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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001638-MR

JENNIE STUART MEDICAL
CENTER, INC. APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NOS. 09-CI-00478 & 09-CI-00487

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; AND
THE TROVER CLINIC FOUNDATION,
INC., D/B/A REGIONAL MEDICAL
CENTER OF HOPKINS COUNTY APPELLEES

OPINION
REVERSING AND REMANDING WITH DIRECTIONS

** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, JUDGE: Jennie Stuart Medical Center, Inc. (Jennie Stuart) appeals from an opinion and order of the Franklin Circuit Court affirming the decision of the Commonwealth of Kentucky, Cabinet for Health and Family Services (Cabinet) to disapprove its application for a Certificate of Need (CON). Jennie Stuart sought approval to convert two existing Level II neonatal intensive care unit beds into Level III beds. Approval was denied because Jennie Stuart did not intend to provide, nor was it capable of providing, all levels of Level III care. Jennie Stuart contends that the circuit court erred in finding that the Cabinet had correctly interpreted the applicable standard of review and in determining that it did not have the authority to "second guess" the Cabinet's interpretation. For the reasons expressed herein, we agree. Hence, we reverse the circuit court's decision and remand this matter to the Cabinet for approval of Jennie Stuart's application.

Prior to reaching the merits of this appeal, we must first address the Cabinet's failure to file a brief in this matter. Our rules of procedure direct us in such situations as follows:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

Kentucky Rules of Civil Procedure (CR) 76.12(3)(c). We have opted to accept Jennie Stuart's statement of the facts and issues as correct pursuant to subsection (i), but we shall address Jennie Stuart's arguments on the merits.

Jennie Stuart is a Joint Commission-accredited Kentucky nonprofit corporation that operates an acute care hospital in Hopkinsville, Kentucky. One service it provides is obstetrical care. To that end, Jennie Stuart operates a six-bed Level II neonatal intensive care unit (NICU) to care for infants at or above specified gestational ages and weights who have medical issues.

In order to maintain its special care neonatal beds, Jennie Stuart must operate consistently within the State Health Plan. The State Health Plan, in turn, is to incorporate the most recent version of the American Academy of Pediatrics and the American College of Obstetrics and Gynecology *Guidelines for Perinatal Care* (*Guidelines*). The most recent version of the *Guidelines* was released in 2008, and it included an expanded classification system for Level II and Level III beds. The *Guidelines* now describe Level III NICUs as follows:

> Level IIIA NICUs can provide for newborns with a birth weight of more than 1,000g and a gestational age of more than 28 weeks. Continuous life support can be provided but is limited to conventional mechanical ventilation. Minor surgical procedures can be performed. Level IIIB NICUs care for infants with extreme prematurity (28 weeks of gestation or less) or extremely low birth weight (1000g or less) or who have severe or complex illnesses. Advanced respiratory support, including high-frequency ventilation and inhaled nitric oxide, and physiologic monitoring equipment must be available. Level IIIC NICUs, which may be located at childrens hospitals, have the capabilities of Level IIIB NICUs and also are located within an institution with the capability of providing extracorporeal membrane oxygenation and performing surgical repair of complex congenital cardiac malformations that require cardiopulmonary bypass.

Under the new edition, Jennie Stuart discovered that some of its Level II care overlapped into Level IIIA care. Therefore, in 2008, Jennie Stuart applied for a CON pursuant to KRS 216B.010, *et seq.*, and the applicable regulations, to convert two of its Level II beds to Level IIIA beds so that it could continue to care for its patients as it had prior to the updated edition. In early 2009, the Cabinet held a comparative hearing on Jennie Stuart's application.[2] The Cabinet then entered its order disapproving the application because Jennie Stuart failed to establish consistency with the State Health Plan pursuant to KRS 216B.040(2)(a)2.a and 900 Kentucky Administrative Regulations (KAR) 6:050 § 7(1).[3] The circuit court affirmed the Cabinet's order, and this appeal now follows.

In *Starks v. Kentucky Health Facilities*, 684 S.W.2d 5, 6-7 (Ky. App. 1984), this Court stated that as follows:

> If the findings of fact of an administrative agency are supported by substantial evidence of probative value, they must be accepted as binding upon the reviewing court, and the resulting question is whether or not the agency applied the correct rule of law to the facts so found. . . . [W]e believe the criteria provided in KRS 216B.040(2) for the issuance of a certificate place broad discretion in the board. The board is restricted only from arbitrary and capricious acts within the traditional framework of the foregoing authority. [Citations omitted.]

[2] The Trover Clinic Foundation, Inc., d/b/a Regional Medical Center of Hopkins County, an appellee herein, also sought a CON to obtain two Level III beds. The Cabinet held a comparative hearing and considered both applications together. Regional Medical Center did not appeal the circuit court's order affirming the denial of its application.

[3] 900 KAR 6:050 is no longer in effect.

In the present matter, Jennie Stuart does not dispute the Cabinet's findings of fact. Rather, Jennie Stuart contends that the Cabinet misapplied the applicable statutes and regulations. Therefore, we shall closely examine the provisions at issue.

KRS 216B.040(2)(a)2 and 900 KAR 6:050 § 7(1), the accompanying regulation then in effect, require an applicant to establish five criteria in order to be awarded a CON. These criteria include consistency with plans; need and accessibility; interrelationships and linkages; costs, economic feasibility and resource availability; and quality. There is no dispute that Jennie Stuart established all but the first criterion, consistency with the State Health Plan. Accordingly, that is the only criterion we shall address.

The 2007-2009 version of the State Health Plan, in effect at the time of Jennie Stuart's application, provides that the following criteria must be met in order for Level III beds to be approved:

> 1. Approval of the application does not cause the number of Level III beds in the Commonwealth to exceed the following calculation:
>
> **(Total annual state births for the plan year/1000) • 1 = Maximum number of Level III beds in the state**
>
> 2. The Cabinet determines that more Level III beds than indicated by the above calculation are justified in order to allow for the presence of hospitals that provide a higher intensity of neonatal care than that provided by most hospitals, due to a high percentage of neonatal patient referrals for specialized services such as open-heart surgery, transplants, etc.;
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> 3. No new Level III program shall be approved in the ADD unless the overall utilization of existing providers of Level III services in the ADD is at least seventy-five

(75) percent as computed from the most recently published inventory and utilization data;

4. No additional beds shall be approved for an existing unit unless the utilization of this unit is at least seventy-five (75) percent as computed from the most recently published inventory and utilization data; and

5. The application documents consistency with the most recent published edition of the American Academy of Pediatrics and the American College of Obstetrics and Gynecology *Guidelines for Perinatal Care*.

In its order, the Cabinet addressed Jennie Stuart's application as it related to consistency with the State Health Plan:

15. It is undisputed that Jennie Stuart's application does not satisfy Special Care Neonatal Beds review criterion 1, as the calculated ratio allows for 56 Level III neonatal beds within the Commonwealth, and the *2007 Annual Kentucky Utilization and Service Report* indicates that Kentucky currently has 157 Level III neonatal beds, with 80 located at Kosair Children's Hospital in Louisville; 16 at the University of Louisville Hospital; 10 at Norton Suburban Hospital in Louisville; 50 at University of Kentucky Hospital in Lexington, and one at King's Daughters Medical Center in Ashland.

16. Because it does not meet review criterion 1, Jennie Stuart must meet review criterion two, and prove to the Cabinet that more Level III beds are justified, because it provides a higher intensity of neonatal care than that provided by most hospitals, due to a high percentage of neonatal patient referrals for specialized services such as open-heart surgeries, transplants, etc. [Because Level III is such a specialized level of care anyhow, the phraseology of the review criterion becomes important, in an analysis of its intent. While the SHP does not specifically delineate among Level III-a, -b, and –c services, the plain language of review criterion 2 references surgical procedures, *explicitly*, when describing the specialized services that are necessary to

> justify an exception to the SHP-calculated need for Level III special care neonatal beds. No other types of neonatal medical services are listed for illustrative purposes. Therefore, the undersigned concludes that the intent of review criterion 2 is to provide a narrowly-tailored exception to the review criterion 1 calculation only in the most extreme cases: when a hospital is able to provide the highest level of neonatal care – Level III-c surgical neonatal services.][4] As Jennie Stuart proposes only to offer Level III-a services, its application does not satisfy review criterion 2.
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> 17. Review criterion 3 is not applicable to Jennie Stuart.
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> 18. Review criterion 4 is not applicable to Jennie Stuart.
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> 19. Jennie Stuart participates in the Vermont-Oxford Network data collection system, which enables the hospital to better increase the effectiveness and efficiency of its neonatal services. Jennie Stuart attests in its application that its neonatal staff complies with the *Guidelines for Perinatal Care*. Jennie Stuart's application satisfies review criterion 5.
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> 20. Based on the foregoing, Jennie Stuart's application is not consistent with statutory Criterion 1 and regulatory criterion 7(1).

The Cabinet's conclusion in paragraph 16 is the basis of Jennie Stuart's appeal.

The crux of Jennie Stuart's argument on appeal is that the circuit court erred in upholding the Cabinet's ruling despite its misinterpretation and misapplication of the statutes and regulations. Jennie Stuart contends that the Cabinet misinterpreted one phrase in the Level III criteria; namely, ". . . hospitals

[4] The bracketed portion included above is taken from the Cabinet's ruling regarding Regional Medical Center's application, which was incorporated by reference in the portion ruling on Jennie Stuart's application.

that provide a higher intensity of neonatal care than that provided by most hospitals due to a high percentage of neonatal patient referrals for specialized services such as open-heart surgery, transplants, etc." Jennie Stuart's argument is this: the Cabinet construed the above phrase to mean that no applicant would be approved for Level III services unless it was able to provide neonatal heart or transplant surgeries, procedures only pediatric teaching facilities are permitted to perform under the State Health Plan. And the only two pediatric teaching facilities in the Commonwealth, Norton Kosair Children's Hospital and the University of Kentucky Medical Center, already have a combined total of 138 Level III beds. In light of these facts, the Cabinet's construction of the phrase renders the provision meaningless, making the ultimate ruling arbitrary and without a rational basis. We agree with Jennie Stuart's argument.

The Supreme Court of Kentucky addressed statutory construction in *Reyes v. Hardin County*, 55 S.W.3d 337, 342 (Ky. 2001):

> "The universal rule is, that in construing statutes it must be presumed that the Legislature intended something by what it attempted to do. . . ." *Grieb v. National Bond & Inv. Co.*, 264 Ky. 289, 94 S.W.2d 612, 617 (1936) (emphasis added). "All statutes are presumed to be enacted for the furtherance of a purpose on the part of the legislature and should be construed so as to accomplish that end rather than to render them nugatory." *Commonwealth ex rel. Martin v. Tom Moore Distillery Co.*, 287 Ky. 125, 152 S.W.2d 962, 967 (1939).

In a later opinion, the Court held:

> Statutes should be construed in such a way that they do not become ineffectual or meaningless. Any apparent

> conflict between sections of the same statute should be harmonized if possible so as to give effect to both sections.
>
> . . . .
>
> The statute must be read as a whole and in context with other parts of the law. All parts of the statute must be given equal effect so that no part of the statute will become meaningless or ineffectual.

Lewis v. Jackson Energy Co-op. Corp., 189 S.W.3d 87, 91-92 (Ky. 2005) (internal citations omitted). Finally, the Court has held that:

> [O]ur goal in construing a statute is to give effect to the intent of the General Assembly, and we derive that intent, if at all possible, from the plain meaning of the language the General Assembly chose. We presume, of course, that the General Assembly intended for the statute to be construed as a whole and for all of its parts to have meaning. We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one.

King Drugs, Inc. v. Commonwealth of Kentucky, Revenue Cabinet, 250 S.W.3d 643, 645 (Ky. 2008) (internal citations omitted).

Based upon these rules of statutory construction and taking the latest version of the *Guidelines* into consideration, the Cabinet construed the phrase at issue in the State Health Plan too narrowly by limiting approval of any new Level III beds to only those facilities able to offer all categories of Level III care. If this were the correct interpretation, no facility would be permitted to add any Level III beds. The criterion at issue in the State Health Plan must be construed in harmony with the *Guidelines*, which now subcategorizes Level III beds into three levels of

care. To hold otherwise would certainly render the criterion in the State Health Plan meaningless, as the only facilities eligible for Level III beds already have a vast number of them.

In its opinion and order affirming, the circuit court determined that the Cabinet's interpretation of the regulation was reasonable and, as such, that it must defer to that interpretation. The circuit court also determined that the narrow construction applied by the Cabinet did not lead to an absurd result because it was calculated to protect premature infants. However, this statement was based upon a citation to the *Guidelines* that addressed only Level IIIB and Level III NICUs, not Level IIIA NICUs, which is the level at which Jennie Stuart was seeking a CON. Furthermore, we disagree with the circuit court's statement that it did not have the authority to second guess the Cabinet's interpretation. *See Durbin Orthopaedic Center, PSC v. Commonwealth, State Bd. of Physical Therapy*, 294 S.W.3d 421 (Ky. 2009) (holding that statutory provisions must be construed according to the intent of the General Assembly and harmonized to avoid an absurd or nonsensical result).

Accordingly, we hold that the circuit court erred in upholding the Cabinet's disapproval of Jennie Stuart's application because the Cabinet misapplied and misinterpreted the second criterion of the State Health Plan's Criterion 1 for approval of Level III beds. Therefore, we reverse the opinion and order of the Franklin Circuit Court. Because the Cabinet found that the application

was consistent with all other criteria, we remand this matter to the Cabinet for approval of Jennie Stuart's application for a Certificate of Need.

ALL CONCUR.

BRIEF FOR APPELLANT:

Colleen McKinley
Louisville, Kentucky

No appellee brief filed.