

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, )

vs. )

STATE OF NORTH CAROLINA, *et al.* )

Defendants Appellees. )

**From Wake County**  
No. 08 CVS 7955

FILED  
2009 JUL 22 A 11:17  
NORTH CAROLINA COURT OF APPEALS

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**PLAINTIFFS-APPELLANTS' MOTION FOR PEREMPTORY SETTING**

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TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Pursuant to Rule 29(b) of the North Carolina Rules of Appellate Procedure, Plaintiffs-Appellants Hope-A Women's Cancer Center, P.A. ("Hope") and Raleigh Orthopaedic Clinic, P.A. (the "Clinic") (collectively, the "Plaintiffs" or "Plaintiffs-Appellants"), by and through their undersigned attorneys, respectfully submit this motion to set oral argument in this action for the next scheduled oral argument date following the close of briefing and to deny any requests for extension of time in the briefing schedule. In support of their motion, the Plaintiffs-Appellants state as follows:

1. This is an appeal of the trial court's decision in a constitutional case involving the validity of certain aspects of North Carolina's Certificate of Need ("CON") law as they apply to the Plaintiffs-Appellants.
2. On 26 March 2009, the Superior Court entered an order granting Defendants-Appellee's Motion for Judgment on the Pleadings and dismissing Plaintiffs-Appellants' claims that certain aspects of the CON law discussed below violated specified provisions of the Constitution of North Carolina.
3. The Plaintiffs-Appellants gave notice of appeal on 17 April 2009. The Record on Appeal was settled on 25 June 2009. The case was docketed 10 July 2009.
4. The issues in the case were well defined and thoroughly briefed before the trial court. What remains is swift resolution of the constitutional issues raised so that the parties in this case and other parties affected by the litigation may obtain clear and specific guidance from the appellate courts of North Carolina regarding the meaning and application of the Constitution of North Carolina.

#### THE PARTIES

5. Founded in 1992, Hope specializes in gynecologic and breast cancer treatment as well as the treatment of other complex breast and gynecologic disorders. Hope serves patients referred by physicians throughout Western North Carolina.
6. Based on their education, training, and professional experience, the physicians of Hope believe that a comprehensive cancer center offering diagnostic and treatment modalities including advanced imaging, medical and radiation oncology, and surgical services in one location improves the continuity of care for

cancer patients and enables the highest possible level of care to be provided to those patients. In order to develop a cancer center with such integrated services, Hope wishes to provide its patients with positron emission tomography, magnetic resonance imaging (“MRI”) and linear accelerator services at the same location at which it now provides chemotherapy and surgical services.

7. The Clinic is the largest orthopaedic practice in Wake County. The Clinic has four office locations and serves patients from all of Wake County and a large region of Eastern North Carolina.
8. Based on their education, training and professional experience, the physicians of the Clinic believe that single specialty operating rooms, the equipment and staff of which do not need to be changed throughout the day to accommodate different types of surgical procedures, offer significant advantages to physicians and their patients in both the quality and the cost of necessary medical care. Currently, no facility in Wake County has any dedicated ambulatory orthopaedic surgery operating rooms. In order to continue to provide high quality, cost effective medical services to its patients, the Clinic wishes to develop a licensed ambulatory surgery center with six operating rooms dedicated to the provision of orthopaedic surgery.

#### SUMMARY OF RELEVANT LAW

9. The CON law requires that healthcare providers such as Plaintiffs-Appellants obtain a CON prior to developing or offering new institutional health services. Pursuant to N.C. Gen. Stat. § 131E-176(16), the new equipment and services

desired by Plaintiffs-Appellants are all defined as “new institutional health services” requiring a CON.

10. CON applications subject to the State Medical Facilities Plan (“SMFP”) are first evaluated on the basis of a sole criterion: whether or not the SMFP itself permits a particular new institutional health service. The first of the criteria contained in N.C. Gen. Stat. § 131E-183 provides that “[t]he proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility [or] operating rooms ... that may be approved.” N.C. Gen. Stat. § 131E-183(a)(1) (Emphasis added).
11. The State Health Coordinating Council (SHCC) produces the SMFP. In developing the SMFP, the SMFP is not subject to substantive legislative guidance or administrative criteria. The discretion exercised in developing the SMFP is unfettered.
12. Furthermore, once produced, the SMFP is not subject to effective judicial review. It is specifically excepted from the administrative review process available by default for the review of other rules. No *de novo* judicial review is available.
13. The SHCC is composed of individuals who are predominately health care industry insiders. At least twenty-three of twenty-seven members of the SHCC are officers, directors, or employees of health care organizations subject to the

limitations of the SMFP. The members of the SHCC are not subject to the State Ethics Act.

14. The trial court, without any substantive legal analysis, incorrectly determined that the statutory scheme summarized above and argued in the trial court does not adversely affect the constitutional rights of Plaintiffs-Appellants. The trial court did so without citation to law, disclosure of its reasoning, or issuance of substantive legal guidance with respect to the constitutional issues raised. See Addendum A.
15. There remains appreciable uncertainty in the state of constitutional law with respect to the challenged portion of the CON law until the appellate courts of North Carolina render an analysis and decision on the issues raised.
16. The constitutional validity of the CON law, as applied to Plaintiffs-Appellants, directly affects the medical care of Plaintiffs-Appellants' patients with critical health care needs, including cancer treatment and medically necessary surgical treatment. Medical care, which in the medical opinion of the licensed physicians employed by Plaintiffs-Appellants ought to be made more accessible to patients, will instead be made less accessible.
17. All relevant legal issues have been thoroughly briefed before the trial court with numerous and voluminous briefs.
18. This Court has broad discretion to grant a preemptory setting for this case at the next scheduled hearing date. See Rule App. Proc. 29(b). Expediting oral

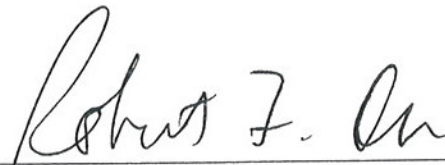
argument in this case is critical to give Plaintiffs-Appellants and the citizens of North Carolina substantive legal guidance on important constitutional issues.

19. This motion will not prejudice Defendants-Appellees in any way. The motion will not alter the briefing schedule contained in the Rules of Appellate procedure, nor will it deprive Defendants of any opportunity for briefing or argument that they would otherwise have under the rules.
20. Under Rule 29(b), this Court should grant Plaintiffs-Appellants' motion to set oral argument for the next scheduled oral argument date following the close of briefing and to deny any requests by Plaintiffs-Appellants or Defendants-Appellees for extension of time to file briefs in the case so that the parties may obtain an expedited decision in this appeal and ensure that the important constitutional issues raised in the case, which the trial court did not substantively address, are clearly resolved with all due speed.

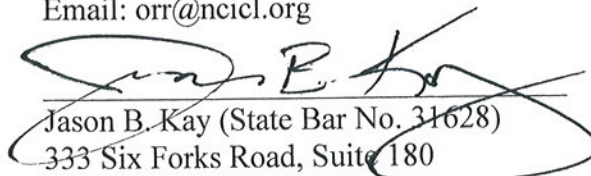
#### CONCLUSION

For the reasons stated above, Plaintiffs-Appellants respectfully request that the Court exercise its discretion under Rule 29(b) to set oral argument in this action for the next scheduled oral argument date following the close of briefing and to deny any requests for extension of time in the briefing schedule.

This the 22<sup>nd</sup> day of July, 2009.



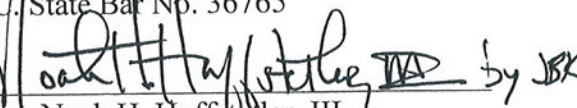
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**CERTIFICATE OF SERVICE**

It is hereby certified that a copy of the foregoing Motion for Peremptory Setting was served this day on the persons indicated below by depositing a copy under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed as follows:

Mark A. Davis  
Angel E. Gray  
N.C. DEPARTMENT OF JUSTICE  
114 W. Edenton Street  
Post Office Box 629  
Raleigh, North Carolina 27602-6763

This the 22<sup>nd</sup> day of July, 2009.

Jason Kay

A large, stylized handwritten signature in black ink, appearing to read 'Jason Kay', is written over the printed name. The signature consists of several large, sweeping loops and a long horizontal stroke.