

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)

MOTION TO DISMISS AND
ANSWER TO FIRST AMENDED
COMPLAINT

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.)

MOTION TO DISMISS

NOW COME Defendants, through counsel, and respectfully move to dismiss Plaintiffs' First Amended Complaint in its entirety pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure based on lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted due to lack of standing; estoppel and/or quasi-estoppel; waiver; and the absence of any constitutional bar to the statutes and Executive Orders referenced in the First Amended Complaint.

ANSWER

NOW COME Defendants, through counsel, and respond to the allegations of the First Amended Complaint as follows:

PARTIES

1. Admitted upon information and belief.
2. Admitted upon information and belief.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted.
9. Admitted.

JURISDICTION

10. Denied on the ground that this paragraph merely states a legal conclusion except it is admitted that Plaintiffs purport to assert a claim for declaratory relief under the Declaratory Judgment Act.

11. Denied as this paragraph merely states a legal conclusion.
12. Denied as this paragraph merely states a legal conclusion.
13. Denied.
14. Denied as this paragraph merely states a legal conclusion.

HOPE

15. Denied for lack of information, except it is admitted that Plaintiff Hope-A Women's Cancer Center, P.A. (hereafter "Hope-A") is a for-profit medical provider that provides various types of medical services.

16. Denied for lack of information as to the beliefs of Hope-A's physicians.

17. Denied for lack of information.

18. Denied for lack of information.

THE CLINIC

19. Denied for lack of information except it is admitted that Plaintiff Raleigh Orthopaedic Clinic, P.A. (hereafter "ROC") is a for-profit medical provider that provides various types of medical services.

20. The first sentence of this paragraph is denied for lack of information as to the beliefs of the physicians employed by ROC. With regard to the second sentence of this paragraph, is admitted that there are currently no operating rooms in Wake County where dedicated ambulatory orthopaedic surgery is performed.

21. Denied for lack of information as to the wishes of ROC.

22. Denied for lack of information.

THE CON LAW

23. It is admitted that the terms of North Carolina's Certificate of Need statutes, which are set out in N.C. GEN. STAT. § 131E-175 *et seq.* (hereafter "the CON Laws"), speak for themselves. Except as admitted herein, denied.

24. It is admitted that the CON laws speak for themselves and that Defendants utilize the criteria set out in the CON laws in determining whether to grant or deny a certificate of need (hereafter "CON"). Except as admitted herein, denied.

25. It is admitted that Defendants utilize the need determinations contained in the annual State Medical Facilities Plan (hereafter "the SMFP") to the extent required under North Carolina law

when evaluating a CON application. It is further admitted that CON applicants - including Plaintiffs - have ample opportunity to provide input regarding the contents of the SMFP before a final SMFP is issued. It is further admitted that the process by which Defendants review CON applications is set out in the CON laws and any accompanying regulations, the contents of which speak for themselves. Except as admitted herein, denied.

26. It is admitted that the 2008 SMFP and the provisions of North Carolina law setting out the process by which each annual SMFP is developed speak for themselves. Except as admitted herein, denied.

27. It is admitted that the North Carolina State Health Coordinating Council (hereafter "the SHCC") was originally created in 1976 by Executive Order No. XIX which was issued by Governor James Holshouser, that since then a number of Executive Orders - including Executive Orders Nos. 98 and 139 (which were issued by Governor Mike Easley) - have addressed various issues relating to the SHCC, and that the terms of said Executive Orders, including Exhibits 2 and 3 to the First Amended Complaint, speak for themselves. Except as admitted herein, denied.

28. It is admitted that the terms of the 2008 SMFP, the Department's website, and Exhibit 4 to the First Amended Complaint - including those provisions identifying the members and officers of the SHCC - speak for themselves and that the SHCC merely submits a recommended SMFP to the Governor. Those allegations in this paragraph concerning specific information about the business activities of the members of the SHCC are denied for lack of information, except it is admitted upon information and belief that some segment of the SHCC's members engage in the provision of health care services in North Carolina and are subject to the CON laws. Except as admitted herein, denied.

29. It is admitted that the terms of N.C. GEN. STAT. § 131E-176(25) speak for themselves. Except as admitted herein, denied.

30. It is admitted that the terms and effect of the CON laws speak for themselves. Except as admitted herein, denied.

THE STATE GOVERNMENT ETHICS ACT

31. It is admitted that the terms and provisions of the State Government Ethics Act speak for themselves. Except as admitted herein, denied.

32. It is admitted that the terms and provisions of 2006 Session Laws, Chapter 201, s. 25 speak for themselves. Except as admitted herein, denied.

33. It is admitted that the terms of N.C. GEN. STAT. § 138A-12(a), 138A-10(a)(8), and 138A-24(a)(2)(i) speak for themselves. Except as admitted herein, denied.

34. It is admitted that the State Ethics Commission has determined that advisory bodies, including the SHCC, and their members are not subject to the State Government Ethics Act and that, for this reason, the members of the SHCC are not required to, and have not, filed statements of economic interest. Except as admitted herein, denied.

THE ADMINISTRATIVE PROCEDURE ACT

35. It is admitted that the terms and effect of Chapter 150B of the North Carolina General Statutes speak for themselves. Except as admitted herein, denied.

36. It is admitted that the terms and effect of Chapter 150B of the North Carolina General Statutes speak for themselves. Except as admitted herein, denied.

37. It is admitted that the terms and effect of the Administrative Procedure Act and the CON laws speak for themselves. Except as admitted herein, denied.

38. It is admitted that the terms and effect of the 2000 amendments to the Administrative Procedure Act speak for themselves. Except as admitted herein, denied.

39. It is admitted that the terms and effect of the 2000 amendments to the Administrative Procedure Act speak for themselves. Except as admitted herein, denied.

40. Denied.

41. It is admitted that the terms and effect of the Administrative Procedure Act, the CON laws, and 10A N.C.A.C. 14C.0402 speak for themselves. Except as admitted herein, denied.

ADJUSTMENTS TO THE PLAN

42. It is admitted that the terms of the 2008 SMFP speak for themselves. Except as admitted herein, denied.

43. It is admitted that the terms of the 2008 SMFP, the Administrative Procedure Act, the CON laws, and the remainder of the North Carolina General Statutes speak for themselves. Except as admitted herein, denied.

44. It is admitted that Hope-A submitted a petition seeking adjustment of the 2008 SMFP to show a need determination for the acquisition of a magnetic resonance imaging ("MRI") scanner to be used exclusively for imaging procedures to diagnose and treat breast cancer, that the document attached as Exhibit 6 to Plaintiffs' First Amended Complaint speaks for itself, and that the final SMFP approved for that calendar year did not include said need determination. Except as admitted herein, denied.

45. It is admitted that on four occasions since 2004, ROC has submitted a petition seeking the inclusion in the SMFP of a determination of need for new operating rooms in Wake County, North Carolina, that on the most recent occasion ROC submitted a petition to determine a need for

six freestanding, single speciality operating rooms in Wake County in the 2008 SMFP, that the document attached to the First Amended Complaint as Exhibit 7 speaks for itself, and that the 2008 SMFP included four operating rooms for Wake County. Except as admitted herein, denied.

46. Denied for lack of information except it is admitted that the contents of Exhibit 6 to the First Amended Complaint speak for themselves.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment: Delegation of Legislative Authority)

47. Answered as above.

48. Denied.

49. Denied.

SECOND CLAIM FOR RELIEF

(Declaratory Judgment: Procedural Due Process)

50. Answered as above.

51. Denied.

52. Denied.

THIRD CLAIM FOR RELIEF

(Declaratory Judgment: Substantive Due Process)

53. Answered as above.

54. Denied.

55. Denied.

FOURTH CLAIM FOR RELIEF

(Declaratory Judgment: Access to the Courts)

56. Answered as above.

57. Denied.

58. Denied.

FIFTH CLAIM FOR RELIEF

(Preliminary and Permanent Injunction)

59. Answered as above.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

64. Denied.

65. Denied.

SIXTH CLAIM FOR RELIEF

(Monetary Damages)

66. Answered as above.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

PRAYER FOR RELIEF

1. Denied.
2. Denied.
3. Denied.
4. Denied.
5. Denied.

Any allegations in the First Amended Complaint not expressly admitted above are expressly denied.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs lack standing to bring this action.

SECOND AFFIRMATIVE DEFENSE

Defendants plead the doctrines of sovereign immunity and/or public official immunity regarding any claims for monetary damages.

THIRD AFFIRMATIVE DEFENSE

Any claims seeking injunctive relief are barred by Plaintiffs' failure to exhaust their administrative remedies and this Court's ensuing absence of subject matter jurisdiction under Rule 12(b)(1) as well as sovereign immunity.

FOURTH AFFIRMATIVE DEFENSE

Defendants plead the doctrines of estoppel, quasi-estoppel, laches and/or waiver in bar of Plaintiffs' claims.

FURTHER AFFIRMATIVE DEFENSES

Defendants also reserve the right to assert any additional affirmative defenses as may become apparent during the remainder of this litigation.

WHEREFORE, Defendants pray unto the Court that:

1. Their motion to dismiss be granted and that this action be dismissed with prejudice;
2. Costs be awarded to them; and
3. For such further relief as the Court deems just and proper.

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

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

This is to certify that the undersigned has this day served the foregoing **MOTION TO DISMISS AND ANSWER TO FIRST AMENDED COMPLAINT** 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:

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

Robert F. Orr
Executive Director & Senior Counsel
N. C. Institute for Constitutional Law
333 Six Forks Road, Suite 180
Raleigh, NC 27609

Jason B. Kay
Senior Staff Attorney
N.C. Institute for Constitutional Law
333 Six Forks Road
Raleigh, NC 27609

COUNSEL FOR PLAINTIFFS

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***

This the 9th day of January, 2009.

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

***COUNSEL FOR SURGICAL CARE
AFFILIATES, BLUERIDGE DAYS SURGERY,
GREENSBORO SPECIALITY SURGERY,
EYE SURGERY CENTER, CHARLOTTE
SURGERY, AND ASHEVILLE RADIOLOGY***



Mark A. Davis
Special Deputy Attorney General