NORTH CAROLINA
BUNCOMBE COUNTY

SUPERIOR COURT DIVISION
FILE NO. 23-CV-5013

Jeff Jackson, Attorney General, *ex rel* Dogwood Health Trust,
Plaintiff,

vs.

MH Master Holdings, LLLP,
Defendant.

Defendant's Brief In Support of its Motion for Partial Reconsideration

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I. Introduction

Defendant purchased the Mission Health System ("MHS") almost eight years ago, after extensively negotiating a purchase agreement with the then-owner of MHS and after the Attorney General exercised his statutory right to review, negotiate and not object to that same agreement. In this breach of contract case, the Attorney General is now (while ostensibly acting on behalf of a private party) seeking to create and enforce quality and quantity of care obligations against Mission Hospital that were never included in the purchase agreement. To do as the Attorney General asks, this Court would have to adopt a strained interpretation of an otherwise simple phrase stating only that Mission Hospital "shall not discontinue the provision of the services" listed on a schedule that accompanied the purchase agreement. Defendant respectfully requests that the Court decline to do so, since the evidence and testimony gathered during the years this lawsuit has been pending makes the meaning of that phrase clear and straightforward. In the context of the purchase agreement, the word "discontinue" simply means stop—and Mission Hospital has never stopped fulfilling its role in providing the healthcare services at issue.

This Motion for Partial Reconsideration, however, addresses a much narrower issue related to the purchase agreement: whether the Court improperly granted summary judgment on the meaning of the word "provision" standing alone and divorced from the phrase "shall not

discontinue the provision of the services." Although neither Defendant nor the Attorney General sought summary judgment on the meaning of that one word, Judge Earp ultimately ruled that the word "provision" requires Mission Hospital "to take all steps necessary to actually provide the services set forth in Schedule 7.13(a)." ECF No. 172, Order & Op. on Cross Mots. for Summ. J. & Mot. to Exclude ("Order") ¶¶60, 126b. This *sua sponte* ruling is not a matter of simple semantics—if "provision" means what Judge Earp said it means, it will substantially and materially impact the day-to-day operation of Mission Hospital, the only Level I Trauma Center in western North Carolina and one of the largest hospitals in North Carolina.

Unfortunately, no one has yet had the opportunity to brief, or even discuss, that impact because no one sought the standalone interpretation of the word "provision" that the Court included in her ruling. Given that, Defendant respectfully requests that this Court withdraw the summary judgment order interpreting the word "provision" as requiring MHS "to take all steps necessary to actually provide the services set forth in Schedule 7.13(a)," ECF No. 172, Order ¶¶60, 126b.

First, the Court decisively and finally answered a question that no party had yet asked. Both the Attorney General and Defendant framed their summary judgment motions around the meaning of Section 7.13(a)'s requirement that Mission Hospital "not discontinue the provision of" certain services as a whole. Neither party asked the Court to

consider or define the word "provision" in isolation. By severing "provision" from the remainder of the phrase, the Court violated canons of contractual interpretation (the meaning of a contract is derived from the agreement as a whole, not from any individual provision) and potentially tied the hands of this Court in interpreting the remainder of the key phrase of the purchase agreement at trial.

Second, the ruling risks imposing contractual obligations that are inconsistent with the law of North Carolina and with Mission Hospital's operations *before* Defendant acquired it. Like all hospitals, Mission Hospital always has relied on physicians to use their independent medical judgment to provide medical services to its patients. Regardless of their employment status, Mission Hospital does not and cannot dictate when and what medical services physicians will provide to their patients because doing so necessarily interferes with a physician's independent medical judgment. If the word "provision" means what the Court said it means in the summary judgment ruling, the Court now will have to answer significant legal questions about how that "provision" of services can co-exist with North Carolina law requiring a medical license to practice medicine and complex, nuanced federal statutes prohibiting a hospital from influencing a physician's judgment about where and how to provide medical services to patients.

At a bare minimum, there is a genuine dispute of material fact regarding what the word "provision" means in the context of the purchase

agreement at issue in this lawsuit. Given that, this Court now should reconsider and withdraw the grant of summary judgment as to the word "provision" and allow the interpretation of the entire phrase to be determined at one time.

II. Background

A. The Key Players and Contractual Term

In 2018, MHS's former owner (now known as ANC Healthcare, hereafter referred to as "Seller") sold the healthcare system to Defendant MH Master Holdings, LLLP, a subsidiary of HCA Healthcare (hereafter referred to as "HCA" or "Mission"), through an Amended & Restated Asset Purchase Agreement (the "A&R APA"). Before the transaction closed on January 30, 2019, the Attorney General reviewed the A&R APA, including Mission's go-forward obligations, and blessed the transaction. The sale proceeds—over $1.5 billion—endowed the Dogwood Health Trust, a nonprofit whose purpose is to "dramatically improve the health and well-being of all people and communities in Western North Carolina."[1]

Section 7.13(a) of the A&R APA provides that "[F]or a period of ten (10) years immediately following the Closing Date, Buyer shall not

[1] Press Release, Dogwood Health Tr., Dogwood Health Trust Now Operational with Close of $1.5 Billion Mission Health Asset Sale to HCA Healthcare (Feb. 1, 2019), https://dogwoodhealthtrust.org/dogwood-health-trust-now-operational-with-close-of-1-5-billion-mission-health-asset-sale-to-hca-healthcare/.

discontinue the provision of the services set forth on Schedule 7.13(a) . . . at the Mission Hospital Campus Facility . . . ." ECF No. 50-1, A&R APA & Schedules, at 110. Those services (the "Hospital Service Commitments") include (1) "Emergency and Trauma services generally consistent with the [then-] current Level II Trauma Program with emergency services for pediatrics and adults"; and (2) "Oncology Services—inpatient and outpatient cancer services, radiation therapy, surgery, chemotherapy, and infusion services." ECF No. 145–19, Disclosure Schedule of A&R APA, MISSION0000068971 at –69320. The A&R APA does not define "shall not discontinue" or "provision." ECF No. 172, Order ¶10. And while Schedule 7.13(a) includes a list of healthcare services, it does not include any standards or metrics related to quality or quantity. ECF No. 145, Def.'s Mot. for Summ. J. ("Def.'s MSJ") at 27.

B. Seller and Mission Extensively Negotiated the APA

Section 7.13(a)'s Commitment that Mission "shall not discontinue the provision of the services set forth on Schedule 7.13(a)," appeared in the first draft purchase agreement negotiated by Seller and Mission, and never changed thereafter. *See* ECF No. 145-3, APA Draft, MISSION0000070633 at –70721; ECF No. 146-13, Tierney Decl. ¶¶22–23. Because hospitals cannot control the volume of services provided within their four walls and cannot infringe on the independent medical judgment of physicians, both Seller and Mission understood that this language imposed no obligation to provide a particular volume of any service

or services. *See* ECF No. 146-13, Tierney Decl. ¶¶31, 46–51; ECF No. 146-25, Ryan Dep. 74:13–75:22. While that language was never negotiated, the parties extensively negotiated the list of services that Mission committed to "not discontinue." Seller initially sought a non-exhaustive list of services to ensure "Mission Hospital as we know it will continue as we know it for at least ten years." ECF No. 145-11, MISSION0000062769 at –63117. Mission refused because healthcare systems must maintain flexibility to respond to demographic, technological, political, and other uncertainties. ECF No. 146-13, Tierney Decl. ¶27; ECF No. 146-2, Tierney Dep. 55:17–56:2. Seller understood Mission's concern that "ill-defined mandates" may cause future confusion and agreed that the Schedule would be "a literal list" of specific services. ECF No. 145-11, at –63117; ECF No. 146-3, Seller Dep. 22:13–22; ECF No. 146-13, Tierney Decl. ¶27.

As contemporaneous correspondence reflects, and the negotiators' sworn testimony confirms, both Mission and Seller understood the binary nature of the commitment. Dr. Ron Paulus, Seller's President and CEO,[2] and Mission debated at length the content and description of the Hospital Service Commitments. *See generally* ECF No. 145-11, MISSION0000062769 at –63112–119 (emails between Dr. Paulus and

[2] Although the Attorney General noticed the deposition of Dr. Paulus, a non-party to the contract and to this litigation, he withdrew that notice without explanation and failed to seek any testimony from him thereafter.

Mission negotiating terms of Schedule 7.13(a)). In an email dated August 22, 2018, Dr. Paulus wrote to Mission: "I've accepted that you are unwilling to have the list be a general description (which is what has been our understanding from the beginning). . . . I've taken out the parentheses and e.g., modifiers, to reflect that this is now a literal list." ECF No. 172, Order ¶38; ECF No. 145-11, MISSION0000062769 at –63117. Although Dr. Paulus suggested that the parties would "trust one another" that "the myriad of obvious things that aren't listed (e.g., general x-ray, etc.) will be continued out of common sense[,]" he conceded that the actual text of the Schedule 7.13(a) constitutes a "literal list." *Id*.

Section 7.13(a) and the Hospital Service Commitments in its Schedule also did not guarantee that *all* services available at Mission Hospital at the time of the transaction would remain available (nor that any service would be provided at pre-acquisition levels). ECF No. 145-9, ECF No. 145-12; *see also* ECF No. 146-13, Tierney Decl. ¶¶19–25. Indeed, certain pre-acquisition services explicitly were removed from the "literal list" of services. For instance, Hematology was removed from an earlier draft of the Schedule, although Mission Hospital at times offered it prior to the acquisition. ECF No. 146-3, Seller Dep. 24:20–26:14; ECF No. 146-13, Tierney Decl. ¶28. Seller also initially sought to require Mission Hospital to satisfy specific trauma capabilities tied to third-party verification. ECF No. 146-3, Seller Dep. 24:20–25:25. The parties agreed instead on "generally consistent with" a Level II Trauma Program, without

reference to any third-party verification. *Id.* at 26:15–27:8; ECF No. 146-13, Tierney Decl. ¶29. Mission negotiated and contracted for flexibility, so it could effectively serve its patients. ECF No. 146-2, Tierney Dep. 55:17–56:2; ECF No. 146-13, Tierney Decl. ¶27.

Mission's lead negotiator, Chadd Tierney, testified that the parties used "discontinue" consistent with its ordinary meaning—something is either continued or it is not. ECF No. 146-2, Tierney Dep. 39:2–18; *see also* ECF No. 146-13, Tierney Decl. ¶¶22–25. Though absent in Section 7.13(a) and its Schedule, Seller and Mission knew how to include quantity metrics when they wished to do so. For example, Section 7.18 required Mission to "maintain substantially current levels of graduate medical education." ECF No. 50-1, A&R APA & Schedules, at 120–21. The same was true of quality metrics. Section 7.13(b), which addressed the five hospitals within the MHS other than Mission Hospital, and was specifically negotiated by the Attorney General, included specific quality conditions. *Id.* at 111.

On August 30, 2018, Seller and Mission executed the original Asset Purchase Agreement (*see* ECF No. 145-9) and agreed to Hospital Service Commitments in a final version of Schedule 7.13(a) (*see* ECF No. 145-12).

C. The Attorney General Knew in 2018 that the Hospital Service Commitments Did Not Include Quality or Quantity Standards

As required by North Carolina law governing transactions involving charitable or religious corporations, Seller notified the Attorney General of the proposed acquisition of MHS on September 4, 2018.[3] ECF No. 71-14, Mission Health Notice Letter, MISSION0000077477. For several months thereafter, the Attorney General closely reviewed the terms of the APA (and, as discussed *infra*, asked for several changes to some of its terms, but not to Section 7.13(a) or its accompanying Schedule). ECF No. 50, Am. Compl. at 2, ¶32; ECF No. 146-6, Stein Decl. at 1–3.

Contemporaneous correspondence confirms that the Attorney General, acting through his agents, understood the Hospital Service Commitments as Mission did. Jennifer Harrod, the Special Deputy Attorney General and lead negotiator for then-Attorney General Stein, wrote in talking points for an October 2018 meeting with Mission: "The board thinks HCA has agreed to maintain current hospital services at current levels. *That's not what the APA says*, and HCA says it would *not* have agreed to do this." ECF No. 146-8, NCAG_0000006483 (emphasis added). An internal memorandum for the Attorney General's senior advisors

[3] A North Carolina charitable or religious corporation must provide written notice to the Attorney General thirty days before it sells all or most of its property. *See* N.C.G.S. §55A-12-02(g).

likewise stated "HCA is not committing to offering the same 'availability or level' of the services . . . ." ECF No. 149, NCAG_0000008944 at –8947.

The Attorney General's office also acknowledged at the time that its "statutory tools" to regulate the MHS "[were] limited" and negotiated for contract terms that would create "[a] role for the AGO" and that would allow "AG enforcement of all public protections." ECF No. 146-8, NCAG_0000006483 at –6484–85. Harrod stated: "Assuring the quality of care is outside of our expertise and outside of the scope of our review." ECF No. 146-26, NCAG_0000003358.

Despite deep knowledge of the APA's terms, the Attorney General never sought any changes to the Hospital Service Commitments. In this litigation, Former Attorney General and now-Governor Joshua Stein declared under oath: "I do not recall the Department requesting or playing any role in any changes to Section 7.13(a) or Schedule 7.13(a)." ECF No. 146-6, Stein Decl. at 3.

The Attorney General's contemporaneous knowledge of the meaning of the Hospital Service Commitments and absence of any effort to change those commitments stands in stark contrast to his aggressive negotiation of other provisions of the purchase agreement. For example, he successfully negotiated to include specific service definitions and quality conditions for the other MHS hospitals, as reflected in revisions to Section 7.13(b) and its schedule. *See* ECF No. 145-16, Redline of A&R APA against APA, MISSION0000076546 at –76669; ECF No. 145-18,

Overview of DOJ Review of Mission/HCA Transaction, at 1; ECF No. 145-20, Letter from NC DOJ to D. Esposito, at 2. The Attorney General also added an entirely new provision, Section 7.13(h), requiring HCA to remain enrolled in Medicare and Medicaid—adherence to which itself requires compliance with certain federal quality standards. ECF No. 145-18 at 1; ECF No. 50-1 at 114.

On January 16, 2019, the Attorney General issued a Letter of Non-Objection to the transaction. ECF No. 145-20. Mission relied on this non-objection to close the acquisition on January 31, 2019. ECF No. 146-13, Tierney Decl. ¶¶45–53 ("Had NCDOJ conditioned approval of the [t]ransaction on terms akin to those Plaintiff seeks in this litigation, [Mission] would have refused.").

D. After the Acquisition, Mission Hospital Operated as Western North Carolina's Only Level II Trauma Center

Both before and after the acquisition, Mission Hospital provided the healthcare infrastructure required to care for patients in a hospital setting. But, critically and like other hospitals all over North Carolina and nationwide, Mission Hospital provides most of its services to patients through the actions of independent and non-employed physicians who have medical staff privileges that allow them to admit and treat patients at the hospital. Consistent with standard practice for hospitals, Mission Hospital (then and now) provides healthcare facilities, infrastructure, and support staff; it then grants medical staff privileges to physicians

who use their independent medical judgment to decide whether to bring patients there for treatment. ECF No. 146-10, Lowe Dep. 201:16–202:4; ECF No. 146-13, Tierney Decl. ¶¶8–10; ECF No. 146-28, Expert Report of M. Timothy Renjilian ("Renjilian Report"), ¶20. Mission does not now employ the physicians who provide emergency and certain oncology services, and Seller likewise did not do so before the acquisition. ECF No. 146-12, Rosenfeld Dep. 70:4–74:9. This model of hospital operations, used both before and after the acquisition, reflects the legal restrictions that understandably limit the ability of hospitals to direct physician decisions regarding medical care, including the Stark Law and anti-kickback statutes. ECF No. 145, Def.'s MSJ at 13–16; ECF No. 146-29, Renjilian Dep. 55:8–57:20. Further, this model ensures physician use their independent medical judgment to treat patients, as required by North Carolina law prohibiting the corporate practice of medicine. *See* N.C. Gen. Stat. §90-18(a).

E. Mission Continues Offering First Class Patient Care in Western North Carolina

The record shows that Mission fulfilled the Hospital Service Commitments in 2023 and continues to fulfill them today. Mission never stopped accepting patients to, or treating patients in, its emergency department. ECF No. 146-18, Joslin Dep. 54:19–23. Mission never inappropriately refused a patient for an ER-to-ER transfer. *Id.* at 54:24–56:23. Further, the emergency department wait times that the Attorney

General complained of in this lawsuit improved significantly even before he filed the operative complaint in April 2024. *See* ECF No. 146-19, Jones Dep. 46:17–47:6, 137:22–140:19; ECF No. 146-16, Kehler Dep. 80:15–82:24, 119:2–18. Mission has hired more nurses, improved pay, provided funding for a local nursing school, and taken effective steps to reduce nursing turnover. ECF No. 146-15, Patrick Dep. 81:9–19, 169:9–170:13. Mission continues to offer both inpatient and outpatient cancer services, including radiation therapy and oncology surgery, and even complex hematology services. ECF No. 146-14, Palmeri Dep. 305:3–7, 341:8–17.

In recognition of the quality of care Mission provides, the American College of Surgeons verified it as a Level I Trauma Center in late 2025.[4] Further, Mission has earned a number of accolades since the acquisition, including the Magnet Designation from the American Nurses Credentialing Center (2025); America's 50 Best Hospitals from Healthgrades (2020–2024); the Patient Safety Excellence Award from Healthgrades (2022–2024); the Joint Commission's Gold Seal of Approval and the American Heart Association Excellence Award for Overall Quality of Care; a Healthgrades' America's 100 Best Hospital ranking for cardiac care (2020–2024), coronary intervention (2024), surgical care (2024), and

[4] Press Release, Mission Health, Mission Hospital earns Level I trauma verification by American College of Surgeons (Dec. 3, 2025), https://www.mission-health.org/about-us/newsroom/mission-hospital-earns-level-i-trauma-verification-by-american-college-of-surgeons.

other services; and a ranking tied at #1 for Business North Carolina's best hospital in North Carolina. ECF No. 146-28, Renjilian Report ¶49.

F. The Attorney General Sues Mission

In December 2023—almost five years after the acquisition and his review of the A&R APA—then-Attorney General Stein sued Mission for breach of the Hospital Service Commitments related to its (1) emergency and trauma services and (2) oncology services in 2023. ECF No. 50, Am. Compl. ¶¶206–225. The Amended Complaint relied heavily on affidavits—many containing third-party hearsay from former Mission employees, patients, and affiliates—and on the findings of Immediate Jeopardy issued by CMS in February 2024 regarding episodic events at Mission Hospital in 2022 and 2023. *Id.* ¶¶57–63. In the Amended Complaint, the Attorney General advanced a reading of Section 7.13(a) and its Schedule that would empower his office to regulate the quantity and quality of healthcare services at Mission Hospital, contending that a service could be "constructively discontinued" by Mission if it was "inadequately provided." ECF No. 172, Order ¶34.

The Attorney General's broad claims narrowed during the years of litigation, and his contract interpretation and breach theory shifted substantially. By oral argument on the cross motions for summary judgment, the Attorney General argued that Mission must "continuously provide" the Section 7.13(a) services that were "available at Mission at the

time of the transaction." ECF No. 143, Att'y Gen.'s MSJ, at 2–3, 30–38. To prove that Mission breached its obligations with respect to emergency and trauma services, the Attorney General pointed only to ICU nurse-to-patient ratios and the absence of a 24/7/365 on-call otolaryngology surgeon (though he did not move for summary judgment on this issue, he opposed Mission's argument that he failed to prove any breach of these services).[5] ECF No. 146-17, Oral Arg. Tr. 15:7–25. And, the Attorney General's only evidence for a contractual breach related to oncology services was the choice made by an independent physician group (Messino Cancer Centers)—without Mission's input or influence—to change its business strategy and become a for-profit healthcare provider relying almost exclusively on outpatient facilities to provide care to its patients. ECF No. 146-14, Palmeri Dep. 240:4–23.

Throughout this period, as the Attorney General's own affiants confirmed, Mission never stopped accepting or treating patients in its emergency department, ECF No. 146-18, Joslin Dep. 54:19–23, and Mission continues to offer all required oncology services, ECF No. 146-14, Palmeri Dep. 304:13–305:24. The Attorney General has never disputed these basic facts and has found no evidence to dispute them now.

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[5] Judge Earp granted summary judgment on this point because the Attorney General failed to identify evidence of Mission's alleged noncompliance with Trauma Program standards for otolaryngology coverage. ECF No. 172, Order ¶94. Mission does not contest this ruling in its motion for reconsideration.

G. The Court Rules and the Case is Reassigned

On July 27, 2026, this Court ruled on cross-motions for summary judgment.[6] The Court denied both motions as to the meaning of "shall not discontinue," after concluding the phrase was (still) ambiguous. ECF No. 172, Order ¶55. But, the Court *sua sponte* granted partial summary judgment—ostensibly for the Attorney General—on the meaning of the word "provision," even though the Attorney General did not seek such a ruling. *Id.* ¶61. The Court interpreted the word "provision" to mean "the act or process of providing," concluding that Section 7.13(a) "requires that HCA not discontinue supplying or making Schedule 7.13(a) services available to Mission Hospital's patients." *Id.* ¶60. This interpretation requires Mission to "take all steps necessary to actually provide" the Schedule 7.13(a) services, *id.* ¶126b, an affirmative duty inconsistent with the evidence of Mission Hospital's longstanding and pre-acquisition operating model, one which (necessarily) relies on physicians to use their independent medical judgment to decide whether and when to provide services at the hospital. *See* ECF No. 146-10, Lowe Dep. 201:16–202:4; ECF No. 146-13, Tierney Decl. ¶¶8–10.

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[6] Mission filed an initial motion for partial summary judgment on July 26, 2024. ECF No. 69. The Court determined that summary judgment was inappropriate at that time because "determination of the parties' intent with respect to the contract language at issue requires a more developed record than the one presented." ECF No. 133, ¶38. By then, the Court had granted Mission the opportunity to depose Seller, and ordered the Attorney General to produce certain internal documents after rejecting his privilege claims. *Id.*

The court denied Mission's motion for summary judgment on equitable estoppel and declined to estop the Attorney General from advancing his interpretation of the A&R APA, reserving that issue for trial despite the undisputed record evidence that the Attorney General's own office knew in 2018 that the A&R APA did not impose quality or quantity obligations on Mission. ECF No. 172, Order ¶¶54–55.

III. Legal Standard

Interlocutory orders are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. R. Civ. P. 54(b). A Motion for Reconsideration under Rule 54(b) should be granted when "the prior decision was based on clear error or would work manifest injustice." *Londry v. Stream Realty Partners, L.P.*, 2026 NCBC 19 ¶10 (Super. Ct. Mar. 9, 2026). Manifest injustice is generally defined as "an error by the court that is direct, obvious, and observable." *Pender Farm Dev., LLC v. NDCO, LLC*, 2020 NCBC 67 ¶14 (Super. Ct. Sep. 25, 2020) (citation omitted).

IV. Argument

A. The Court Has Authority to Decide the Motion

Just a few hours after entering the Order on the Cross-Motions for Summary Judgment, the Court reassigned this case to Judge Davis due to Judge Earp's retirement. ECF No. 173. Rule 63 authorizes "a substitute judge to reconsider an order entered by a judge who has since

retired." *Springs v. City of Charlotte*, 222 N.C. App. 132, 134–35 (2012) (*citing In re Expungement for Kearney*, 174 N.C. App. 213, 214–15 (2005)).

Mission respects that "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Woolridge*, 357 N.C. 544, 549 (2003) (citation omitted). This reasonable rule is grounded in the principle that parties should not engage in "judge shopping" and simply "wait[] for another judge to come around." *Id.* at 550 (citation omitted). But that rule does not apply when one judge retires and another is designated to preside over the case. *See Morris v. Rodeberg*, 285 N.C. App. 143, 2022-NCCOA-555, ¶14 (2022), *aff'd*, 385 N.C. 405 (2023). Although some Business Court cases have held that Rule 63 does not authorize a successor judge to correct the predecessor's legal error, those cases do not control here for three reasons. *Cnty. of Catawba v. Frye Reg'l Med. Ctr., Inc.*, 2015 NCBC 17, ¶¶15, 17 (Super. Ct. Feb. 25, 2015); *Morris Int'l v. Packer*, 2021 NCBC 66A, ¶44 (Super. Ct. Nov. 2, 2021).

First, *Frye* and its progeny are incompatible with Court of Appeals precedent. In *Kearney*, a judge of the Superior Court granted an expunction, then retired. *In re Expungement for Kearney*, 174 N.C. App. at 214–15. The State asked a subsequent judge to reconsider the expunction, contending that it was legally erroneous because some of the expunged charges were statutorily ineligible. *Id.* at 214. The subsequent judge

denied reconsideration "for lack of jurisdiction." *Id.* The Court of Appeals reversed, holding that notwithstanding the prior judge's "absence from the bench due to retirement," Rule 63 empowered the subsequent judge to grant reconsideration. *Id.* at 215.

Since *Kearney*, the Court of Appeals has twice emphasized that after a judge leaves the bench, her prior orders are fair game for reconsideration. *Springs v. City of Charlotte*, 222 N.C. App. 132, 135 (2012) (Beasley, J.) ("This Court has interpreted the language of Rule 63 to statutorily authorize a substitute judge to reconsider an order entered by a judge who has since retired."); *Morris v. Rodeberg*, 285 N.C. App. 143, 147, 2022-NCCOA-555, ¶14 (citing *Springs*). *Morris* is particularly instructive here because the *Morris* court considered *Frye* and found it unpersuasive. *See* Appellant's Br. at 6, *Morris v. Rodeberg*, No. COA21-378 (N.C. Ct. App. Sep. 15, 2021), https://www.ncappellatecourts.org/showfile.php?document_id=291378.

Second, the rule announced in *Frye* is an unsound one. Under Rule 54, the availability of reconsideration is intrinsically linked to the unavailability of interlocutory review. Orders entered before entry of judgment as to all parties and all claims are, by default, "subject to revision at any time" before final judgment. N.C. R. Civ. P. 54(b). A dispositive order can be made final, and when that is done it becomes immediately appealable and is no longer subject to revision by the trial judge. But the category of orders that *Frye* would create—orders that are not subject to

revision by any court until the conclusion of litigation—is incompatible with the framework created by the Rules of Civil Procedure.

And, the reasons given in *Frye* do not support the rule it announced. *Frye* was driven in part by concern that allowing reconsideration would "invit[e] a potential sea of motions" whenever a case was reassigned. *Frye Reg'l*, 2015 NCBC 17, ¶17 n.2. *Cf. DeGorter v. Capitol Bancorp Ltd.*, 2014 NCBC 62, ¶35 (Super. Ct. Nov. 26, 2014) (expressing unwillingness to "open the floodgates" by reconsidering prior judge's order). But before a case is reassigned, reconsideration of interlocutory orders is always available, subject only to the issuing judge's discretion. What restrains litigants from, for example, using successive Rule 54 motions to make new arguments on the same motion is not that the Court lacks jurisdiction to consider them; it is that they expect the Court to look on that practice with disfavor and to exercise its discretion accordingly.

But ruling that reconsideration is unavailable in cases like these would "open the floodgates" in a different way. The right to seek revision of interlocutory orders may be a "substantial right" justifying interlocutory review because of the close connection between finality and reviewability and because the right to seek reconsideration would be "los[t] absent a review prior to final determination" of the action. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726 (1990) (citation omitted); *Byrd v. Avco Corp.*, 389 N.C. 32, 39–40 (2026) (holding that denial of reconsideration affected substantial right). Either way, the unavailability of

reconsideration would certainly be a factor weighing in favor of interlocutory review by *certiorari*. *See Morris,* 2022-NCCOA-555 (granting *certiorari* to avoid deciding whether unavailability of reconsideration created right to review).

Third, if there is any case that warrants a deviation from the rule announced in *Frye*, it is this one. In every prior case on this issue, it would have been at least technically possible for the party seeking reconsideration to present its request to the prior judge. But in this case, the Court's summary judgment order was entered just hours before the case was reassigned. *Compare Packer*, 2021 NCBC 66A, ¶46 (observing that the movant "had appropriate avenues in which to raise [reconsideration] issue before [the prior judge] but . . . failed to do so"). Moreover, the summary judgment ruling in this case was, as discussed below, issued without any briefing on the standalone issue the trial court chose, *sua sponte*, to resolve. That ruling therefore should not control this Court's interpretation of Section 7.13(a)—and especially not in light of the interrelated issues this Court will be facing at the impending bench trial.

B. The Court Erroneously and *Sua Sponte* Granted Summary Judgment on the Word "Provision" Alone, Despite Disputed Material Facts

In its Order, the Court *sua sponte* granted summary judgment on the meaning of the word "provision," but not on the meaning of the rest of Section 7.13(a). *See* ECF No. 172, Order ¶¶60–61. Specifically, the

Court said it "shall GRANT the Attorney General's Motion concerning interpretation of the word 'provision,'" and that "'provision' requires HCA to take all steps necessary to actually provide the services set forth in Schedule 7.13(a)." *Id.* ¶¶61, 126b. This was error.

First, neither the Attorney General nor Mission sought summary judgment on the interpretation of the word "provision" in isolation. Reconsideration is appropriate where a court has made a decision outside the adversarial issues presented to the Court by the parties. *Ayscue v. Griffin*, 263 N.C. App. 1, 10–11 (2018). The decision to grant summary judgment (ostensibly to the Attorney General) on a single word of the key provision of the purchase agreement is especially erroneous in light of the Attorney General's own motion and arguments in this litigation. The Attorney General moved "for summary judgment as to the proper interpretation of Section 7.13(a) of the Amended and Restated Asset Purchase Agreement" as a whole. ECF No. 141.

Throughout this litigation, the Attorney General stressed that it would not be appropriate to rule on any portion of the key phrase in Section 7.13(a) in isolation. ECF No. 93 at 18–19 (arguing that "shall not discontinue the provision of the services . . ." should be construed together). In making his own summary judgment argument, the Attorney General *at most* requested that the Court find that "shall not discontinue the provision of services" requires Mission to "continuously provide" the scheduled services. *See* ECF No. 143 at 8. At no point did the Attorney

General request a standalone determination of what the word "provision" means or ask the Court to interpret that word in isolation from the rest of the phrase. The Court wrote that "[t]he Attorney General responds that the term 'provision' requires HCA to do all things necessary to provide the services listed in Schedule 7.13(a)." ECF No. 172, Order ¶57. But the Attorney General *never* made that argument, never used those words, and never posited that the word "provision" alone required Mission to do *anything*. In support of that paragraph of the Order, the Court cited three discrete portions of the Attorney General's briefing, but reading those excerpts actually confirms that the Attorney General believed Section 7.13(a) should be interpreted as a *whole* and in the context of the entire purchase agreement—not that provision could be interpreted alone, let alone interpreted to mean what the Court concluded.

The Court, however, asserted that Mission sought summary judgment in favor of its "conten[tion] that the word 'provision' requires only that Mission provide 'infrastructure'" for physicians to deliver medical services, and that the Attorney General sought summary judgment on the grounds "that the term 'provision' requires [Mission] to do all things necessary to provide" the scheduled services. ECF No. 172, Order ¶¶56–57. But, neither party put forth these contentions in their briefing or in their oral arguments. Nonetheless, the Court concluded that Mission must "take all steps necessary to actually provide the services set forth in Schedule 7.13(a)." *Id.* ¶¶60–61, 126b. The Court's description of what

each side "contends" about "provision" was therefore not based on summary judgment arguments made by either party and thus amounts to clear error.

Second, the Court's reasoning is internally inconsistent and ignores disputed material facts about what the word "provision" means in context. In one passage the Court wrote that the A&R APA requires that Mission not discontinue "supplying or making Schedule 7.13(a) services available" to patients. ECF No. 172, Order ¶60. Elsewhere it wrote that Mission must "take all steps necessary to actually provide the services set forth in Schedule 7.13(a)." *Id.* ¶126b. Spliced into the operative contractual language, the Court's interpretation would read: Mission "shall not discontinue supplying or making Schedule 7.13(a) services available to patients by taking all steps necessary to actually provide the services set forth in Schedule 7.13(a)"—a construction that is grammatically incoherent (and, as explained below, legally and realistically unworkable). Under this reading, it is unclear whether Mission would be in breach by not "supplying or making" these services available *at all*, not "supplying or making" these services available at *all times*, or not taking "all steps necessary" to *actually* provide these services (not just "supply[] or make[]" these services available). *Novant Health, Inc. v. Aetna U.S. Healthcare of Carolinas, Inc.*, 2001 WL 34054420 at *4–5 (N.C. Super. Ct. Mar. 8, 2001) (rejecting proffered interpretation of a term that "creates an inconsistency not found under a simple reading of the clause").

Beyond that, the newly-introduced phrase "all steps necessary" is undefined and unknowable, making Mission's compliance impossible (*see infra,* Section IV.C.).

This is error worthy of reconsideration because the intent of the contracting parties "is derived not from any singular contractual term individually, but from the agreement as a whole." *State v. Philip Morris USA, Inc.*, 363 N.C. 623, 631–32, 644 (2009); ECF No. 172, Order ¶27 (quoting *Philip Morris USA*). Time and time again, courts have reaffirmed the principle that "[i]ndividual clauses in an agreement and particular words must be considered in connection with the rest of the agreement." *Sepanski v. Ashleigh Fisher Consulting, LLC*, 2026 WL 2035410, at *3 (N.C. Ct. App. July 15, 2026) (quoting *Robbins v. C.W. Myers Trading Post, Inc.*, 253 N.C. 474, 477 (1960)). Recently, in *Sepanski*, the Court of Appeals reversed a trial court decision because the court had defined a contract term in isolation and failed to harmonize that term with other provisions of the agreement. *Id.* at *5. The record evidence developed in this litigation to date also supports the view that throughout the course of negotiating the purchase agreement and during this litigation, the parties always have interpreted Section 7.13 as a whole and have never severed the phrase "shall not discontinue" and "provision" from one another. *See supra* at Section II.B. –II.C.

Third, at minimum there is a genuine issue of material fact about what "provision" means in the Hospital Service Commitments. Mission's

lead negotiator, Chadd Tierney, testified that Mission's obligation under the Hospital Service Commitments was to "provide the resources, equipment, space, technology and other items to support required services" for "willing patients and willing providers." ECF No. 146-13, Tierney Decl. ¶21. This was done, in part, because hospitals need flexibility to determine which services and service lines to offer, and Mission could not be obligated to "maintain every service that was then provided at Mission as of the closing". ECF No. 146-2, Tierney Dep. 54:5-55:25. Contemporaneous statements made by Jennifer Harrod, the Attorney General's lead representative in negotiations with the contracting parties, also support this interpretation. Ms. Harrod wrote that "[t]he board thinks HCA has agreed to maintain current hospital services at current levels. That's not what the APA says, and HCA says it would not have agreed to do this. Dr. Paulus knows this and has not told the board." ECF No. 146.8 at NCAG_0000006483.

Compare that to the Attorney General's current litigation position (and the evidence he contends supports it), that Mission must "continuously provide" the services available at Mission at the time of the acquisition, and the Court's ruling that "provision" requires Mission "to take all steps necessary to actually provide the services set forth in Schedule 7.13(a)". *See generally*, ECF No. 143; ECF No. 172, Order ¶¶60, 126b. The evidence from Mr. Tierney and Ms. Harrod, at a minimum, illustrates there is a genuine dispute of material fact about the meaning of

the word "provision" in the context of Section 7.13(a) because there is uncontroverted evidence that contradicts *both* the Attorney General's interpretation of that Section and the Court's reading of that word. The Court erred in granting summary judgment on the meaning of the term "provision" because disputed facts remain. And the Court should correct this clear error of law now and grant reconsideration.

C. The Court's Ruling Would Require Mission to Engage in Conduct Inconsistent with the Law.

The Court's ruling purports to require Mission to "take all steps necessary to actually provide" the services listed in Schedule 7.13(a). ECF No. 172, Order ¶126b. That interpretation transforms Mission's obligation as a hospital from ensuring physicians can exercise their independent medical judgment to decide whether to deliver the listed medical services into an obligation to guarantee that the listed medical services actually are delivered to patients within the hospital setting—*regardless of a physician's independent medical judgment about the who, what, where, when and how of the medical care they deem necessary for patients*. But, neither Mission Hospital nor any other North Carolina hospital could do so because neither state nor federal law allows hospitals to dictate or otherwise interfere with a physician's independent medical judgment. The law is clear that it is up to the physician to decide where, when, and how to treat a patient, using independent medical judgment. If Mission is obligated by the term "provision" to take "all steps" to ensure

that physicians provide certain services at Mission Hospital, Mission would be required to exercise medical judgments that state law reserves to physicians and that federal law prohibits.

1. The Court's Interpretation Could Require Mission to Seek to Control Physicians' Independent Medical Judgment in Violation of North Carolina Law.

The Court's interpretation of the word "provision" could be read to require Mission to make medical decisions that North Carolina law forbids it to make: whether, where, and how a physician treats a patient. Hospitals provide the infrastructure, equipment, personnel, and administrative support that allow physicians to treat their patients. *See* ECF No. 146-28, Renjilian Report ¶15. A hospital cannot compel independent physicians to admit their patients or dictate the medical care physicians provide to their patients. *Id.* ¶¶15, 17–18; *see also* ECF No. 146-3, Seller Dep. 40:16-41:19 (physicians must authorize treatment in a particular care setting before the services can be performed).

North Carolina law prohibits any person or entity not licensed to practice medicine from engaging in the practice of medicine, including "undertaking to . . . treat" patients. N.C. Gen. Stat. §§90-1.1(5)(c), 90-18(a). The State's regulations go further: they bar non-licensees from exercising any authority over a licensee's professional medical judgment, even within entities permitted to employ physicians. *See* 21 N.C. Admin. Code 32C.0105(b).

Mission is not a physician, and it is not licensed to practice medicine. The corporate practice of medicine doctrine potentially runs headlong into Judge Earp's erroneous interpretation of "provision" by prohibiting Mission from *not taking every step* to guarantee that a medical service is provided to a patient, without regard to a physician's independent medical judgment. To meet Judge Earp's definition, Mission would have to take action to attempt to control who admits patients to the hospitals, which treatments are administered to those patients, and how often. Such an exercise of medical judgment is expressly and appropriately reserved to licensed physicians. *See* N.C. Gen. Stat. §§90-1.1(5)(c), 90-18(a).

2. Federal Law Limits any Contractual Obligation for Mission Hospital to Ensure a Particular Volume of Services are Provided.

Multiple complex federal laws—including but not limited to the Stark Law and the Anti-Kickback Statute—govern financial relationships between hospitals, such as Mission Hospital, and referring physicians, such as oncologists, and may further constrain Mission's ability to "provide" services in the manner Judge Earp concluded the APA requires. As relevant here, the Anti-Kickback Statute and the Stark Law impose meaningful constraints on financial and patient referral-related relationships between a hospital like Mission Hospital and its physician medical staff members. Because neither party advocated for the interpretation of

"provision" that the Court adopted, the parties had no opportunity to discuss these legal complexities. If the Court's order stands, Mission could be forced to implement this interpretation without any opportunity to explain the nuances of these issues (which were top of mind when the A&R APA was drafted) and how they could impact the people of Western North Carolina.

First, the Anti-Kickback Statute makes it a felony to knowingly and willfully offer or pay any remuneration, directly or indirectly, to induce or reward the referral of patients or the arranging of items or services payable by a federal healthcare program. 42 U.S.C. §1320a-7b(b)(2). The statute is relevant to all practicing physicians on the Mission Hospital medical staff—whether employed or independent—and introduces particular complexity wholly unaddressed by the parties in this litigation. *See id.* (reaching remuneration offered or paid to "any person"); 42 C.F.R. §1001.952(d), (i) (separate safe harbors for personal services arrangements and bona fide employment relationships).

Second, the Stark Law generally prohibits a physician from referring federal health care program patients for designated health services to an entity with which the physician has a financial relationship, unless an exception applies. 42 U.S.C. §1395nn; 42 C.F.R. §§411.350–357. Critically, the physician compensation arrangements Mission could use to secure continued hospital-based services would need to satisfy an applicable Stark exception, including requirements that compensation be

consistent with fair market value and not determined in a manner that considers the volume or value of physician referrals or other services generated for Mission.[7] *See* 42 C.F.R. §411.357; *United States ex rel. Drakeford v. Tuomey Healthcare Sys., Inc.*, 792 F.3d 364, 379–80 (4th Cir. 2015) (physician compensation varied with the volume or value of referrals where increased hospital procedures generated both increased physician compensation and increased facility fees for the hospital).

3. If the Court's Interpretation Could Raise the Possibility of Conduct Inconsistent with Law, Section 13.10 Requires That the Obligation Be Severed and Replaced With a Lawful One

Because the Court's interpretation of "provision" implicates Mission's ability to comply with multiple state and federal laws, the Court should grant reconsideration and withdraw the order granting summary judgment on the word "provision." If it does not, there is a potential knock-on remedy that neither party briefed nor asked for: severability. If the Court's reading stood, and if in implementation Mission were faced with the possibility of violating certain state or federal laws, Section 13.10 of the A&R APA requires any unlawful provision to be severed and replaced with a legal and enforceable provision "as similar in terms to

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[7] Unlike the Anti-Kickback Statute, the Stark Law imposes liability without regard to intent: an arrangement that fails any element of an applicable exception taints every resulting Medicare referral. *See* 42 U.S.C. §1395nn(a)(1); 42 C.F.R. §411.353(a).

such illegal, invalid or unenforceable provision as may be possible." *See* A&R APA §13.10(d). Here, for the reasons set forth above, it is not clear what similar interpretation of the purchase agreement that is consistent with law could be provided other than the one put forth by Mission: Section and Schedule 7.13(a) obligate Mission to take all lawful steps to maintain the capacity through which qualified, independent physicians can deliver the listed medical services. In other words, the parties' own severability mechanism confirms that, even if Judge Earp correctly interpreted "provision" standing alone, the only enforceable version of Section 7.13(a) is one that does not require Mission to seek to control or dictate physicians' independent medical judgments.

V.Conclusion

The Court should reconsider its ruling on the meaning of "provision" and deny summary judgment to Plaintiff.

Submitted October 15, 2026.

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Compliance. This brief complies with Business Court Rule 7.8 because the body of this document, including footnotes, is at most 7,500 words.

Service. Under Business Court Rule 3.9, this brief was served automatically by electronic filing.

Certified October 15, 2026.

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