

**IN THE MISSOURI SUPREME COURT**

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**No. SC92015**

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**MERCY HOSPITALS EAST COMMUNITIES  
(f/k/a St. John's Mercy Health System),**

Plaintiff-Appellant,

v.

**MISSOURI HEALTH FACILITIES REVIEW COMMITTEE  
AND JAMES K. TELLATIN,**

Defendants-Respondents,

**PATIENTS FIRST COMMUNITY HOSPITAL,**

Intervenor-Respondent.

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Appeal from the Circuit Court of St. Louis County  
Honorable Richard C. Bresnahan, Circuit Judge

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**SUBSTITUTE BRIEF OF INTERVENOR-RESPONDENT  
PATIENTS FIRST COMMUNITY HOSPITAL**

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## STATEMENT OF FACTS

Pursuant to Rule 84.04(f), Respondent Patients First Community Hospital (“Patients First”) hereby supplements Appellant Mercy Hospitals East Communities (“Mercy”) Statement of Facts for completeness.

This appeal involves a question surrounding the validity of 19 CFR 60-50.400(6)(F)(1) referred to as the “New Hospital Rule.” Mercy contends that the New Hospital Rule conflicts with the Certificate of Need Laws, §197.300 *et seq.* (“CON Laws”), and as such is invalid. The New Hospital Rule was promulgated by the Missouri Health Facilities Review Committee (the “Committee”) pursuant to the powers granted to it in §197.320 R.S.Mo.

Mercy brought the underlying action challenging the Committee’s rule after its competitor Patients First submitted a Letter of Intent to the Committee on April 9, 2010 requesting a non-applicability review for its proposed three-bed hospital with an emergency room in Washington, Missouri. (L.F. 31-38). Patients First requested its non-applicability review after Mercy had revoked the staff privileges of four Patients First cardiologists at Mercy’s hospital in Washington, Missouri. (L.F. 61-62). Patients First estimated the cost of the proposed three-bed hospital to be \$953,750.00, below the statutory minimum. (L.F. 31).

By way of background, before a person can file an application for a Certificate of Need (“CON”), he must submit a Letter of Intent to the Committee. §197.325 R.S.Mo. The Certificate of Need Program staff (CONP) reviews all Letters of Intent to determine if a CON application is required. 19 CSR 60-50.400(6). If the CONP staff determines

that a CON application is not required in a particular instance, the Committee chair can issue a non-applicability CON letter or the CONP staff can add the proposal to the list of non-applicability proposals to be considered at the next regularly scheduled Committee meeting. 19 CSR 60-50.400(6)(C).

Patients First's non-applicability request was originally set on the agenda for the Committee's May 10, 2010 meeting. (L.F. 18). On May 7, 2010, Mercy filed a Verified Petition for Declaratory Judgment, Injunctive Relief and a Writ of Prohibition ("Petition"), and a Motion for Temporary Restraining Order, Preliminary Injunction and Preliminary Order in Prohibition ("Motion") in the Circuit Court of St. Louis County. (L.F. 6-63; 154-185). Mercy wanted the circuit court to issue a preliminary order in prohibition enjoining and prohibiting the Committee from ruling on Patients First's non-applicability determination at its May 10, 2010 meeting. (L.F. 6-63; 154-185). In its Motion, Mercy contended that New Hospital Rule was invalid because it conflicted with the CON Laws. (L.F. 154-185). The Committee removed Patients First's non-applicability determination from the May 10, 2010 agenda, and Mercy consequently cancelled its May 10, 2010 hearing on its Motion. (L.F. 18).

The Committee put Patients First's non-applicability determination on its July 12, 2010 meeting agenda. (L.F. 18). As a result, Mercy again noticed its Motion for hearing on July 1, 2010, but subsequently withdrew its Motion because Patients First was once again removed from the Committee's agenda (scheduled July 12, 2010). (L.F. 3). In its Notice of Withdrawal, Mercy stated that it would set a new hearing date prior to the

Committee's September 13, 2010 meeting when it believed that Patients First's non-applicability determination would be back on the Committee's agenda. (L.F. 3, 97).

Patients First's non-applicability determination was placed on the Committee's September 13, 2010 meeting agenda. (L.F. 184). Mercy re-noticed its Motion for hearing for a third time. (L.F. 2). At the same time, Patients First and the Committee noticed for hearing their Motions to Dismiss Mercy's Petition. (L.F. 2). Mercy's Motion and Patients First's and the Committee's Motions to Dismiss were heard on September 2, 2010. (L.F. 3-4) The circuit court issued an Order and Judgment on September 9, 2010. (L.F. 186-190). In its Order and Judgment, the circuit court granted Patients First's and the Committee's Motions to Dismiss and denied Mercy's Motion for preliminary injunction and preliminary writ in prohibition. (L.F. 187-190). The circuit court ruled that no justiciable controversy existed and the case was not ripe for judicial determination. (L.F. 187). The circuit court further ruled that Mercy failed to demonstrate that it was likely to prevail on the merits in that it had failed to show how the New Hospital Rule was invalid. (L.F. 186-190).

After the circuit court's September 9, 2010 Order and Judgment, at its September 13, 2010 meeting, the Committee voted to issue Patients First a non-applicability review Letter for its proposed three-bed hospital. (L.F. 184). Mercy timely filed an appeal on October 8, 2010 in the Missouri Court of Appeals for the Eastern District of Missouri. (L.F. 191-193). Notably, on March 11, 2010, Mercy also filed a second lawsuit in the Circuit Court of Cole County involving essentially the same facts and law at issue in the present case. In its Cole County action, Mercy sought a similar declaratory judgment

regarding the invalidity of the New Hospital Rule and judicial review of the Committee's decision to grant Patients First a non-applicability review letter with regard to its three-bed hospital.

Oral argument was held before the court of appeals on June 9, 2011. The court of appeals issued an Order dated July 26, 2011. In its Order, the Court held that the New Hospital Rule was valid and that it did not conflict with the statutory scheme enacted by the legislature. (Slip op. at 9-13). The Court of Appeals further held that the legislature intended for new hospitals to qualify as a new institutional health service under subsection (a) of §197.305(9) and not subsections (b) – (g) and, under this construction, the New Hospital Rule implemented the legislature's intent in enacting §197.305(9) without conflicting with the CON Laws. (Slip op. at 13). The Court of Appeals also held that Mercy's challenge to the New Hospital Rule was justiciable because Mercy's claim was ripe and Mercy had standing to bring its claim. (Slip op. at 5-7).

On August 10, 2011, Mercy filed a motion for rehearing and/or transfer to this Court with the Court of Appeals which was denied on August 29, 2011. Mercy then filed an application to transfer with this Court on September 14, 2011. On October 25, 2011, Mercy's application for transfer was sustained, and this matter was ordered transferred to this Court.

**POINTS RELIED ON**

**I. The Circuit Court Correctly Entered Judgment In Favor Of The Respondents Because Appellant Cannot Challenge the Committee's Non-Applicability Review Determination with Respect to Patient First's Three-Bed Hospital Because it Lacks Standing and, Even If Appellant had Standing, it Failed to Exhaust its Administrative Remedies and No Justiciable Controversy Exists.**

§197.335 R.S.Mo.

§536.041 R.S.Mo.

§536.050 R.S.Mo.

§536.053 R.S.Mo.

*Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. banc 1996)

*Boot Heel Nursing Center, Inc. v. Missouri Dept. of Social Services*, 826 S.W.2d 14 (Mo. Ct. App. 1992)

*St. Joseph's Hill Infirmary, Inc. v. Mandl*, 682 S.W.2d 821 (Mo. Ct. App. 1984)

*State ex rel Kansas City Power & Light Co. v. McBeth*, 322 S.W.3d 525 (Mo. banc 2010)

**II. The Circuit Court's Judgment Should Be Affirmed Even If This Court Finds That Appellant Has Standing To Bring This Action Because The New Hospital Rule Is Valid And Does Not Conflict With The Certificate Of Need Laws In That It Requires A Certificate Of Need Application For New Hospitals Costing In Excess Of \$1 Million Which Is Consistent With The Language Of The Certificate Of Need Laws As Amended In 1997.**

§197.305(9) R.S.Mo.

§197.310 R.S.Mo.

§197.315 R.S.Mo.

§197.320 R.S.Mo.

§197.325 R.S.Mo.

§197.366 R.S.Mo.

19 CSR 60-50.200

19 CSR 60-50.400

1979 S.B. No. 22

1997 S.B. No. 373

1996 H.B. 1362

*Bd. of Edu. of the City of St. Louis v. State of Missouri*, 47 S.W.3d 366 (Mo. 2001)

*Huber v. Wells Fargo Home Mort. Co.*, 248 S.W.3d 611 (Mo. banc 2008).

*Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. banc 2011)

*United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907  
(Mo. banc 2006).

## ARGUMENT

**I. The Circuit Court Correctly Entered Judgment In Favor Of The Respondents Because Appellant Cannot Challenge the Committee's Non-Applicability Review Determination with Respect to Patient First's Three-Bed Hospital Because it Lacks Standing and, Even If Appellant had Standing, it Failed to Exhaust its Administrative Remedies and No Justiciable Controversy Exists. (Responds to Appellant's Point I).**

Mercy brought the underlying lawsuit to challenge the application of a rule with regard to Patients First's three-bed hospital, not to challenge the validity of a rule. Far from being a legal attack on the facial validity of the New Hospital Rule, this entire action arises from and depends upon the facts surrounding the efforts of Patients First to build its three-bed hospital. The circuit court was correct in dismissing this action because Mercy lacks standing to bring its claim and, even if it had standing, it failed to exhaust its administrative remedies and no justiciable controversy exists.

***A. Mercy lacks standing to challenge the Committee's non-applicability determination with regard to Patients First's three-bed hospital.***

Mercy alleges that it has standing to challenge the New Hospital Rule pursuant to §536.053 R.S.Mo. However, §536.053 is inapplicable because Mercy is not challenging a Committee rule, but rather challenges the Committee's application of the New Hospital Rule to Patients First's three-bed hospital. It is well settled that a party like Mercy has no standing to appeal a non-applicability determination reached by the Committee with respect to a competitor. The CON Laws and Missouri case law explicitly limit standing

for administrative review to the applicant of a certificate of need. As a competitor of Patients First, Mercy has no standing to challenge the Committee's issuance of a non-applicability determination with respect to Patients First's three-bed hospital, and its claims are nothing more than an attempt to stifle its competition. See §197.335 R.S.Mo.; *St. Joseph's Hill Infirmary, Inc. v. Mandl*, 682 S.W.2d 821, 824 (Mo. Ct. App. 1984); *Medical Management v. Missouri Health Facilities Review Comm.*, 904 S.W.2d 291 (Mo. Ct. App. 1995); *Community Care Centers, Inc. v. Missouri Health Facilities Review Comm.*, 735 S.W.2d 13, 14 (Mo. Ct. App. 1987). Notably, this is not the first time Mercy has attempted to forestall competition.<sup>1</sup>

Mercy cannot attempt to subvert its lack of standing to appeal the Committee's decision regarding Patients First's non-applicability determination by purporting to challenge the validity of the CON Laws and the New Hospital Rule. Mercy's lawsuit was nothing more than an attempt to "appeal" the Committee's decision regarding Patients First's three-bed hospital before the decision was even made. The lower court

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<sup>1</sup> In November 2009, Mercy revoked the medical staff privileges of four board-certified cardiologists who live and practice in Franklin County, announcing that it would only provide cardiovascular services exclusively through Mercy-employed physicians. As a result, the four excluded physicians could not treat their patients in Mercy's emergency room and had no place to care for patients requiring overnight monitoring. To enable these physicians to provide the necessary services to their patients, Patients First sought to construct and operate the proposed three-bed hospital at issue in this case.

was correct in dismissing Mercy's Petition because Mercy has no standing to bring its claims.

***B. Mercy failed to exhaust its administrative remedies in that it did not meet any of the criteria for excuse of exhaustion of remedies set forth in §536.050 R.S.Mo.***

Even if it has standing to bring this action, Mercy is still subject to the requirement that it exhaust its administrative remedies before filing suit. Missouri law is clear that an available administrative remedy must be exhausted before a court can give injunctive or declaratory relief, and the failure to exhaust an administrative remedy deprives a court of jurisdiction. *Boot Heel Nursing Center, Inc. v. Missouri Dept. of Social Services*, 826 S.W.2d 14, 16 (Mo. Ct. App. 1992).

Mercy attempts to argue that it does not have to exhaust its administrative remedies pursuant to §§536.053 and 536.050 R.S.Mo. As a preliminary matter, §536.053 is not applicable in the present case because, as stated above, this statute governs a party's standing to challenge a rule, not the standing to challenge the specific application of a rule. With regard to §536.050, Mercy simply failed to exhaust its administrative remedies. Pursuant to §536.050.2, Mercy would not be required to exhaust an administrative remedy if the court determined that:

- (1) The administrative agency has no authority to grant the relief sought or the administrative remedy is otherwise inadequate; or
- (2) The only issue presented for adjudication is a constitutional issue or other question of law; or

- (3) Requiring the person to exhaust any administrative remedy would result in undue prejudice because the person may suffer irreparable harm if unable to secure immediate judicial consideration of the claim...

Mercy cannot invoke any of these exceptions to exhaustion.

First, Mercy has failed to meet the exception set out in §536.050.2(1) because at the time the lower court entered its Order, the Committee had the authority to grant the relief Mercy sought. Mercy wanted the Committee to deny Patients First a non-applicability review letter with regard to its three-bed hospital. The Committee had the authority to do this because the Committee is vested with the authority to make CON determinations, and it had not yet ruled on Patients First's non-applicability review letter at the time the lower court entered its Order.

To the extent that Mercy was requesting that the Committee amend or repeal the New Hospital Rule in order to prevent the Committee from granting Patients First a non-applicability review letter, it could have done so pursuant to §536.041 R.S.Mo. Section 536.041 specifically states that:

Any person may petition an agency requesting the adoption, amendment or repeal of any rule. Any agency receiving such a petition or other request in writing to adopt, amend or repeal any rule shall forthwith furnish a copy thereof to the joint committee on administrative rules and to the commissioner of administration, together with the action, if any, taken or

contemplated by the agency as a result of such petition or request, and the agency's reasons therefore.

Mercy failed to make any such request to the Committee before filing its lawsuit.

Furthermore, despite the fact that the Committee granted Patients First a non-applicability review letter at its September 13, 2010 meeting, the Committee still had the power to invalidate Patients First's non-applicability review letter, and could grant Mercy its requested relief, if Patients First's project exceeds the applicable expenditure minimum. Mercy argues that Patients First's three-bed hospital exceeds the expenditure limit set forth in §197.305(9)(a) and, therefore, it requires a CON. The Committee has regulations in place that would prevent Patients First from building a three-bed hospital in excess of the expenditure minimum without a CON. For example, pursuant to 19 CSR 60-50.400(6)(E), if Patients First's three-bed hospital was to exceed the expenditure minimum, its Non-Applicability CON Letter would be invalidated and a CON would be required. Mercy's concern over the cost of Patients First's three-bed hospital is alleviated by the requirements set forth in 19 CSR 60-50.400(6)(E).

Similarly, Mercy cannot show that it falls under the exhaustion exception in §536.050.2(2) because the issue presented to the lower court was not solely a constitutional issue or question of law. A declaratory judgment action, where the only issue presented is a challenge to a regulation of a state administrative agency, would not require exhaustion of administrative remedies. *Boot Heel Nursing Center, Inc.*, 826 S.W.2d at 16. However, a "challenge to the construction and application of an administrative regulation which requires a review of the facts relating thereto presents

matters other than purely legal issues of constitutionality. Such a challenge requires exhaustion of administrative remedies to develop a factual record for review.” *Id.* (emphasis added).

In the present case, Mercy is seeking a declaratory judgment about the Committee’s regulations as they apply to Patients First’s three-bed hospital. Mercy’s only concern is the Committee’s non-applicability determination with regard to Patients First’s three-bed hospital, not with the general application of the Committee’s rules.<sup>2</sup> This point is made clear by the fact that Mercy spends four pages of its Amended Petition alleging that Patients First’s three-bed hospital requires a CON because it exceeds the \$1 million expenditure limit set out in §197.305(9)(a) because Patients First has failed to disclose certain costs and expenditures. (L.F. 15-20). Patients First has, in fact, not exceeded the expenditure limit. Nevertheless, whether or not Patients First has exceeded the \$1 million expenditure limit is a question of fact, not a legal issue.

Lastly, Mercy cannot show that it falls under the exception stated in §536.050.2(3) because exhausting its administrative remedies would not result in undue prejudice or

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<sup>2</sup> Notably, Mercy cannot find the general application of the Committee’s regulations objectionable as Mercy has availed itself of the Committee’s non-applicability procedures in the past. For example, in 2008, Mercy requested and obtained a non-applicability CON letter to move a linear accelerator (with a fair market value of less than \$1,000,000), which provides radiation oncology services, from its hospital in St. Louis County to its hospital in Franklin County. (L.F. 83).

cause it to suffer irreparable harm. The only “harm” that Mercy alleges it will suffer if Patients First is issued a non-applicability letter is harm to its competitive position. Mercy appears to believe that it has a right to be free from competition. However, the law is well settled that “the right to be free from legitimate competition is not a right at all and is certainly not one protected by law.” *St. Joseph’s Hill Infirmary, Inc. v. Mandl*, 682 S.W.2d 821, 824 (Mo. Ct. App. 1984). Mercy will not be irreparably harmed by Patients First’s three-bed hospital.

***C. Mercy cannot show that a justiciable controversy exists over the application of the New Hospital Rule to Patients First’s non-applicability determination.***

Mercy asked the circuit court for the extraordinary relief of a declaratory judgment declaring that the Committee’s New Hospital Rule was facially invalid as applied to Patients First’s three-bed hospital. (L.F. 20-23). In order for the lower court to grant Mercy declaratory relief, the court must have before it a justiciable controversy. *Akin v. Director of Revenue*, 934 S.W.2d 295, 298 (Mo. banc 1996). This Court has stated that a mere difference of opinion or a disagreement on a legal question is insufficient to grant a declaratory judgment, but, rather, parties must show that their rights and liabilities are somehow affected. *Id.* In a declaratory judgment action, Missouri courts require that a plaintiff have a “legally protectable interest at stake in the outcome of the litigation.” *State ex rel Kansas City Power & Light Co. v. McBeth*, 322 S.W.3d 525, 530 (Mo. banc 2010). “A legally protectable interest exists if the plaintiff is directly and adversely affected by the action in question or if the plaintiff’s interest is conferred by statute.” *Id.*

In the present case, Mercy has failed to present a justiciable controversy. Mercy has done nothing more than express an opinion with regard to a legal question: whether or not the Committee should grant Patients First a non-applicability CON letter with respect to its three-bed hospital. To support its opinion, Mercy attempts to challenge statutes, rules and regulations that have been in effect for decades. The long-standing statutes, rules and regulations that Mercy now seeks to challenge have not suddenly created a justiciable controversy that would entitle Mercy to declaratory relief.

Furthermore, Mercy cannot show how its rights or liabilities are affected by Patients First receiving a non-applicability review letter as the only party affected by this determination is Patients First. Mercy has no legally protectable interest at stake in the outcome of the Committee's decision with regard to Patient First's three-bed hospital. As shown herein, the only interest Mercy has in the outcome of the Committee's decision regarding Patients First's non-applicability determination is as a competitor of Patients First. Mercy has no right to be free from competition and, even if such right existed, it is not protected by the law. *See e.g. St. Joseph's Hill Infirmary, Inc.*, 682 S.W.2d at 824. Mercy has presented no justiciable controversy, and the lower court was correct in dismissing its Petition.

**II. The Circuit Court's Judgment Should Be Affirmed Even If This Court Finds That Appellant Has Standing To Bring This Action Because The New Hospital Rule Is Valid And Does Not Conflict With The Certificate Of Need Laws In That It Requires A Certificate Of Need Application For New Hospitals Costing In Excess Of \$1 Million Which Is Consistent With The Language Of The Certificate Of Need Laws As Amended In 1997. (Responds to Appellant's Point II)**

Patients First recognizes that this Court may find that Mercy has standing to bring this action and, therefore, wants to express the reasons why the New Hospital Rule does not conflict with the CON Laws. By addressing the validity of the New Hospital Rule, Patients First in no way concedes that Mercy has standing to bring this action.

In arguing that the New Hospital Rule conflicts with the CON Laws in Point II of its substitute brief, Mercy urged this Court to fundamentally rewrite the CON Laws as enacted by the legislature. In §197.305(9)(a), the legislature expressly limited the scope of the definition of a new institutional health service and the CON Laws by setting a cost threshold of \$1 million respect to new health care facilities. The adoption of this cost threshold was an act of public policy by the legislature that this Court cannot set aside without exceeding its powers under the state Constitution. The effect of Mercy's interpretation of the CON laws would be to make the cost threshold disappear from the statute, by subjecting new health facilities to the CON process even if they fell below the cost threshold that was specified by the legislature. Only the legislature has the power to effect change to the statute - and, more broadly, to the public policy represented by the CON Laws - that Mercy seeks from this Court.

*A. The CON Law, the Committee and the New Hospital Rule.*

The CON Laws were enacted over thirty years ago in 1979, with some sections becoming effective in October 1980. The purpose of the CON Laws is to “achieve the highest level of health for Missourians through cost containment, reasonable access, and public accountability.” 19 CSR 60-50.200(2). The Committee is the agency tasked with administering the CON Laws and reviews and approves or disapproves all applications for a CON made pursuant to the CON Laws. §197.310.6 R.S.Mo. The CON Laws vest the Committee with the power to “issue reasonable rules and regulations governing the submission, review and disposition of [CON] applications.” §197.310.6 R.S.Mo. The CON Laws also grant the Committee the power to promulgate reasonable rules, regulations, criteria and standards to meet the objectives of the CON Laws. §197.320 R.S.Mo.

Pursuant to §197.315.1, any person who proposes to develop or offer a new institutional health service must obtain a CON from the Committee prior to the time such services are offered. Section 197.305(9) R.S.Mo. sets forth seven separate definitions of a “new institutional health service.” If a party’s proposed project or service does not meet any of the seven definitions of a “new institutional health service,” a CON is not required and a party can seek a non-applicability review from the Committee. However, if a party’s proposed project or service falls under any one of the seven definitions of a “new institutional health service,” a CON is required and a party must apply for a CON.

To begin the CON review process, a party seeking a CON or a non-applicability review must submit a Letter of Intent to the Committee. §197.325 R.S.Mo. Once a

Letter of Intent is received by the Committee, the Certificate of Need Program (“CONP”) staff reviews it according to the six provisions found in 19 CSR 60-50.400(6)(A)-(F). As part of its review, the CONP staff tests the Letter of Intent for applicability in accordance with statutory provisions for expenditure minimums, exemptions and exceptions. 19 CSR 60-50.400(6)(B). If the test verifies that a statutory exemption or exception is met on a proposed project or it is below all expenditure minimums, the Committee chair can either issue a non-applicability letter or the Letter of Intent is added to a list of non-applicability proposals to be considered at the next Committee meeting. 19 CSR 60-50.400(6)(C). However, if the test verifies that an exception or exemption is not met and the proposal is above the applicable expenditure minimum, a CON application is required. 19 CSR 60-50.400(6)(D).

The New Hospital Rule was created pursuant to the Committee’s powers granted to it by the legislature in §197.320. The New Hospital Rule is one of the six provisions the CONP staff looks at when reviewing a Letter of Intent. The New Hospital Rule is one of several circumstances set out in 19 CSR 60-50.400(6)(F) which state when a CON application must be made. The New Hospital Rule specifically states that “[a] CON application must be made if: 1. The project involves the development of a new hospital costing one million dollars (\$1,000,000) or more... .” 19 CSR 60-50.400(6)(F)(1). The other six subparts of 19 CSR 60-50.400(6)(F) set out other circumstances when a CON application must be made. As more fully demonstrated below, the New Hospital Rule is consistent with the language of §197.305(9)(a) and does not conflict with the CON Laws.

***B. The New Hospital Rule does not conflict with the CON Laws because the every new hospital, regardless of cost, is not required to obtain a CON.***

In its substitute brief, Mercy argues that the circuit court erred in upholding the validity of the New Hospital Rule because it conflicts with the CON Laws. Mercy's argument rests on its belief that every new hospital, regardless of cost, is required to obtain a CON. Contrary to Mercy's arguments, as set forth more fully below, the New Hospital Rule does not conflict with the CON Laws. This conclusion is supported by both the legislative history of the CON Laws as well as the rules of statutory construction. As such, the circuit court's judgment upholding the validity of the New Hospital Rule should be affirmed.

***1. The legislative history of §197.305(9) and §197.366 demonstrate that the legislature did not intend for every new hospital, regardless of cost, be required to obtain a CON.***

As previously stated, the CON Laws were first enacted in 1979. When the CON Laws were first enacted, the definition of a new institutional health service was as follows:

- (a) The development of a new health care facility;
- (b) The acquisitions, including acquisitions by lease of any health care facility or equipment costing in excess of \$150,000;
- (c) Any capital expenditure by or on behalf of a health care facility in excess of \$150,000;

- (d) Predevelopment activities as defined in subsection (4) hereof costing in excess of \$150,000;
- (e) Any change in licensed bed capacity of a health care facility which increases the total number of beds by more than ten or more than ten percent of total bed capacity, whichever is less, over a two year period;
- (f) Health services, excluding home health services, which are offered in a health care facility and which were not offered on a regular basis in such health care facility within the twelve month period prior to the time such services would be offered;
- (g) A reallocation by an existing health care facility of licensed beds among major types of service or reallocation of licensed beds from one physical facility or site to another by more than ten beds or more than ten percent of total licensed bed capacity, whichever is less, over a two year period.

*See* 1979 S.B. No. 222. Since 1979, this section has been amended only one time. In 1997 the legislature enacted S.B. No. 373 which amended what is now §197.305(9). The only change that S.B. No. 373 made to §197.305(9) was to add the phrase “costing in excess of the applicable expenditure minimum” to subsection (a) changing the definition from:

“the development of a new health care facility”

to the amended statute:

“development of a new health care facility **costing in excess of the applicable expenditure minimum.**”

The addition of this phrase undeniably demonstrates the legislature’s intention to only include new health care facilities costing in excess of the applicable expenditure minimum to the definition of a new institutional health service. Logically, this leads to the conclusion that the legislature never intended for every new hospital, regardless of cost, to obtain a CON.<sup>3</sup>

Despite the legislative history of §197.305(9)(a), Mercy attempts to argue that the lower courts’ analysis of the 1997 amendment was incorrect. Mercy bases its argument on the legislature’s creation of §197.366 and *McKnight Place Extended Care, L.L.C. v. MHFRC*, 142 S.W.3d 228 (Mo. App. 2004). Mercy’s argument fails. The legislature

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<sup>3</sup> In its Appendix to its Substitute Brief, Mercy includes a chart comparing the CON Laws to the Committee’s New Hospital Rule and the other subsections of what is now 19 CSR 60-50.400(6)(F). *See* Mercy’s Appendix at A. 006. The relevance of Mercy’s chart to this matter is unclear as the majority of the chart focuses on subsections (b) – (g) of §197.305(9) and prior versions of the New Hospital Rule dating as far back as 1982. Mercy is supposedly challenging the validity of the New Hospital Rule as presently written, and as such, subsection (a) is the only relevant subsection of §197.305(9). Mercy appears to want this Court to use its chart to conclude that the New Hospital Rule conflicts with the CON Law and that §197.305(9)(a) is invalid. Mercy’s chart, however, does not support this conclusion and is irrelevant to this Court’s analysis.

created §197.366 in 1996. At the time of its creation, §197.366 stated that after December 31, 2001, the term “health care facilities” in section 197.300 to 197.366 shall mean, among other things, “construction of a new hospital as defined in chapter 197, RSMO.” *See* 1996 Mo. H.B. 1362. Based on the effective dates of §197.366, Mercy argues that the legislature only intended the revised definition of §197.305(9)(a), amended one year later, to be in effect from 1997 to 2002 to provide some sort of relief until §197.366 went into effect on January 1, 2002.

Mercy’s argument is not supported by any evidence whatsoever. Mercy’s argument is simply its own conjecture and is contrary to the most basic rules of statutory construction. “It is presumed that the General Assembly legislates with knowledge of existing laws.” *Turner v. Sch. Dist of Clayton*, 318 S.W.3d 600, 667 (Mo. banc 2010). As a result, the legislature was aware of §197.366 - which was created in 1996 - when it amended §197.305(9)(a) one year later in 1997. If, as Mercy argues, the legislature intended for §197.305(9)(a) to only be in effect until January 1, 2002 when §197.366 was to become effective, it could have easily added such language to §197.305(9)(a), but it did not. Notably, the legislature has taken no action to repeal the definition of a new institutional health service found in §197.305(9)(a) in the nearly fifteen years since it was amended.

Furthermore, Mercy’s argument ignores the well established rule that a later-enacted specific statute prevails over an earlier-enacted statute. *Parktown Imports Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 673 n.2 (Mo. banc 2009). As stated above, §197.366 was created in 1996 and defined the term “health care facilities” as that term is used in

the CON Laws. One year later, §197.305(9)(a) was amended to change the definition of a new institutional health service from “the development of a new health care facility” to “the development of a new health care facility costing in excess of the applicable expenditure minimum.” Section 197.305(9)(a) is undeniably the later-enacted specific statute and, therefore, prevails over the earlier-enacted §197.366.

In addition to claiming that the lower courts’ analysis of the 1997 amendment was incorrect because of the creation of §197.366, Mercy also argues that the lower courts’ analysis was incorrect because it allegedly failed to acknowledge that “virtually the same issue in the same statutory section had already been decided” in the *McKnight* case. See Mercy’s Substitute Brief at p. 26. Mercy’s argument is flawed because the “same issue” was not decided in *McKnight*. The issue presented in *McKnight* was whether the seven separate definitions of a new institutional health service found in §197.305(9)<sup>4</sup> were to be read conjunctively or disjunctively. The court ultimately concluded that §197.305(9) was not a list of exclusions but rather was a list of new institutional health services and if a proposed entity met any one of the seven definitions, it was deemed a new institutional health service and a CON was required.

The lower courts’ analysis of the 1997 amendment to §197.305(9)(a) is not at odds with the holding in *McKnight*. Contrary to Mercy’s belief, the lower courts did not hold that if a new hospital is below the applicable expenditure minimum then a CON is not needed because the seven definitions of a new institutional health service were to be read

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<sup>4</sup> At the time of the *McKnight* opinion, §197.305(9) was §197.305(10).

disjunctively. Rather, the lower courts held that, based on the plain and ordinary meaning of §197.305(9), the only subsection that could logically apply to a new hospital was subsection (a). The lower courts did not write out the other six definitions of a new institutional health service, they merely held that they were inapplicable to a new hospital. Notably, the only party to write out a subsection of §197.305(9) is Mercy. As more fully discussed below, Mercy's interpretation of §197.305(9) would have the effect of writing subsection (a) out of the statute because it would render §197.305(9)(a) meaningless.

**2. *The rules of statutory construction dictate that every new hospital regardless of cost is not required to obtain a CON.***

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used and to consider words in their plain and ordinary meaning. *Huber v. Wells Fargo Home Mort. Co.*, 248 S.W.3d 611, 614 (Mo. banc 2008). When the plain language does not answer the legislative intent, Courts must turn to recognized principals of statutory construction. *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907, 911-12 (Mo. banc 2006). To discern legislative intent, "the Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem the statute was enacted to remedy." *Id.* at 912 (citations omitted). "Statutory construction should not be hyper technical but instead should be reasonable, logical, and should give meaning to statutes." *Id.* (citations omitted).

The plain and ordinary meaning of the language used in §197.305(9) leads to the conclusion that the legislature never intended for every new hospital regardless of cost to obtain a CON. This is most apparent by the language of §197.305(9)(a) which specifically defines a new institutional health service as the development of a new health care facility, which is defined in part as the construction of a new hospital, *costing in excess of the applicable expenditure minimum*. If the legislature wanted every new hospital to obtain a CON, as Mercy argues, it would go back to the pre-1997 amendment language which required every new hospital to obtain a CON. Notably, it has not. By amending §197.305(9)(a) the legislature did not want the Committee to require every new hospital to apply for and obtain a CON, rather it limited the applicability of the CON Law to new hospitals costing in excess of \$1 million, the statutory minimum.

The plain and ordinary meaning of the language used in §197.305(9)(e), (f) and (g) leads to the same conclusion. As the lower courts correctly pointed out, subsections (e), (f) and (g) logically could only affect existing hospitals and not new hospitals. For example, §197.305(9)(e) defines a new institutional health service as “[a]ny change in licensed bed capacity of a health care facility which increases the total number of beds by more than ten or more than ten percent of total bed capacity, whichever is less, over a two-year period.” The legislature’s use of the word increase by its plain and ordinary meaning presumes that this definition applies to an existing health care facility. A new hospital has no beds and, therefore, it would be mathematically impossible to increase the number of beds by ten or ten percent.

Subsection (f) presents a similar issue. This section defines a new institutional health service as “[h]ealth services, excluding home health services, which are offered in a health care facility and which were not offered on a regular basis in such health care facility within the twelve-month period prior to the time such services would be offered.” (Emphasis added.) By its plain and ordinary meaning, the phrases “are offered” and “were not offered” indicate that this definition cannot apply to a new hospital because a new hospital has not yet and could not have been offering health care services within the twelve month period before it opens. The logical reading of this definition is that it only applies to an existing health care facility.

Finally, like subsections (e) and (f), subsection (g) by its plain and ordinary language can only apply to an existing health care facility. Subsection (g) defines a new institutional health service as “[a] reallocation by an existing health care facility of licensed beds among major types of service or reallocation of licensed beds from one physical facility or site to another by more than ten beds or more than ten percent of total licensed bed capacity, whichever is less, over a two year period.” Because a new hospital cannot be an existing health care facility, the legislature obviously intended subsection (g) to apply only to an existing hospital.

In its substitute brief, Mercy repeatedly refers to the lower courts’ analysis of §197.305(9)(e), (f) and (g) as “conflicts” with §197.366. However, the lower courts did not conclude that the two statutes were in conflict with one another. While the appellate court did state that the two statutes could not be read in complete harmony, it went on to recognize that several subsections of §197.305(9) take on unexpected meaning which the

legislature could not have intended if a new hospital was treated as a health care facility under each subsection of the statute. The appellate court cited to the *United Pharmacal* case for the proposition that statutes must be construed beyond their simple text when the direct application of their language would lead to an absurd result as it would if new hospitals were treated as health care facilities under subsections (e), (f) and (g) of §197.305(9) because subsection (a) would be left without meaning.

Mercy also argues that new hospitals are not excepted from the definitions of a new institutional health service found in subsections (e) and (f) of §197.305(9) and, as a result, every new hospital is required to obtain a CON.<sup>5</sup> Specifically, Mercy alleges that subsection (e) applies to a new hospital because a new hospital changes its number of licensed beds from no licensed beds to having some licensed beds. Mercy reasons that an increase from zero to three beds triggers the ten percent rule because an increase from one to three beds would do so and an increase from zero to three is a greater increase. Similarly, Mercy argues that subsection (f) applies to new hospitals because services that a new hospital provides after it opens are not services offered within the preceding twelve months. Mercy's arguments are devoid of logic and ignore the plain and ordinary language used in the statutes.

Finally, Mercy's interpretation of §197.305(9) is not only illogical but it also goes against one of the most basic rules of statutory construction - the legislature does not

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<sup>5</sup> Mercy admits that the definition of a new institutional health service found in subsection (g) of §197.305(9) could not include a new hospital.

create meaningless statutes. “When interpreting statutes, courts do not presume that the legislature has enacted a meaningless provision.” *Edwards v. Gerstein*, 237 S.W.3d 580, 581 (Mo. 2007) (citing *State v. Winsor*, 110 S.W.3d 882, 887 (Mo. App. W.D. 2003)). If Mercy’s interpretation of §197.305(9) was correct, then subsection (a) would be left meaningless because a new hospital, regardless if exceeded the applicable expenditure minimums, would automatically trigger subsections (e) and (f). Had the legislature intended that every new hospital require a CON, it would have never amended subsection (a) in 1997 to add the limiting language “costing in excess of the applicable expenditure minimum.” Section 197.305(9) cannot be read in a way that would strip subsection (a) of meaning.

***C. Mercy is asking this Court to engage in judicial legislation by rewriting §197.305(9).***

Mercy wants this Court to engage in judicial legislation by remedying what Mercy considers to be a defect in the definition of a “new institutional health service” found in §197.305(9)(a). Mercy’s position is inconsistent with this Court’s past holdings. This Court has held that the “courts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government.” *Bd. of Edu. of the City of St. Louis v. State of Missouri*, 47 S.W.3d 366, 371 (Mo. 2001); *see also Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667 (Mo. banc 2011); *Hawkins v. City of Fayette*, 604 S.W.2d 716, 725 (Mo. App. W.D. 1980). Courts must enforce the law as written. *Turner*, 318 S.W.3d at 668.

Mercy is asking this Court to effectively write out one of the seven definitions of a new institutional health service from the CON Laws by declaring §197.305(9)(a) invalid. For this Court to declare §197.305(9)(a) invalid would amount to judicial legislation. If §197.305(9) needs alteration, it is for the legislature to do, not the courts. *Roberson v. State of Missouri*, 989 S.W.2d 192, 194 (Mo. App. S.D. 1999). This Court must enforce §197.305(9) as written which means that a new hospital requires a CON if it costs in excess of \$1 million. To hold otherwise would exceed the limits of this Court's constitutional powers.

The CON Laws represent the considered opinion of the legislature as to an important issue of public policy, specifically the availability and provision of health care services by institutions in Missouri. The change that Mercy is encouraging this Court to make in the CON Laws is not one that affects merely a discrete dispute between two competitors in the business arena. Instead, Mercy is urging a fundamental change to the legislature's expressed policy as it applies to all would-be institutional providers of health care in Missouri. Should this Court accept Mercy's argument, the current limitation on applicability of the CON Laws to new health care facilities, which is clearly set forth in the statute with a \$1 million cost threshold, would be excised from §197.305(9). This is a policy change that only the legislature, which created the policy in the first place, can make.

***D. Mercy's reliance on Turner v. Sch. Dist. of Clayton is misplaced.***

Mercy relies on the *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667 (Mo. banc 2011) case to support its argument that the lower courts failed to acknowledge the

correct standard for “ignoring express statutory language based on a putative conflict between statutes.” See Mercy’s Substitute Brief at p. 14. Mercy’s reliance on *Turner* is misplaced.

In the *Turner* case, the Court was faced with the issue of whether one statute effectuated an implied partial repeal of another statute. In its opinion, this Court stated that “[i]f by any fair interpretation both statutes may stand, there is no repeal by implication and both statutes must be given their effect. When two provisions are not irreconcilably inconsistent, both must stand even if ‘some tension’ exists between them.” *Id.* (citations omitted). The issue in the present case is not whether one statute effectuated an implied partial repeal of another. Rather, the issue is whether or not an agency rule conflicts with Missouri statute. As such, the “standard” for repeal by implication as stated in *Turner* is inapposite.

In its substitute brief, Mercy argues for the first time that because the Circuit Court and the Court of Appeals did not find an irreconcilable inconsistency between §197.305(9) and §197.366, neither court was justified in allowing one statute to prevail over another. Mercy’s argument incorrectly presumes that the Circuit Court and Court of Appeals held that §197.305(9) somehow effectuated an implied partial repeal of §197.366. Contrary to Mercy’s arguments, the lower courts did not repeal a statute by implication, but rather held that the New Hospital Rule does not conflict with the CON Laws after interpreting §197.305(9) and §197.366 in a way that was supported by the legislature history of each statute and by the rules of statutory construction.

*E. Contrary to Mercy's argument, absurdity does not result from the New Hospital Rule.*

Mercy's belief that the New Hospital Rule will allow a "two-step" for developers to circumvent the CON Law process is unfounded. Mercy premises its argument on the fact that a developer could build a new hospital costing less than \$1 million dollars without a CON and then later engage in unlimited expansion without a CON because of the removal of existing hospitals from the definition of "health care facilities." The New Hospital Rule does not allow a "two-step" for developers because pursuant to the other subsections of §197.305(9), an existing hospital seeking to expand may still be required to obtain a CON. Therefore, a developer would not be able to construct a new hospital without a CON and then engage in unlimited expansion as Mercy suggests.

**CONCLUSION**

Mercy believes that the New Hospital Rule conflicts with the CON Laws because it does not require every new hospital to obtain a CON. The New Hospital Rule states that a CON application must be made if the "project involves the development of a new hospital costing one (1) million dollars or more..." 19 CSR 60-50.400(6)(F)(1). One of the definitions of a new institutional health service is "development of a new health care facility costing in excess of the applicable expenditure minimum." §197.305(9)(a) R.S.Mo. The applicable expenditure minimum is \$1 million. §197.305(6) R.S.Mo. Based on the definition of a new institutional health service and expenditure minimum found in §197.305, is unclear how the language of the New Hospital Rule conflicts with the CON Laws.

The Circuit Court's judgment dismissing Mercy's Petition should be affirmed. The Court should enter judgment that the New Hospital Rule is valid and does not conflict with the Certificate of Need Laws.

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**CERTIFICATE PURSUANT TO RULES 84.06(C) AND (H)**

The undersigned counsel for Intervenor/Respondent hereby states:

- 1) The foregoing substitute brief contains 7,782 words, which is within the applicable limitations in length set forth in Rule 84.06(b); and
- 2) The electronic copy of this brief has been scanned for viruses and is virus free.

/s/ Richard B. Walsh, Jr.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 22<sup>nd</sup> day of December, 2011 a true and accurate copy of the foregoing document was electronically filed with the Clerk of the Missouri Supreme Court using the CM/ECF system which will send notification of such filing to the following email addresses and sent via U.S. Mail:

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