

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

08 CVS 007955

WAKE COUNTY

HOPE-A WOMEN'S CANCER CENTER, P.A.,)
and RALEIGH ORTHOPAEDIC)
CLINIC, P.A.)

Plaintiffs)

v.)

STATE OF NORTH CAROLINA; MICHAEL F.)
EASLEY, Governor of the State of North Carolina,)
in his official capacity; NORTH CAROLINA)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES; DEMPSEY E. BENTON, Secretary of)
the North Carolina Department of Health and)
Human Services, in his official capacity; DAN A.)
MYERS, M.D., Chairman of the North Carolina)
State Health Coordinating Council, in his official)
capacity; JEFF HORTON, Acting Director,)
Division of Health Service Regulation, North)
Carolina Department of Health and Human)
Services, in his official capacity; and LEE B.)
HOFFMAN, Chief of the Certificate of Need)
Section, Division of Health Service Regulation,)
North Carolina Department of Health and Human)
Services, in her official capacity,)

Defendants.)

**MOTION FOR PROTECTIVE
ORDER and MOTION FOR STAY**

NOW COME Defendants, by and through the undersigned counsel, and move for the entry of a protective order relieving them from responding or objecting to any discovery in this action pending a ruling on the merits of their Motion to Dismiss and staying all discovery pending such a ruling. In support of this Motion, Defendants show unto the Court as follows:

1. Hope-A Women's Cancer Center, P.A. ("Hope") and Raleigh Orthopaedic Clinic, P.A. ("Raleigh Orthopaedic") (collectively hereinafter "Plaintiffs"), filed their Complaint in this action on 6 May 2008.

2. Plaintiffs allege that the North Carolina Certificate of Need Laws and Executive Order 98 represent an unconstitutional delegation of legislative authority, deprive Plaintiffs of their right to procedural and substantive due process, and deprive Plaintiffs of access to the courts.

3. On 6 June 2008, in lieu of an Answer, Defendants filed a Motion to Dismiss pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure.

4. On 13 June 2008, Plaintiffs served their First Set of Interrogatories and First Request for Production of Documents to Defendants (hereafter "First Discovery Requests"), a copy of which is attached hereto as Exhibit A.

5. In their First Discovery Requests, Plaintiffs primarily seek the mental impressions of Defendants' counsel regarding the legal theories underlying Defendants' Motion to Dismiss.

6. It is well settled under North Carolina law that work product containing the mental impressions or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought is not discoverable.

7. Plaintiffs' First Discovery Requests impermissibly attempt to obtain the mental impressions, conclusions, opinions or legal theories of Defendants' attorneys.

8. In addition, Defendants would incur undue burden and expense in responding to any discovery prior to a ruling on their Motion to Dismiss.

9. For the reasons set forth above, Defendants respectfully submit that a Protective Order should be issued to relieve Defendants from any and all obligations to respond and/or object to

Plaintiffs' First Discovery Requests prior to a ruling on Defendants' Motion to Dismiss and to stay all discovery in this action until such a ruling is issued.

WHEREFORE, Defendants pray that this Court enter a Protective Order (1) relieving Defendants from any and all obligations to respond and/or object to Plaintiffs' Discovery Requests (or to any subsequent discovery requests) pending a ruling on Defendants' Motion to Dismiss; and (2) providing that all discovery in this action be stayed until said ruling is issued.

Respectfully submitted, this the 14th day of July, 2008.

ROY COOPER
Attorney General



Mark A. Davis
Special Deputy Attorney General
N.C. State Bar No. 18142
E-mail: mdavis@ncdoj.gov

Angel Gray
Assistant Attorney General
N.C. State Bar No. 24257
E-mail: agray@ncdoj.gov

N.C. Department of Justice
114 W. Edenton Street
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6900
Fax: (919) 716-6763

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MOTION FOR PROTECTIVE ORDER and MOTION FOR STAY** was this day served upon the following by electronic transmission and by depositing a copy of same in the United States Mail, first-class postage prepaid, and addressed as follows:

Noah H. Huffstetler, III
Wallace C. Hollowell, III
Denise M. Gunter
Elizabeth B. Frock
NELSON, MULLINS, RILEY & SCARBOROUGH, LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612

COUNSEL FOR PLAINTIFFS

COURTESY COPIES TO:

Gary S. Qualls
Colleen M. Crowley
William W. Stewart, Jr.
Gina L. Bertolini
K&L GATES, LLP
430 Davis Drive, Suite 400
Morrisville, North Carolina 27560

COUNSEL FOR CMC, PITT, HIGH POINT REGIONAL, REX, AND CAPE FEAR VALLEY

Robert V. Bode
Todd S. Hemphill
Diana E. Ricketts
BODE CALL & STROUPE, LLP
3105 Glenwood Avenue, Suite 300
Raleigh, North Carolina 27602

COUNSEL FOR BAPTIST AND N.C. HOSPITAL ASSOCIATION

Maureen Demarest Murray
Terrill Johnson Harris
Allyson Jones Labban
SMITH MOORE, LLP
P.O. Box 29594
Greensboro, North Carolina 27420

COUNSEL FOR MISSION, WAKEMED, AND MOSES CONE

Frank S. Kirschbaum
KIRSCHBAUM, NANNEY, KEENAN & GRIFFIN, P.A.
2418 Blue Ridge Road, Suite 200
Raleigh, NC 27607

COUNSEL FOR SURGICAL CARE AFFILIATES, BLUE RIDGE DAY SURGERY,
GREENSBORO SPECIALITY SURGERY, EYE SURGERY CENTER, CHARLOTTE
SURGERY, AND ASHEVILLE RADIOLOGY

This the 14th day of July, 2008.



Mark A. Davis
Special Deputy Attorney General

EXHIBIT A

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 007955

HOPE-A WOMEN'S CANCER CENTER,)
P.A., and RALEIGH ORTHOPAEDIC)
CLINIC, P.A.,)

Plaintiffs,)

vs.)

STATE OF NORTH CAROLINA;)
MICHAEL F. EASLEY, Governor of the)
State of North Carolina, in his official)
capacity; NORTH CAROLINA)
DEPARTMENT OF HEALTH AND)
HUMAN SERVICES; DEMPSEY E.)
BENTON, Secretary of the North)
Carolina Department of Health and)
Human Services, in his official capacity;)
DAN A. MYERS, M.D., Chairman)
of the North Carolina State Health)
Coordinating Council, in his official)
capacity; JEFF HORTON, Acting)
Director, Division of Health Service)
Regulation, North Carolina Department)
of Health and Human Services, in his)
official capacity; and LEE B. HOFFMAN,)
Chief of the Certificate of Need)
Section, Division of Health Service)
Regulation, North Carolina Department)
of Health and Human Services, in her)
official capacity,)

Defendants.)

RECEIVED

JUN 13 2008

NC Department Of Justice
DHR / DHSR

PLAINTIFFS' FIRST SET OF INTERROGATORIES
AND FIRST REQUEST FOR PRODUCTION OF
DOCUMENTS TO DEFENDANTS

TO: Angel E. Gray
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
ATTORNEY FOR DEFENDANTS

Pursuant to Rules 33 and 34 of the North Carolina Rules of Civil Procedure, Plaintiffs Hope-A Women's Cancer Center, P.A. ("Hope") and Raleigh Orthopaedic Clinic, P.A. (the "Clinic") (collectively, the "Plaintiffs") hereby request that defendants State of North Carolina (the "State"), North Carolina Department of Health and Human Services (the "Department"), Michael F. Easley ("Mr. Easley"), Dempsey E. Benton ("Mr. Benton"), Dan A. Myers, M.D. ("Dr. Myers"), Jeff Horton ("Mr. Horton") and Lee B. Hoffman ("Ms. Hoffman") (collectively, the "Defendants"), answer the following interrogatories and respond to the following requests for production of documents (collectively denominated "Discovery Requests") in accordance with the provisions of Rules 33 and 34 and the definitions and instructions set forth below.

DEFINITIONS AND INSTRUCTIONS

1. "Hope" shall mean Hope-A Women's Cancer center, P.A., its officials, employees, agents, representatives, affiliates, parents and subsidiaries.
2. The "Clinic" shall mean Raleigh Orthopaedic Clinic, P.A., its officials, employees, agents, and representatives.
3. The "Plaintiffs" shall mean Hope and the Clinic.
4. The "State" shall mean the State of North Carolina, its officials, employees, agents, representatives, affiliates, parents and subsidiaries.

5. The "Department" shall mean the North Carolina Department of Health and Human Services, its officials, employees, agents, representatives, affiliates, parents and subsidiaries.

6. "Mr. Easley" shall mean Governor Michael F. Easley.

7. "Mr. Benton" shall mean Dempsey E. Benton.

8. "Dr. Myers" shall mean Dan A. Myers, M.D.

9. "Mr. Horton" shall mean Jeff Horton.

10. "Ms. Hoffman" shall mean Lee B. Hoffman.

11. The "Defendants" shall mean the State, the Department, Mr. Easley, Mr. Benton, Dr. Myers, Mr. Horton and Ms. Hoffman.

12. "Identify" with respect to any natural person shall mean to state, to the extent known, his or her:

a. full name;

b. present address; if present address is not known, state the last known address and the date thereof;

c. present telephone number; if present telephone number is not known, state the last known telephone number and the last date thereof; and

d. present employer, address of employer, and position; if such information is not known, state the last known employer, address of employer and position, and the date thereof.

13. "Identify" with respect to any corporation, association, partnership, firm, organization, hospital, trade union, governmental agency or body, any division, department, or units thereof, shall mean to state, to the extent known, its:

- a. full name;
- b. principal office address; and
- c. all business affiliations involved in any transactions or activities related to the subject of the interrogatory and the identity of the party or other persons on whose behalf such entity or entities acted at the time in question.

14. "Identify" with respect to any document shall mean to state, to the extent known:

- a. the general nature or description of such document (i.e., letters, memorandum, drawing, etc.) and the number of pages of which it consists;
- b. the general subject matter of such documents;
- c. the date appearing on such documents; if no date appears thereon, so state and provide the date or approximate date such document was prepared;
- d. the name, business address, job title, and responsibilities of the author and each person who made any notation thereon or who signed or initialed the document or if was not signed, the person who prepared it;
- e. the name, business address, job title, and responsibilities of the person to whom such document was addressed and the name of each such person to whom such document or a copy thereof, was given or sent; and
- f. the location(s) where the document has been stored and the identity of the person having custody of such document.

15. "Document" is used in the broadest sense and includes, but is not limited to, all originals, non-identical copies and drafts of the following items, either printed, recorded, or reproduced by any other mechanical process, or stored electronically, or written or produced

by hand: correspondence, e-mail, memoranda, records, summaries of personal conversations, interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, confirmations, telegrams, telexes, books, notes, reports, logs, diaries, personal memoirs, tape recordings, transcripts of tape recordings, charts, photographs, photographic prints and slides, cancelled checks, invoices, bills, notebooks, drawings, plans, interoffice communications, telephone message books, time slips or any other form of writings or records of any kind.

16. If any information requested in any of the following Discovery Requests is withheld on the basis of a claim of privilege or attorney work product, the claimed basis for withholding the information and the nature of the information withheld shall be set forth, together with a statement of all the circumstances relied upon to support such claim.

17. As to those interrogatories consisting of a number of separate divisions or related parts or portions, a completed response is required to each such part or portion with the same effect as if it were propounded as a separate interrogatory. Should the Defendants interpose an objection to an interrogatory in any response, it should clearly indicate to which part or portion of the interrogatory the objection is directed.

18. If any interrogatory cannot be answered in full after exercising due diligence to secure the information with which to do so, please so state and answer the interrogatory to the extent possible. Also, specify why the Defendants are unable to answer the remainder of any such interrogatory and state whatever knowledge or information presently is available concerning the unanswered portion of the interrogatory.

19. These interrogatories shall be deemed continuing to the full extent provided in the North Carolina Rules of Civil Procedure, so as to require supplemental answers if you

obtain additional information between the time the answers are served and the time of the hearing.

20. If the Defendants decline to produce any document falling within the scope of this request pursuant to a claim of privilege, it must provide the following information separately as to each such piece of information and/or document:

- a. general description of the nature and subject matter of the document;
- b. its author;
- c. its recipient or addressee;
- d. its date;
- e. the number of copies prepared and by whom;
- f. the identity of each person who has received a copy or had an opportunity to receive a copy thereof;
- g. the physical location and identity of a custodian thereof;
- h. the grounds on which the Defendants contend that the document is not subject to discovery; and
- i. whether any matter that is not subject to the claim of privilege or other asserted grounds for non-production is discussed in the document.

21. "SMFP" shall mean the North Carolina State Medical Facilities Plan.

22. In the event that any documents requested herein to be identified or produced have been lost, destroyed or discarded, such document shall be identified as completely as possible, including, without limitation, the following information: date of disposal, manner of disposal, reason for disposal, name and address of person who disposed of the document and the name and address of the person who authorized the disposal.

INTERROGATORIES

1. Identify each individual or entity with knowledge or information concerning the allegations and statements set forth in Defendants' June 6, 2008 Motion to Dismiss, and for each person or entity identified, provide a statement of the substance of the knowledge or information possessed.

RESPONSE:

2. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on lack of subject matter jurisdiction. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on lack of subject matter jurisdiction, including all legal and factual support for this contention.

RESPONSE:

3. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on lack of personal jurisdiction. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on lack of personal jurisdiction, including all legal and factual support for this contention.

RESPONSE:

4. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety as a result of Plaintiffs' failure to state a claim upon which relief can be granted. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on failure to state a claim upon which relief can be granted, including all legal and factual support for this contention.

RESPONSE:

5. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on lack of standing. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on lack of standing, including all legal and factual support for this contention.

RESPONSE:

6. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on absence of a protected property interest. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on absence of a protected property interest, including all legal and factual support for this contention.

RESPONSE:

7. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on public official and sovereign immunity. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on public official and sovereign immunity, including all legal and factual support for this contention.

RESPONSE:

8. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on Plaintiffs' failure to exhaust administrative remedies. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on a failure to exhaust administrative remedies, including all legal and factual support for this contention.

RESPONSE:

9. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on estoppel. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on estoppel, including all legal and factual support for this contention.

RESPONSE:

10. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on laches. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on laches, including all legal and factual support for this contention.

RESPONSE:

11. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on waiver. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on waiver, including all legal and factual support for this contention.

RESPONSE:

12. Defendants' June 6, 2008 Motion to Dismiss asserts that Plaintiffs' Complaint should be dismissed in its entirety based on the absence of any constitutional bar to the North Carolina General Assembly's authority to enact the statutes referenced in the Complaint. Please describe in detail all of the reasons why you contend that Plaintiffs' Complaint should be dismissed based on the absence of any constitutional bar to the North Carolina General Assembly's authority to enact the statutes referenced in the Complaint, including all legal and factual support for this contention.

RESPONSE:

13. Identify all non-privileged discussions, meetings, conferences, telephone communications, email correspondence, or other communications regarding this action (08 CVS 007955) and/or the subject matter of this action involving any of the Defendants, or anyone acting on behalf of any of the Defendants (including anyone in the North Carolina Attorney General's Office) and any third party, and for each discussion, meeting, conference, telephone communication, email correspondence, or other communication identify the following:

- (a) date and location of each discussion, meeting, conference, telephone communication, email correspondence, or other communication;
- (b) names, positions, and addresses of persons attending or participating in each discussion, meeting, conference, telephone communication, email correspondence, or other communication;
- (c) substance of the matters discussed in each discussion, meeting, conference, telephone communication, email correspondence, or other communication; and
- (d) all documents which reflect, refer, or relate to each discussion, meeting, conference, telephone communication, email correspondence, or other communication, including all agenda, minutes and documents, distributed, referred to, or prepared in relation to the discussion, meeting, conference, telephone communication, email correspondence, or other communication.

RESPONSE:

REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the North Carolina Rules of Civil Procedure, the Defendants are requested to produce the following documents:

1. Produce all documents identified, described, referred to, or otherwise mentioned in your responses to Plaintiffs' first set of interrogatories.

RESPONSE:

2. Produce all documents and things, which reflect, refer, relate to, or provide support for each of your responses to Plaintiffs' first set of interrogatories.

RESPONSE:

3. Produce all documents relied upon or consulted by Defendants in preparing your responses to Plaintiffs' first set of interrogatories.

RESPONSE:

This the 13~~th~~ day of June, 2008.

NELSON MULLINS RILEY &
SCARBOROUGH, LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
Denise M. Gunter
N.C. State Bar No. 16695
Wallace C. Hollowell, III
N.C. State Bar No. 24304
Elizabeth B. Frock
N.C. State Bar No. 36765

By: Noah H. Huffstetler III
Noah H. Huffstetler, III
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799

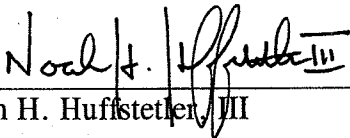
ATTORNEYS FOR HOPE- A WOMEN'S
CANCER CENTER, P.A. AND RALEIGH
ORTHOPAEDIC CLINIC, P.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiffs' First Set of Interrogatories and First Request for Production of Documents to Defendants has been served upon the person listed below by hand-delivery, addressed as follows:

Angel E. Gray
Assistant Attorney General
N.C. Department of Justice
114 W. Edenton Street, Suite 421
Raleigh, NC 27602-0629

This the 13th day of June, 2008.



Noah H. Huffstetter III

