No. 244A24

No. _____ SIXTEENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DUKE UNIVERSITY HEALTH SYSTEM, INC.,

Appellee-Respondent,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTHCARE PLANNING AND CERTIFICATE OF NEED SECTION,

Appellant-Petitioners,

and

UNIVERSITY OF NORTH CAROLINA HOSPITALS AT CHAPEL HILL AND UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM,

Appellants/Intervenors-Petitioners.

From the Office of Administrative Hearings
No. 22 DHR 2685
No. COA 23-351

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UNC AND AGENCY'S NOTICE OF APPEAL BASED ON DISSENTING OPINION AND PETITION FOR DISCRETIONARY REVIEW ON ADDITIONAL ISSUES

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INDEX

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Other Authorities:

NOTICE OF APPEAL BASED ON DISSENT IN THE COURT OF APPEALS PURSUANT TO N.C. GEN. STAT. § 7A-30(2)[1] AND N.C. R. APP. P. 14(b)(1)

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Appellants/Intervenors University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System ("UNC") and Appellant North Carolina Department of Health and Human Services, Division Of Health Service Regulation, Healthcare Planning And Certificate Of Need Section (the "Agency") hereby jointly appeal to the Supreme Court of North Carolina from the judgment of the Court of Appeals filed on 6 August 2024, which was entered with a partial dissent by Judge Jefferson Griffin. The Court of Appeals' opinion and dissent in this case are attached hereto as Exhibit A. The dissent by Judge Griffin was based on the following

[1] On 3 October 2023, the 2023 North Carolina State Budget (HB 259) became law and ended the statutory avenue of automatic appellate review to the North Carolina Supreme Court based on a dissenting opinion at the Court of Appeals. The relevant session law decreed that this legislative change "is effective when it becomes law and applies to appellate cases filed with the Court of Appeals on or after that date." HB 259, Section 16.21.(e). This Court recently explained that so long as an "appeal was filed and docketed at the Court of Appeals before the effective date of that act [3 October 2023]," parties may still rely on the prior G.S. § 7A-30(2) to file an appeal as of right to the Supreme Court based on a dissenting opinion. *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, (189A22 – Slip Op, p. 4, fn. 1 Published 23 August 2024). The record in this appeal was filed at the Court of Appeals on 18 April 2023 and docketed on 19 April 2023. Thus, the prior G.S. § 7A-30(2) applies to this appeal and accords Appellants a right to appeal based on the dissenting opinion below.

issues, which Appellants will present to the Supreme Court of North Carolina for appellate review:

I. Whether the Court of Appeals majority erred by misapplying the controlling standard of review under N.C.G.S § 150B-51(b) with respect to Criterion (12) by engrafting additional criteria and requirements to the whole record test despite concluding that ALJ's decisions as to Criterion (12) were supported by substantial evidence?

II. Whether the Court of Appeals majority erred by misapplying the controlling standard of review under N.C.G.S § 150B-51(b) and remanding this cause to the Office of Administrative Hearings for additional findings regarding the conformity of UNC's application with Criterion (12), when Criterion (12) was supported by other and allowable substantial record evidence with respect to the primary and secondary sites listed on the CON application?

PETITION FOR DISCRETIONARY REVIEW BASED ON ADDITIONAL ISSUES

University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System ("UNC") and North Carolina Department of Health and Human Services, Division Of Health Service Regulation, Healthcare Planning And Certificate Of Need Section (the "Agency"), pursuant to N.C.G.S. § 7A-31(c) (2023) and North Carolina Rules of Appellate Procedure 14(a) and 15(b), respectfully petition the Supreme Court of North Carolina to certify for discretionary review certain issues in addition to and complemented by those set out as the basis for the

dissenting opinion contained in North Carolina Court of Appeals Opinion filed on 6 August 2024 in this cause, on the grounds that the subject matter of the additional issues involve matters of significant public interest and legal principles of major significance to the jurisprudence of this State, and the decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court. In support of this petition for discretionary review as to these additional issues[2], petitioners show the following:

I. INTRODUCTION

This case centers on ensuring the public's access to critical healthcare services and provider choice in North Carolina. Here, UNC seeks to construct and operationalize a new and needed 40-bed, two OR community hospital in southern Durham County that has been approved but undeveloped for about three years. A competing application was filed by Respondent Duke University Health System, Inc. ("Duke") to add 40 additional beds and two ORs at its flagship hospital in central Durham County. (R pp 16-155). Significantly, UNC's new hospital would be developed in an area where there are currently no acute care hospital beds or hospital-based ORs. (Doc Ex 2352). In fact, there has not been a new hospital developed anywhere in Durham County in nearly 50 years. (Doc Ex. 2367). But a CON cannot be issued until all appeals fully disposing of a contested case have been exhausted. N.C. Gen. Stat. § 131E-187(c). For the reasons that follow, this Court's

[2] [2] The Agency joins the Additional Issue PDR only as to Issue V(b).

full intervention is the most expedient way to accomplish that objective in this case involving underlying issues of public health, which are of significant public concern. Judge Griffin's dissent recognized that the majority below erred. Judge Griffin concluded that the ALJ's ruling should be affirmed under the controlling standard of review because the challenged statutory criterion was supported by other allowable substantial record evidence. Thus, Judge Griffin properly applied this Court's settled doctrine that lower court rulings are to be affirmed so long as the correct result was reached below. *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957).

UNC also seeks discretionary review of the following issue not addressed by Judge Griffin's dissent:

(1) The majority opinion violated a cardinal rule of North Carolina appellate procedure by basing its decision on an argument that Appellant did not advance in its lone brief. The majority's approach contravenes several foundational appellate principles and highlights additional institutional concerns that warrant this Court's further intervention. First, lower court rulings are presumed correct, and appellants have the burden of showing that the trial court committed prejudicial error. Second, Appellate Rule 28(b)(6) confirms that appellate courts do not make arguments to overcome the presumption of verity; that is the appellant's job. Third, when the Court of Appeals fails to follow these basic principles of party presentation, the system becomes unworkable. Deciding a case on an argument that an appellant did not make deprives the appellee of both notice and an opportunity to address and refute that argument. The majority opinion below runs afoul of all of these directives.

UNC and the Agency both seek discretionary review of the following issue not addressed by Judge Griffin's dissent:

(2) The majority opinion also misstated material facts appearing of record pertaining to an alternate site location in UNC's application. All three judges below mistakenly believed that an alternate site location was not included in UNC's CON application, but a review of that application conclusively establishes that the alternate site was listed. This majority compounded this mistake by relying on it as a basis to reverse and remand for further findings, despite the majority's acknowledgement that substantial evidence already supported the statutory criterion under review. Thus, this interconnected issue is also proper for certification under G.S. 7A-31(c).

Remand in this case will result in unnecessary delay, additional intermediate appeals, and substantial harm to the public. Patient choice of beds and ORs will remain improperly limited in the Durham County community, and patients will continue to have only one choice of provider. (R pp 132, 143). These public health concerns highlight the significant public interest component of the underlying issues in this case. Those issues are ripe for final resolution by this Court of last resort, which is best equipped to put this case quickly back on track in the fewest steps possible. Thus, discretionary review as to these additional issues are sought as follows:

A. **By UNC: Whether the Court of Appeals majority failed to apply the presumption of verity of lower court judgments by upsetting the ALJ's final decision and remanding the cause to OAH based upon an argument not made by Duke in its lone Court of Appeals brief?**

B. **By UNC and the Agency: Whether the Court of Appeals factual misreading of the record that there was no alternative site included in UNC's Application constituted error and which led to the majority's improper remand of this specific issue related to Criterion (12) to the ALJ for further unnecessary findings?**

II. PROCEDURAL HISTORY AND FACTS

In April 2021, both UNC and Duke submitted CON applications to the Agency to develop 40 new beds and 2 new ORs in Durham County pursuant to need determinations in the 2021 SMFP. (R p 380). UNC focused its proposal on expanding access to the fastest growing area of the county (the southern region), where more than half of the population of Durham County resided as of 2020. (Doc Ex 2370). UNC proposed to construct a physically accessible community hospital in an easy-to-navigate setting, focusing on providing lower-acuity services including women's and obstetrics services. (T pp 1502, 1689-90).

In its application, in response to questions related to statutory review Criterion (12), UNC specifically detailed that its primary proposed site, identified as the most effective site currently available, would be located in the Research Triangle Park ("RTP") area of Durham County and would be known as UNC Hospitals-RTP. As specified in its application, the proposed location would require rezoning and an amendment of certain then-existing covenants to permit hospital usage. (Doc. Ex. 2429-30). UNC also included a letter of support of its proposed project and primary location from the Research Triangle Foundation, the governing body for the RTP, in its application (Doc. Ex. 2827). Although not required to do so by any CON review criterion, regulation, or application question, UNC further identified an alternate

proposed site in its application that would be available to it should the same be necessary or more desirable. (Doc. Ex. 2830). Both UNC's primary and secondary sites were documented heavily in the UNC Application, Agency Decision, and the ALJ's Final Decision. Days of testimony concerning these locations were admitted during the more than two week contested case hearing and are largely quoted in the majority opinion. (Slip Op. pp. 40-61).

By contrast, Duke simply proposed to add 40 additional beds and 2 ORs to its existing medical center in downtown Durham at its large and often difficult to navigate campus. (R pp 21-23). Unlike the UNC project, Duke's proposal would not alter or enhance patients' access to a new provider or a new location for services.

Because the need determinations in the SMFP serve as a limit to those assets which may be approved in a single review and both UNC and Duke proposed to meet those needs, the UNC and Duke applications were reviewed competitively. Here, the Agency found both UNC and Duke conforming with the required statutory review criteria and found UNC to be the comparatively superior applicant based upon a number of factors. The Agency issued its decision on 21 September 2021 to approve UNC's Application for a new hospital and denied Duke's competing project to develop the same beds and ORs (the "Agency Decision"). (R pp 16-155). In part, the Agency's Decision to approve UNC's new hospital to be developed in southern Durham County was based upon its offering a new service in a new geographic location, therefore enhancing access to populations not currently served, and its ability to enhance

competition by introducing an alternative provider to a market controlled nearly entirely by Duke. (R pp 142-43, 145-46).

Duke timely filed a petition for contested case hearing challenging the Agency's Decision and following months of extensive written discovery, depositions, pre-trial motions, and an eleven-day evidentiary hearing, Administrative Law Judge ("ALJ") Melissa Owens Lassiter issued a Final Decision affirming the decision of the Agency in its entirety. In support of her Final Decision, the ALJ cited 506 findings of fact and 140 conclusions of law. (R pp 382-479).

Duke appealed the ALJ's Final Decision to the Court of Appeals, although its appeal was largely couched in terms of challenges to the Agency Decision, rather than any specific allegations of error in the ALJ's findings or conclusions. (Slip Op. p. 15).

In a 6 August 2024 opinion, the Court of Appeals affirmed the ALJ's decision with respect to all challenges that were advanced by Duke in its lone brief. In its analysis of UNC's conformity with Criterion (12), the criterion addressing the proposed location of the project, the majority held that "the ALJ's decisions as to Criterion 12 were, for purposes of our review, supported by substantial evidence." (Slip Op. p. 63). Despite this otherwise dispositive conclusion, the majority exceeded the scope of its review based on contentions not raised by Duke, that "the use of considerations outside the scope of the ALJ's review casts doubt on whether the ALJ herself would have reached the same conclusions as to Criterion 12 when taking only the proposed location in the application in to account." (*Id.*). In so doing, the majority grounded its decision on the erroneous factual assumption that only one potential

location was proposed in the UNC Application. But the record conclusively established otherwise. (Doc. Ex. 2429, 2830-31). Therefore, the majority expanded and misapplied the whole record test standard of review that applied to this case. The majority's erroneous take on the record and deciding the appeal based on an argument not advanced by Duke below are troubling. UNC now timely files its petition for discretionary review to this Court based on certain additional issues complemented by Judge Griffin's analysis contained in his dissent below.

III. REASONS WHY CERTIFICATION SHOULD ISSUE

A. Standard for Discretionary Review.

This Court of last resort sits as the guardian of North Carolina law. As such, "[i]t is the institutional role of this Court to provide guidance and clarification when the law is unclear or applied inconsistently." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012); *see also Lumbee River Electric Membership Corp. v. Fayetteville,* 309 N.C. 726, 742, 309 S.E.2d 209, 219 (1983) (discretionary review appropriate when Court of Appeals misunderstood and misapplied North Carolina Supreme Court precedent). "G.S. 7A-31 provides the statutory authority for discretionary review by the Supreme Court of decisions of the Court of Appeals." *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 592, 194 S.E.2d 133, 138 (1973). The pertinent statutory provisions provide that review following determination by the Court of Appeals is appropriate when in the opinion of the Supreme Court:

> (1) The subject matter of the appeal has significant public interest[;]

> (2) The cause involves legal principles of major significance to the jurisprudence of the State [; or]
>
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

G.S. § 7A-31(c).

B. This Additional Issue Petition Satisfies the Requirements For Certification Under G.S. § 7A-31(C).

This additional issue petition strikes at a core purpose warranting Supreme Court intervention—to protect the integrity of this state's jurisprudence in areas of deep public concern. The additional issues proposed for certification here transcend the direct interests of the parties and affect the proper institutional role of North Carolina's intermediate error correcting court.

Judge Griffin's dissent lays the appropriate groundwork for highlighting significant and related structural problems with the majority's application of North Carolina law.[3] Here, the dissenting opinion was rooted in this Court's long-standing directive that North Carolina's appellate courts affirm judgments and orders, not reasons. *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957); *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990). Accordingly, if the correct result was reached below, the underlying judgment should not be disturbed even though the lower court may not have assigned the correct reasons for the judgment entered. *Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E. 2d 411, 413 (1958). Applying these principles, Judge Griffin's dissent correctly concluded that

[3] After all, what better way to show that a case involves important legal principles to North Carolina law when all judges on the panel could not reach unanimity.

the majority erred by misapplying the controlling standard of review under N.C.G.S § 150B-51(b) by engrafting new criteria to that standard and remanding this cause to the Office of Administrative Hearings for further findings regarding the conformity of UNC's application with Criterion (12), even though Criterion (12) was supported by proper and allowable substantial record evidence with respect to the primary site listed on the CON application.

But the majority's ruling, contains a related and important additional institutional flaw- the majority remanded the case for additional findings based upon an argument that was not raised by Duke in its lone Appellant's Brief. The majority opinion acknowledged that if under whole record test substantial evidence exists to justify the Agency's decision, it should be affirmed, and further that "the ALJ's decisions as to Criterion 12 were, for purposes of our review, *supported by substantial evidence*." (Slip Op. p. 63). But, then, the majority opinion remanded the case for further findings based upon an argument related to Criterion (12) that Duke did not raise—that "the use of considerations outside the scope of the ALJ's review casts doubt on whether the ALJ herself would have reached the same conclusions as to Criterion 12 when taking only the proposed location in the application into account." (*Compare* Slip Op. pp. 63-64 *with* Duke Univ. Health Sys., Inc. Appellant Br. pp. 41-43).

The majority's intervention to upset the ALJ's ruling strikes at the heart of the party presentation doctrine and charts a troubling course for the role of North Carolina's intermediate error correcting court. As the United States Supreme Court has instructed "courts are essentially passive instruments of government." *United*

States v. Sineneng-Smith, 590 U.S. 371, 376 (2020). In our adversarial system of adjudication, we consequently follow the principle of party presentation. *Id.* at 375. Under it courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* To these ends, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Castro v. United States*, 540 U. S. 375, 386, (2003) (Scalia, J., concurring in part and concurring in judgment).

North Carolina adheres to these critical principles which were avoided below. At baseline in North Carolina, "[t]here is a presumption in favor of the regularity and validity of judgments in the lower court, and the burden is upon appellant to show prejudicial error." *London v. London*, 271 N.C. 568, 570, 157 S.E. 2d 90, 91 (1967). Since appellants bear the heavy burden to show prejudicial error, the Court of Appeals does not make arguments for reversal, that is the appellant's job. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."). To that end, "[t]he Court of Appeals sits as a reviewer of the actions of the trial court." *Hill v. Hill*, 229 N.C. App. 511, 514-15, 748 S.E.2d 352, 356 (2013). But:

> in that role, [the Court of Appeals] must be impartial to all parties. It is not our role to advocate for a party that has failed to file a brief, nor is it our role to supplement and expand upon poorly made arguments of a party filing a brief. It is not the role of the appellate

> courts to create an appeal for an appellant. The Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule."

Id.

These threshold guideposts which protect our adversarial system and the error-correcting function of the Court of Appeals were avoided below. An appellee having no notice of the basis on which the Court of Appeals might rule, and no opportunity to refute the novel theory raised *ex mero motu*, charts a perilous course in North Carolina. Thus, this Court's intervention is necessary under G.S. § 7A-31(c) in order to protect the integrity of the uniform application of our appellate rules and long-standing precedent which requires appellants alone to show prejudicial error to upset final rulings. Those concerns are further highlighted here as the substantive issues involves the ability of a major state healthcare provider to develop and provide needed acute care services and thus enhance the significant public interest at bar.

To that end, in CON cases, the Court of Appeals "cannot substitute [its] own judgment for that of the Agency if substantial evidence exists." *Total Renal Care*, 171 N.C. App. at 349, 615 S.E.2d at 84. Thus, when an appellant alleges, as Duke did in its underlying appeal, that a decision was not supported by the evidence the reviewing court must apply the "whole record test." *Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 646, 529 S.E.2d 257, 261 (2000). Under the whole record test, the Court will review "the entire record in order to determine whether the agency's decision is supported by substantial evidence." *Id.* Where substantial evidence exists to justify the Agency's decision, it should be

affirmed. *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 543, 659 S.E.2d 456, 462 (2008).

Remarkably, the majority did just that: it concluded that "the ALJ's decisions as to Criterion 12 were, for purposes of our review, supported by substantial evidence." (Slip Op. p. 63). But then, the majority opinion below took an ill-advised course—it remanded the case based on arguments not raised by the appellant and further factually misconstrued the record. Despite a fulsome record, the majority, *ex mero motu*, cites to considerations "outside the scope of the ALJ's review" referencing the primary proposed location as the "only" location proposed in the application. (*Id.*). Such factual misstatement is material to the majority's order for remand on this specific issue concerning the primary site proposed in the application. In other words, by misstating the factual record regarding the evidence in the record, the majority seeks to remand for findings of conformity with Criterion (12) which has already been established by the substantial evidence in that record. No remand is necessary or appropriate on this issue, and critically, the majority's basis for a remand was not argued by the appellant in its lone brief.

Moreover, the majority cites to undisputed findings relating to UNC's evidence that the project will not unduly increase the cost of providing its proposed services—the specific portion of Criterion (12) that it seeks remand for the ALJ to address. (Slip Op. pp. 40-41 (quoting FF 202)). Yet it provides no other explanation or nexus as to how the erroneous assumption that a secondary site was not identified in the application would impact that determination. The record evidence provided is not

dependent upon one specific facility location versus another, but as to the ability of UNC as a system to fund the proposal and apply its substantial economies of scale in a way that would not unduly increase the cost of healthcare to its patients. Again, this was not an issue challenged by Duke at any point in this case, under Criterion (12) or any other review criteria. As such, the majority sidestepped its proper institutional function as an error-correcting body guided only by the governing standard of review and particular arguments made by the appellant before it.

The end result of a further remand, and then additional intermediate appeals, is several years of further delay in UNC's ability to even begin development of its project that was first deemed needed and approved by the State in 2021. G.S. 7A-31(c). This further delay primarily impacts those patients in the growing area of Durham County for whom additional healthcare resources have been determined are needed to meet the demands of this fast-growing population. An applicant approved for a CON is not permitted to begin development of its approved resources until all appeals have been exhausted and therefore UNC's project is at an actual standstill until that time. N.C. Gen. Stat. § 131E-187(c). This delay is not consistent with the principles articulated by this Court in prior CON decisions or the purposes of the CON regulatory design and would, as Judge Griffin's dissenting opinion presupposes, would result in substantial harm. "When viewed in its entirety, Article 9 of Chapter 131E of the General Statutes, the Certificate of Need Law, reveals the legislature's intent that an applicant's fundamental right to engage in its otherwise lawful business be regulated but not be encumbered with unnecessary bureaucratic delay."

HCA Crossroads Residential Centers, Inc. v. N. Carolina Dep't of Hum. Res., 327 N.C. 573, 579, 398 S.E.2d 466, 470 (1990). For these reasons, discretionary review of the following core institutional issues- in addition to- but very much related to the concerns contained in Judge Griffin's dissenting opinion should be allowed.

V. ISSUES TO BE BRIEFED

In the event the Court allows this petition for discretionary review as to additional issues, Appellants intends to present the following issues in its new brief to the Court:

A. **By UNC: Whether the Court of Appeals majority failed to apply the presumption of verity of lower court judgments by upsetting the ALJ's final decision and remanding the cause to OAH based upon an argument not made by Duke in its lone Court of Appeals brief?**

B. **By UNC and the Agency: Whether the Court of Appeals factual misreading of the record that there was no alternative site included in UNC's Application constituted error and which led to the majority's improper remand of this specific issue related to Criterion (12) to the ALJ for further unnecessary findings?**

VI. CONCLUSION

For the reasons set forth herein, UNC and the Agency respectfully requests that this Court allow their petition for discretionary review as to these additional issues as delineated above.

Respectfully submitted this the 10th day of September 2024.

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Electronically submitted

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I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I, Lorin J. Lapidus, hereby certify that on this date I served a copy of the foregoing **UNC AND AGENCY'S NOTICE OF APPEAL AND PETITION FOR DISCRETIONARY REVIEW** upon counsel of record via email as set forth below:

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This the 10th day of September, 2024.

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