

We believe that the trial court erred in dismissing the case; therefore, we reverse and remand for further proceedings.

On November 19, 2015, Planned Parenthood submitted a license application to operate an abortion clinic to the Office of Inspector General of the Cabinet. On December 1, 2015, Planned Parenthood's attorney e-mailed Maryellen Mynear, the Cabinet's Inspector General at the time. Planned Parenthood needed clarification as to the policy surrounding operating abortion clinics. Planned Parenthood asked if it was required to begin operations after a license application was submitted, but before a license was granted, in order to comply with the regulations that require an inspection be done of the facilities. Ms. Mynear responded to the e-mail that same day indicating that Planned Parenthood's clinic must be operational in order for the inspection process to fully evaluate compliance with applicable regulations.

On December 4, 2015, Planned Parenthood's attorney e-mailed Ms. Mynear again to reaffirm that its facility could be operational without fear of being deemed unlicensed. Ms. Mynear responded on December 7, 2015, that Planned Parenthood could continue operating its facility pending the inspection. Ms. Mynear stated that such an arrangement was a "long standing OIG policy."

Between December 3, 2015, and January 28, 2016, the Planned Parenthood facility performed 23 abortions. On January 28, the Cabinet sent a

letter to Planned Parenthood informing it that the license application was deficient and that it should cease operations. The Cabinet's position was not only that the application was deficient, but that it is illegal to operate an abortion facility without first obtaining a license.

On February 18, 2016, the Cabinet filed the underlying action against Planned Parenthood. The Cabinet sought to fine Planned Parenthood for performing abortions without a license. Planned Parenthood moved to dismiss the case pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f) for failing to state a claim upon which relief can be granted. Planned Parenthood argued that it complied with all applicable regulations and relied on assurances from the Cabinet's Inspector General that operating its facility before a formal license was granted was not only acceptable, but necessary to complete the application process. The trial court granted Planned Parenthood's motion. It found that Planned Parenthood complied with the statutory and regulatory obligations. It also found that the Cabinet had a long-standing policy of allowing health facilities to operate pending the granting of its license. This appeal followed.

A motion to dismiss for failure to state a claim upon which relief may be granted "admits as true the material facts of the complaint." So a court should not grant such a motion "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved[.]" Accordingly, "the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." This

exacting standard of review eliminates any need by the trial court to make findings of fact; “rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?” Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court’s determination; instead, an appellate court reviews the issue [*de novo*].

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (footnotes omitted).

The Cabinet is tasked by statute to regulate licensure standards and procedures for abortion clinics. Kentucky Revised Statute (KRS) 216B.0431. An abortion clinic is a health facility, KRS 216B.015(13),¹ and it is illegal to operate a health facility without first obtaining a license from the Cabinet. KRS 216B.105(1). Abortion facilities must enter into written agreements with a hospital and local ambulance service which indicate the ambulance service will transfer abortion facility patients to a hospital which will treat said patients if unforeseen complications arise. KRS 216B.0435. Kentucky Administrative Regulation 902 KAR 20:360 §2(4) states that as a condition precedent to the granting of a license, the Cabinet must perform an on-site inspection of the facility, which may be unannounced and must be done during the facility’s regular business hours. The Cabinet can fine abortion facilities that operate without a license, KRS

¹ KRS 216B.015(13) does not explicitly state that an abortion clinic is a health facility. This statute does list some types of health facilities, but states that it is “not limited to” those facilities. In addition, the Cabinet identifies the abortion clinic as a health facility in its complaint.

216B.990(1), and can fine abortion facilities that knowingly or negligently violate abortion related statutes and regulations. KRS 216B.990(6).

The Cabinet alleged in its complaint that Planned Parenthood knowingly submitted deficient written agreements with a hospital and ambulance service in order to speed up the licensing process; that there was no long-standing policy to allow abortion facilities to operate pending the granting of a license; that Planned Parenthood knew it could not operate an abortion facility without a license; and that Planned Parenthood did not reasonably rely on Ms. Mynear's statements to the contrary. Since this case was dismissed pursuant to CR 12.02(f), we must accept the Cabinet's allegations as true and review the trial court's judgment *de novo*. Accepting these allegations as true, the Cabinet has pled facts which suggest Planned Parenthood did everything it could to begin performing abortions as soon as possible. While the Cabinet may have a difficult time proving its allegations, we believe said allegations are sufficient to state a claim upon which relief can be granted. "A motion to dismiss for failure to state a claim does not test the merits of the action but is confined solely to the sufficiency of the pleading." *White v. Brock*, 487 S.W.2d 908, 909 (Ky. 1972).

Based on the foregoing, we reverse the judgment of the trial court and remand for further proceedings.

ACREE, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

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