IN THE MISSOURI SUPREME COURT

No. SC92015

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

Plaintiff/Appellant,

v.

MISSOURI HEALTH FACILITIES REVIEW COMMITTEE,

Defendant/Respondent,

JAMES K. TELLATIN,

Defendant/Respondent,

PATIENTS FIRST COMMUNITY HOSPITAL,

Intervenor/Respondent.

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

SUBSTITUTE BRIEF OF APPELLANT MERCY HOSPITALS EAST COMMUNITIES

Dudley W. Von Holt, #32876
Bruce D. Ryder, #28013
Jeffrey R. Fink, #44963
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000
(314) 552-7000 (fax)
Attorneys for Plaintiff/Appellant,
Mercy Hospitals East Communities

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

JURISDICTION

This case challenges the validity of a rule promulgated by Defendant-Respondent the Missouri Health Facilities Review Committee. This appeal was originally within the general jurisdiction of the court of appeals under article V, section 3 of the Missouri Constitution. Pursuant to Article V, section 10 of the Missouri Constitution, this Court now has jurisdiction of this appeal because this Court granted Plaintiff-Appellant Mercy Hospitals East Communities' application for transfer.

STATEMENT OF FACTS

A. The parties

Plaintiff-Appellant Mercy Hospitals East Communities (f/k/a St. John's Mercy Health System) ("Mercy") is a nonprofit Missouri corporation that operates Mercy Hospital St. Louis in Creve Coeur, Missouri, and Mercy Hospital Washington in Washington, Missouri. (L.F. 6).

Defendant-Respondent The Missouri Health Facilities Review Committee ("MHFRC") is the state agency responsible for administering the Missouri Certificate of Need Law ("CON Law"), RSMo § 197.300-197.366. *See* RSMo § 197.310. (L.F. 6).

Defendant-Respondent James K. Tellatin is the Chair of MHFRC and is a party in his official capacity. (When Mercy filed its first amended petition, Gordon L. Kinne was the Chair of MHFRC and was named as a defendant. (L.F. 7). Under Rule 52.13(d), Mr. Tellatin is automatically substituted for Mr. Kinne as a defendant.)

Intervenor Patients First Community Hospital is a nonprofit Missouri corporation owned by the for-profit physician group Patients First Health Care, L.L.C. (L.F. 15). Patients First seeks to develop a three-bed hospital in Washington, Missouri, without demonstrating need for the hospital under the CON Law. (L.F. 15-18).

B. The CON Law

The legislature passed the CON Law in 1979 to prevent unneeded duplication of health care facilities and reduce the cost of health care to consumers. *Dept. of Soc. Servs. v. Senior Citizens Nursing Home Dist. of Ray County*, 224 S.W.3d 1, 4 (Mo. App. W.D. 2007). The central requirement of the CON Law is that "[a]ny person who proposes to

develop or offer a new institutional health service within the state must obtain a certificate of need from the committee prior to the time such services are offered." § 197.315.1. Generally, the "new institutional health service[s]" that can trigger a certificate of need are those offered by "health care facilities." § 197.305(9).[1]

There are several types of "new institutional health service[s]" that a "health care facility" can offer. For example, if a "health care facility" proposes to make a capital expenditure in excess of a certain amount, that constitutes a "new institutional health service" that requires a certificate of need. § 197.305(9)(c). If a "health care facility" plans to offer a new health service, that also constitutes a "new institutional health service" that requires a certificate of need. § 197.305(9)(f). Other "new institutional health service[s]" include the acquisition of a "health care facility," the purchase of major medical equipment, and an increase in licensed bed capacity. §§ 197.305(9)(b), (e).

When the legislature first passed the CON Law, it provided that many types of "health care facilities" required a certificate of need to offer such "new institutional health service[s]." These facilities included diagnostic imagining centers, ambulatory surgical facilities, and hemodialysis units, as well as hospitals and nursing homes. § 197.305(7) (1994). In 1996, the legislature substantially changed the definition of "health care facilities," limiting it to nursing homes, long-term care hospitals, and

[1] In prior years, this statute was designated as § 197.305(12) and § 197.305(10) due to statutory amendments and renumbering.

"[c]onstruction of a new hospital." § 197.366. As a result, "hospitals" are no longer "health care facilities," but "new hospitals" are. The legislature delayed the effective date for this amended definition for over five years – to January 1, 2002. A 025.[2]

When it enacted the new definition of "health care facilities," the legislature provided that it applied to the entire range of statutes within the CON Law: "The term 'health care facilities' in sections 197.300 to 197.366 shall mean: . . ." § 197.366. The statute that defines the "new institutional health service[s]" that require a certificate of need, § 197.305(9), falls within this range. It reads:

"New institutional health service":

(a) The development of a new health care facility costing in excess of the applicable expenditure minimum;

(b) The acquisition, including acquisition by lease, of any health care facility, or major medical equipment costing in excess of the expenditure minimum;

(c) Any capital expenditure by or on behalf of a health care facility in excess of the expenditure minimum;

(d) Predevelopment activities as defined in [§ 197.305(12)] costing in excess of one hundred fifty thousand dollars;

(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;

[2] Citations to the Appendix will appear as "A" followed by a page number.

(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.

§ 197.305(9).

This definition of "new institutional health service" has remained largely unchanged since the initial enactment of the CON Law in 1979. The only amendment was passed in 1997. That amendment added the "expenditure minimum" language that appears in sub-part (a) above. Before the amendment, sub-part (a) read simply: "The development of a new health care facility." The legislature did not indicate in any way that it intended the 1997 amendment to alter the meaning of the 1996 amended definition of "health care facilities." Nor did it postpone the effective date of the 1997 amendment to January 1, 2002, as it did with the 1996 amendment.

B. The New Hospital Rule

The CON Law gives MHFRC the power to "promulgate reasonable rules . . . to meet the objectives of sections 197.300 to 197.366 . . ." § 197.320. MHFRC has adopted numerous rules that address procedures for submitting certificate of need applications, criteria for decision-making, and other matters. These rules are currently located at 19

CSR 60.50-200 to 60.50-900. As required by the CON Law, MHFRC's rules provide that the process for seeking approval of a "new institutional health service" starts when an applicant submits a letter of intent to MHFRC 30 days before filing an application for a certificate of need. § 197.325; 19 CSR 60.50-400(1).

MHFRC's rules provide that the certificate of need program staff will review letters of intent to determine whether the proposed project requires a certificate of need or not. 19 CSR 60-50.400(6). If the staff and MHFRC's chair agree that a proposed project does not require a certificate of need, then the chair issues a "Non-Applicability CON letter" indicating that no further action is required. 19 CSR 60-50.400(6)(C). No statute expressly authorizes Non-Applicability CON letters, and the procedures MHFRC has adopted for issuing such letters appear to conflict with the procedures required by the CON Law.[3] *See* §§ 197.310.3, 197.310.6, 197.330.

MHFRC also has adopted a rule stating when a proposed project will require a certificate of need application. 19 CSR 60-50.400(6)(F). MHFRC first promulgated this rule in 1981. At that time, the rule tracked the statutory language in §197.305(9). 13 CSR 60-3.010(14) (1981), A 028-29; 13 CSR 60-3.020(1) (1981), A 029; A 06. Over the years, however, the rule has increasingly deviated from the CON Law. A 06. For example, the current version of the rule adopted in 2004 provides no certificate of need trigger for three of the seven statutory "new institutional health services" – §§ 197.305(9)(d), (f), and (g). 19 CSR 60-50.400(6)(F). A table showing MHFRC's

[3] This apparent conflict is not at issue in this appeal.

fluctuating rules on when a certificate of need is required, indexed against the relevant statutory provisions, is attached in the Appendix. A 06.

The portion of the rule at issue here – 19 CSR 60-50.400(6)(F)(1) (the "New Hospital Rule") – provides that a new acute care hospital requires a certificate of need only if it triggers sub-part (a) of §197.305(9), which occurs if the new hospital costs more than the $1 million "expenditure minimum." The New Hospital Rule thus does not require a new hospital to obtain a certificate of need if it offers a "new institutional health service" under other sub-parts of § 197.305(9). The New Hospital Rule does not explain why these other sub-parts, which expressly apply to "health care facilities," do not apply to new hospitals.

C. Patients First invoked the New Hospital Rule

On April 9, 2010, Patients First and a related company, Creekside Land & Development Co., LLC (together, "Applicants"), filed a letter of intent with MHFRC indicating that they planned to construct a new three-bed hospital about three blocks from Mercy Hospital Washington. Applicants claimed that the three-bed hospital would cost less than $1 million. (L.F. 15-16, 29-38). Relying on the New Hospital Rule, Applicants requested a Non-Applicability CON letter from MHFRC stating that the proposed new hospital could offer services without obtaining a certificate of need. (L.F. 18, 29). This was the first time that any hospital developer had sought to avoid certificate of need review through use of the New Hospital Rule.

Through an agenda dated August 19, 2010, MHFRC gave notice that it would consider Patients First's request for a non-applicability letter at its September 13, 2010, meeting. (L.F. 116).

D. Mercy filed the present action

In May 2010, Mercy brought this action for a declaratory judgment that the New Hospital Rule is invalid. On September 2, 2010, the trial court held a hearing on Mercy's motion for preliminary injunction to enjoin the threatened application of the New Hospital Rule, and on MHFRC's and Patients First's motions to dismiss. The trial court granted the motions to dismiss on September 8, 2010, holding that Mercy had not presented a ripe and justiciable controversy because MHFRC had not yet applied the New Hospital Rule. (L.F. 187); A 02. The trial court also found that MHFRC had not exceeded its authority in promulgating the New Hospital Rule. *Id.* The trial court entered judgment dismissing the action without prejudice, and Mercy appealed. (L.F. 190); A 05.

E. The Court of Appeals' decision

The court of appeals issued its opinion on July 26, 2011. It concluded that Mercy had presented a ripe and justiciable controversy, and it proceeded to consider the validity of the New Hospital Rule. The court decided not to apply the "health care facilities" definition according to its terms, which the court referred to as the "simple text" of the statute. Instead, the court held that §§ 197.305(9) and 197.366 "cannot be read in complete harmony," that application of § 197.366 causes some sub-parts of § 197.305(9) to "take on unexpected meanings," and that the language "defies any logical analysis." Slip op. at 11-12. Therefore, the court decided to construe these statutes "beyond their

simple text" because to follow the text would "create an absurd result." *Id.* at 12. The court then concluded that the "new hospital" portion of the definition of "health care facility" applies only to § 197.305(9)(a).

The court of appeals suggested that its holding was supported by the 1997 amendment to § 197.305(9)(a), which changed the language of that sub-part from "[t]he development of a new health care facility" to "[t]he development of a new health care facility costing in excess of the applicable expenditure minimum." Slip op. at 12. The court believed that by enacting the 1997 amendment, the legislature intended that the construction of any new hospital that costs less than the new $1 million expenditure minimum in sub-part (a) should be exempt from obtaining a certificate of need, regardless of whether it satisfies one of the other definitions of "new institutional health service." The court stated that "had the legislature intended for all new hospitals to require a certificate of need, there would have been no reason for the 1997 amendment to Section 197.305(9)(a)." Slip op. at 12-13.

POINTS RELIED ON

I. The trial court erred in dismissing this action, because it was ripe and justiciable, in that RSMo §§ 536.050.1 and 536.053 and Rule 87.02(c) authorized Mercy to challenge the validity or threatened application of MHFRC's rules without waiting for the agency to address the question.

§ 536.053

§ 536.050

Rule 87.02

Premium Standard Farms, Inc. v. Lincoln Township of Putnam County, 946 S.W.2d 234 (Mo. banc 1997)

II. The trial court erred in upholding the validity of the New Hospital Rule, 19 CSR 60-50.400(6)(F)(1), because the rule conflicts with the CON Law, in that it applies the "new hospital" portion of the definition of "health care facility" to only one of the sub-parts of § 197.305(9), ignoring the legislative direction that the definition apply to the entire statute, including all sub-parts of § 197.305(9).

§ 197.366

§ 197.305

§ 536.014

§ 197.315

§ 19 CSR 60-50.400(6)(F)(1)

Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660 (Mo. banc 2010)

McKnight Place Extended Care, L.L.C. v. MHFRC, 142 S.W.3d 228 (Mo.App. 2004)

ARGUMENT

MHFRC's New Hospital Rule is invalid because it conflicts with the express language of the CON Law. As a result of the 1996 amendment to the definition of "health care facilities," a new hospital is required to get a certificate of need if it offers any of the seven "new institutional health services" set forth in the CON Law. The New Hospital Rule conflicts with the statute by providing that a new hospital is required to obtain a certificate of need only if it proposes to engage in the first of the seven "new institutional health services."

Mercy's case is justiciable, despite the fact that MHFRC had not applied the New Hospital Rule at the time Mercy filed, because Mercy is challenging the validity of an administrative rule. In its first point on appeal, Mercy demonstrates that the trial court erred in dismissing this action on ripeness and justiciability grounds. In its second point on appeal, Mercy demonstrates that both the trial court and the court of appeals erred by failing to apply the express language of the CON Law in evaluating the validity of the New Hospital Rule.

I. The trial court erred in dismissing this action, because it was ripe and justiciable, in that RSMo §§ 536.050.1 and 536.053 and Rule 87.02(c) authorized Mercy to challenge the validity or threatened application of MHFRC's rules without waiting for the agency to address the question.

Under the plain language of §§ 536.050.1 and 536.053 and Rule 87.02(c), Mercy could challenge the validity of the New Hospital Rule at any time and was not required to wait for MHFRC to apply it. A plaintiff is not required to exhaust administrative

remedies or wait for the agency to apply its rules before the party may challenge the validity of the agency's rules in court. *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 237 (Mo. banc 1997) ("[S]everal exceptions to the general requirement of exhaustion have been recognized by the courts of this state" including "where the validity of agency rules or the threatened application thereof is at issue."). Indeed, § 536.053 provides that a party challenging a rule "shall not be required to exhaust any administrative remedy . . ." In addition, § 536.050.1 and Rule 87.02(c) both provide that suits regarding the validity or threatened application of agency rules "may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented."

Before the trial court, Respondents quoted exhaustion requirements found in § 536.050.2. (L.F. 93-94, 107-08). But "[t]he requirement of exhausting administrative remedies set out in § 536.050.2 is [ ] irrelevant" and inapplicable when, as is the case here, a plaintiff challenges the validity of an agency rule in a circuit court. *Kansas Ass'n of Private Investigators v. Mulvihill*, 35 S.W.3d 425, 431 (Mo. App. W.D. 2000).

Respondents also rely on *Boot Heel Nursing Center, Inc. v. Missouri Dept. of Social Services*, 826 S.W.2d 14, 17 (Mo. App. W.D. 1992). But that case, unlike the present case, did not involve a direct challenge to the validity of an agency rule. *See id.* at 16. Moreover, the 1992 decision in *Boot Heel Nursing Center* predates: (a) the 1999 enactment of § 536.053, which clearly states that exhaustion of administrative remedies is not required; (b) the 1997 decision in *Premium*, which notes that exhaustion of

administrative remedies is not required when the validity of an agency rule is at issue; and (c) the Missouri Court of Appeals' 2000 decision in *Mulvihill*.

In sum, under §§ 536.050.1 and 536.053 and Rule 87.02(c), Mercy's challenge to the New Hospital Rule was ripe and justiciable. The trial court, therefore, erred in ruling to the contrary. On this subject, the court of appeals was correct and this Court should reverse the trial court's order and judgment on this point.

II. The trial court erred in upholding the validity of the New Hospital Rule, 19 CSR 60-50.400(6)(F)(1), because the rule conflicts with the CON Law, in that it applies the "new hospital" portion of the definition of "health care facility" to only one of the sub-parts of § 197.305(9), ignoring the legislative direction that the definition apply to the entire statute, including all sub-parts of § 197.305(9) .

The statute at issue is straight-forward: the CON Law provides that a "health care facility" must have a certificate of need before it offers any one of seven "new institutional health service[s]." A new hospital is a "health care facility." Therefore, a new hospital is required to have a certificate of need before it offers any one of the seven "new institutional health service[s]." MHFRC's New Hospital Rule fails to apply the statute according to these terms, exempting new hospitals from six of the seven types of "new institutional health service[s]." MHFRC tries to justify its failure to follow the express statutory language by claiming that the statutory definitions of "health care facility" and "new institutional health service" are in conflict.

This Court, however, has set a high bar for ignoring express statutory language based on a putative conflict between statutes. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667 (Mo. banc 2010). Neither the trial court nor the court of appeals even acknowledged the correct standard as stated in *Turner*. Neither court found an irreconcilable inconsistency that would justify ignoring the controlling statutory language. The putative phrasing inconsistencies between the 1996 definition of "health care facilities" and the 1979 definition of "new institutional health service" can and should be reconciled so that both statutes can be applied consistently with their terms.

A. The plain meaning of the CON Law conflicts with the New Hospital Rule

A statute must be interpreted according to its plain and ordinary meaning and the courts cannot read into a statute legislative intent that is contrary to this plain meaning. *Wolf Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988); *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). When the legislature defines a term, that definition is binding on the courts. *St. Louis Country Club v. Admin. Hearing Comm'n*, 657 S.W.2d 614, 617 (Mo. banc 1983); *In re Estate of Hough*, 457 S.W.2d 687, 692 (Mo. 1970). In the present case, the plain meaning of the words used in the CON Law conflicts with, and thereby invalidates, the New Hospital Rule.

The CON Law provides that the developer of any "new institutional health service" must obtain a certificate of need. § 197.315.1. There are seven types of "new institutional health service" that can trigger this requirement. § 197.305(9). These "new institutional health service[s]" are generally offered by "health care facilities" (§ 197.305(9)), which are currently defined to includes nursing homes, long-term care hospitals, and "[c]onstruction of a new hospital." § 197.366. Thus, if a new hospital seeks to offer a "new institutional health service," it must first obtain a certificate of need.

The New Hospital Rule provides that the "new hospital" definition of "health care facility" does not apply each time that the legislature used the term "health care facility." Specifically, the New Hospital Rule provides that "health care facility" includes new hospitals when it appears in § 197.305(9)(a), but does not include new hospitals when it appears in any of the other sub-parts of § 197.305(9) . The New Hospital Rule is thereby

in conflict with the CON Law if the definition of "health care facility" in § 197.366(4) in fact applies to any of those other sub-parts.

The plain meaning of the statute setting forth the definition of "health care facility" resolves this issue. It provides that the definition "shall" apply to use of the term "in sections 197.300 to 197.366." § 197.366. This statutory range obviously includes § 197.305(9).[4] Therefore, when § 197.305(9) refers to "health care facilities," that phrase includes new hospitals. The plain meaning of the statute precludes selective application of the "health care facilities" definition among the sub-parts of the statute. The definition must apply to all of the sub-parts. The New Hospital Rule does not apply the definition to all sub-parts. It therefore conflicts with the CON Law and is invalid. § 536.014.

B. The putative textual conflict does not lead to a different outcome

The trial court and the court of appeals concluded that the definition of "health care facilities" in § 197.366(4) applies only to § 197.305(9)(a) because it conflicts with the language used in three of the other sub-parts of § 197.305(9). Respondents contend that these other sub-parts are phrased in such a way that they cannot apply to a new hospital. The trial court and the court of appeals agreed, the court of appeals concluding that "these two statutes cannot be read in complete harmony." Slip op. at 11.

It is possible for two statutes to so conflict that one statute must prevail over the other. But neither the trial court nor the court of appeals applied the proper standard to determine whether there is such a conflict in this case. The correct standard requires that

[4] See § 1.0702.

there be an irreconcilable inconsistency before one statute may be disregarded. *Turner,* 318 S.W.3d at 667 ("When two provisions are not irreconcilably inconsistent, both must stand even if 'some tension' exists between them."). The purported conflicts between the definition of "health care facilities" and § 197.305(9) do not reflect such an "irreconcilable inconsistency."

The trial court and the court of appeals cited three alleged conflicts between the statutes. (L.F. 188); A 03; slip op. at 11-12. First, § 197.305(9)(e) purportedly "makes little sense" when applied to a new hospital because "new hospitals cannot 'change' their number of beds . . ." Slip op. at 11-12. This contention is incorrect. A new hospital certainly does "change" its licensed beds. It changes from having no licensed beds to having some licensed beds. The concept of a change or increase in beds is certainly capable of being applied to a newly constructed hospital.

Sub-part (e) is triggered by increases in licensed beds by ten or ten percent. Respondents allege that this measure cannot apply to a new hospital because there is no way to calculate a ten percent increase of beds from zero. But this too is not an irreconcilable conflict. The best reconciliation is that an increase from zero to three beds does trigger the ten percent measure because an increase from one to three would do so and an increase for zero to three is obviously a greater increase. There may be other ways to reconcile the two statutes, as well. But the relevant issue is not the identification of the best interpretation. It is whether MHFRC could simply ignore sub-part (e) as though it does not apply at all to new hospitals.

The second conflict cited by the trial court and the court of appeals is that sub-part (f) cannot apply because a new hospital "cannot add new services relative to those provided the year before they existed." Slip op at 12. As with sub-part (e), this perceived conflict can be reconciled because sub-part (f) can logically be applied to a new hospital. A new hospital obviously has not provided any services in the 12 months before it opens. Thus, the services it will provide after it opens are services not offered within the preceding 12 months. There is simply no conflict in applying sub-part (f) to new hospitals.

The third conflict cited by the trial court and the court of appeals is that sub-part (g) refers to "existing health care facilities" and therefore cannot be applied to a new hospital. It is true that a new hospital cannot be an existing facility, and that a new hospital cannot "reallocate" beds from one type of service or physical facility to another. The fact that this one type of "new institutional health service" cannot be provided by a new hospital, however, does not justify rewriting the definition of "health care facility" so that it applies to different statutes than those specified by the legislature. It simply means that a new hospital will not require a certificate of need pursuant to sub-part (g).

The lower courts' perception of conflicts between the two statutes arises largely from those courts' failure to consider the statutes in their historical context. *South Metro. Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 668 (Mo. banc 2009) (identifying "historical context" as a "determinative consideration"). When the legislature enacted § 197.305(9) in 1979, existing hospitals were subject to the CON Law and the statute was phrased accordingly. When the legislature amended the scope of the

statute in 1996, it chose to limit the definition of "health care facilities" to new hospitals without changing the phrasing of all the statutory provisions in which the defined phrase was used. The fact that the original phrasing could be awkward when applied to new hospitals is not surprising when considered in this context. Such imperfect phrasing does not justify ignoring the plain meaning of the amended "health care facility" definition.

The three putative conflicts between § 197.366 and § 197.305(9) are thus reconcilable to the extent that they exist. Because the statutes are reconcilable, "both must stand even if 'some tension' exists between them." *Turner*, 318 S.W.3d at 667. Both the trial court and the court of appeals erred in concluding that the express language of the statutes could be ignored simply because there is some tension between the statutory definition and the phrasing of the statute in which the defined term is used.

Moreover, even if an irreconcilable conflict existed between § 197.366 and § 197.305(9), that would not lead to the conclusion that § 197.305(9) trumps § 197.366. When two statutes conflict, the later-enacted statute prevails over the earlier-enacted statute. *Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 859 (Mo. banc 1998). It is sometimes said 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). Under either articulation of the rule, the definition of "health care facility" in § 197.366 would prevail over the putatively conflicting language in § 197.305(9). Section 197.366 is obviously the later-enacted statute, as the language in § 197.305(9)(e), (f), and (g) was enacted in 1979. Section 197.366 is also more specific, in that it provides a specific definition of a phrase used in

§ 197.305(9) and it defines the statutes to which that definition applies. Therefore, if an irreconcilable conflict exists, the conflicting language in § 197.305(9) must yield to the later-enacted language in § 197.366.

C. Even if the "health care facilities" definition was irreconcilably inconsistent with sub-parts (e), (f), and (g), the New Hospital Rule would still be invalid.

Even if the trial court and the court of appeals had been correct that § 197.305(9)(e), (f), and (g) conflict with and prevail over § 197.366, that would not lead to the conclusion that new hospitals should be subject to only sub-part (a). There are still sub-parts (b), (c), and (d) to consider. The trial court and the court of appeals implicitly concluded that § 197.305(9)(b), (c), and (d) do not apply to new hospitals, but provided no analysis supporting this conclusion. The express terms of the statute indicate that these sub-parts do apply to new hospitals and render the conflicting New Hospital Rule invalid.

Sub-part (b) applies to the "acquisition" of: i) any health care facility, or ii) any major medical equipment costing in excess of the expenditure minimum. There is no conflict between this sub-part and the "new hospital" definition of "health care facilities." A new hospital certainly can be acquired. Moreover, the major medical equipment trigger in sub-part (b) is not even limited to health care facilities. Anyone who acquires major

medical equipment exceeding a certain cost[5] is required to obtain a certificate of need. No conflict in the statutory language would prevent the New Hospital Rule from including these concepts.

Sub-part (c) applies to any capital expenditures in excess of the expenditure minimum. Although this may frequently be the same standard as applied to new hospitals in sub-part (a) because the expenditure minimum is the same, the sub-part should nevertheless be applicable to new hospitals because of the potential for differences resulting from the "by or on behalf of" language in sub-part (c) and the potential for differences in determining the "cost" of a health care facility under sub-part (a) versus the amount of a "capital expenditure" under sub-part (c).[6] Despite the absence of any

---

[5] The expenditure minimum varies depending on the circumstances. For new hospitals, the minimum would be $1 million. § 197.305(6)(c).

[6] For example, Patients First proposed excluding from the "cost" of its new hospital the value of the land under the building, walkways, and parking areas and the expenditures to remodel the connected office building space to be used for the hospital's pharmacy, nursing office, administrative office and other functions because those expenditures were incurred by its sister company and landlord-to-be, Creekside Land & Development. Although Mercy contends that these expenditures should be included under either standard, there would have been no basis for omitting such expenditures under sub-part (c).

statutory conflict, the New Hospital Rule does not require new hospitals that come within the scope of sub-part (c) to obtain a certificate of need.

Sub-part (d) applies when there are any "predevelopment activities" that exceed $150,000. Predevelopment activities include "expenditures for architectural designs, plans, working drawings and specifications, and any arrangement or commitment made for financing." § 197.305(12). In the context of defining what constitutes a "new institutional health service," this sub-part seems specifically written to apply to a new hospital. Although it is the only sub-part that does not expressly use the "health care facilities" definition, no reason exists to exclude the construction of a new hospital from its scope – particularly when new hospitals are the epitome of a "new institutional health service." Nevertheless, the New Hospital Rule does not require a new hospital engaging in such predevelopment activities to obtain a certificate of need.

Respondents' argument that there is a statutory conflict arising out of the phrasing of §§ 197.305(9)(e), (f), and (g) is incorrect because of the lack of an irreconcilable conflict. But if an irreconcilable conflict existed, that would still not be grounds for excluding from the New Hospital Rule sub-parts (b), (c), and (d), for which there is no plausible suggestion of a conflict.

D. The absurd results argument does not lead to a different outcome

The court of appeals suggested that the statute at issue should be construed "beyond [its] simple text" because "the direct application of the plain language would create an absurd result." Slip op. at 12. But the court of appeals failed to identify any "absurd result" from the application of the statutes according to their express terms. It

simply described phrasing that it believed was awkward in the context of new hospitals. The construction of statutory language (awkward or not) and the identification of absurd results are, of course, different analyses. *See, e.g., E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011).

The result that Respondents suggest would flow from applying the "health care facilities" definition according to its terms is that all new hospitals would be required to obtain a certificate of need. If this is true, it is in no way an absurd result. The legislature decided to deregulate existing hospitals from many of the requirements of the CON Law. At the same time, the legislature expressly provided that whatever provisions formerly applied to existing hospitals must now apply to new hospitals. It is a reasonable legislative choice to require a comprehensive analysis of the need for new hospitals when eliminating that same requirement for existing hospitals.

Even if this Court disagrees with the legislature's decision to enact the definition of "health care facilities," or believes that the statute needs some amendment in other respects, that does not provide a basis for refusing to give effect to its current terms. *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002) ("The legislature may wish to change the statute to cover out-of-state multiple-offense drivers such as Rowe. But this Court, under the guise of discerning legislative intent, cannot rewrite the statute."); *accord Hogue v. Wurdack*, 298 S.W.2d 492, 496-97 (Mo. App. 1957).

Moreover, the lower courts failed to recognize the absurdity resulting from the New Hospital Rule itself. When the legislature eliminated "hospitals" from the definition of "health care facilities" and substituted new hospitals, it allowed existing hospitals to

thereafter expand – adding beds and services and making capital expenditures – without obtaining a certificate of need. § 197.305(9)(c), (e), (f). Under the trial court and court of appeals' decisions, if the existing New Hospital Rule is valid, a developer can therefore build a new hospital costing less than $1 million without a certificate of need and then later engage in unlimited expansion without a certificate of need because of the removal of existing hospitals from the definition of "health care facilities." Developers could thereby add hospitals of any size to any community with no determination that the hospital is needed at any point in the process. Such a result is inconsistent with the cost-control purpose of the CON Law[7] and is inconsistent with the terms of that law. There is no language in the statute that indicates the legislature intended to create such a two-step for developers to circumvent the CON Law process.

E. The 1997 amendment does not lead to a different outcome and the lower courts' analysis is inconsistent with McKnight Place Extended Care, L.L.C. v. MHFRC, 142 S.W.3d 228 (Mo. App. 2004).

The trial court and court of appeals suggested that the legislature's 1997 amendment of § 197.305(9)(a) to include an expenditure minimum supports the New Hospital Rule. (L.F. 188); A 03. The court of appeals reasoned: "had the legislature intended for all new hospitals to require a certificate of need, there would have been no

[7] *See Dept. of Social Services v. Senior Citizens Nursing Home Dist.*, 224 S.W.3d 1, 4 (Mo. App. 2007).

reason for the 1997 amendment . . ." Slip op. at 12-13. That is, the legislature intended for "new health care facilities" to have an expenditure minimum, so that provision would be meaningless if a new hospital always triggers a certificate of need under other provisions of § 197.305(9).

In addition to ignoring the plain meaning of the statute, the lower courts ignored at least one very plausible explanation for the legislature's actions. When the legislature removed existing hospitals from many of the requirements of the CON Law in 1996, it also removed numerous other facilities, such as kidney disease treatment centers, diagnostic imaging centers, radiation therapy centers, and ambulatory surgical facilities. *Compare* § 197.305(7) (2000) *with* § 197.366. But the legislature postponed the effective date of this change to January 1, 2002. § 197.366. Thus, for a multiple-year interim period, facilities such as ambulatory surgical centers would be fully subject to CON Law review even though the legislature had made the decision to deregulate them from most CON Law requirements effective January 1, 2002.

One year after making this decision, the legislature passed the 1997 amendment to § 197.305(9)(a), allowing facilities such as ambulatory surgical centers to be built without a certificate of need requirement if they cost less than $1 million. This was most plausibly an accommodation to the soon-to-be deregulated businesses. They would be fully deregulated in 2002, but in the interim they would be allowed to build small facilities without obtaining a certificate of need.

It is implausible to suggest that the legislature's 1997 addition of an expenditure minimum to § 197.305(9)(a) reflected an intent to undo the 1996 amendment codified at

§ 197.366. It would have been easy to simply amend § 197.366 instead. The legislature's recent enactment of § 197.366 makes it extremely unlikely that it would amend that section *sub silentio* the very next year. The fact that the legislature did not delay the 1997 amendment to 2002, as it had for the amendment to "health care facilities" the year before, makes it even less likely that the 1997 amendment was intended to change the effect of the earlier amendment.

Moreover, the lower courts' analysis of the 1997 amendment failed to acknowledge that virtually the same issue in the same statutory section had already been decided in *McKnight Place Extended Care, L.L.C. v. MHFRC*, 142 S.W.3d 228 (Mo.App. 2004). In *McKnight Place*, an existing nursing home was adding 12 skilled nursing beds at a cost that was less than the expenditure minimum under Section 197.305(9) (c). MHFRC nevertheless required the nursing home to get a certificate of need because the new beds triggered another certificate of need requirement – the 10-bed, 10-percent increase-in-bed standard in § 197.305(9)(e). The nursing home appealed this determination.

On appeal, the nursing home argued that a project that is below the expenditure minimum in sub-part (c) should be exempt from triggering a certificate of need as any other type of "new institutional health service." It would make no sense, the nursing home claimed, to satisfy the expenditure minimum only to be required to have a certificate of need by another sub-part. The court of appeals rejected this argument because it would render the other provisions meaningless.

> If, as McKnight argues, any expenditure on a health care service below the expenditure minimum defined in section 197.305(6) did not require a certificate of need, then section 197.305(10)(e), section 197.305(10)(f), and section 197.305(10)(g) would all be rendered meaningless. McKnight's argument effectively writes out three of the seven definitions of a "new institutional health service." To write out definitions expressly provided for in the statute would violate a principal rule of statutory construction that each word or phrase in a statute must be given meaning if possible.

McKnight Place, 142 S.W.3d at 233 (citation omitted). Similarly, in the present case, the trial court and court of appeals' conclusion that only sub-part (a) applies to new hospitals effectively writes the other six definitions of "new institutional health service" out of the statute.

F. The New Hospital Rule is inconsistent with another part of the CON Law.

The New Hospital Rule not only conflicts with the express language of §§ 197.366 and 197.305(9), it is also inconsistent with § 197.315.3. That statute provides that "[a]fter October 1, 1980, no state agency charged by statute to license or certify health care facilities shall issue a license to or certify any such facility, or distinct part of such facility, that is developed without obtaining a certificate of need." § 197.315.3. Under this provision, a certificate of need is a prerequisite for any health care facility that requires a license. A new hospital must obtain a license from the Department of Health and Senior Services to operate. § 197.040. Therefore, a new hospital requires a certificate of need under § 197.315.3.

It makes little sense to allow a new hospital to be built without a certificate of need under the New Hospital Rule when it must obtain a certificate of need to be licensed pursuant to § 197.315.3. Respondents may argue that § 197.315.3 applies only to new hospitals that need review under the New Hospital Rule. If this is their argument, it suffers from two flaws. First, that is not what the statute says. Second, the argument requires ignoring an amended statutory definition (§ 197.366(4)) because it is not "in complete harmony" with the original statutory language (§ 197.305(9)), and then ignoring original statutory language (§ 197.315.3) because it conflicts with the new statutory interpretation. Such a convoluted projection of meanings onto the CON Law simply cannot be reconciled with the primary rule of statutory interpretation, that the plain meaning of statutory language controls. *E & B Granite, Inc.*, 331 S.W.3d at 318.

CONCLUSION

Mercy asks this Court to reverse the trial court's judgment, declare the New Hospital Rule to be invalid, and remand the case for further proceedings.

THOMPSON COBURN LLP

By /s/ Dudley W. Von Holt

Dudley W. Von Holt, #32876
Bruce D. Ryder, #28013
Jeffrey R. Fink, #44963
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000
(314) 552-7000 (fax)
dvonholt@thompsoncoburn.com
bryder@thompsoncoburn.com
jfink@thompsoncoburn.com
Attorneys for Plaintiff/Appellant,
Mercy Hospitals East Communities

Certification Pursuant to Rule 84.06(c)

The undersigned hereby certifies that the foregoing substitute brief complies with the limitations contained in Rule 84.06(b) and contains 7,503 words, as measured by the Microsoft Word software program used to prepare the brief.

THOMPSON COBURN LLP

By /s/ Dudley W. Von Holt

Dudley W. Von Holt, #32876
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000
(314) 552-7000 (fax)
dvonholt@thompsoncoburn.com
Attorneys for Plaintiff/Appellant,
Mercy Hospitals East Communities

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2011, 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 e-mail addresses:

William S. Vanderpool
Kevin Hall
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
Bill.vanderpool@ago.mo.gov
Kevin.hall@ago.mo.gov

Attorneys for Defendants-Respondents Missouri Health Facilities Review Committee and James K. Tellatin

Richard B. Walsh, Jr.
Anne R. Kerns
Lewis, Rice & Fingersh, L.C.
600 Washington Avenue
Suite 2500
St. Louis, Missouri 63101
rwalsh@lewisrice.com
akerns@lewisrice.com

Attorneys for Intervenor-Respondent Patients First Community Hospital

/s/ Dudley W. Von Holt