospital to be a Level I trauma center; however, Morristown is excluded from the benefits of the Act solely because the expiration of the CN regulations no longer provide a process for obtaining a Level I trauma center CN. T2 at 6:23-7-2; 13:21-14:4. The trial court found that the State offered only conclusory statements as to why ALS should be provided by Level I trauma centers but not other trauma centers.

Only 7% of ALS cases in New Jersey are trauma cases that even involve trauma centers as a destination for the care of patients treated pre-hospital with BLS or ALS services (Da498). For the other 93% of patients provided ALS services, there is absolutely no need for a patient connection to a trauma center. Id. Even in the fraction of cases where ALS is required for a trauma patient, ALS providers will follow the comprehensive

standing orders developed through the Department's regulatory process without the involvement of a supervising physician either at a non-trauma emergency department or at a trauma facility.⁷ SUF ¶ 21-26(Da492-3). The Legislature had no rational basis, because there is none, to justify the assertion that quality of care would improve under the supervision of a Level I trauma center by excluding other qualified providers.

The State made much of the asserted "community paramedicine" basis for the statute in the trial court, but has all but abandoned it here. The State cited an article below called "*Mobile Integrated Healthcare Practice: A Healthcare Delivery Strategy to Improve Access, Outcomes and Value*" ("the MIHP article") as support for the proposition that only Level I trauma centers can support community paramedicine. The trial court based its rejection of this argument in part on the certification from Dr. Jeffrey Beeson, one of the authors of the MIHP article, who termed the State's argument "misleading" and noted that the MIHP article in no way supports the Act (Da541-2).

In analyzing whether the exclusive rights awarded to Level I trauma centers were rational with respect to the purposes of

⁷ Trauma surgeons are only involved in ALS care in the rare case where surgical treatment, such as amputation, is required pre-hospital. Even in those cases, there is no distinction between Level I and Level II trauma centers. SUF ¶ 34 (Da495).

the Act, the trial court concluded that centralization would not be improved by the Act because the Act will have the opposite effect: it will create a piecemeal ALS system in the regions where providers like Virtua and Capital Health System have already been awarded regional CNs by the Department. T2 at 14:24-15:7. The court held that the Act does not require that a Level I trauma center provide BLS services, thus demonstrating that the Level I trauma center classification does not fulfill any purpose of ALS-BLS coordination under the Act. Id. at 15:8-10. As to improving the quality of care, the trial court held that the Act does not improve quality of care because the Act itself requires that all ALS services be subject to the same level of regulatory oversight. T2 at 15:8-14. Finally, the court held that there is no rational basis to say that the Act promotes cost effectiveness because the Act eliminates Virtua as a provider, which has been providing ALS services to Camden at no taxpayer cost, while providing \$2.5 million of state appropriations to Cooper to initiate a new program. T2 at 16:1-9. These conclusions were all supported by the factual record.

For these reasons, the State did not demonstrate a likelihood of success on the merits, and the Appellate Division erred by determining, without a stated basis, that the Crowe factors had been met.

POINT THREE

BALANCING THE HARMS AND THE PUBLIC INTEREST DO NOT FAVOR A STAY.

The State's only arguments on balancing the hardships and the public interest were that Camden may have been left without BLS services. As discussed in Point One, that argument was meritless, and neither the State nor Camden would have suffered, or will suffer, hardship in the absence of a stay. The State's other arguments ignore entirely the harm that will result to Virtua and Capital Health as victims of an unconstitutional statute, and the harm caused by this irrational preemption of the statewide regulation of EMS services by the Department.

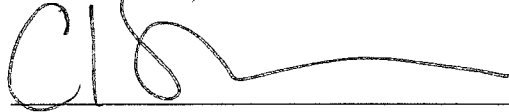
More significant, however, is the effect of a stay on the citizens of Camden in need of ALS and BLS services. The stay has replaced Virtua as the established high-quality provider of ALS services in Camden with an untested program being developed by Cooper. Virtua stands ready to continue to provide ALS services, and the stay preventing Virtua from doing so does not serve the public interest.

CONCLUSION

The State did not meet its burden to show that it had met any of the Crowe factors by clear and convincing evidence, or that the trial court abused its discretion in denying a stay. The Appellate Division erred in issuing a stay on this record. For these reasons, this Court should vacate the Appellate

Division's December 29, 2015 order, or alternatively modify it to allow Virtua to remain as ALS provider in Camden.⁸

Respectfully submitted,



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and Capital Health System, Inc.*

Dated: January 4, 2016

⁸ Virtua respectfully suggests that this case is appropriate for the Court to consider exercising its power under R. 2:12-1 to directly certify this case for appeal. This case involves a substantial constitutional question that is likely to be appealed as of right to this Court in the future. R. 2:2-1(a).

ORDER ON MOTION

VIRTUA HEALTH, INC. and
CAPITAL HEALTH SYSTEM, INC.,

Plaintiffs-Respondents,

v.

STATE OF NEW JERSEY and
CHRISTOPHER J. CHRISTIE,
in his official capacity as
Governor of the State of New
Jersey,

Defendants-Appellants.

MOTION FILED: 12/23/15

ANSWER FILED: 12/28/15

SUBMITTED TO THE COURT: 12/29/15

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART: G
JUDGES: JOSEPH L. YANNOTTI
JEROME M. ST. JOHN

BY: STATE OF NEW JERSEY

BY: VIRTUA HEALTH and
CAPITAL HEALTH SYSTEM

ORDER

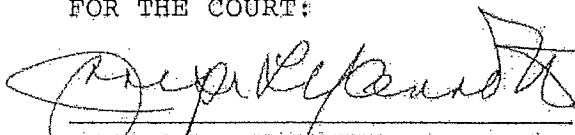
THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON
THIS 29TH DAY OF DECEMBER, 2015, HEREBY ORDERED AS FOLLOWS:

MOTION FOR STAY PENDING APPEAL: GRANTED/OTHER

SUPPLEMENTAL:

We are convinced that, upon consideration of the criteria for
granting a stay pending appeal in Crowe v. De Gioia, 90 N.J.
126, 132-34 (1982), the State's motion should be granted.
Accordingly, the trial court's order of December 22, 2015,
declaring P.L. 2015, c. 70 to be in violation of the New Jersey
Constitution, shall be and hereby is stayed pending further
order of this court.

FOR THE COURT:


JOSEPH L. YANNOTTI, P.J.A.D.

Superior Court of New Jersey
Appellate Division

Disposition on Application for Permission to File Emergent Motion

Case Name: VIRTUA HEALTH, INC. V. STATE OF NEW JERSEY, ET AL.

Appellate Division Docket Number: (if available): _____

Trial Court or Agency Below: LAW DIVISION-MERCER COUNTY

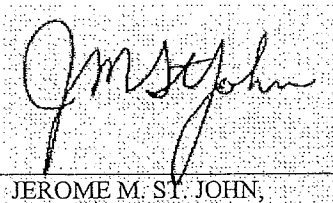
Trial Court or Agency Docket Number: Mer-L-1720-15

DO NOT FILL IN THIS SECTION – FOR COURT USE ONLY

I. The application for leave to file an emergent motion on short notice is **Denied** for the following reasons:

- The application on its face does not concern a threat of irreparable injury, or a situation in which the interests of justice otherwise require adjudication on short notice. The applicant may file a motion with the Clerk's Office in the ordinary course.
- The threatened harm or event is not scheduled to occur prior to the time in which a motion could be filed in the Clerk's Office and decided by the court. If the applicant promptly files a motion with the Clerk's Office it shall be forwarded to a Panel for decision as soon as the opposition is filed.
- The applicant did not apply to the trial court or agency for a stay, and obtain a signed court order, agency decision or other evidence of the ruling before seeking a stay from the Appellate Division.
- The application concerns an order entered during trial or on the eve of trial as to which there is no prima facie showing that the proposed motion would satisfy the standards for granting leave to appeal.
- The timing of the application suggests that the emergency is self-generated, given that no good explanation has been offered for the delay in seeking appellate relief. Due to the delay, we cannot consider a short-notice motion within the time frame the applicant seeks, without depriving the other party of a reasonable time to submit opposition. And the magnitude of the threatened harm does not otherwise warrant adjudicating this matter on short notice despite the delay. If the applicant promptly files a motion with the Clerk's Office it shall be forwarded to a Panel for decision as soon as the opposition is filed.
- Other reasons:

This court, by order dated December 29, 2015, stayed the trial court's order of December 22, 2015. The within application has been addressed by our December 29, 2015 order.



JEROME M. ST. JOHN

J.A.D.

DECEMBER 30, 2015
Date

SUPREME COURT OF NEW JERSEY
S-38 September Term 2015
077046

VIRTUA HEALTH, INC., ET AL.,
PLAINTIFFS-APPLICANTS,

v.

DISPOSITION
FILED

STATE OF NEW JERSEY,
DEFENDANT.


DEC 31 2015

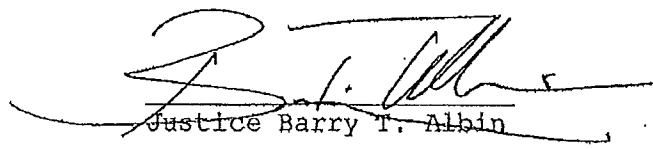

CLERK

The stay entered by the Superior Court, Appellate Division shall continue pending further order of the Court. Plaintiffs shall serve and file their notice of motion and brief in support (original plus eight), along with eight copies of their Appellate Division submissions, on or before 4:30 p.m. on Monday, January 4, 2016. The State shall serve and file an answering brief (original plus eight), along with eight copies of its Appellate Division submissions, on or before 4:30 p.m. on Wednesday, January 6, 2016. No additional briefs or documents are permitted unless requested by the Court. Plaintiffs' motion will be presented to the full Court for its consideration on

January 12, 2016.

The foregoing is a true copy
of the original on file in my office.


CLERK OF THE SUPREME COURT
OF NEW JERSEY
December 31, 2015


Justice Barry T. Albin

