COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2013-CA-446

UNIVERSITY MEDICAL CENTER, INC. — APPELLANT

V.

On Appeal From Jefferson Circuit Court
Civil Action No. 08-CI-12392

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, INC., ET AL. — APPELLEES

BRIEF FOR APPELLANT, UNIVERSITY MEDICAL CENTER, INC.

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Certificate of Service

I hereby certify that a copy of this brief was sent by U.S. first-class mail, postage prepaid, this 15th day of July, 2013 to: William E. Sharp, ACLU of Kentucky, Inc., 315 Guthrie Street, Suite 300, Louisville, KY 40202; Jon L. Fleischaker, Jeremy S. Rogers, Dinsmore & Shohl, LLP, 101 S. Fifth Street, 2500 National City Tower, Louisville, KY 40202-2810; Mr. John Keith Smith, 1393 S. 3rd Street, Louisville, KY 40208; and Hon. Angela McCormick Bisig, Jefferson Circuit Court, Division 10, 700 West Jefferson, Louisville, KY 40202. The undersigned certifies that the record on appeal was not withdrawn by the party filing this brief.

Bethany A. Breetz

INTRODUCTION

This appeal concerns whether University Medical Center (UMC), a private non-profit corporation that has been treated as a private entity since its inception, is a public agency for purposes of the Open Records Act. After the Attorney General reversed position and determined that UMC is a public agency under the subsection of the Act directing that entities "established created, and controlled" by a public agency are public agencies, the trial court disagreed with the Attorney General's latest determination, but declared UMC a public agency under another subsection of the Act that applies to an "entity where the majority of its governing body is appointed by a public agency."

STATEMENT CONCERNING ORAL ARGUMENT

UMC believes that oral argument will assist this Court in (1) identifying the absence of substantial evidence sufficient to support the trial court's conclusion that the majority of UMC's governing body is appointed a public agency and (2) understanding the trial court's erroneous and overbroad interpretation of the appointment requirement in Kentucky's Open Records Act. Oral argument will also assist the Court in assessing the conflicting decisions of the Attorney General and the trial court.

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STATEMENT OF THE CASE

1. Summary

This case concerns whether UMC, which was established and created in 1995 by the presidents of two private hospital companies, is a public agency for purposes of Kentucky's Open Records Act (the "Act"). In 2011, after having been treated as a private entity since its inception, including a 2006 Open Records Decision concluding that UMC was not a public agency, the Attorney General reversed position. In a 2011 opinion that gave rise to this appeal, the Attorney General stated that UMC was a public agency under Subsection (j) of KRS 61.870(1), because UMC was "established and created" to operate "the hospital affiliated with the University of Louisville School of Medicine" and was controlled by U of L. On appeal, the parties agreed that whether UMC is a public agency turns on the question of whether it was "established, created, *and* controlled" (the Subsection (j) requirements) by a public agency, and they briefed that issue. The trial court found that UMC was established and created by two individuals on behalf of two private companies. Thus, it held that UMC was not a public agency under Subsection (j) because it was not established or created by a public agency.

Although neither the Attorney General nor the defendants argued that a majority of UMC's governing body was appointed by a public agency, the trial court went on to hold that UMC is a public agency under Subsection (i) of KRS 61.870(1), which defines a "public agency" as an "entity where the majority of its governing body is appointed by a public agency." Even though only a minority of UMC's Board of Directors is appointed by U of L, the trial court held that U of L's purported control over the Nominating Committee and purported ability to block nominees amounted to "*de facto* power of appointment" and rendered UMC a public agency under Subsection (i).

2. Private entities have always managed the University of Louisville Hospital.

Private corporations have managed the University of Louisville Hospital (the "Hospital") since its opening in 1983. Following an executive order of Governor John Y. Brown, Jr., Humana,[1] a private for-profit corporation, managed the Hospital from 1983 through 1995. In 1995, the Commonwealth negotiated the termination of Humana's agreements and sought a replacement for Humana.

3. Norton and Jewish (private entities) established and created UMC.

Ultimately, the Commonwealth and U of L chose UMC through a competitive process, and in February 1996 UMC took on Humana's previous role. (11/21/12 Order, AR 1867, p. 2 (attached as Exhibit 2); 1996 UMC Aff. Ag., AR 125-212.) Similar to the entities before it, UMC is a private corporation. It was established and created in June 1995 by Norton Healthcare, Inc. f/k/a Alliant Health System, Inc. and Jewish Hospital Healthcare Service—two of Louisville's leading private nonprofit healthcare companies. (Exh. 2, p. 1; UMC Art. of Inc., AR 22-30 at Art. 5.) The presidents of Norton and Jewish incorporated UMC and, along with their board chairmen, also served as UMC's initial board of directors. (*Id.* at Art. 6.)

After forming UMC, Norton and Jewish prepared a competitive proposal and then participated in months of negotiations in competition with another bidder to secure the contract. (6/30/1995 Proposal, AR 1061-1293.) UMC's sponsors were Norton and Jewish, not U of L. (*Id.* at Transmittal Letter, AR 1064.) UMC adopted its original bylaws in June 1995, before UMC's competitive proposal, the contract negotiations, and the contract award. (Orig. Bylaws, AR 1045-59.) The original bylaws further

[1] Humana went through several corporate reorganizations during the term of its agreements with the Commonwealth and U of L. Its for-profit successor and affiliate corporations include Galen of Virginia, Inc. and Columbia/HCA Healthcare Corporation.

demonstrate that Norton and Jewish were the founding members of UMC and supplied all of its initial directors. (*Id.* §§ 2.01, 3.02; UMC Art. of Inc., AR 22-30.) U of L had no governance or management role when UMC was established and created.

While one of the purposes for which Norton and Jewish created UMC was to submit a proposal to manage the Hospital, it was not the sole purpose. UMC's articles of incorporation set forth purposes similar to those of other non-profit corporations managing hospitals, including providing medical care to the community.[2] (UMC Art. of Inc., AR 22, at pp. 1-2.) U of L's RFP did not dictate that UMC be formed at all, much less dictate its structure or even the terms of the management agreement it proposed to U of L. (RFP, AR 1295-1306.) Nor did U of L's RFP require that bidders share decision-making authority in the contracting entity with U of L. (*Id.* at p. 4).

As part of their establishment and creation of UMC, Norton and Jewish took on financial obligations. For example, in February 1996 UMC paid over $20 million to the Commonwealth and obtained a Bill of Sale for all equipment and supplies at the Hospital and related facilities and for all prepaid expenses incurred before February 1996. (2/6/96 letter from Henry Wagner (Jewish's president) as Director of UMC and Bill of Sale, AR 1308-11.) In addition, Norton and Jewish "absolutely and unconditionally guarantee[d]" on a "50/50 basis" the prompt payment of any and all amounts owed by UMC to U of L under UMC's Affiliation Agreement with U of L. (Guaranty, AR 1313-14.)

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[2] UMC's purposes are to (a) "operate and maintain the hospital affiliated with the University of Louisville School of Medicine, and to provide care for the people who are in need of those, or related, medical services" and "provide such other services as are related to the delivery of medical care"; (b) "carry on educational activities related to rendering care to the sick and injured, and to the promotion of health"; (c) "promote and carry on scientific research related to the care of the sick and injured"; (d) "participate, so far as circumstances may warrant, in any activity designed and carried on to promote the general health of the community"; and (e) "provide, on a nonprofit basis, hospital or health care facilities and services for the care and treatment of persons who are acutely ill or who otherwise require medical care and related services." (UMC Art. of Inc., AR 22, at 1-2.)

4. **U of L does not control UMC.**

U of L's arrangements with the private entities managing the Hospital have been structured substantially the same since 1983 when Humana secured the contract. *See* attached Exhibit 3. U of L has had affiliation agreements and real estate lease agreements with both Humana and UMC. The leases conveyed exclusive dominion and control of the real property and facilities to the private entities in exchange for rent payments. The affiliation agreements ensured that the Hospital, under the management of the private entities, would be available for U of L's School of Medicine to teach, conduct research, and provide clinical care. All of the affiliation agreements have established the Hospital as the School of Medicine's primary venue to perform these functions. (Humana Aff. Ag., AR 48 at § 8; UMC 1996 Aff. Ag., AR 125 at § 5.1.1; UMC 2007 Aff. Ag., AR 242 at § 5.1.1.) Unlike the Humana affiliation agreement, UMC's agreement includes no commitment that U of L will locate additional programs at the Hospital. (*Id.*)

The content of the Affiliation Agreement chiefly originated from UMC's proposal to U of L—not the other way around. (10/2/95 Proposal, AR 81-123; RFP, AR 1295-1306.) The RFP did not direct Norton and Jewish how to structure UMC or dictate the terms of UMC's proposal. (RFP, AR 1295 at p. 4). Nor did the agreement give U of L "control" over UMC. Instead, that agreement addresses U of L's teaching, research, and clinical care functions performed at the Hospital and how UMC will facilitate them. (*Id.* at 5-6). The agreement does not relate to the management of UMC as an entity or establish the details of how UMC will perform its management functions.

U of L has similar affiliation agreements with other private entities. UMC not is the sole private entity that contracts with U of L regarding its teaching, research, and clinical programs. U of L's primary pediatric teaching hospital is Kosair Children's

Hospital, which is owned and operated by Norton. Faculty and students from U of L's School of Medicine also provide services at Norton Hospital, Jewish Hospital, the Veterans Administration Hospital, Baptist Hospital East, and Trover Clinic, all of which have affiliation agreements with U of L and none of which is managed by a public agency under the Act. (UMC Response, AR 1008 at p. 8.)

5. UMC's community-based Board of Directors controls UMC.

After establishing and creating UMC in 1995, Norton and Jewish board representatives voted in February 1996 to add U of L as one of three members of the corporation and permit U of L to appoint one-half of UMC's twelve directors. (2/4/96 Resolutions, AR 1316-19.) UMC hired a new President and CEO, James H. Taylor, in 1996. (J. Taylor Aff., AR 1321-26, ¶ 14.) The Hospital flourished under UMC's management, and soon the Hospital began to compete "head-to-head" with other hospitals managed by Norton and Jewish. (*Id.* ¶ 20.) As competition increased, UMC's management team, including Mr. Taylor, became concerned that UMC's "competitor" directors had a conflict of interest. In effect, UMC's two largest competitors had "inside information" on UMC's strategic plans and could vote on and potentially thwart them. (*Id.* ¶ 21.) Mr. Taylor initiated conversations with UMC's Board regarding these issues. (*Id.* ¶ 22.) Through this dialogue and study of best practices concerning the governance of non-profit companies, UMC concluded that it would be better served by a community-based board of directors. (*Id.* ¶ 23.)

Following lengthy negotiations, Norton and Jewish withdrew from UMC in July 2007. (*Id.* ¶ 24.) UMC's management advocated strongly for UMC to be controlled by a community-based board of directors. (*Id.*). Accordingly, in connection with the withdrawal, a community-based board of directors was adopted. The bylaws currently in

effect were adopted not long thereafter, in January 2008, including the same community-based board structure. (Bylaws, AR 1328-44; attached Exhibit 5.)

UMC's bylaws provide for two classes of directors: "Community Directors" and "University Directors." (*Id.* § 4.02(a).) University Directors are appointed by UMC's chairperson (U of L's president or his designee) or are *ex officio* directors (directors by virtue of their office, *e.g.* the dean of U of L's Medical School). (*Id.*) UMC's Board must contain a minimum of 4 and a maximum of 7 University Directors. (*Id.*) In contrast, no one appoints the Community Directors; rather, they are elected by the Board as a whole from nominees recommended by a Nominating Committee. (*Id.*) UMC's Board "shall consist of not less than" 9 and not more than 12 Community Directors, thereby ensuring the Community Directors always constitute a majority of the Board.

The Nominating Committee consists of two Community Directors and two University Directors and can act only when both Community Directors are present. (*Id.* §§ 6.01(D), 6.03.) The Nominating Committee cannot elect or appoint any Director. (*Id.*) It may only "recommend . . . candidates" and must limit its recommendations to individuals "who have demonstrated an interest in health care issues" and are not "officers, directors or employees" of UMC's competitors or a "trustee, officer or employee" of U of L. (*Id.* §§ 4.02(a), 6.03.) The committee must also "endeavor to recommend . . . candidates . . . who represent the broad ranges of diversity within the community." (*Id.* § 4.02(a).) Using these criteria, neither the Nominating Committee nor University Directors can force any Community Director candidate onto UMC's Board—the Board, which is designed to include a majority of Community Directors, must vote to elect any Community Director.

Majority control of the Board by the Community Directors is further solidified by the bylaws. For example, they provide that: (1) in order to achieve a quorum at a Board or committee meeting, a majority—more than half of whom are Community Directors—must be present; and (2) University Directors must be a minority of UMC's Board and each of its committees. (*Id.* §§ 4.02(a), 4.06, 4.10, 6.01(A), 6.03.) UMC's bylaws also provide that they may only be amended by votes of a majority of the directors appointed by U of L *and* a majority of the Community Directors. (*Id.* Art. XV). UMC thus ensures that Community Directors are active members and maintain majority control. Moreover, Community Directors owe fiduciary duties to UMC, and, as board members, they do not serve as representatives of U of L. (Comm. Director Affs., AR 1347-63.)

While University Directors do not "control" the Board or UMC, the presence of directors appointed by U of L (as was the case with previous private entities managing the Hospital), facilitates coordination and communication between U of L and UMC. Indeed, Humana likewise allowed University representation on its body in charge of managing the Hospital to facilitate communication. (Humana Aff. Ag., AR 48, § 3.) Further, as UMC board members, University Directors owe fiduciary duties to UMC.

6. UMC controls its own day-to-day affairs.

UMC runs the Hospital, not U of L. For example, UMC maintains separate human resources, information technology, accounting, marketing, business development, and other departments. (J. Taylor Aff., AR 1321, ¶ 5.) U of L has no control over UMC's hiring and firing decisions, establishment of policies or procedures, or purchasing. (*Id.* ¶ 5-9, 19.) While UMC works with U of L on collaborative efforts, such as space management and strategic issues affecting both entities, UMC does not seek University permission to make management decisions. (*Id.*)

As part of managing the Hospital, UMC:

(a) provides support and administrative staff for the Hospital, such as nurses, information technology specialists, accountants, etc.;

(b) performs accounting and recordkeeping functions for hospital-related functions (not for U of L physicians practicing, teaching, or conducting research at the Hospital);

(c) manages, purchases, maintains, and dispenses pharmaceutical and other medical supplies necessary for the delivery of healthcare services;

(d) manages, purchases, and maintains the equipment necessary for the delivery of healthcare services, such as examination beds, linear accelerators, computers, etc.;

(e) manages, maintains, and coordinates use of the physical space necessary for the delivery of healthcare services, such as operating rooms, etc.; and

(f) provides and maintains the networks, information security, and other technology-related services necessary for the delivery of healthcare services, such as wireless internet connections that are compliant with applicable laws.

(*Id.*) In contrast, U of L is responsible for managing the Medical School, not UMC.

7. Defendants requested documents from UMC, and the Attorney General erroneously determined that UMC must provide the documents.

A short time prior to the current dispute, the Attorney General in 2006 concluded that UMC is not a "public agency" for purposes of the Act. The opinion made a specific finding that UMC was not a public agency under Subsection (h) of KRS 61.870(1), and also stated that, because UMC does not "otherwise fall within the parameters of KRS 61.870(1)(a) through (k), UMC is not a public agency for open records purposes." 06-ORD-210 at 1-2.

Despite this controlling decision, each of the defendants/appellees submitted requests in 2011 under the Act to UMC. (Defs. Requests, AR 278-86.) UMC responded to each of the requests and, relying expressly on the Attorney General's decision in 06-ORD-210, stated that it is a private organization not subject to the Act. (UMC Responses, AR 288-297.) Each of the defendants appealed to the Attorney General. (AR 298-328.) UMC responded, setting forth why it is not a "public agency" under the Act

and further explaining that some of the records requested were exempt from disclosure under the Act. (UMC Att'y Gen. Appeal Responses, AR 503-40.)

The Attorney General's decisions, issued in unexplained violation of KRS 61.880(2) after the deadlines for decisions imposed by the statute had expired, erroneously concluded that UMC is a "public agency" under Subsection (j) (the "established, created, and controlled" definition). (Att'y Gen. Ops., AR 553-71, attached as Exh. 1. Three of the opinions, 11-ORD-158, -159, and -160, rely on the "dispositive" opinion in 11-ORD-157.) Without having reviewed the documents sought or having asked for any information from UMC, the Attorney General also erroneously determined that all of the documents requested were subject to disclosure under the Act. (*Id.*)

8. UMC demonstrates that it was not established or created by U of L.

UMC filed a complaint in circuit court appealing the Attorney General opinions. (Complaint, AR 1.) The media defendants, WHAS and Courier-Journal, and the plaintiff, UMC, filed cross-motions for summary judgment; ACLU, another defendant, responded to UMC's motion; the fourth defendant, Keith Smith, took no part in briefing. (AR 634, 1008, 1364, 1686, 1701, 1826). The defendants sought to finesse the plain language of Subsection (j), which requires that an entity be (1) "established," (2) "created," *and* (3) "controlled" by a public agency to fall within its scope.

Similar to the Attorney General's reasoning in 11-ORD 157, the defendants admitted that U of L did not take part in UMC's incorporation but nevertheless argued that UMC was established and created by U of L because UMC was "established and created at the direction of the University and the State according to" their criteria, and it was created to operate the Hospital on behalf of U of L. (AR 634, p.3; AR 1701, p. 3.) *Compare* with 11-ORD-157, p.4 (although U of L officials "did not affix their signatures

to the June 1995 Articles of Incorporation," UMC was created as "a vehicle to compete for the opportunity" to operate the Hospital). The defendants did not, however, set forth any evidence showing that UMC was established or created by the University; rather it was established and created *by others* as a result of a public agency's invitation to participate in a competitive RFP process.[3] (*Id.*)

No Kentucky case law or statute ignores the mechanism by which an entity came into being to deem it a public entity based simply on the reason for its creation. In attempting to morph the Act's plain language, the Attorney General and the defendants mischaracterized the decision in *University of Louisville Foundation, Inc. v. Cape Publications, Inc.*, No. 2002-CA-1590, 2003 Ky. App. Unpub. LEXIS 1370 (Ky. App. Nov. 21, 2003). There, this Court stated: "The Foundation was established and created by the members of the Board of Trustees of the University of Louisville, acting in their official capacities." *Id.* at *16. But as this Court previously noted in an earlier decision regarding the University of Louisville Foundation, the Board of Trustees established and created the Foundation by adopting a resolution bringing it into being. *Courier-Journal & Louisville Times Co. v. Univ. of Louisville Bd. of Trustees*, 596 S.W.2d 374, 375-76 (Ky. App. 1979). In contrast, no U of L representatives, much less U of L officials acting in their "official capacities" or by board resolution, took any action to "establish and create" UMC. These facts put UMC outside the scope of Subsection (j).

Nor was UMC established according to U of L's "criteria": the RFP did not dictate that UMC be formed at all, much less dictate its structure or even the terms of the

[3] This is akin to claiming that, when invitees to a graduation party choose to create a card for the graduate, it is the *graduate* that created the card, not the person who actually put pen and creative thoughts to paper. The facts that the graduate issued an invitation and that the invitee chose to respond to the invitation with a card, do not convert the graduate into the person who established or created the card.

management agreement UMC proposed to U of L. (RFP, AR 1295-1306.) In contrast to the defendants, UMC cited uncontroverted facts regarding UMC's establishment and creation (articles of incorporation, original bylaws). (AR 1008 at pp. 3-5 and exhibits thereto; AR 1686 at pp. 2-4 and exhibits thereto.)

The trial court correctly made findings of fact that UMC was created by Wagner and Williams "on behalf of Jewish and Norton" (Exh. 2, p.5.) The court further found that, "[w]hile UMC was created with the goal of operating" the Hospital in response to U of L's RFP, U of L "did not become legally associated with UMC until after" UMC was selected to run the Hospital. (*Id*, pp. 5-6.)

> Neither Jewish nor Norton, the entities on whose behalf Mr. Wagner and Mr. Williams created and established UMC, are public agencies. Therefore, UMC cannot satisfy the definition of a public agency under KRS 61.870(1)(j) as previously found by the Attorney General because it was not established or created by a public agency.

(*Id.* p. 6.)[4]

9. The circuit court erroneously held that UMC was a public agency under Subsection (i).

Although no party argued (and the Attorney General did not find) that UMC was a public agency under any other provision of the Act, the circuit court went on to hold that UMC is a public agency under Subsection (i). (Exh. 2, pp. 6-8.) That subsection provides that an "entity where the majority of its governing body is appointed by a public agency" is a public agency under the Act.

The circuit court started down this path in its order setting oral argument in which it limited the parties to addressing three questions (none of which had been raised by any

[4] Because the circuit court found that UMC was neither established nor created by UMC, it did not reach the third requirement of Subsection (j)—that a public agency "controlled" UMC. (*Id.*) As demonstrated above and in the lower court, however, U of L did not and does not control UMC. (UMC Resp. and S.J. Mem., AR 1008, at pp. 6-12 and attachments thereto; UMC Reply, AR 1686, at pp. 5-6.)

of the parties): (1) "Is the Court precluded from considering whether UMC is a 'public agency' under" other provisions of the Act?"; (2) "Does the composition of the Nominating Committee" and the Bylaws' procedure for appointing Community Directors provide U of L with "*de facto* power of appointment over" the Community Directors?; and (3) "If some catastrophic event occurred" and all the Community Directors "were lost, how would UMC be able to proceed under the Bylaws currently in force . . .?" (6/25/12 Order, AR 1837, pp. 3-4.) Following oral argument, UMC and WHAS/Courier Journal filed supplemental memoranda regarding whether UMC was a public agency under Subsection (i). (AR 1842, 1860).

Although recognizing that U of L may appoint only a minority of board members with a majority being Community Directors elected by the Board as a whole, the court held that, because U of L's president or his designee, serving as UMC's chairman, selects which Community Directors serve on the Nominating Committee and because U of L controls two of the four votes on the Nominating Committee, "no candidate for a Community Director vacancy may be presented to the UMC Board without the approval of U of L," resulting in "*de facto* power of appointment over the Community Directors." (Exh. 2, pp. 6-7.) (The court neglected to mention that, similarly, because the Community Directors control two of the four votes on the Nominating Committee, "no candidate for a Community Director vacancy may be presented to the UMC Board without the approval of" the Community Directors.) The court went on to hold that the "catastrophic emergency" situation posed by the court in its order compelling oral argument, along with U of L's power to block all nominees for community director vacancies, if it chose, further demonstrated that U of L would have the power to appoint

Community Directors of its choosing. (*Id.* p. 7.) The trial court held that this "*de facto* power of appointment" made UMC a public agency under Subsection (i). (*Id.* p. 8.)

The court then ruled that it should examine the documents *in camera* to determine whether exemptions applied. (*Id.* p. 9.) Finally, the court made a factual finding that UMC acted in good faith in relying on the 2006 Attorney General opinion in refusing to provide the requested records, and it held that the defendants were not entitled to costs under KR 61.882(5).

UMC subsequently submitted the documents for *in camera* inspection. Upon agreement of the parties that exemptions, if any, applicable to the documents would be decided, if necessary, following the conclusion of UMC's anticipated appeal, the circuit court made the November 2012 order final and appealable, and UMC appealed. (2/5/13 Order, AR 1913, attached as Exhibit 3; Notice of Appeal, AR 1928.)

ARGUMENT[5]

I. Standard of Review

"A trial court's findings of fact are reviewed under a clearly erroneous standard," and its "conclusions of law are reviewed de novo." *Hoskins v. Beatty*, 343 S.W.3d 639, 641 (Ky. App. 2011), citing *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005). Factual "findings are not clearly erroneous if supported by substantial evidence," meaning evidence that 'has sufficient probative value to induce conviction in the mind of a reasonable person.'" *Id.*, citing *Gosney*.

[5] UMC's arguments are preserved for review through its complaint, motion for summary judgment, and memoranda in the trial court in which it argued that the parties seeking documents from UMC bore the burden of proof and that it is not a public agency under Subsections (i) or (j) of KRS 61.870(1). (AR 1, 1008, , 1686, 1826, and 1860.)

Thus, here, for example, the circuit court's findings of fact regarding Subsection (j)—that UMC was established and created by two individuals on behalf of two private entities (Norton and Jewish), not by U of L—are reviewed under a clearly erroneous standard. Because those facts demonstrating that UMC is not a public agency under Subsection (j) were supported by substantial evidence, they must be upheld.

In contrast, the trial court's legal conclusion that UMC is a public agency under Subsection (i) is reviewed de novo, meaning it is accorded no deference. That conclusion should be reversed.

II. The defendants bear the burden to prove that UMC is a public agency.

The defendants bear the burden to demonstrate that UMC is a public agency. *See, e.g.*, 09-ORD-033 (although public agencies resisting disclosure of records bear the burden of proof, "where, as here, the 'body' disputes its status as a 'public agency,' that body cannot properly be assigned the statutory burden of proof.") In similar contexts, Kentucky courts have consistently held that an entity cannot be forced to prove a negative by demonstrating that it is *not* the agent of, an agency of, or under the control of another entity. *See e.g., Wright v. Sullivan Payne Co.*, 839 S.W.2d 250 (Ky. 1992). Likewise, a party claiming agency must prove the agency relationship. *See, e.g., Couch v. Natural Resources & Envtl. Protection Cabinet*, 986 S.W.2d 158, 161 (Ky. 1999) ("[T]he burden of proof is on the party who alleges agency."); *Cincinnati Ins. Co. v. Clary*, 435 S.W.2d 88, 89 (Ky. 1968) ("One pleading and relying on agency has the burden of proving both the agency and its extent.").

Moreover, the Act provides no basis for making a private entity prove that it is *not* a public agency.[6] *See* 09-ORD-033; KRS 61.880(5) (not putting the burden of proof on private entities); KRS 61.880(2)(c) (not putting the burden of proof on private entities). And this makes perfect sense. As the Indiana Supreme Court held in *Indianapolis Convention & Visitors Ass'n v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 212 (Ind. 1991), a requestor bears the burden of proving that an entity is a "public agency" under Indiana's Public Records Act, because the party "seeking the benefit of a statute must bring himself within its provisions." Here, the defendants/appellees did not, and cannot, meet their burden.

III. The trial court erred in holding that a potential ability to block a nominee amounts to appointment of board members under Subsection (i).

Subsection (i) of KRS 61.870(1) defines as a public agency "[a]ny entity where the majority of its governing body is appointed by a public agency . . . ." This provision includes three essential elements: (1) the *majority* (2) must be of the entity's *governing body* and (3) must be *appointed* by a public agency. None of these elements is present here. As demonstrated above, the majority of UMC's governing body is made up of Community Directors. Those Community Directors are not "appointed" by anyone. Accordingly, UMC is not a public agency under any provision of the Act.

A. The nominating process for Community Directors does not render UMC a public agency under Subsection (i).

A majority of UMC's Community Directors is elected by UMC's Board; they are not "appointed" by U of L or anyone else. The Nominating Committee consists of two

[6] No basis exists for applying the burden of proof differently depending on whether an action is under KRS 61.880(5) or KRS 61.880(c)(2). Also, the fact that UMC was named as a "plaintiff" is simply the result of this action's procedural history. The defendants below were the parties making claims against UMC.

Community Directors and two University Directors and can act only when both Community Directors are present. (Bylaws, Exh. 5 at §§ 6.01(D), 6.03.) The Nominating Committee cannot elect or appoint any director. (*Id.*) It may only "recommend . . . candidates" and must limit its recommendations to individuals "who have demonstrated an interest in health care issues" and are not "officers, directors or employees" of UMC's competitors or a "trustee, officer or employee" of U of L. (*Id.* at §§ 4.02(a), 6.03.) The Committee must also "endeavor to recommend . . . candidates . . . who represent the broad ranges of diversity within the community." (*Id.* § 4.02(a).)

Using these criteria, the Committee cannot force any candidate onto UMC's Board—the Board must vote to elect any Community Director. And, to obtain a quorum for such a vote, a majority of the Board, "more than half of whom are Community Directors," must be present. (*Id.* § 4.10.) Thus, UMC's Community Director-controlled majority is self-perpetuating. They are not appointed by anyone. As recently found by the U.S. District Court: U of L "has no authority to appoint a majority of [UMC's] Directors." *Mitchell v. UMC*, No. 10-5979 (6th Cir. filed Aug. 10, 2011) *aff'g* No. 3:07CV-414-H, 2010 U.S. Dist. LEXIS 80194, *28–*29 (W.D. Ky. Aug. 9, 2010).

This is a common board structure. *See, e.g.*, *Eitel v. John N. Norton Memorial Infirmary*, 441 S.W.2d 438 (Ky. 1969) (describing Norton's self-perpetuating board of directors); *Absher v. Illinois C. R. Co.*, 371 S.W.2d 950, 952 (Ky. 1963) (describing a blend of *ex officio* and elected board members and stating "[e]xcept to the extent that the Railroad designates *ex officio* some of the board members and the employes elect the others, no vestige of control exists in the Railroad, the employes, or any person or group but the board itself, which alone is empowered to amend the regulations.").

Further, in the event of a vacancy in a community director position, the Nominating Committee again only has the power to make recommendations. (Bylaws § 4.06). The Board of Directors—a majority of whom must be Community Directors—must elect new Community Directors after recommendation of candidates by the Nominating Committee. (*Id.* §§ 4.06, 4.10).

The fact that the Nominating Committee is chaired by U of L's president or his designee or that the Nominating Committee is evenly split between University and Community Directors does not bring UMC within the statutory language.

- UMC's Nominating Committee is not its *governing body* because its only power is to make "recommendations" regarding Community Director candidates.
- Neither UMC's Nominating Committee nor its chairperson *appoints* Community Directors. As described above, UMC's Community Directors are self-perpetuating. They are "nominated," not "appointed" by the Nominating Committee and are "elected," not "appointed" by the UMC Board, which has a majority of Community Directors.
- While it is theoretically possible for the University Director members of the Nominating Committee to block a potential nominee for a Community Director vacancy (an event that has never occurred), the Community Director members may likewise block a Community Director nominee.
- Only a majority of UMC's Board, more than half of whom must be Community Directors, may elect a Community Director. Thus, University Directors cannot force the election of a Community Director nominee.

Accordingly, because a majority of UMC's "governing body"—its Board—is nominated and elected by the Board—not "appointed" by a "public agency"—UMC does not fall within the "public agency" definition of Subsection (i) due to its nominating process. The circuit court misconstrued UMC's bylaws in holding that UMC's Nominating Committee structure results in some sort of "*de facto* power of appointment" by U of L over Community Directors that somehow brings UMC within the scope of Subsection (i). (Exh. 2, pp. 6-7.) At most, University Directors on the Nominating

Committee would have the power to decline to recommend a potential candidate. Their decisions, however, must be guided by their fiduciary duties to UMC—not any other entity.

As demonstrated, U of L does not have "*de facto* power" of appointment of the Community Directors. In ruling otherwise, the trial court not only ignored the bylaws and the wording of the statute, it ignored the affidavits of the Community Directors. In those uncontroverted affidavits, UMC's Community Directors swore that: (1) they owe fiduciary duties to UMC, (2) they do not act in a representational capacity for U of L, and (3) as members of UMC's Board of Directors, U of L does not control how they vote or act with respect to UMC. (Community Director Affidavits, AR 1347-63.)

The Kentucky Attorney General has acknowledged that a similar structure does not bring an entity with the scope of Subsection (i). In 04-ORD-222, the Ballard County Economic and Industrial Development Board, Inc. stated that its directors were "nominated by a Nominating Committee and then elected by the Board . . . ." *Id.* Similar to UMC, the Industrial Development Board's Nominating Committee consisted of six people appointed by the County Judge/Executive and the Board Chairman. *Id.* The Attorney General concluded that selection of directors by a *nomination* and *election* process "[did] not fall within the parameters of KRS 61.870(1)(i)." *Id.*

This makes sense because board member *election* processes differ from *appointment* processes. For example, the nonprofit corporation statutes refer to directors being "elected or appointed." *See, e.g.*, KRS 273.211. "It is a basic principle of statutory construction that terms joined by the disjunctive 'or' must have different meanings because otherwise the statute or provision would be redundant." *Hall v. Hospitality Res.,*

Inc., 276 S.W.3d 775, 784 (Ky. 2008) (quoting *United States v. Hill*, 79 F.3d 1477, 1482, 1483 (6th Cir. 1996)).

The statutory provision at issue, Subsection (i), deals with the appointment of individuals, not nomination and election. KRS 61.870(1)(i) ("appointed by a public agency"). "The literal language of the statute is both plain and unambiguous and must be given effect as written. The words used in the statute are to be given their ordinary meaning." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 547 (Ky. 2000). Kentucky law does not allow the addition of words to a statute to broaden its scope. *Rue v. Kentucky Retirement Sys.*, 32 S.W.3d 87, 89 (Ky. App. 2000) ("We are not free to add words to statutory enactments in order to enlarge their scope beyond that which can be gleaned from a reading of the words used by the legislature.").

The circuit court's overbroad reading of "appointed" in subparagraph (i) would swallow the definition of "public agency" in subparagraph (j), which requires that an entity be "established, created and controlled" by a public agency. *State v. Heck*, 817 P.2d 247, 249 (N.M. App. 1991) ("To construe the statute otherwise would render meaningless the alternative definitions"). Indeed, the media defendants implicitly acknowledged that Subsections (i) and (j) must be construed separately and that Subsection (i) does not apply to UMC:

> There is a separate definition of "public agency" in the Open Records Act that applies to "[a]ny entity where the majority of its governing body is appointed by a public agency . . . [.]" KRS 61.870(1)(i). As such, "control" under KRS 61.870(1)(j) cannot be construed to require the University's appointment of a majority of UMC's directors. Such a construction would violate a basic rule of statutory interpretation by rendering the separate definitions in KRS 61.870(1)(i) and KRS 61.870(1)(j) redundant.

(Media Def. Response/Reply, AR 1367, at p. 7 n.2 (citing *Hall*, 276 S.W.3d at 784)).

The effect of the circuit court's interpretation of the statute is to make the *participation* of a public agency in a nomination process equivalent to appointment or control—a result the Kentucky Supreme Court has rejected. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 51 (Ky. 2003).

B. Even a "catastrophic emergency" would not allow a public agency to appoint a majority of UMC's board members.

In its order "compelling" oral argument, the circuit court restricted argument to three questions that had not been raised by any of the parties. Among those issues was the fate of UMC's Board in the event the Community Directors were "lost" in a catastrophic accident. (AR 1837-40.) The circuit court subsequently held that, in the event of such a catastrophe (or in the event that U of L blocked all nominees for a Community Director vacancy), under KRS 271B.8-100(1)(c), U of L would have the power to appoint Community Directors of its choosing. (Exh. 2 at p. 7, ¶¶ 13-14.) The circuit court was wrong in reaching this legal conclusion.

Chapter 271B, the "Kentucky Business Corporation Act," applies to "for profit" corporations. KRS 271B.1-010, KRS 271B.1-400(4). UMC, however, is a non-profit corporation governed by the Kentucky Nonprofit Corporation Act, KRS 273.160, *et seq.* Thus, the court erred as a matter of law in premising its decision on KRS 271B.8-100(1)(c).

The Nonprofit Corporation Act, which does apply to UMC, has a gap-filler provision allowing a Board of Directors to fill a vacancy only in the event the articles of incorporation or bylaws do not provide how a vacancy shall be filled:

> Any vacancy occurring in the board of directors . . . may be filled by the affirmative vote of a majority of the remaining directors, though less than a quorum of the board of directors, unless the articles of incorporation or the bylaws

> provide that a vacancy . . . shall be filled in some other manner, in which case such provision shall control.

KRS 273.213.

Thus, if a corporation's articles or bylaws, like UMC's, address how vacancies are to be filled, the articles or bylaws control. UMC's bylaws specifically direct how Board vacancies will be filled, and, thus, they control the filling of vacancies, even in the event of a catastrophe. "In the event a vacancy occurs in the office of a director due to death, resignation, removal, or otherwise," if the vacant seat is that of a Community Director, then it "shall be filled" by "the Board of Directors from one or more candidates nominated by the Nominating Committee." (Bylaws, Exh. 5, § 4.06.) That Nominating Committee must, in turn, contain two Community Directors, and both those Community Directors must be present for the Nominating Committee to act. (*Id.* § 6.01(D).) If the two Community Director members of the Nominating Committee survive the hypothesized catastrophe and the Nominating Committee nominates candidates for Board approval, then the Board may only act on that nomination if "a majority of the Board . . . more than half of whom are Community Directors," are present. (*Id.* § 4.10.)

Thus, if all the Community Directors are wiped out in a catastrophe, the bylaw requirements to fill Community Director vacancies will be impossible to fulfill. At the same time, because the bylaws direct how "[a]ny vacancy occurring in the board of directors . . . shall be filled," then KRS 273.213 does not apply. In such a situation, UMC (like many other for-profit or not-for-profit corporations facing a bizarre or unexpected occurrence) would need to file a declaratory judgment action to determine how to proceed under the circumstances.

Two corporations that were consolidating under the provisions of the then-recently enacted Kentucky Nonprofit Corporation and that were unsure of how to proceed did just that in *Eitel, supra*, 441 S.W.2d 438. In that declaratory judgment action, the court declared the consolidation "as formulated in the agreement by the two institutions to be in all respects valid" and further directed the mechanism to be followed regarding trust receipts. *Id.* at 440. Relevant to the situation here, the court also approved the parties' agreement regarding the governance of the new corporation by a board of directors made up of two separate classes of members and regarding the mechanism to create those two classes. *Id.* at 441. "The division of the directors into two classes with each class having a separate identity with provision for self-perpetuation is consistent with KRS 273.213 which empowers the new corporation to provide how vacancies on its board of directors shall be filled." *Id.*

If a catastrophe eliminated all the Community Directors, UMC, like the corporations in *Eitel*, would seek court direction regarding how to proceed. The University of Louisville could not simply appoint Community Directors because that would violate UMC's bylaws.

C. This Court has already determined that Subsection (i) applies only to entities performing "governmental functions," unlike UMC.

In addition to the facial inapplicability of Subsection (i), it also does not apply in light of this Court's interpretation of the statute. This Court has held that Subsection (i) applies only to entities performing governmental functions: "In our opinion, in enacting subsection (i), the legislature purposefully references the 'governing body' in an attempt to include within the definition of 'public agency' those bodies that are created to

perform governmental functions." *Kentucky Central Life Insurance Company v. Park Broadcasting of Kentucky, Inc.* 913 S.W.2d 330, 335 (Ky. App. 1996).

This Court looked at a number of factors to determine whether an entity was performing a governmental function, including whether it was responsible for its own finances, whether there was government interference or control of the entity's day-to-day operations, and whether the entity enjoyed sovereign immunity. *Id.* UMC possesses none of these qualities of governmental entities: (1) It is financially responsible for all aspects of the Hospital's management. (J. Taylor Aff., AR 3121, ¶ 6.) (2) Its funds are not part of U of L's budget. (*Id.* ¶ 7.) (3) The day-to-day operation of UMC is conducted by UMC management and UMC employees, who are not employees of U of L, with little to no interference by U of L. (*Id.* ¶ 19.) (4) UMC's assets are maintained separately from U of L's assets. (*Id.* ¶ 8.) (5) UMC's employees are not U of L employees, are not placed on U of L's payroll, and do not get public employee benefits. (*Id.* ¶ 9.) (6) UMC does not enjoy sovereign immunity[7] and is not represented by the Attorney General. (*Id.* ¶ 10.) (7) UMC employs attorneys who address compliance and contracts and does not share counsel employed by U of L. (*Id.* ¶ 11.)

In addition to meeting all the factors demonstrating that it is not functioning as a governmental "agency" under Kentucky's Open Records Act, UMC's functions would not be considered governmental in other contexts. Courts consistently distinguish between hospital management functions and other functions. For example, when

[7] The University of Kentucky, unlike U of L, manages its own hospital rather than having it managed by a private entity. Thus, although the University of Kentucky Medical Center "is in full competition with and provides the same function as private hospitals," the University of Kentucky's operation of its hospital, which is "essential to the teaching and research function of its medical school," is accorded sovereign immunity. *Withers v. University of Kentucky,* 939 S.W.2d 340, 343 (Ky. 1997). U of L, in contrast, does not operate its own hospital and the Hospital, managed by UMC, is not afforded sovereign immunity. (AR 1321, ¶ 10; *see, also, e.g. Univ. Med. Ctr., Inc. v. Beglin,* 375 S.W.3d 783, 792 (Ky. 2012) (affirming in part and reversing in part judgment against UMC arising out of the operation of its blood bank).

questions have arisen with respect to clinical care at the Hospital, courts have held that the hospital manager was not responsible for actions of U of L physicians under an agency theory. *Floyd v. Humana of Virginia, Inc.*, 787 S.W.2d 267 (Ky. App. 1989); *see also Roberts v. Galen of Virginia, Inc.*, 111 F.3d 405, 413 (6th Cir. 1997) *rev'd on other grounds* 525 U.S. 249 (1999). This Court has explained that, "[m]ost important to our consideration of the independent contractor issue" is "the extent of control that [the hospital manager] exercised over the details of [the physician] work. Our review of the record indicates that any such control was minimal." *Johnston v. Sisters of Charity of Nazareth Health System, Inc.*, No. 2002-CA-1812-MR, 2003 Ky. App. Unpub. LEXIS 3 (Nov. 14, 2003) (discretionary review den'd). UMC's arrangement with physicians is essentially the same as the one described in *Johnston*—the hospital manager provides the site and the equipment and sets the fees, while the physician provides services "within his own professional discretion without interference from" the hospital manager. *Id.* UMC maintains and provides a location for the University to perform its functions, but neither entity controls the other—they have different functions. (J. Taylor Aff., AR3121.)

Managing a hospital is not a governmental function. *See e.g., Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984); *Willis v. Univ. Health Services, Inc.*, 993 F.2d 837 (11th Cir. 1993); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir. 1975); *Patrick v. Floyd Medical Center*, 201 F.3d 1313 (11th Cir. 2000). Moreover, the Sixth Circuit recently affirmed a decision that UMC does not perform a governmental function. *Mitchell v. UMC*, No. 10-5979 (6th Cir. filed Aug. 10, 2011) *aff'g* No. 3:07CV-414-H, 2010 U.S. Dist. LEXIS 80194, *28–*29 (W.D. Ky. Aug. 9, 2010).

As this Court has previously determined when addressing Subsection (i), because UMC performs no governmental function, it is not a public agency under Subsection (i).

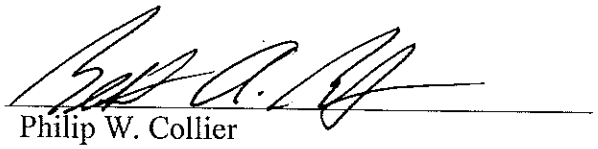
D. The Attorney General determined that UMC was not a public agency when UMC's Board included a higher percentage of University appointees.

In 2006, the Attorney General determined that UMC's Board, half of which was appointed by U of L, did not bring UMC within the scope of Subsection (i). 06-ORD-210. Now only a minority of UMC's Board is appointed by U of L, and the majority is a self-perpetuating. (Bylaws, Exh. 5 at § 4.02.) Only UMC's Nominating Committee, which recommends Community Director candidates, reaches the half and half threshold present in 2006. (*Id.* § 6.03). With less U of L representation on UMC's Board today than in 2006, Subsection (i) is even more clearly inapplicable to UMC.

CONCLUSION

The trial court correctly found that private individuals on behalf of private companies created and established UMC. Thus, it is not a public agency under Subsection (j), which applies to entities "established, created, and controlled" by a public agency.

But the trial court then incorrectly combined the "control" aspect of Subsection (j) with the "appointment" of the "majority" of an entity's "governing body" in Subsection (i) and held that UMC is a public agency under this hybridized version of the Act. Because, however, a majority of UMC's Board of Directors goes through a nomination and election process and is not appointed by anyone, let alone a public agency, the trial court's legal conclusion that UMC is a public agency is erroneous. This Court should reverse the trial court and hold that UMC is not a "public agency" as defined in the Open Records Act.



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APPENDIX

Exhibit 1	**Attorney General Opinions in 11-ORD-157, 158, -159, and -160** (AR 553-71)
Exhibit 2	**November 21, 2012 Findings of Fact, Conclusions of Law, and Order** (AR 1867-86)
Exhibit 3	**February 5, 2013 Order** (AR 1913)
Exhibit 4	**Comparison of Humana and UMC Affiliation Agreements** (AR 1014-16))
Exhibit 5	**Current Bylaws** (AR 1328-44)