

RENDERED: AUGUST 23, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001096-MR

THE CHRIST HOSPITAL CORPORATION, INC.

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NOS. 16-CI-00936 AND 17-CI-00715

SAINT ELIZABETH MEDICAL CENTER, INC.;
COMMONWEALTH OF KENTUCKY;
THE SECRETARY FOR THE KENTUCKY CABINET
FOR HEALTH AND FAMILY SERVICES; AND
THE KENTUCKY CABINET FOR HEALTH AND
FAMILY SERVICES, OFFICE OF HEALTH POLICY

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, TAYLOR AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: The Christ Hospital Corporation, Inc., appeals from an opinion and order of the Franklin Circuit Court which reversed a final order of the administrative branch of the Cabinet for Health and Family Services and which

granted summary judgment in favor of Saint Elizabeth Medical Center, Inc.

Finding no error in the order of the circuit court, we affirm.

This case concerns Christ Hospital's application for a certificate of need ("CON") in order to build an ambulatory surgical center ("ASC") in Fort Mitchell, Kenton County, Kentucky. An ASC primarily provides outpatient surgical services. A CON is needed in order to build new medical facilities.

Kentucky Revised Statute (KRS) 216B.010 states:

The General Assembly finds that the licensure of health facilities and health services is a means to insure that the citizens of this Commonwealth will have safe, adequate, and efficient medical care; that the proliferation of unnecessary health-care facilities, health services, and major medical equipment results in costly duplication and underuse of such facilities, services, and equipment; and that such proliferation increases the cost of quality health care within the Commonwealth. Therefore, it is the purpose of this chapter to fully authorize and empower the Cabinet for Health and Family Services to perform any certificate-of-need function and other statutory functions necessary to improve the quality and increase access to health-care facilities, services, and providers, and to create a cost-efficient health-care delivery system for the citizens of the Commonwealth.

In order to obtain a CON, an applicant must meet certain requirements set forth in the Cabinet's State Health Plan.¹ From 1999 to 2015, the State Health Plan provided that a CON could be issued if overall surgical utilization in a certain

¹ The State Health Plan is incorporated into the Kentucky Administrative Regulations (KAR) pursuant to 900 KAR 5:020.

planning area² is at least 85%. The State Health Plan contained an exception to this rule for ASCs. If an ASC was limited to a specific type of procedure that patients were not receiving in the planning area, then a CON could be issued even if the 85% surgical utilization condition was not met. Under this exception, the ASC could only perform those surgeries not being performed in the planning area. It could not perform procedures that were already available in the planning area.

In 2015, the Cabinet sought to overhaul the CON procedures and make changes to the State Health Plan. One such change was to the ASC exemption. The new version allowed an ASC to be built, even if the 85% condition is not met, in counties with a population equal to or greater than 75,000 if the applicant could identify surgical procedures that were not being performed in the planning area. Unlike the previous version, an ASC would not be limited in the types of surgical procedures it could perform. The ASC would have to perform the procedures not already being offered in the area, but it could also perform procedures already available in the area.³

In April of 2016, Christ Hospital filed a CON application to establish an ASC in Fort Mitchell. Saint Elizabeth challenged the application and sought a

² A planning area is the county in which the proposed medical facility will be built and all contiguous counties.

³ The new version of the ASC exemption has since been rescinded and the previous version is now in effect. This Court's ruling in this case will only affect Christ Hospital's CON application as it was the only entity that sought to take advantage of the new version of the ASC exemption while it was in effect.

public hearing pursuant to KRS 216B.085. A public hearing was held on August 23 to 26, 2016, and January 3 to 6, 2017. The hearing was administered by Administrative Law Judge (ALJ) Cheryl Neff. Christ Hospital presented evidence showing that there were multiple surgical procedures not being performed in the Northern Kentucky planning area. Christ Hospital limited its evidence to outpatient procedures only. Saint Elizabeth provided evidence that if you include inpatient procedures, then there were zero procedures not being performed in the Northern Kentucky planning area.

On June 8, 2017, an order was entered approving the CON application. Saint Elizabeth appealed this decision to the Franklin Circuit Court. Saint Elizabeth also filed an original action challenging the revised State Health Plan's new ASC exception. Saint Elizabeth alleged that the new plan violated the Kentucky Constitution and KRS 216B.010, the CON enabling statute. Both cases were consolidated by the circuit court.

The trial court ultimately found in favor of Saint Elizabeth on all issues. The court held that the new ASC exception violated KRS 216B.010 because it allowed for the duplication of healthcare services. The court also held that the exception violated Section 59 of the Kentucky Constitution because it is impermissible special legislation. Additionally, the court held that the exception violated Section 2 of the Kentucky Constitution because parts of it were arbitrary.

Finally, the court held that the findings made by the ALJ were not supported by substantial evidence and that the ALJ erred in her legal conclusions. This appeal followed.

Christ Hospital raises distinct issues on appeal. These issues can be narrowed down into three categories: (1) that the trial court impermissibly substituted its own facts for those of the ALJ; (2) that the revised CON regulation did not violate the Kentucky Constitution; and (3) that the revised CON regulation did not violate KRS 216B.010. Because we are affirming the trial court's holdings that the ALJ erred, that the new CON regulation violates the Kentucky Constitution, and that the new regulation violates KRS 216B.010, we need not address every issue raised by Christ Hospital. We will, therefore, only discuss four claims of error raised on appeal as they will determine the ultimate issue, whether or not Christ Hospital can build an ASC.

We will first examine the ALJ's order. The trial court held that the ALJ's findings of fact were not supported by substantial evidence. The trial court set forth multiple facts which it believed were not supported by substantial evidence. We will examine one of these issues.

The trial court held that the ALJ improperly interpreted the ASC exclusion. The full exclusion states:

Notwithstanding criterion 2 [(the 85% surgical utilization condition)], an application to establish an ASC in a

county with a population $\geq 75,000$ shall be consistent with the Plan if the following conditions are met:

- a. The applicant documents that patients are not receiving the specific type of surgical procedures (as identified by procedure codes) proposed by the applicant at facilities in the planning area; and
- b. The application contains an explanation of why the unmet need for the specific type of surgical procedure has not been reasonably addressed by providers in the planning area[.]

2015-2017 State Health Plan: Certificate of Need Review Standards, p. 58-59

(August 2015). Christ Hospital's evidence of procedures not being performed consisted of evidence from ASCs and only identified outpatient procedures. Christ Hospital did not include procedures done in inpatient settings, at emergency rooms, or in doctor's offices.

The ALJ found this to be acceptable because the exception at issue concerned ASCs. The trial court held that this was an erroneous interpretation of the ASC exception. The trial court believed that nothing in the language of the exception limited the procedure examination to outpatient procedures only. We agree with the trial court.

This Court's standard of review for an administrative adjudicatory decision is the clearly erroneous standard. *Stallins v. City of Madisonville*, 707 S.W.2d 349, 351 (Ky. App. 1986). A decision is clearly erroneous if it is not supported by substantial evidence. *Id.*

Substantial evidence is defined as evidence, taken alone or in light of all the evidence, that has sufficient probative value to induce conviction in the minds of reasonable people. If there is substantial evidence to support the agency's findings, a court must defer to that finding even though there is evidence to the contrary. A court may not substitute its opinion as to the credibility of the witnesses, the weight given the evidence, or the inferences to be drawn from the evidence. A court's function in administrative matters is one of review, not reinterpretation.

Thompson v. Kentucky Unemployment Ins. Comm'n, 85 S.W.3d 621, 624 (Ky. App. 2002) (footnotes omitted). “[A]n administrative agency’s findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo*.”

Hutchison v. Kentucky Unemployment Ins. Comm'n, 329 S.W.3d 353, 356 (Ky. App. 2010). As the proper interpretation of a statute is purely a legal issue, our review is *de novo*. *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky. App. 2003) (citations omitted).

When this Court engages in statutory interpretation, our main goal is “to give effect to the intent of the General Assembly.” The clearest indicator of that intent is the “language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration.” And “[w]here the words used in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as written.”

Bell v. Bell, 423 S.W.3d 219, 223 (Ky. 2014) (footnotes and citations omitted).

“We must interpret statutes as written, without adding any language to the

statute[.]” *Commonwealth v. Chestnut*, 250 S.W.3d 655, 661 (Ky. 2008) (footnote omitted). “General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy.” *Cty. of Harlan v. Appalachian Reg’l Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002) (citation omitted). “Significant, however, in the interpretation of the administrative regulation . . . is that ‘in the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation.’” *All. for Kentucky’s Future, Inc. v. Env’tl. & Pub. Prot. Cabinet*, 310 S.W.3d 681, 687 (Ky. App. 2008), *as modified* (2009) (citation omitted).

Here, allowing Christ Hospital to only present evidence of outpatient surgical procedures and procedures performed at ASCs was erroneous. The exclusion states that Christ Hospital must present evidence of “surgical procedures” not being performed at “facilities” in the planning area. There is no limiting language. Christ Hospital should have presented evidence regarding outpatient and inpatient procedures, as well as procedures performed at ASCs, hospitals, emergency rooms, and doctor’s offices. Limiting the evidence would be adding words to the regulation. In addition, when looking at the CON regulation as a whole, the 85% surgical utilization condition states that it is in regard to inpatient and outpatient surgeries. The ALJ erred in finding that Christ Hospital

met the ASC exception because Christ Hospital did not present a full picture of surgical procedures being performed in the area. As this was the primary issue to be determined at the administrative level, the ALJ's allowing only outpatient data skewed the rest of her findings. For that reason, this is the only issue we will address as it pertains to the ALJ's order.

We will next discuss the issues concerning the Kentucky Constitution.

The trial court held that the ASC exception violates Section 59 of the Kentucky Constitution.

Section 59 of the Constitution provides that the General Assembly shall not pass local or special Acts concerning any of the 28 subjects which are specifically named. After the enumeration of these subjects, the concluding paragraph of the Section contains the all inclusive provision that:

'In all other cases where a general law can be made applicable, no special law shall be enacted.'

It is generally established in this and other jurisdictions to which our investigation has extended that in order for a law to be general in its constitutional sense it must meet the following requirements: (1) It must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification.

The second requirement is as essential as the first. The Legislature can not take what may be termed a natural class of persons, split that class in two and then arbitrarily designate the dissevered factions of the original unit as two classes and thereupon enact different rules for the government of each. It is equally well

established that the classification must be based upon some reasonable and substantial difference in kind, situation or circumstance which bears a proper relation to the purpose of the Statute.

Schoo v. Rose, 270 S.W.2d 940, 941 (Ky. 1954) (citations omitted).

When asserting the validity of a classification, the burden is on the party claiming the validity of the classification to show that there is a valid nexus between the classification and the purpose for which the statute in question was drafted. There must be substantially more than merely a theoretical basis for a distinction. Rather, there must be a firm basis in reality.

Yeoman v. Commonwealth, Health Policy Bd., 983 S.W.2d 459, 468 (Ky. 1998).

The trial court found that there was no justification for the 75,000-population threshold; therefore, limiting the ASC exception to areas with a certain population is a special law not accessible to all areas of Kentucky. We agree.

There was no evidence presented indicating why the Cabinet included the population requirement and no one from the Cabinet testified during the circuit court proceeding. Nor is there any reason given in the CON regulation or State Health Plan as to why this population threshold was inserted into the new version of the regulation.

Christ Hospital argues that the population requirement was meant to protect rural hospitals. Christ Hospital claims that areas with larger populations could support increased competition, but medical providers in rural areas could not survive with increased competition. Christ Hospital points to the Cabinet's

Statement of Consideration to support this theory. When the Cabinet was beginning the process of amending the State Health Plan and the CON regulations, it allowed public comment. Comments and questions were submitted to the Cabinet and the Cabinet responded. The Cabinet provided information and guidance as to why it was making certain changes; however, other than general statements that the revised State Health Plan will benefit rural providers, it does not discuss how the 75,000-population threshold would protect rural providers.

“Although density of population and the size of a city may be a proper basis of valid classification of some subjects, the basis must have a rational or reasonable relation to the differentiating conditions.” *City of Louisville v. Klusmeyer*, 324 S.W.2d 831, 834 (Ky. 1959). While a population threshold could potentially survive a constitutional challenge, there is insufficient evidence in the record before us to allow this one to stand. No one from the Cabinet testified in this case. In addition, the State Health Plan, CON regulations, and Cabinet’s Statement of Consideration do not discuss the reasons behind the new population requirement. Finally, Dan Sullivan, a healthcare planning consultant hired by Saint Elizabeth, provided evidence that the average utilization rate of surgical services in counties with a population of 75,000 or more is 44.3%, and the average utilization rate of surgical services in counties with a population under 75,000 is

43.8%. This shows no material difference in the utilization rate in counties with a higher population.

The new version of the ASC exception discriminates against areas below the population threshold. The old version of the exception did not. The burden of proving the validity of the population threshold was on Christ Hospital, but it could only provide a theoretical basis for it. That is insufficient. *Yeoman, supra.*

We now move on to Section 2 of the Kentucky Constitution. Section 2 of the Kentucky Constitution states that “[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”

Section 2 of the Kentucky Constitution prohibits the exercise of absolute and arbitrary power over the lives, liberty and property of free men. This section has been interpreted to mean that a legislature, or a body acting under legislative authority, may not, “under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupation or impose unreasonable or unnecessary restrictions on them. The regulation of a lawful business is dependent upon some reasonable necessity for the protection of health, safety, morality or other phase of the general welfare. . . .” An exercise of executive authority to promulgate regulations “must have a substantial basis and cannot be made a mere pretext for actions that do not come within its scope.”

Motor Vehicle Comm'n v. Hertz Corp., 767 S.W.2d 1, 2-3 (Ky. App. 1989)

(citations omitted).

The trial court found, amongst other things, that the 75,000-population threshold was arbitrary because it is not found anywhere else in the CON regulations or the State Health Plan. The trial court also cited the evidence provided by Dan Sullivan mentioned above as further proof that the population requirement is arbitrary. We agree with the trial court.

The same arguments raised regarding Section 59 also apply here. Christ Hospital argues that the population threshold is required to protect rural medical providers, and Saint Elizabeth claims that this argument is not supported by evidence and is merely theoretical. There is no evidence that the population threshold protects the health or safety of Kentucky citizens in more rural counties. The ASC exception interferes with the ability of potential ASCs to provide medical care in lower populated areas. Without some explanation as to why the population threshold is necessary, it cannot withstand constitutional scrutiny. The trial court did not err in finding that the new ASC exception is arbitrary and violates Section 2 of the Kentucky Constitution.

Finally, we examine the new ASC exception as it relates to KRS 216B.010, which sets forth the purposes of CON regulations. To review, KRS 216B.010 states:

The General Assembly finds that the licensure of health facilities and health services is a means to insure that the citizens of this Commonwealth will have safe, adequate, and efficient medical care; that the proliferation of unnecessary health-care facilities, health services, and major medical equipment results in costly duplication and underuse of such facilities, services, and equipment; and that such proliferation increases the cost of quality health care within the Commonwealth. Therefore, it is the purpose of this chapter to fully authorize and empower the Cabinet for Health and Family Services to perform any certificate-of-need function and other statutory functions necessary to improve the quality and increase access to health-care facilities, services, and providers, and to create a cost-efficient health-care delivery system for the citizens of the Commonwealth.

Christ Hospital argues that the new exception does not violate KRS 216B.010 because it would provide safe and efficient healthcare and allow for cheaper outpatient services. Saint Elizabeth counters that the new exception promotes the duplication of services in contravention to the statute. The trial court found that the ASC exception violates the express language of the regulation because it promotes the duplication of services. The old version of the exception allowed a new ASC to perform only those surgical procedures not already being performed in the planning area. The new version allows a new ASC to perform all surgical procedures so long as it also performs those not already being done in the area. We find no error in the trial court's holding.

“It is well-established that a regulation is deemed invalid if such regulation is inconsistent or conflicts with statutory law.” *Baptist Convalescent*

Ctr., Inc. v. Boonespring Transitional Care Ctr., LLC, 405 S.W.3d 498, 505 (Ky. App. 2012) (citations omitted).

General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy. The power granted by a statute is not limited to that which is expressly conferred but also includes that which is necessary to accomplish the things which are expressly authorized. In interpreting a statute, this Court must be guided by the intent of the legislature in enacting the law. No single word or sentence is determinative, but the statute as a whole must be considered.

Harlan, 85 S.W.3d at 611 (citations omitted).

When reading the CON statute in its entirety, we agree with the trial court that the new ASC exception violates the statute. KRS 216B.010 indicates that the Cabinet is to perform certificate of need functions to ensure that Kentucky citizens have access to “safe, adequate, and efficient medical care[.]” The statute finds that the proliferation of unnecessary health-care facilities and health services results in “costly duplication and underuse of such facilities, services, and equipment” and that this proliferation “increases the cost of quality health care within the Commonwealth.” *Id.* The statute vests with the Cabinet the ability to create CON regulations in order to “improve the quality and increase access to health-care facilities, services, and providers, and to create a cost-efficient health-care delivery system for the citizens of the Commonwealth.” *Id.*

It is clear from the language of the CON statute that the Kentucky General Assembly believed that the proliferation of unnecessary medical facilities and services increases the cost of quality healthcare and that CON regulations are needed to limit this proliferation to increase access to healthcare providers in a cost-efficient manner. We believe, like the trial court, that the new ASC exception directly contradicts this statute because it allows any new ASC that meets the exception's requirements to perform all surgical procedures, not just those not being performed in the area. This would increase the duplication of procedures in an area, something the CON statute specifically states is anathema to cost-effective, quality healthcare. The old version of the exception did not violate the CON statute because it only allowed a new ASC to perform surgical procedures not already being performed in the area. The trial court did not err in holding that the new ASC exception violated the express language of KRS 216B.010.

Based on the foregoing, we affirm the trial court's judgment.

ALL CONCUR.

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**ORAL ARGUMENT FOR
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