

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,)

and)

ASHEVILLE RADIOLOGY ASSOCIATES,)
P.A.; BLUE RIDGE DAY SURGERY CENTER)
LIMITED PARTNERSHIP; THE)
CHARLOTTE-MECKLENBURG HOSPITAL)
AUTHORITY d/b/a CAROLINAS)
HEALTHCARE SYSTEM; CHARLOTTE)
SURGERY CENTER, LIMITED)
PARTNERSHIP; CUMBERLAND COUNTY)
HOSPITAL SYSTEM, INC. d/b/a CAPE FEAR)

AMENDED MOTION TO
DISQUALIFY

VALLEY HEALTH SYSTEM; GREENSBORO)
 SPECIALITY SURGERY CENTER, LIMITED)
 PARTNERSHIP; HIGH POINT REGIONAL)
 HEALTH SYSTEM; MISSION HOSPITAL,)
 INC.; THE MOSES H. CONE MEMORIAL)
 HOSPITAL OPERATING CORPORATION)
 d/b/a THE MOSES CONE HEALTH SYSTEM;)
 NORTH CAROLINA BAPTIST HOSPITAL;)
 NORTH CAROLINA HEALTH CARE)
 FACILITIES ASSOCIATION, INC; THE)
 NORTH CAROLINA HOSPITAL)
 ASSOCIATION; PITT COUNTY MEMORIAL)
 HOSPITAL, INC.; REX HOSPITAL, INC.;)
 SURGERY CENTER OF SOUTHERN PINES,)
 LLC; SURGICAL CARE AFFILIATES, LLC;)
 WAKE FOREST UNIVERSITY HEALTH)
 SCIENCES; and WAKEMED;)
)

Defendant-Intervenors.

NOW COME Defendants, through counsel, and move to disqualify the North Carolina Institute for Constitutional Law (hereafter “the Institute”), Robert F. Orr (hereafter “Mr. Orr”), and Jason B. Kay (hereafter “Mr. Kay”) from appearing as counsel of record for Plaintiffs in this action and show unto the Court as follows:

1. Plaintiffs Hope-A Women’s Cancer Center, P.A. and Raleigh Orthopaedic Clinic, P.A. (collectively “Plaintiffs”) filed this action challenging several aspects of the manner in which the State Medical Facilities Plan is issued pursuant to North Carolina’s Certificate of Need laws;
2. Plaintiffs are both for-profit medical providers;
3. Plaintiffs’ Complaint, filed on 6 May, 2008, listed the law firm of Nelson Mullins Riley & Scarborough, LLP (hereafter “Nelson Mullins”) as counsel of record on their behalf;

4. On 14 November, 2008, a notice of appearance was filed in which the Institute purported to also make an appearance as counsel of record for Plaintiffs. The signature line on the Notice of Appearance listed the Institute's name followed by signature blocks for Mr. Orr (identified as Executive Director & Senior Counsel) and Mr. Kay (identified as Senior Staff Attorney);

5. The Institute is registered under North Carolina law as a non-profit corporation;

6. N.C. GEN. STAT. § 84-5 prohibits the practice of law by corporations in this State;

7. The only statutory exception to N.C. GEN. STAT. § 84-5 is contained in N.C. GEN. STAT. § 84-5.1 which permits nonprofit corporations organized pursuant to Chapter 55A, for the exclusive purpose of providing indigent legal services, to render such services;

8. The exception contained in N.C. GEN. STAT. § 84-5.1 does not apply in the present case because (a) the Institute is not organized for the sole purpose of rendering indigent legal services; and (b) the Plaintiffs in this action are for-profit entities that have previously retained private counsel in this action;

9. Accordingly, the Institute is not permitted under North Carolina law to represent Plaintiffs in this action;

10. On or about 31 December, 2008, Plaintiffs filed an Amended Complaint in this action. The signature lines on the Amended Complaint list the Nelson Mullins law firm along with signature blocks for five of its attorneys. While the Institute is not mentioned, below the signature lines for the Nelson Mullins attorneys are signature lines for Mr. Orr and Mr. Kay. The addresses, phone numbers, and facsimile numbers for Mr. Orr and Mr. Kay are identical to those contained on the Institute's 14 November, 2008 notice of appearance; and

11. The prohibition on corporations practicing law set out in N.C. GEN. STAT. § 84-5 and § 84-5.1 applies equally to attorneys employed by said corporations who engage in such conduct while acting in the course and scope of their employment with the corporation.

WHEREFORE, Defendants respectfully request that the Court issue an order disqualifying Mr. Orr, Mr. Kay, and the Institute from representing Plaintiffs in this lawsuit.

Respectfully submitted, this the 9th day of January, 2009.

ROY COOPER
Attorney General



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **AMENDED MOTION TO DISQUALIFY** in the above titled action upon all other parties to this cause by:

- Hand-delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile or email; or
- Depositing a copy hereof, first-class postage pre-paid, in the United States mail, properly addressed to:

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***COUNSEL FOR MISSION,
WAKEMED, AND MOSES CONE***

This the 9th day of January, 2009.

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Mark A. Davis
Special Deputy Attorney General