NO. COA09-844 TENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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HOPE-A WOMEN'S CANCER CENTER, P.A. and RALEIGH ORTHOPAEDIC CLINIC, P.A., Plaintiffs-Appellants, v. STATE OF NORTH CAROLINA, *et al.*, Defendants-Appellees.	<u>From Wake County</u> No. 08 CVS 007955

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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HOPE-A WOMEN'S CANCER CENTER, P.A. and RALEIGH ORTHOPAEDIC CLINIC, P.A.,	)	
Plaintiffs-Appellants,	)	From Wake County No. 08 CVS 007955
v.	)	
STATE OF NORTH CAROLINA, *et al.*,	)	
Defendants-Appellees.	)	

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Pursuant to the 11 December 2009 Order of this Court extending the time to file reply briefs, Plaintiffs-Appellants Hope-A Women's Cancer Center, P.A. ("Hope") and Raleigh Orthopaedic Clinic, P.A. (the "Clinic") respectfully submit this Reply Brief to address certain issues raised by the various *amici curiae*.

I. THE SUPREME COURT'S HOLDING IN FRYE DID NOT ADDRESS THE GENERAL ASSEMBLY'S UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY WITH RESPECT TO THE CREATION OF THE PLAN, AND DOES NOT CONTROL THIS COURT'S ANALYSIS OF THAT ISSUE.

Several of the *amici curiae* briefs argue that the holding of our Supreme Court in Frye Regional Med. Ctr. v. Hunt, 350 N.C. 39, 510 S.E.2d 159 (1999) clearly delineates the role of the State Health Coordinating Council (the "Council") as purely advisory, while the role of the Governor is that of final decision maker. The *amici* suggest that, because the final approval of the State Medical Facilities Plan (the "Plan") rests solely with the Governor, the manner in which the Council prepares the Plan for her review and approval has no impact on the constitutionality of this aspect of the CON Law. This argument is both factually wrong and misplaced.

First, the *amici* cannot, with a straight face, seriously suggest that the Governor writes the Plan, that she plays any more than a cursory and perfunctory role in developing the methodology[1] and criteria used to evaluate proposed changes in need determinations, or that even in an inordinately active year she makes more than a handful of the plethora of specific need determinations contained in the Plan. The 2008 Plan at issue here is more than 300 pages long and

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[1] The *amici* brief submitted by the North Carolina Hospital Association, *et al.*, erroneously implies that the General Assembly provided guidance for the Council as to the "established methodologies [used] to assess the need across the State for various health services . . ." (Br. at 5). In fact, the CON Law contains no such "established methodologies," and contains no criteria more specific than the broad, general aspirational statements contained in N.C. Gen. Stat. § 131E-175. The omission of substantive guidance by the General Assembly, along with the lack of procedural safeguards, renders the process by which the current Plan is developed an unconstitutional delegation of legislative authority.

contains more than a thousand individual determinations regarding the need, or lack thereof, for numerous types of equipment, services and facilities for particular geographically distinct service areas, often at the county level, across the State; it took months to develop and was presented to Governor Easley for his review on 7 November 2007. Governor Easley approved the 2008 Plan, with minor changes, on 18 December 2007. Although he approved the final Plan, it simply strains credibility to suggest, for example, that Governor Easley knew or participated in determining the methodology used to make a need determination as to the number of MRIs needed in each of the State's 100 counties in 2008.

Consistent with the historical role of the Governor with respect to the Plan, Governor Easley did not participate in the crafting of the 2008 Plan except for a few changes before final approval. Indeed, the Frye case arose because then-Governor Hunt, in the view of the plaintiff in that case, had the temerity to change a specific need determination in the Plan that had been approved by the Council. The Court noted that, prior to the amendment made by Governor Hunt in that case, Governors had made only the occasional minor, limited change to the Plan; Frye was *remarkable* because the Governor made a substantive change in a need determination. Since Frye, Governors have continued to make substantive changes in need determinations to the Plan, but such changes are few and far between. The vast majority of the need determinations contained in the Plan are made by the

Council alone, and are untouched by the Governor. The stroke of the Governor's pen does not cleanse the Plan of the unconstitutional impurity which necessarily follows when a body of self-interested, entrenched industry insiders makes unchallengable need determinations (from which many of them personally and professionally benefit) without substantive guidance from the legislature or adequate procedural safeguards.

While Frye holds that the Governor has the power to change the Plan prepared by the Council before giving her final approval, Frye does not stand for the proposition that the Governor is the one who actually makes the vast majority of the need determinations in the Plan, as the *amici* argue. The *amici* play a semantic game with *dicta* from Frye in an attempt to distort the true role of the Council.

Second, ultimately, the issue of whether the Department, the Council, or the Governor carries the laboring oar in crafting the Plan is immaterial with respect to the constitutional question of whether the creation of the Plan, as currently set forth by the General Assembly, is an unconstitutional delegation of legislative authority. Regardless of who in the executive branch actually crafts and approves the Plan, the General Assembly has provided neither the substantive guidance nor the procedural safeguards necessary to make the current delegation of legislative authority a constitutional one.

II. THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS ISSUES IN THIS CASE ARE CONTROLLED BY OUR SUPREME COURT'S REASONING IN ASTON PARK.

In the brief submitted by the North Carolina Hospital Association, North Carolina Baptist Hospital and Wake Forest University Health Sciences, those *amici* argue that "no case that we know of . . . has found current CON Laws and need determination limits to violate a due process right to conduct business . . ." (Br. at 12). Referring to "[t]he one case, In re Aston Park Hospital, Inc., 282 N.C. 542, 193 S.E.2d 729 (1973), which found the CON law unconstitutional," these *amici* argue that the Court should ignore our Supreme Court's holding and rationale in Aston Park. These *amici* suggest that the General Assembly's adoption of a new CON Law in 1978 has effectively mooted out the holding of Aston Park, which the *amici* further suggest is "generally discredited or distinguished." (Br. at 12).[2]

Contrary to the impression given by these *amici*, however, our Supreme Court has not questioned, disturbed, or otherwise repudiated its holding in Aston Park in the 37 years since its issuance. While it is true that the General Assembly adopted the current CON Law in 1978 to replace the CON Law invalidated in

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[2] To their credit, at least these *amici* cite and attempt to distinguish Aston Park when discussing the due process claims in this case. The other *amici curiae* briefs discuss the due process claims – one submitted by the North Carolina Health Care Facilities Association, the other by The Charlotte-Mecklenburg Hospital Authority, *et al.* – purport to analyze Appellants' due process claims without even citing Aston Park, the one North Carolina Supreme Court decision with reasoning that is directly applicable to the issues raised in this case.

Aston Park, the current CON Law is also unconstitutional to the extent it runs afoul of the basic holding in Aston Park. To the knowledge of the Plaintiffs-Appellants, no North Carolina appellate court has ruled on the constitutionality of the current CON Law or process since Aston Park.

While these *amici* cite state courts in other jurisdictions that have declined to apply the holding and rationale of Aston Park to their own state constitutional provisions and statutes, these cases are of no import to this Court in this case. Rather, this Court is bound by our Supreme Court's clear and untouched rationale in Aston Park, in which our Supreme Court held that:

> . . . . Article I, s 19, of the Constitution of this State does not permit the Legislature to authorize a State board or commission to forbid persons, with the use of their own property and funds, to construct adequate facilities and to employ therein a licensed professional and quasi-professional staff for the treatment of sick people, who desire the service, merely because to do so endangers the ability of other, established hospitals to keep all their beds occupied.

282 N.C. at 549, 193 S.E.2d at 734. These *amici* misunderstand this Court's observation in State ex rel. Utilities Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993) that the General Assembly's repeal of the specific statute found to be unconstitutional in Aston Park "rendered moot" the issue of that specific statute's constitutionality, suggesting instead that Empire Power somehow should also be read to "render moot" the rationale behind Aston Park. When a law

is found to be unconstitutional and is thereafter repealed, the General Assembly cannot replace the original with a new law which suffers from the same constitutional defect as the original law and "render moot" the holding of our Supreme Court.[3]

Indeed, in the 16 years since this Court's decision in Empire Power, this Court has cited Aston Park for its basic, two-part test. See, e.g., Rhyne v. K-Mart Corp., 149 N.C. App. 672, 696, 562 S.E.2d 82, 99 (2002); Armstrong v. N.C. State Bd. of Dental Examiners, 129 N.C. App. 153, 159, 499 S.E.2d 462, 468 (1998). If our Supreme Court had abandoned the basic holding and rational of Aston Park, this Court would not have continued to favorably cite the case as recently as 2002.

Even if this Court now disagrees with the basic holding of Aston Park and would have, in a case of first impression, upheld the CON Law at issue in Aston Park, this Court is not free to substitute its own view of Article I, s 19 with respect to restrictions on the provision of new health care services for that of our Supreme Court. The fact that this case involves the current CON Law and not the CON Law

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[3] As a hypothetical example, at the time the U.S. Supreme Court struck down Virginia's anti-miscegenation laws in Loving v. Virginia, 388 U.S. 1 (1967), North Carolina had such a law in the General Statutes. That law has since been repealed. However, if the General Assembly were to pass a new anti-miscegenation law, it, too, would be instantly unconstitutional and therefore unenforceable unless the U.S. Supreme Court were to reverse the holding and reasoning of Loving v. Virginia. Likewise, provisions of the current CON Law may not be enforced to the extent those provisions run afoul of the holding and reasoning in Aston Park, barring an abandonment of that reasoning by our Supreme Court.

invalidated in Aston Park does not give this Court leave to stray from the essential holding of Aston Park. Because the Plan represents an even more egregious violation of the Plaintiffs-Appellants' rights than the statute declared unconstitutional in Aston Park, this Court must apply the basic rationale of Aston Park and find for the Plaintiffs-Appellants in this matter.

III. THE CONSTITUTIONAL DUE PROCESS QUESTION AT ISSUE IN THIS COURT'S DECISION IN BIO-MEDICAL APPLICATIONS IS INAPPOSITE TO THE DUE PROCESS ISSUES IN THE INSTANT MATTER.

Several of the *amici* cite this Court's decision in Bio-Medical Applications of North Carolina, Inc. v. N.C. Dept. of Health and Human Services, 179 N.C. App. 483, 634 S.E.2d 572 (2006) for the proposition that "a business opportunity is not a fundamental right in the constitutional sense and it is not sufficient to invalidate on substantive or procedural due process grounds entry restriction regulations which serve a rational legislative purpose." (Br. of N.C. Hosp. Ass'n at 9).[4] The Bio-Medical case, which was not cited by the Plaintiffs-Appellants or

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[4] The *amici* also cite Bio-Medical for its recognition that the Frye court held that the Plan is issued by the Governor and not by the Council. Neither Frye nor Bio-Medical addressed the constitutional question of the delegation of legislative authority raised in the instant action. Further, as discussed *supra*, the fact that the Governor signs the Plan and has the statutory authority to make unilateral changes to the Plan as prepared by the Council does not cleanse the process by which the Plan was prepared of its constitutional infirmities. The error lies first with the General Assembly, which failed to provide the substantive guidance and adequate procedural safeguards necessary for a delegation of legislative authority to pass constitutional muster.

the Defendants-Appellees in their main briefs, is inapposite to the argument presented by the Plaintiffs-Appellants in the instant case. In Bio-Medical, the Plan at issue included a need determination for 10 additional dialysis stations in Wake County; this need determination was arrived at through a miscalculation of data that was acknowledge by all parties. The plaintiff in Bio-Medical, a then-existing provider of dialysis services, brought a declaratory judgment action seeking injunctive and mandamus relief in an attempt to correct the miscalculation and prevent 10 additional dialysis stations from becoming operational in Wake County. The constitutional claim raised by the plaintiff in Bio-Medical was a claim that it had a due process right to be free from the competition of other potential providers of the same service without a correct need determination. This Court held:

> Every one has [the] right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance.

Id., 179 N.C. App. at 491, 634 S.E.2d at 578 (quoting Walker v. Cronin, 107 Mass. 555 (1871)).

It is ironic that the *amici* in the instant matter, who collectively seek to preserve the challenged aspects of the CON Law at issue in this case which have the effect of preventing Plaintiffs-Appellants from competing with the providers currently providing similar services and facilities in their respective counties,

would cite <u>Bio-Medical</u>. In the instant case, Plaintiffs-Appellants do not seek to be protected from competition; rather, Plaintiffs-Appellants seek "to be free from malicious and wanton interference, disturbance or annoyance" in the form of a CON Law which violates their substantive and procedural due process rights as outlined by our Supreme Court in <u>Aston Park</u>.

Respectfully submitted this the 13th day of January, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for the Plaintiffs-Appellants hereby certify that the foregoing Reply Brief was prepared using the proportional type Times Roman, fourteen-point font, and contains no more than 3,000 words, exclusive of covers, indexes, tables of authorities, certificates of service, and appendixes.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Plaintiffs-Appellants' Reply Brief was served on the following persons by United States Mail, postage prepaid, addressed as follows:

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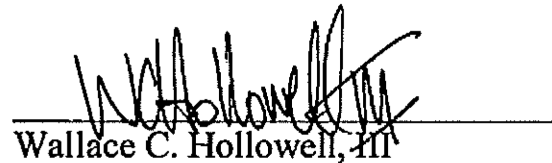

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