

NO. COA14-160

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

CUMBERLAND COUNTY HOSPITAL SYSTEM,  
INC. d/b/a CAPE FEAR VALLEY HEALTH  
SYSTEM,

Petitioner,

v.

From the Office of  
Administrative Hearing  
(Cumberland County)  
No.12 DHR 12094

NC DEPARTMENT OF HEALTH AND HUMAN  
SERVICES, DIVISION OF HEALTH  
SERVICE REGULATION, CERTIFICATE OF  
NEED SECTION,

Respondent,

and

FIRSTHEALTH OF THE CAROLINAS,  
INC.,

Respondent-Intervenor.

Appeal by petitioner from Final Decision entered 17  
September 2013 by Administrative Law Judge Beecher R. Gray.  
Heard in the Court of Appeals 14 August 2014.

*K&L Gates LLP, by Gary S. Qualls, Susan K. Hackney and  
Steven G. Pine for petitioner-appellant.*

*Nelson Mullins Riley & Scarborough LLP, by Noah H.  
Huffstetler, III, Denise M. Gunter, and Candace S. Friel,  
for respondent/intervenor-appellee FirstHealth.*

*Attorney General Roy Cooper, by Special Deputy Attorney  
General June S. Ferrell and Assistant Attorney General  
Scott T. Stroud for respondent-appellee DHHS.*

STEELMAN, Judge.

N.C. Gen. Stat. § 131E-188(a) does not prevent an administrative law judge from entering summary judgment in a contested case challenging a CON decision. Summary judgment was properly entered for respondents because petitioner failed to demonstrate that approval of the CON substantially prejudiced its rights.

### I. Factual and Procedural Background

Respondent-intervenor FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital (FirstHealth) operates FirstHealth Moore Regional Hospital (FirstHealth Moore) in Moore County. In 2010 FirstHealth filed an application for a Certificate of Need (CON) to develop FirstHealth Hoke Community Hospital (FirstHealth Hoke) in Raeford, Hoke County, with eight acute care beds and one operating room (OR). At that time Hoke County was included in two service areas in the State Medical Facilities Plan (SMFP): the Moore/Hoke service area and the Cumberland/Hoke service area. Although there are several multi-county service areas, this was the only instance of a county being included in two service areas. In December 2012 Hoke County became a separate service area and the joint Moore/Hoke and Cumberland/Hoke service areas were eliminated. In April 2012, respondent North Carolina Department of Health and

Services, Division of Health Service Regulation, Certificate of Need Section (DHHS), granted FirstHealth's application for a CON to develop FirstHealth Hoke.

On 15 June 2012, FirstHealth and petitioner Cumberland County Hospital System, Inc. d/b/a/ Cape Fear Valley Medical Center (Cape Fear) each filed CON applications to provide 28 acute care beds in the Cumberland/Hoke service area in accordance with the 2012 SMFP. Cape Fear's 28-Bed application proposed to add 28 acute care beds to its existing hospital in Fayetteville, and FirstHealth's 28-Bed application proposed to add 28 acute care beds to FirstHealth Hoke. These were competitive applications under 10A N.C.A.C. 14C.0202(f) ("Applications are competitive if . . . the approval of one or more of the applications may result in the denial of another application reviewed in the same review period."), because, under N.C. Gen. Stat. § 131E-183(a)(1) and the need determination in the 2012 SMFP, both 28-Beds applications could not be approved.

Also on 15 June 2012, FirstHealth submitted a CON application asking to relocate one of its ORs from FirstHealth Moore to FirstHealth Hoke, facilities that were both in the Moore/Hoke service area. The OR was pre-existing, and approval of FirstHealth's OR application would not cause the disapproval

of any other CON applications. DHHS determined that it was a noncompetitive application under 10A N.C.A.C. 14C.0202(f).

On 27 November 2012 DHHS approved FirstHealth's 28-Bed application and its OR application, and denied Cape Fear's 28-Bed application. On 21 December 2012 Cape Fear filed petitions for contested case hearings to challenge DHHS's approval of FirstHealth's OR CON application and its decision to approve FirstHealth's 28-Bed application while denying Cape Fear's 28-Bed application.

On 25 February 2013 the Administrative Law Judge (ALJ) consolidated Cape Fear's petitions for contested case hearings in the 28-Bed and OR cases. Cape Fear's appeal from the decision of the ALJ in the 28-Bed case is currently pending before this Court, and the present appeal involves only FirstHealth's OR application.

On 17 May 2013 Cape Fear filed a motion for partial summary judgment in both cases, and FirstHealth and DHHS filed a joint motion for summary judgment in the OR case. FirstHealth and DHHS asserted that there were no genuine issues of material fact and that they were entitled to summary judgment on the grounds that Cape Fear could not demonstrate that its rights were substantially prejudiced by DHHS's decision to approve the OR application. ALJ Gray conducted a hearing on the parties'

summary judgment motions on 31 May 2013. On 17 September 2013 ALJ Gray filed a Final Agency Decision granting summary judgment in favor of FirstHealth and DHHS with respect to Cape Fear's petition for a contested case hearing in the OR case. The ALJ ruled that FirstHealth and DHHS were entitled to summary judgment because Cape Fear had not shown that approval of FirstHealth's OR CON had substantially prejudiced its rights.

Cape Fear appeals.

## II. Unconditional Right to Contested Case Hearing

In its first argument, Cape Fear contends that the ALJ erred by granting summary judgment in favor of FirstHealth, on the grounds that it "is entitled to a full contested case hearing, pursuant to N.C. Gen. Stat. § 131E-188, to prove that it was substantially prejudiced." Cape Fear contends that N.C. Gen. Stat. § 131E-188 "guarantees" it a "full contested case hearing." We disagree.

### A. Standard of Review

N.C. Gen. Stat. § 150B-151 governs our review of the ALJ's decision and provides in pertinent part that:

. . .

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been

prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. . . .

(d) In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. . . .

In the present case, Cape Fear appeals from an order granting summary judgment. "Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' 'In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)],

and must be viewed in a light most favorable to the non-moving party.' *Patmore v. Town of Chapel Hill N.C.*, \_\_ N.C. App. \_\_, \_\_, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, \_\_ N.C. \_\_, 758 S.E.2d 874 (2014). "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the burden then shifts to the non-movant to come forward with specific facts establishing the presence of a genuine factual dispute for trial." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted).

"We review a trial court's order granting or denying summary judgment *de novo*. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (other citations omitted)).

#### B. Burden of Proof

Preliminarily, Cape Fear argues that the ALJ applied an incorrect burden of proof by failing to first require

FirstHealth and DHHS to demonstrate that Cape Fear could not establish a *prima facie* case before shifting the burden to Cape Fear to rebut the movant's showing with specific facts establishing the presence of a genuine factual dispute for trial. Cape Fear bases this argument on the fact that the ALJ's order includes the standard of proof for a contested case hearing. Cape Fear asserts that there "was no reason for the ALJ to recite the standard for a contested case hearing," and that the "only logical conclusion" is that the ALJ employed an incorrect standard by "initially assigning Cape Fear the burden of proof[.]" Cape Fear fails to identify any indication that the ALJ applied an incorrect burden of proof, other than its inclusion in the order of the standard for a contested case hearing.

This argument lacks merit.

### C. Analysis

Cape Fear argues that the ALJ erred by granting summary judgment for FirstHealth because, under N.C. Gen. Stat. § 131E-188(a), it has an absolute "unconditional" right to a full evidentiary hearing. We disagree.

N.C. Gen. Stat. § 131E-188(a) states in relevant part that:

After a decision of the Department to issue,  
[or] deny . . . a certificate of need . . .  
any affected person, as defined in  
subsection (c) of this section, shall be



entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes. A petition for a contested case shall be filed within 30 days after the Department makes its decision. . . .

Cape Fear focuses on the phrase "shall be entitled to a contested case hearing." However, given that the statute grants an affected person a contested case hearing "under Article 3 of Chapter 150B of the General Statutes," we must consider the quoted phrase in the context of the provisions of Chapter 150B.

N.C. Gen. Stat. § 150B-23(a) states in relevant part that:

A contested case shall be commenced by filing a petition with the Office of Administrative Hearings[.] . . . A petition . . . shall state facts tending to establish that the agency named as the respondent has . . . substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. . . .

The statute's enumeration of specific requirements for a contested case petition indicates that the right to an evidentiary hearing is contingent upon a valid petition. In addition, N.C. Gen. Stat. § 150B-33(b)(3a) provides that an ALJ may "[r]ule on all prehearing motions that are authorized by

G.S. 1A-1, the Rules of Civil Procedure[.]” N.C. Gen. Stat. § 1A-1, Rule 56 authorizes a party to move “for a summary judgment in his favor upon all or any part thereof[,]” and N.C. Gen. Stat. § 150B-34(e) expressly provides that an “administrative law judge may grant . . . summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case.” Moreover, N.C. Gen. Stat. § 150B-51(d) states the standard for a court “reviewing a final decision allowing judgment on the pleadings or summary judgment[.]”

Accordingly, Article 3 of Chapter 150B of the General Statutes generally authorizes an ALJ to resolve a contested case without a full evidentiary hearing by entering summary judgment in appropriate cases. Since N.C. Gen. Stat. § 131E-188(a) provides for the right to a contested case hearing “under Article 3 of Chapter 150B of the General Statutes,” we hold that, just as in other contested cases, an ALJ may enter summary judgment in a case challenging a CON decision.

In arguing for a contrary result, Cape Fear relies primarily on the quoted excerpt from N.C. Gen. Stat. § 131E-188(a) stating that an affected person “shall be entitled to a contested case hearing,” and asserts that the “plain language” of the statute “grants any ‘affected person’ an unconditional

statutory right to a contested case hearing under the APA.” Cape Fear fails to acknowledge that its right to a contested case hearing is explicitly made subject to Chapter 150B, or that similar language in N.C. Gen. Stat. § 150B-23(a), stating that “parties in a contested case shall be given an opportunity for a hearing,” does not bar an ALJ from entering summary judgment. Further, Cape Fear’s position would lead to the absurd result that an appellant would have an absolute right to a full evidentiary hearing, even if its petition were devoid of any allegations that might justify relief.

Cape Fear concedes that this Court has previously upheld an ALJ’s award of summary judgment in favor of a party to a CON appeal. *See, e.g., Presbyterian Hosp. v. N.C. Dep’t of Health & Human Servs.*, 177 N.C. App. 780, 783, 630 S.E.2d 213, 215 (2006), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 446 (2007), stating that:

This Court has previously held that, as genuine material issues of fact will always exist, summary judgment is never appropriate in an application for a CON where two or more applicants conform to the majority of the statutory criteria. *See Living Centers-Southeast, Inc. v. North Carolina HHS*, 138 N.C. App. 572, 580-81, 532 S.E.2d 192, 197 (2000). We find the facts of this case distinguishable. Here, unlike in *Living Centers-Southeast*, [the CON applicant] was the sole applicant for a non-competitive CON. Therefore, an award of summary judgment is permissible in this matter.

Cape Fear attempts to distinguish cases such as *Presbyterian Hosp.* on the grounds that these cases do not expressly analyze an ALJ's authority to enter summary judgment in a CON case. Having completed such an analysis, we hold that in appropriate cases an ALJ may enter summary judgment on a petition for a contested case hearing to challenge a non-competitive CON decision.

This argument is without merit.

### III. Substantial Prejudice

#### A. Relationship Between the 28-Bed and OR Cases

In its second argument, Cape Fear contends that it "was substantially prejudiced as a matter of law by the Agency's approval of the FirstHealth OR Application because the FirstHealth OR Application and the FirstHealth 28-Bed Application were essentially one, intertwined hospital expansion project." For example, Cape Fear directs our attention to FirstHealth's statement that approval of its 28-Bed CON application would result in its operating a 36 bed hospital for which a second OR would be needed. Cape Fear contends that because there was a "symbiosis" between FirstHealth's 28-Bed application and its OR application, we should treat FirstHealth's OR application as a part of its competitive 28-Bed application. We disagree.

As discussed above, a "competitive application" is defined in the North Carolina Administrative Code as follows:

Applications are competitive if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application reviewed in the same review period.

10A N.C.A.C. 14C.0202(f). Cape Fear does not contend that it submitted a CON application to relocate an OR to Hoke County, but argues that, because FirstHealth's OR application shares factual and legal circumstances with its 28-Bed application, we should deem the OR application to be competitive based on the alleged interconnection between the applications. As discussed above, the 28-Bed case is not before us. Moreover, Cape Fear is essentially asking us to apply a new, expanded definition of a competitive application. "[W]e must decline to, in effect, amend the Rules. 'If changes seem desirable, it is a matter for the legislature.'" *Precision Fabrics Group v. Transformer Sales and Service*, 344 N.C. 713, 719, 477 S.E.2d 166, 169 (1996) (quoting *Powell v. State Retirement System*, 3 N.C. App. 39, 43, 164 S.E.2d 80, 83 (1968)). Because FirstHealth's OR CON application was not "competitive" as defined in the Administrative Code, we do not reach Cape Fear's argument that "a competitive applicant

like Cape Fear is substantially prejudiced as a matter of law" by the entry of summary judgment.

B. Failure to Consider the Cumberland/Hoke Service Area

In its third argument, Cape Fear contends that it "was substantially prejudiced as a matter of law by the Agency's failure to review whether FirstHealth satisfied the criteria for adding an OR to the Cumberland/Hoke Service Area. Hoke County [was] included in both the Cumberland/Hoke Service Area and the Moore/Hoke Service Area. Thus, by relocating an OR to Hoke County, FirstHealth proposed to add an OR to the Cumberland/Hoke Service Area." We dismiss this argument as moot.

FirstHealth's OR CON sought to relocate an existing OR from FirstHealth Moore to FirstHealth Hoke, medical facilities which were both in the Moore/Hoke service area as defined in the SMFP. At that time, Hoke County was also in the Cumberland/Hoke service area. Cape Fear argues that the ALJ erred by approving FirstHealth's CON application without determining the effect of FirstHealth's CON application on the Cumberland/Hoke service area. We do not reach this argument, because the Moore/Hoke and the Cumberland/Hoke service areas have been terminated.

On 15 April 2014 FirstHealth filed a motion in this Court requesting us to take judicial notice of the license issued to FirstHealth Hoke and the statement in the 2014 SMFP that:

On 12/21/12, for the 2013 State Medical Facilities Plan, Hoke County was designated as a single-county service area for the Operating Room need methodology. Therefore, Hoke, Moore, and Cumberland counties' population growth rates were calculated as single-county operating room service areas.

Therefore, even if we were to reverse the ALJ's approval of FirstHealth's OR CON, there is no possibility that on remand the ALJ could assess the needs of the Cumberland/Hoke service area, because it no longer exists. As a result, analysis of whether or not the ALJ should have considered the former Cumberland/Hoke service area would have no practical effect on the outcome of this case. "'A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.'" *Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 525, 715 S.E.2d 285, 287-88 (2011) (quoting *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996)). We grant FirstHealth's motion to take judicial notice and dismiss as moot Cape Fear's argument concerning the former Cumberland/Hoke service area.

Cape Fear opposes FirstHealth's motion for judicial notice, on the grounds that neither FirstHealth Hoke's medical license nor the termination of the Cumberland/Hoke service area were before the ALJ at the time of the summary judgment hearing.

However, we are not considering these documents in order to assess the correctness of the Final Decision, but to determine whether the appellate issue of the ALJ's obligation to consider FirstHealth's OR application in the context of the former Cumberland/Hoke service area remains extant. Cape Fear also argues that, in the event that we take judicial notice of the documents proffered by FirstHealth, we should also take judicial notice of certain documents pertaining to FirstHealth's request to use available rooms in FirstHealth Hoke for treatment of emergency room patients. We deny Cape Fear's request to take judicial notice of these documents, which are not relevant to our review of the ALJ's summary judgment order.

#### IV. DHHS Compliance with N.C. Gen. Stat. § 131E-183

In its fourth argument, Cape Fear asserts that, even if the ALJ concluded that Cape Fear had not produced evidence of substantial prejudice, it was still required to determine whether DHHS had properly applied the review criteria in N.C. Gen. Stat. § 131E-183(a) in its approval of FirstHealth's OR CON. Cape Fear argues that "agency error may result in substantial prejudice," and that "[b]ecause the Final Decision made no determination as to whether the Agency erred, or otherwise met the Section 150B-23 standards, genuine issues of material fact remain regarding whether Agency error



substantially prejudiced Cape Fear.” Cape Fear takes the position that, because it is possible, in a particular factual context, that substantial prejudice might result from agency error, that this possibility necessarily results in “genuine issues of material fact” unless the ALJ makes findings regarding DHHS’s compliance with all pertinent statutory provisions in addition to its determination that Cape Fear failed to show prejudice. We disagree.

“This Court has previously addressed the burden of a petitioner in a CON contested case hearing pursuant to this statute.

“Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine *whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner’s rights*, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.”

*Parkway Urology, P.A. v. N.C. HHS*, 205 N.C. App. 529, 536, 696 S.E.2d 187, 193 (2010) (quoting *Britthaven, Inc. v. N.C. Dep’t of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995)), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 753 (2011) (emphasis in *Parkway Urology*). “In addition, in *Presbyterian Hosp. v. N.C. Dep’t of Health & Human Servs.*, this Court affirmed a grant of summary judgment against a non-applicant CON

challenger specifically because it had failed to demonstrate any genuine issue of material fact as to whether it had been substantially prejudiced by the award of a CON to a nearby competitor." *Id.* In *Parkway Urology*, after determining that the appellant had not shown substantial prejudice, we stated that "[s]ince [the appellant] failed to establish that it was substantially prejudiced by the awarding of the CON to [the appellee], it cannot be entitled to relief under N.C. Gen. Stat. § 150B-23(a). As a result, we decline to address [the appellant's] additional challenges to the [agency decision]." *Id.* at 539, 696 S.E.2d at 195.

Cape Fear does not identify any specific right that it possesses which was prejudiced by a particular agency error and we decline to adopt the general rule proposed by Cape Fear that, before an ALJ may rule that an appellant has not shown substantial prejudice, it must make findings regarding the agency's compliance with all pertinent statutory requirements.

Cape Fear also argues that it was "substantially prejudiced by the economic losses it will suffer as a result of the Agency's decision" to approve FirstHealth's OR CON application. However, "t]his Court held in *Parkway Urology* that harm from normal competition does not amount to substantial prejudice:

[The non-applicant's] argument, in essence,  
would have us treat any increase in

competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B-23(a). . . . [The non-applicant] was required to provide specific evidence of harm resulting from the award of the CON to [the applicant] that went beyond any harm that necessarily resulted from additional [OR] competition . . . and NCDHHS concluded that it failed to do so. After a review of the whole record, we determine that NCDHHS properly denied [the non-applicant] relief due to its failure to establish substantial prejudice.

*CaroMont Health, Inc. v. N.C. HHS Div. of Health Serv. Regulation*, \_\_ N.C. App. \_\_, 751 S.E.2d 244, 251 (2013) (quoting *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195).

For the reasons discussed above, we conclude that the ALJ did not err by granting summary judgment in favor of FirstHealth and DHHS, and that its Final Agency Decision should be

AFFIRMED.

Judges GEER and STROUD concur.