

RENDERED: SEPTEMBER 30, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001318-MR

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH AND FAMILY SERVICES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 07-CI-02063

FLEMING REGIONAL MEDICAL
IMAGING, PLLC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: The Cabinet for Health and Family Services (the Cabinet) appeals from the Franklin Circuit Court's opinion and order finding that Fleming Regional Medical Imaging, PLLC (Medical Imaging) is exempt from the certificate of need requirements of Kentucky Revised Statutes (KRS) Chapter 216B. On appeal, the Cabinet argues that its regulations setting forth factors a

hearing officer should consider when determining whether a certificate of need exemption is appropriate are consistent with the Act. The Cabinet also argues that the circuit court's conclusion to the contrary should be reversed. We note that the Cabinet initially appealed the circuit court's finding that Medical Imaging had the burden of proof and that the hearing officer's review should be limited in scope. However, the Cabinet, in its brief, stated that it now agrees with the circuit court's conclusions regarding those two issues. For the following reasons, we affirm.

FACTS¹

Three physicians, one specializing in primary care (Dr. Womack) and two radiologists (Drs. Dineen and Crutcher), formed Medical Imaging to establish and operate an MRI facility in Fleming County, Kentucky, in office space adjacent to Dr. Womack's office. Prior to opening the facility, Medical Imaging sought an advisory opinion from the Cabinet regarding its status as a facility exempt from the certificate of need requirements. The Cabinet initially determined that Medical Imaging was not exempt but, upon receipt of additional information, issued a second advisory opinion finding that Medical Imaging was exempt as a private physician office. Fleming County Hospital District, D/B/A Fleming County Hospital (the Hospital) and the Kentucky Hospital Association (the Association) requested a hearing. Following that hearing, the hearing officer determined that

¹ We set forth only a brief summary of the facts herein. For a more complete summary of the facts, see the companion opinion, *Fleming County Hospital District, D/B/A Fleming County Hospital; and The Kentucky Hospital Association v. Fleming Regional Medical Imaging, PLLC and Commonwealth Of Kentucky, Cabinet For Health and Family Services*, 2009-CA-001275-MR, to be rendered contemporaneously with this opinion.

Medical Imaging did not meet the criteria for the exemption. Medical Imaging then sought review in the Franklin Circuit Court. The court reversed the hearing officer and the Cabinet, the Hospital, and the Association requested reconsideration, which the court denied. The Hospital and the Association filed an appeal (2009-CA-00-1275) and the Cabinet also appealed (2009-CA-001318).

ANALYSIS

As we understand it, the Cabinet argues that the circuit court erred when it reversed the hearing officer because the court: (1) misinterpreted the statutory and regulatory scheme; (2) allegedly found that a physician-owned facility gets a "free pass" with regard to certificate of need regulations; and (3) found that the Cabinet could not apply the criteria in 900 KAR 6:050 § 18(9)(a)² because they conflict with KRS 216B.020(2)(a). We disagree with the Cabinet's arguments because we believe that they misconstrue the circuit court's orders.

The Cabinet's first and third arguments appear to involve its belief that the court found that the criteria in 900 KAR 6:050 § 18(9)(a) are in conflict with KRS 216B.020(2)(a) and *Gilbert v. Cabinet for Health and Family Services*, 291 S.W.3d 712 (Ky. App. 2008). Taken in isolation, some of the court's statements could lead to that conclusion. However, we believe that the court's statements, taken in context, reflect its belief that the provisions of 900 KAR 6:050 § 18 do not apply to Medical Imaging. We cannot disagree.

² In 2009, the Cabinet revised and renumbered its regulations; however, we refer and cite to the regulations as they existed at time the underlying litigation took place.

900 KAR 6:050 § 18(1) states that "[t]he cabinet may conduct a show cause hearing . . . in order to determine if a person has established or is operating a health facility or health service in violation of the provisions of KRS Chapter 216B" 900 KAR 6:050 § 18(9)(a) states that the hearing officer shall base his or her findings on certain factors "if it is alleged that an office or clinic offering services or equipment covered by the State Health Plan was established or is operating in violation of KRS 216B.020(2)(a)"

The members of Medical Imaging were contemplating opening an MRI facility and had taken some steps toward achieving their goal of doing so. However, Medical Imaging had not established and was not operating an office or clinic. Therefore, 900 KAR 6:050 § 18 would not apply and any statement by the circuit court regarding the Cabinet's misinterpretation or narrow reading of that regulation is inconsequential.

We recognize that 900 KAR 6:050 § 18(1) indicates that its show cause hearing regulations cover hearings requested pursuant to *Humana of Kentucky v. NKC Hospitals*, 751 S.W.2d 369 (Ky. 1988), a case involving an advisory opinion. However, unlike herein, the advisory opinion in *Humana of Kentucky* dealt with an existing and established service. Reading 900 KAR 6:050 § 18(1) in its entirety, it is clear that the provisions of that regulation apply to advisory opinions related to established or operational facilities or services. Those provisions do not apply to advisory opinions regarding facilities or services that are in the planning stages.

As to the second argument, the circuit court did not find that physician ownership amounts to a "free pass" with regard to the certificate of need requirements. The court found that the evidence supported only one conclusion, that Drs. Womack, Dineen, and Crutcher were the sole owners of Medical Imaging. There was evidence that other ownership configurations had been discussed; however, none were implemented. There was evidence that other physicians had sought loans at the same time Medical Imaging was being formed. However, there was no evidence that any loans were actually taken or that any other physicians were participating financially in Medical Imaging. Therefore, the circuit court correctly determined that Medical Imaging was wholly physician-owned.

However, that was not the sole basis for the court's determination. The court found that there was evidence that the majority of, if not all, patient referrals would come primarily from Dr. Womack's practice; that all three physician owners would provide patient services within the facility; and that the facility was adjacent to Dr. Womack's practice. These factors are consistent with this Court's holding in *Gilbert*, and we discern no error in the circuit court's reliance on them.³

³ For an analysis of *Gilbert*, see the companion opinion, *Fleming County Hospital District, D/B/A Fleming County Hospital; and The Kentucky Hospital Association v. Fleming Regional Medical Imaging, PLLC and Commonwealth Of Kentucky, Cabinet For Health and Family Services*, 2009-CA-001275-MR, to be rendered contemporaneously with this opinion.

Finally, we note that, almost as an aside, the Cabinet argues that the circuit court erred by reversing the hearing officer. For the reasons stated in the companion opinion, *Fleming County Hospital District, D/B/A Fleming County Hospital; and The Kentucky Hospital Association v. Fleming Regional Medical Imaging, PLLC and Commonwealth Of Kentucky, Cabinet For Health and Family Services*, 2009-CA-001275, we disagree.

CONCLUSION

For the above reasons, we affirm the circuit court.

ALL CONCUR.

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BRIEF AND ORAL ARGUMENT
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