No. COA21-558 TENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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Jay Singleton, D.O.; and Singleton Vision Center, P.A., Plaintiffs-Appellants, v. North Carolina Department of Health and Human Services; Roy Cooper, Governor of the State of North Carolina, in his official capacity; Kody H. Kinsley, North Carolina Secretary of Health and Human Services, in his official capacity; Phil Berger, President Pro Tempore of the North Carolina Senate, in his official capacity; and Tim Moore, Speaker of the North Carolina House of Representatives, in his official capacity, Defendants-Appellees.	From Wake County

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PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING

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PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING

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NOW COME Plaintiffs-Appellants Jay Singleton, D.O., and Singleton Vision Center, P.A. (collectively, "Dr. Singleton"), by and through counsel, and respectfully petition this Court to reconsider its 21 June 2022 Opinion ("Op.," App p 1) pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. This petition was filed within 15 days of the Court's mandate on 11 July 2022. N.C. R. App. P. 31(a). Appended are certifications from two members of the State Bar who have been members for more than five years, stating that they have no interest in this action, that they have carefully examined the appeal and authorities cited, and that they consider the decision in error on the points identified herein. (App pp 105–110).

POINTS OF FACT AND LAW THE COURT OVERLOOKED OR MISAPPREHENDED

1. The Court misapprehended Dr. Singleton's claims under N.C. Const. art. I, § 32 and N.C. Const. art. I, § 34 as "procedural due process challenges" and, as a result, incorrectly dismissed them for failure to exhaust administrative remedies under N.C. R. Civ. P. 12(b)(1).

2. The Court misapprehended the relief Dr. Singleton seeks, misread *Hospital Group of Western North Carolina, Inc. v. North Carolina Department of Human Resources*, 76 N.C. App. 265, 332 S.E.2d 748 (1985), and overlooked allegations about the inadequacy and futility of the CON process.

INTRODUCTION

This is a constitutional challenge to North Carolina's certificate of need (CON) requirement for ambulatory surgical facilities. Dr. Singleton, an ophthalmologist from New Bern, brought three claims in Wake County Superior Court under Article I, Sections 19, 32, and 34 of the North Carolina Constitution. Dr. Singleton alleges that the CON law, as applied, violates his rights to liberty under the law of the land (Section 19) and to be free from unconstitutional exclusive privileges (Section 32) and monopolies (Section 34).

This Court rightly concluded that North Carolina's "CON statutes are restrictive, anti-competitive, and create monopolistic policies and powers." (Op. ¶ 44, App p 17). Yet the Court dismissed Dr. Singleton's anti-exclusive privileges and anti-monopoly claims for failure to exhaust administrative remedies. The Court did so only because it misapprehended and overlooked key points of fact and law.[1] N.C. R. App. P. 31(a). First, the

[1] Dr. Singleton respectfully disagrees with this Court's affirmance of the superior court's dismissal of his Article I, Section 19 (law of the land) claim under N.C. R. Civ. P. 12(b)(6) but does not request rehearing on this issue.

Court mistook Dr. Singleton's anti-exclusive privileges and anti-monopoly claims (substantive legal claims that do not require exhaustion) for procedural due process claims (administrative claims that do require exhaustion). Second, the Court's exhaustion analysis misunderstood the relief Dr. Singleton seeks, misread a key case, and overlooked allegations that the CON law's administrative remedies are inadequate and futile.

The Court should grant rehearing to correct these simple but consequential mistakes and consider the merits of Dr. Singleton's anti-exclusive privilege and anti-monopoly claims. The Court's decision here could dictate the trajectory of this case: If the Court grants rehearing, reverses its dismissal for failure to exhaust, and ultimately finds that Dr. Singleton *has* stated a claim, the case would return to the superior court. If the Court grants rehearing, reverses its dismissal for failure to exhaust, and ultimately finds that Dr. Singleton has *not* stated a claim, the case would likely go up on appeal to the North Carolina Supreme Court. That is a major difference. Either way, it is better for this Court to weigh in now

about whether Dr. Singleton has stated claims under these important constitutional provisions.

ARGUMENT

I. The Court mistook two of Dr. Singleton's substantive claims for procedural due process claims and wrongly dismissed them for failure to exhaust administrative remedies.

The Court made a category error with grave consequences. It held that Dr. Singleton's anti-exclusive privileges and anti-monopoly claims were "procedural due process constitutional challenges . . . properly dismissed under Rule 12(b)(1)." (Op. ¶ 20, App p 9; *see also* Op. ¶¶ 15–16, App p 7 (construing claims as "procedural due process claims" and claims for "a deprivation of procedural due process")). **But Dr. Singleton did not bring a procedural due process claim.** Not only did he not allege such a claim in his complaint, (R pp 31–34, ¶¶ 130–152)—he expressly distinguished his claims from a procedural due process claim multiple times. (Reply Br. 23, App p 96; Oral Arg., https://tinyurl.com/2ube2s3r, at 2:55–3:02 ("This isn't a challenge to the administrative process itself.")).

This category error matters because, as the Court recognized when holding that Dr. Singleton's law of the land claim did not require exhaustion, "[a] substantive [constitutional] violation may be brought in a declaratory judgment claim in superior court, 'regardless of whether administrative remedies have been exhausted.'" (Op. ¶¶ 21–22, App pp 9–10 (quoting *Good Hope Hosp. v. N.C. Dep't of Health & Hum. Servs.*, 174 N.C. App. 266, 272, 620 S.E.2d 873, 879 (2005))).

The difference between procedural claims and substantive claims is straightforward. Procedural claims allege that administrative "procedures" were not "implemented in a fair manner." *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 48 (2010). They require courts "to ask what process the State provided, and whether [that process] was constitutionally adequate." *Good Hope Hosp.*, 174 N.C. App. at 272,620 S.E.2d at 879. Substantive claims, by contrast, allege that the government violated a "constitutional right, regardless of the fairness of [any] procedures." *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996) (cleaned up).

This Court's decisions in *Good Hope Hospital* and *Shell Island Homeowners Ass'n, Inc. v. Tomlinson* illustrate the difference. In *Good Hope Hospital*, the plaintiff filed both an administrative appeal from the denial of a CON exemption and a separate procedural due process challenge to the agency's decision under the Declaratory Judgment Act while the administrative appeal was pending. 174 N.C. App. at 268–70, 620 S.E.2d at 877–78. This Court dismissed the hospital's procedural due process claim for failure to exhaust because the Court needed to know how the administrative process had resolved before it could decide whether that process was fair. 174 N.C. App. at 271, 620 S.E.2d at 879. In *Shell Island Homeowners Ass'n*, by contrast, the plaintiffs challenged the constitutionality of a regulation that made them ineligible to apply for a building permit, raising equal protection and takings claims. 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999). Because those claims did not turn on how the permitting process was applied, but rather the "constitutionality of [the building] regulation" itself, this Court held that exhaustion was not required. *Id.* at 224, 517 S.E.2d at 412.

By this metric, Dr. Singleton's anti-exclusive privileges and anti-monopoly claims are substantive. Like the challenges to the building regulation in *Shell Island Homeowners Ass'n*, Dr. Singleton's anti-exclusive privileges and anti-monopoly claims attack the CON law not for any procedural reason, but because it grants exclusive privileges and monopolies *by statutory design*. *See In re Certificate of Need for Aston Park Hosp.*, 282 N.C. 542, 551, 193 S.E.2d 729, 736 (1973) (holding that prior CON law, which granted agency statutory power to exclude new hospitals from market, "establishes a monopoly in the existing hospitals contrary to the provisions of Article I, § 34 . . . and is a grant to them of exclusive privileges forbidden by Article I, § 32").

Likewise, Dr. Singleton's anti-exclusive privileges and anti-monopoly claims are non-procedural. Unlike the procedural claim in *Good Hope Hospital*, Dr. Singleton's claims do not challenge an administrative decision or argue that an administrative process was applied unfairly. Indeed, this Court recognized as much when it credited Dr. Singleton's allegation that no CON has been available in his area "for over ten years" (Op. ¶ 3, App p

3) and that this case has never involved any "contested certificate of need case" or "final agency decision" (Op. ¶ 17, App p 8 (cleaned up)). That is, presumably, why this Court treated Dr. Singleton's law of the land challenge to the CON law as "substantive" and held that exhaustion was not required. (Op. ¶¶ 21–22, App pp 9–10). There is no reason to treat Dr. Singleton's anti-exclusive privileges and anti-monopoly claims—which attack the same law under different constitutional provisions—any differently for exhaustion purposes.

This Court should correct its category error, apply the same logic it applied to reject the State's 12(b)(1) motion on Dr. Singleton's law of the land claim (as the trial court did), and decide whether Dr. Singleton stated viable anti-exclusive privilege and anti-monopoly claims. Later in its opinion, the Court hinted that both claims may have merit. (Op. ¶ 44, App p 17 (noting that "the CON statutes are restrictive, anti-competitive, and create monopolistic policies and powers")). If so, that would make the difference between a remand to the trial court and an appeal to the North

Carolina Supreme Court. Either way, though, it is important for this Court to weigh in on *all* of Dr. Singleton's substantive claims.

II. The Court mistook the relief Dr. Singleton seeks, misread *Hospital Group*, and overlooked allegations about the inadequacy and futility of the CON process.

If the Court agrees that Dr. Singleton's anti-exclusive privileges and anti-monopoly claims are substantive, rather than procedural due process claims, the Court need not address the remaining errors described below. But if the Court does not correct its category error, there are three crucial, but easily fixable errors the Court should address: that it mistook the relief Dr. Singleton seeks, misread a key case, and overlooked allegations about the inadequacy and futility of the CON process. Dr. Singleton explains each below.

A. The Court mistook the relief Dr. Singleton seeks.

The Court stated that "[t]he remedy Plaintiffs admittedly and essentially seek is for a fact-finding administrative record and decision thereon to be cast aside and a CON to be summarily issued to them by the Court." (Op. ¶ 19, App p 8). But that is false. There is no administrative

record or decision to be cast aside in this case. Again, this Court seemed to recognize as much when it noted that there has been no CON available "for over ten years" (Op. ¶ 3, App p 3) and that this case has never involved a "contested certificate of need case" or "final agency decision" (Op. ¶ 17, App p 8 (cleaned up)). As for requesting that a CON be summarily issued, Dr. Singleton has never asked a court to do that. Rather, he challenges "the CON *requirement*" (Reply Br. 18, 21–25, App pp 91, 94–98 (emphasis added), wants to apply "apply for a [facility] license" *without* having to get a CON (R pp 11, 31 ¶¶ 6, 128–129), and thus seeks declaratory and injunctive relief against the CON *law*. (R p 34 (prayer for relief)).

B. The Court misread *Hospital Group*.

Dr. Singleton followed this Court's instruction in *Hospital Group of Western North Carolina, Inc. v. North Carolina Department of Human Resources*, 76 N.C. App. 265, 267, 332 S.E.2d 748, 751 (1985), that plaintiffs seeking to challenge the CON law must bring a declaratory judgment action in superior court. Administrative agencies cannot decide whether statutes are constitutional: "[The] well-settled rule [is] that a statute's constitutionality

shall be determined by the judiciary, not an administrative board." *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998). Thus, "a party who seeks to challenge the constitutionality of [the CON law] *must* bring an action pursuant to . . . the Declaratory Judgment Act." *Hosp. Grp. of W. N.C.*, 76 N.C. App. at 268, 332 S.E.2d at 751 (emphasis added). *Hospital Group* is clear on this point, but due to an oversight, this Court misread the case. (Op. ¶¶ 17–18, App p 8 (distinguishing *Hospital Group*)).

In *Hospital Group*, the plaintiff appealed an agency's decision denying it a CON, arguing that the denial was in error and that the CON law was unconstitutional. 76 N.C. App. at 267, 332 S.E.2d at 750. This Court held that because the legislature had adopted a procedure for judicial review of administrative CON decisions, the CON *denial* was properly before the Court of Appeals. 76 N.C. App. at 268, 332 S.E.2d at 751. The Court then separately held that the *constitutional* claim was not properly before it because the CON agency had not reached it (and properly so). *Id.* Instead, the plaintiff was *required* to bring its constitutional claim in a separate

"action pursuant to . . . the Declaratory Judgment Act." *Id.* That is exactly what Dr. Singleton did.

Regardless, this Court stated that Dr. Singleton "omit[ted]" language that "qualifie[d]" *Hospital Group*. (Op. ¶ 17, App p 8). But the "omit[ted]" language merely explained that the legislature had "amend[ed] G.S. 131E-188(b)" to designate the Court of Appeals as the proper venue for "review of a *final agency decision*." 76 N.C. App. at 268, 332 S.E.2d at 751 (emphasis added). That provision, titled "Administrative and judicial review," stated that "[a]ny affected person who was a party *in a contested case hearing* shall be entitled to judicial review of all or any portion of any final decision in . . . the Court of Appeals." N.C. Gen. Stat. § 131E-188(b) (emphasis added).

The "omit[ted]" language from *Hospital Group* therefore had no bearing on the Court's separate holding that *constitutional* challenges to the CON law must be brought in a declaratory judgment action in superior court. This Court simply misread the case.[2]

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[2] Dr. Singleton cited another case, *Hope*, as consistent with his reading of *Hospital Group*. (Reply Br. 22, App p 95 (citing *Hope*, 203 N.C. App at 596, 608, 693 S.E.2d at 676, 683 (deciding constitutional claims even though "[n]either plaintiff was . . . denied a

C. The Court overlooked Dr. Singleton's allegations that the CON process is an inadequate and futile way to challenge the CON law.

Finally, this Court stated that Dr. Singleton "has not shown the inadequacy of statutorily available administrative remedies to review and adjudicate his claims to sustain a deprivation of *procedural due process*." (Op. ¶ 15, App p 7 (emphasis added)). Again, Dr. Singleton brought substantive claims that do not require exhaustion. Section I, *supra*. So he did not need to allege inadequacy of administrative remedies. But he did so *anyway*, and the Court overlooked those allegations.

An administrative process is "inadequate" when it rests on allegedly unconstitutional statutes or regulations. *See, e.g.*, *Shell Island Homeowners Ass'n*, 134 N.C. App. at 224, 517 S.E.2d at 412 (applying for permit was inadequate way to challenge constitutionality of building regulation); *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 211, 443 S.E.2d 716, 723 (1994) (seeking approval to charge illegal fees was

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requested CON or filed a petition for a contested case hearing"))). This Court overlooked *Hope* in its exhaustion analysis.

inadequate way to challenge fee rule). Thus, Dr. Singleton alleged that the CON application process is inadequate when he alleged that the CON *law* is unconstitutional. (R pp 11, 31–34, ¶¶ 6, 130–152 (seeking "declaratory judgment that the CON law" violates three constitutional provisions "as applied to Plaintiffs"); *see also* R pp 22–25, 29–30, ¶¶ 70–92, 116–117 (alleging that forcing him to "one day" slog through an "expensive, burdensome, and fundamentally anti-competitive" application process is not a "remedy" for the requirement that he get a CON in the first place)).

Dr. Singleton also alleged futility. A remedy is futile when it is "useless . . . as a legal or practical matter." *Abrons Fam. Prac. & Urgent Care, P.A.*, 370 N.C. 443, 452, 810 S.E.2d 224, 231 (2018). Dr. Singleton alleged that the CON application process is useless when he alleged that he "cannot apply for a CON" because "the State has not projected a 'need' for a new surgical facility in the Craven/Jones/Pamlico service area for at least a

decade." (R pp 27, 29, ¶¶ 99, 114). A process that Dr. Singleton cannot even initiate is the definition of futile.[3]

Oddly, though, the Court stated that Dr. Singleton "acknowledge[s] [he] could have applied for a CON and have sought and challenged any administrative review." (Op. ¶ 15, App p 7). But Dr. Singleton never conceded that he could apply for a CON. In fact, he argued the opposite several times. (Reply Br. 19, App p 91 ("There is no CON available in Dr. Singleton's area and no process can change that any time soon."); Opening Br. 8–9, App pp 35–36 (explaining same); R p 29, ¶ 114 ("Dr. Singleton . . . cannot apply for a CON because the state has not projected a 'need' for a new surgical facility in his service area through at least 2022.")). This Court

[3] As Dr. Singleton noted in his reply brief, if the State Medical Facilities Plan reflects no need for a new operating room in a service area, nobody can apply for a CON in that area. *See* Reply Br. 17, 18 n.5 (SMFP "need determinations . . . delineate the number of . . . operating rooms . . . that *may be applied for* and approved by CON during the year") (quoting 2022 SMFP, https://tinyurl.com/3vn9sja7, at 9) (emphasis added)).

should not ascribe to Dr. Singleton a concession that he squarely and repeatedly rejected.

CONCLUSION

This Court's opinion made fixable errors with grave consequences. It mistook Dr. Singleton's anti-exclusive privileges and anti-monopoly claims for "procedural due process" claims—which he never brought—rather than treating them as substantive claims that, by the Court's own logic, do not require exhaustion. The opinion also mistook the relief Dr. Singleton seeks, misread *Hospital Group*, and overlooked Dr. Singleton's allegations that the CON process is an inadequate and futile way to challenge the CON law. The Court should grant the petition, correct these errors, and decide whether Dr. Singleton stated viable claims under Article I, Sections 32 and 34.

Respectfully submitted this 25th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing brief complies with the length and typeface requirements of Rule 28(j) of the North Carolina Rules of Appellate Procedure. The brief, excluding the cover page, index, table of cases and authorities, certificate of service, and appendix, contains less than 8,750 words.

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