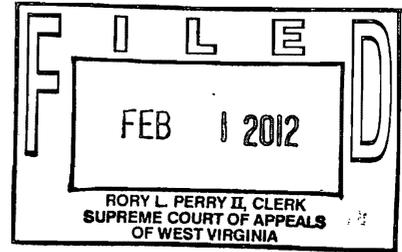


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 11-1299**



**WHEELING HOSPITAL, INC.,**

**PETITIONER,**

**v.**

**CRAIG A. GRIFFITH,  
WEST VIRGINIA TAX COMMISSIONER,**

**RESPONDENT.**

**CIRCUIT COURT OF OHIO COUNTY  
CIVIL ACTION No. 10-CAP-15**

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**AMICUS CURIAE BRIEF BY  
THE WEST VIRGINIA HEALTH CARE AUTHORITY  
ON BEHALF OF THE WEST VIRGINIA TAX COMMISSIONER**

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This amicus curiae brief is filed in support of the West Virginia State Tax Commissioner by the West Virginia Health Care Authority. The West Virginia Health Care Authority is the state agency created pursuant to West Virginia Code § 16- 29B-1 *et seq.* to “protect the health and well-being of the citizens of this State by guarding against unreasonable loss of economic resources as well as to ensure the continuation of appropriate access to cost-effective, high-quality health care services.” W.Va. Code § 16-29B-1.

One of the primary responsibilities of the Health Care Authority (HCA) is to administer the Certificate of Need (CON) program in West Virginia. See W.Va. Code § 16-29B-11. In West Virginia, a CON is required before “any new institutional health service may be acquired, offered or developed...” W.Va. Code § 16-2D-3. The CON process is governed by W.Va. Code §16-2D-1 *et seq.*, legislative rules promulgated pursuant to these Code sections and the State Health Plan which contains CON Standards that must be met before a CON is approved for many health services.

In the current case, several of the services in dispute require the hospital to have a CON. Others are services considered within the normal array of services for an acute care hospital, not a physician. The HCA will address each service listed in the Ohio County Circuit Court’s Order entered August 15, 2011, which is the subject of this appeal.

Findings number 39 and 42 in the Circuit Court Order address the Women’s Health Center and the Wound Care Center. Both of these services are located in medical office buildings owned by Wheeling Hospital. These services are typically

offered by acute care facilities and are subject to CON review if they are located off of the hospital's campus. In the present case, these services are located on the hospital's campus in medical office buildings constructed by the hospital. Thus, the services are not subject to review; however the construction of the medical office buildings is subject to CON review. The HCA's records reflect that Wheeling Hospital has received at least four CONs for the construction of medical office buildings dating from 1981. These construction projects are large capital expenditures which exceed the CON capital expenditure threshold and therefore are reviewable.

Finding number 45 addresses the Oncology Center at Wheeling Hospital which provides radiation and nuclear medicine therapy treatments. Radiation therapy is a service which requires a CON. W.Va. C.S.R. § 65-7-28.1.r. This service is also governed by the State Health Plan Standards for Megavoltage Radiation Therapy Services. The HCA's records reflect that Wheeling Hospital received a CON to renovate and expand its oncology center and to replace two linear accelerators (radiation therapy) in 1997. In addition, the hospital received a CON to replace a gamma camera system in its nuclear medicine division in 1992.

Finding number 49 addresses the Sleep Lab at the hospital. This is a service typically offered by acute care facilities.

Finding number 51 addresses cardiac catheterization. This service requires a CON. W.Va. C.S.R. § 65-7-28.1.c. It is also governed by the State Health Plan Standards for Cardiac Catheterization. This service is **only** performed at acute care hospitals in West Virginia. Wheeling Hospital has received several CON decisions

relating to its provision of cardiac catheterization services. In 1991, the hospital received approval to replace a cardiac catheterization laboratory. In 1994, the hospital received a CON for the addition of a second cardiac catheterization lab.

Finding number 54 identifies pathology as a disputed service. Although this service is not listed in the legislative rule, "The Certificate of Need Rule," 65 C.S.R. 7, as a reviewable service for hospitals, it is considered a service within the normal array of services offered by acute care hospitals and is not a service typically provided by physicians.

Finding number 58 identifies renal dialysis as a disputed service. This service is subject to CON review pursuant to W.Va. C.S.R. § 65-7-28.1.e and is governed by the State Health Plan Standards for End Stage Renal Disease. Wheeling Hospital has received a number of decisions from the HCA regarding the operation and expansion of this service.

Findings number 76 and 83 identify emergency room services and anesthesia services as disputed services. Again, although these services are not listed in The Certificate of Need Rule as reviewable services, they are considered to be within the normal array of services offered by an acute care hospital and are not services typically provided by physicians.

Findings number 86 and 91 identify outpatient and inpatient surgery as disputed services. W.Va. C.S.R. § 65-7-28.1.q lists surgical services as subject to CON review. These services are also governed by the State Health Plan standards for Operating

Rooms and Ambulatory Care Centers. The very nature of these services suggests they could not be performed in a physician office. Otherwise they would not be designated "inpatient" and "outpatient" surgeries.

In summary, all of the disputed services are typically provided by acute care hospitals in either an inpatient or outpatient setting. Many of these services are expensive to provide and require a CON. These services must meet detailed criteria outlined in the State Health Plan Certificate of Need Standards. These services are not within the normal array of services performed at a private physician office.

Accordingly, the West Virginia Health Care Authority respectfully requests this Court to deny the appeal of Wheeling Hospital and affirm the Ohio County Circuit Order entered August 15, 2011.

**WEST VIRGINIA HEALTH CARE AUTHORITY**

**By Counsel,**

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I, Marianne Kapinos, General Counsel for the West Virginia Health Care Authority, hereby certify that on February 1, 2012, I served a true and accurate copy of the forgoing

**Amicus Curiae Brief** by certified mail on:

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