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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GENESIS HEALTHCARE, Appellant below, Appellant, v. DELAWARE HEALTH RESOURCES BOARD, Appellee below, Appellee.	C.A. No. 214, 2015 Court Below: Superior Court in and for New Castle County C.A. No. N13A-11-007-MJB

APPELLANT'S REPLY BRIEF

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I. BOTH THE SUPERIOR COURT AND THE BOARD MISINTERPRETED THE GOVERNING STATUTE

The main issue on this appeal is the Superior Court misinterpreted the Board's governing statute, 16 *Del. C.* § 9306, thereby validating a Board decision that was contrary to the Board's own properly promulgated rules and regulations. OB[1] at 21-31. In its Answering Brief, the Board attempts to recast this issue, arguing substantial evidence supports the Board's decision and it did not commit legal error because it considered all seven statutory factors. AB[2] at 7-18. In so arguing, the Board both relies upon the incorrect legal standard and, like the court below, misinterprets the statute.

A. This Court Reviews a Lower Court or Agency's Interpretation of a Statute *De Novo*.

By relying upon the standard of review for factual determinations made by an administrative agency rather than the standard for legal determinations, the Board suggests this Court's review is limited to a determination of whether substantial evidence supported the decision. AB at 16. Indeed, all of the cases cited by the Board in support of this standard

[1] References to "OB" refer to Appellant's Corrected Opening Brief, filed June 22, 2015. (Trans. I.D. 57436562).

[2] References to "AB" refer to Amended Answering Brief of Appellee Delaware Health Resources Board, filed July 24, 2015. (Trans. I.D. 57602388).

address factual determinations such as the credibility of witness testimony, *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965), or whether just cause existed for an employee's termination, *Robinson v. First State Cmty. Action*, 2013 WL 4017392, at *1, *4 (Del. Super. Ct. July 30, 2013).

In contrast, the question here is one of statutory interpretation, and therefore this Court's review is *de novo*. *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (applying *de novo* standard of review to whether the Superior Court correctly interpreted a standing provision). "Statutory interpretation is ultimately the responsibility of the courts" and a reviewing court must not defer to the statutory interpretation of an agency as correct "merely because it is rational or not clearly erroneous." *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382-83 (Del. 1999) (finding Superior Court's application of "clearly erroneous" test to agency's interpretation of statutory law to have been "unduly deferential" to the agency). In fact, where the Supreme Court is reviewing a Superior Court ruling that in turn reviewed an agency's interpretation of statutory law, this Court is to "directly examine[] the decision of the agency." *DiPasquale*, 735 A.2d at 380.

More specifically, at this point in the proceeding, Genesis does not dispute whether there was substantial evidence to support the Board's

factual findings that the Eden Hill Application met five of the seven statutory factors. Rather, it is disputing the Board's failure to follow its own regulations with respect to the proper weighing of those factors and the Superior Court's incorrect conclusion that the statute and the Plan are in conflict. Simply put, the Superior Court mistakenly struck down a duly promulgated regulation on the ground that it is in conflict with a statute, and this Court's review of such decisions is *de novo*.

B. The Superior Court and the Board Erred in Their Interpretation of the Statute.

The Board suggests it can choose to follow or not follow the Plan at its whim, stating the Plan "merely establishes 'general principles intended to assist potential CPR applicants in understanding the Board's expectations and also to assist the Board itself in conducting CPR reviews.'" AB at 7-8. However, the General Assembly directed the Board to include as an "[e]ssential aspect[] of the plan . . . *rules and regulations which shall be formulated for use* in reviewing Certificate of Public Review applications." 16 *Del. C.* § 9303(d)(1) (emphasis added). Once approved, such regulations have the force and effect of law and must be followed by the promulgating agency. 1A *Sutherland Statutory Construction* § 31:4 (7th ed.); *see also Gow v. Director of Revenue*, 556 A.2d 190, 193 (Del. 1989). Moreover, given the extensive process for amending the Plan, which involves multiple

levels of approval and public input, OB at 7-8, it is inconceivable the General Assembly intended the Board to use it only as a guideline.[3]

Furthermore, the Board cannot unilaterally act in contravention of its own rules and regulations. "One of the most firmly established principles in administrative law is that an agency must obey its own rules. An agency's failure to follow its own rules may be fatal to the agency's action." 1 *Admin. L. & Prac.* § 4:22 (3d ed.); *see also Dugan v. Delaware Harness Racing Comm'n*, 752 A.2d 529, 531 (Del. 2000). As such, the Board is bound to

[3] The Board argues its members are "experts in the field of healthcare" and suggests this justifies allowing the Board to apply or dismiss the Plan's requirements on an ad hoc basis. AB at 14, 18. As a legal matter, Genesis is not aware of any case law that permits an administrative tribunal to ignore its own rules and regulations because of the subject matter expertise of Board members. Factually, the Review Committee was given great deference in deciding this matter and two of the three Review Committee members are not "experts in the field of healthcare." 16 *Del. C.* § 9303(b) (requiring representatives from other fields such as labor and from the public-at-large). As discussed in Genesis' Opening Brief, Ms. Lynn Fahey – the Review Committee's deciding vote on the Eden Hill Application – candidly expressed concern during the deliberation process with respect to her lack of experience on the Board. OB at 10, 16. In addition, Mr. David Hollen represents the interests of labor rather than health care. Indeed, the one person on the Review Committee who arguably is an "expert in the field of healthcare," Mr. William Love, voted against the proposal, after providing thoughtful analysis as to why there is not a need for it. Similarly, at the Board level it was the Chair of the Healthcare Commission that, during discussion on Genesis' motion for reconsideration, cited concerns with the defensibility of the Board's action. A231-A235. Such varying levels of experience among Board members make it all the more important that the Board faithfully follow the requirements of the Plan so as to promote consistency in its decisions.

consistently follow the requirements contained in the Plan, such as the fact that "[c]onsistency with projected bed needs . . . shall serve as a '*threshold' to be met in order for a Certificate of Public Review to be granted for additional nursing home beds*." A12 (emphasis added). While the Board attempts to diffuse the conflict between its Plan and its decision by diluting the import of the Plan (suggesting it is permissive and only applies to one statutory factor in the analysis), this language leaves no room for selective application.

The Board turns to the enabling legislation to alternatively argue it conflicts with the Plan, which was the basis for the Superior Court's holding. AB at 11-12. Section 9306 states that "[i]n conducting reviews under this chapter, the Board shall consider as appropriate at least the following," and then lists seven factors. The Board focuses on the use of the phrase "at least," suggesting that it must consider all seven factors in all circumstances, even if the threshold of consistency with bed need is not met. This interpretation, however, renders the phrase "as appropriate" superfluous, in violation of a well-established canon of statutory construction.

Certainly, if the Board is going to approve an application, it must consider at least all seven of the statutory factors before doing so – it cannot, for example, approve an application merely because consistency with

projected bed need is met, but must consider the other factors as well.[4] If the threshold of consistency with projected bed need is not met, however, then it is no longer "appropriate" to consider the other factors, and the application must be denied. "[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language if reasonably possible." *Oceanport*, 636 A.2d at 900 (citations omitted). The statute contemplates situations when it is not "appropriate" to consider all seven factors, or else the phrase "as appropriate" would be surplusage. The threshold requirement in the Plan not being met is one of those situations.

Such an interpretation makes sense not only from a sentence structure standpoint, but also from a common sense perspective. Even the Superior Court in affirming the Board's ruling found it "contradictory that the Board would approve a project for which the Board found no need." Op. at 16 n.62. Approving the construction of a facility for which there is not a need wastes resources, upsets the existing balance of health care resources, and, as will be discussed in more detail *infra*, threatens the ability of existing

[4] Genesis is not suggesting, as the Board seems to think, that bed need is "the only factor" the Board should consider. AB at 12. If consistency with bed need is met, then the Board must consider the other statutory factors in deciding whether to grant a CPR. It is only where consistency with bed need is *not* met where the Board should not consider the other factors because a CPR cannot be issued under the clear terms of the Plan.

facilities to care for the medically indigent. Thus, it was reasonable for the Board to establish need as a threshold requirement when approving the Plan.

Cutting through the minutiae, the record below strongly suggests the Review Committee and the Board did not carefully consider the Plan in making this decision. With the decision made, the Board now tries to back-in the analysis to support the decision, including striking a key provision of its own Plan. Genesis does not dispute that where the statute and the Plan truly conflict, the statute must control; however, the threshold requirement contained in the Plan can be properly read so as not to conflict with the statute. Delaware courts do not lightly strike duly promulgated regulations of administrative tribunals, as it is well established the courts seek to harmonize statutory and regulatory provisions wherever possible. *Garrison v. Red Clay Consol. Sch. Dist.*, 3 A.3d 264, 267 (Del. 2010). The General Assembly listed factors the Board should consider as appropriate, but left it to the Board, the Healthcare Commission and the Secretary of DHSS to determine in the Plan when it would be appropriate to consider those factors and how they should be weighed. 16 *Del. C.* § 9303(d)(1). The Plan should not be disturbed.

The Board also relies on *Arbor Health Care Co. v. Delaware Health Resources Board*, 1997 WL 817874 (Del. Super. Ct. May 20, 1997) to

support its position that consistency with projected bed need is not a threshold requirement to the awarding of a CPR. AB at 9. This reliance is also misplaced. First, the court made clear its discussion of the bed need projections was *dicta*, as it decided the case on a standing issue. Second, the case is 18 years old and there is no indication any party argued that consistency with bed need was a threshold requirement. Indeed, the Plan has been revised no fewer than thirteen times since this decision was rendered, and the Board provides no insight as to whether the threshold language even existed in the version of the Plan in effect at the time of this decision. The history of the Plan is not available on a searchable database, but since the decision does not mention the threshold language, a fair inference can be drawn that the Plan was modified subsequently to include that language. As such, this Court should interpret the statute and the Plan as they currently exist and not rely on 18-year-old *dicta* interpreting a Plan that is not before the Court and has been modified thirteen times.

Finally, the Board refers to the fact that the Kent County bed projections include beds for the Delaware Veterans Home, suggesting for the first time an issue with the efficacy of the Board's own bed projections. AB at 13-14. As an initial matter, the Court should not consider this argument, as it is being raised for the first time on appeal. Del. Sup. Ct. R. 8.

Regardless, the argument is a red herring. The Board approved the bed projections without qualification, and did so separate and apart from this case.[5] B012. The Board applied the projections to this case and, after considering other factors related to need, OB at 11-12, properly concluded that the Application did not meet the need requirement. A157-A158.

C. This Court May Consider the Fact that the Board Has Recognized the Threshold Requirement.

The Board misinterprets the reason Genesis cites to "the very next Kent County applicant [*sic*]" in its Opening Brief. AB at 19. The Board cites *Tenneco Oil Co. v. Department of Energy*, 475 F. Supp. 299 (D. Del. 1979) as support for the proposition that "[t]he record that forms the basis for this appeal is the record that was before the Board when it made the decision to grant a CPR to Eden Hill." AB at 19. Unlike *Tenneco*, however, where the appellant raised a new argument on appeal that it did not raise to the agency, Genesis is not making a new argument on appeal. It also is not suggesting the Board should have considered facts not in the record. Rather, Genesis offers to the Court, as it did below, the statements made by Board members in the context of deliberations on a subsequent CPR application to

[5] In the Board's zeal to affirm its decision in this case, it curiously calls into question two critical decisions of the Board: (1) approval of the Plan with its threshold requirement, and (2) approval of the current bed need projections. Presumably, numerous case decisions are based in some part on the efficacy of these two decisions.

show the Board applied the threshold requirement in the very next case, thereby evidencing its inconsistent application of its own rules.

Further, the Board incorrectly suggests the referenced subsequent CPR application occurred well after the record in this case was closed. AB at 19. The Board cites to the August 22, 2013 meeting where the Board first voted to approve the Eden Hill Application, but this was far from the last meeting at which the Board deliberated on the Application or Genesis' opposition to it, and thus the record for purposes of this appeal remained open. The Board discussed and voted on Genesis' Motion for Reconsideration at its October 24, 2013 meeting and also included an update on Genesis' motion in its public agenda for its November 19, 2013 meeting – the very meeting at which the discussions on the subsequent Kent County application took place. AR3; OB at 18, 30. The Board even recognized the Eden Hill matter was still pending by including the transcripts from the October 24th and November 19th meetings in the certified record that it provided to the Superior Court in this matter.[6]

[6] The Board acknowledges that "these transcripts were included in the packet of materials submitted to the Court as the 'record,'" but states that "they were not the record before the Board at the time of the Board's decision and should not be considered by this Court." AB at 19. The Board offers no explanation as to the differences in the meaning of the word "record" in this statement and no reason as to why, after including these

The Board's strident opposition to the Court looking at this subsequent decision is understandable, as the Board seeks to have this Court endorse a process where they approved one Kent County application, arguing there is no enforceable threshold requirement in the Plan, only to reject the very next Kent County application seemingly on the grounds that it does not meet the threshold requirement in the Plan. Attempting to bridge this gap, the Board now argues it is permitted to decide cases on an ad hoc basis without regard to the Plan. This approach cries out for correction.

D. The Board Violated its Statutory Duty to Ensure that Health Care Developments Do Not Threaten the Ability of Existing Facilities to Care for the Medically Indigent.

The Board acknowledges it must ensure the ability of existing facilities to serve the medically indigent is not threatened, AB at 8, but by not following the Plan, the Board *has* threatened this ability. The Board simplistically paints this dispute as competition over market share. AB at 13. While Genesis may be a market competitor of Eden Hill with respect to short-term rehabilitation patients, this is a relatively small, albeit financially critical, percentage of Silver Lake's population. OB at 13-14, A190-A191. The medically indigent make up 60% percent of Silver Lake's population, and Eden Hill's business plan does not contemplate competing for this

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transcripts in the certified record, it should be allowed to argue the materials are not part of the record.

business. In fact, the medically indigent do not usually fare well when market forces reign free in the healthcare market place. This was a primary reason for granting the Board this gatekeeper role, 16 *Del. C.* § 9303(d)(2), and yet the Board suggests no recourse for those medically indigent who will be displaced if Silver Lake or like facilities are forced to close their doors. Simply put, the record provides no basis for the Board to claim its decision to approve the Application does not threaten the ability of existing facilities to serve the medically indigent.

II. THE SUPERIOR COURT WAS NOT DEPRIVED OF JURISDICTION

In its Answering Brief, the Board raises a new argument – that Eden Hill was an indispensable party to Genesis' appeal to the Superior Court, and that court lacked jurisdiction to hear the appeal. AB at 21-25. This new argument fails for three reasons: (1) the Board waived this defense by not raising it below, (2) Eden Hill has not been prejudiced, and (3) Genesis complied with the Superior Court rules in filing its notice of appeal.

A. The Board Waived the Defense of Failure to Join an Indispensable Party by Failing to Raise it Below.

The defense of failure to join an indispensable party is waived if not raised prior to or "at the trial on the merits." *Collins v. Throckmorton*, 425 A.2d 146, 151 (Del. 1980) (citing 5 Wright & Miller, FEDERAL PRACTICE &

PROCEDURE § 1392 (1969) (defense of failure to join an indispensable party "may not be asserted for the first time on appeal")). Superior Court Civil Rule 12 governs defenses, and one such defense provided for in that rule is the defense of "failure to join a party under Rule 19." Super. Ct. Civ. R. 12(b)(7). Rule 12(h)(2) provides that this defense "may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Super. Ct. Civ. R. 12(h)(2). "According to the plain language of Rule 12(h)(2)," the defense of failure to join a party under Rule 19 is "waived if [it] is not presented before the close of trial." 5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1392; *see also Ellery v. State*, 633 A.2d 369 (Table), 1992 WL 179411, at *2 n.1 (Del. 1993) ("When a potential Rule 19 defense is not raised before or during trial it is waived."). The Board failed to raise this defense before the determination on the merits in the Superior Court, waiting instead to raise it for the first time on appeal to this Court.[7] In doing so, it waived the defense.

[7] Presumably, the Board is requesting this Court remand to the Superior Court with instructions to dismiss the case. While such relief is not warranted, the Board should have sought such affirmative relief as a cross-appeal in this case, not as part of its answering brief. *See Haley v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996) (holding that "a judgment will not be set aside or altered on appeal in favor of a party who has not filed a timely notice of appeal, irrespective of whether that party is an appellee").

Not only do the Superior Court rules provide that the Board waived the defense, this Court's rules also so provide. The Board acknowledges, as it must, that Del. Sup. Ct. R. 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review." AB at 24. It is undisputed the Board did not raise this issue below – it did not file a motion to dismiss for failure to join an indispensable party, and it did not otherwise raise the issue in briefing before the Superior Court. Thus, this issue is barred under Del. Sup. Ct. R. 8.

The Board attempts to avoid this result by arguing that "failure to join Eden Hill as a party to this action deprived the Superior Court of jurisdiction over this matter" and then citing to case law providing generally that jurisdictional defects cannot be waived. AB at 22, 24-25. However, failure to join a party under Rule 19 is <u>not</u> a jurisdictional defect and thus, the Board cannot avoid Del. Sup. Ct. R. 8. *Yellow Cab Del., Inc. v. Department of Transp.*, 2006 WL 2567677, at *1 (Del. Super. Ct. Aug. 29, 2006) (finding that "[w]hile . . . *the time for taking an appeal* is jurisdictional, modern courts treat a *defective filing* differently," and denying a motion to dismiss a timely appeal that failed to name an indispensable party because the appellee was not prejudiced by the oversight) (emphasis added). Accordingly, because failure to join a party under Rule 19 is not a

jurisdictional issue, Eden Hill's absence as a party did not deprive the Superior Court of jurisdiction and the Board waived its right to raise that defense by waiting to raise it for the first time on appeal.

B. The Board Cites an Outdated Legal Standard in Support of its Argument for Dismissal.

Even if the Board properly raised the defense of failure to join an indispensable party, it cites an outdated legal standard in support of that defense.[8] The Board relies on *Sussex Medical Investors, L.P. v. Delaware Health Resources Board*, 1997 WL 524065 (Del. Super. Ct. Apr. 8, 1997) and *Hackett v. Board of Adjustment of City of Rehoboth Beach*, 794 A.2d 596 (Del. 2002) in support of its argument that Eden Hill is an indispensable party and that this appeal cannot continue in its absence. However, these cases arise out of a procedural posture where the agency properly raised the defense of failure to join an indispensable party through a motion to dismiss below and they no longer represent the current state of the law on this issue.

[8] The Board also ignores the fact that Rule 19 does not necessarily place the onus on adding indispensable parties on the plaintiff/appellant. Under Rule 19(a), "[a] person . . . shall be joined as a party in the action if . . . the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest . . . . If the person has not been so joined, *the Court shall order that the person be made a party*." Super. Ct. Civ. R. 19(a) (emphasis added). Genesis did not name Eden Hill as a party but neither did the Superior Court, perhaps indicating the court did not consider Eden Hill to fall under Rule 19(a).

This Court has recognized that the modern trend in appellate courts "de-emphasizes the technical procedural aspects of appeals and stresses the importance of reaching and deciding the substantive merits of appeals whenever possible." *State Pers. Comm'n v. Howard*, 420 A.2d 135, 137 (Del. 1980) ("We think that appeals as well as trials should, where possible and where the other side has not been prejudiced, be decided on the merits and not upon nice technicalities of practice."). This Court in *Howard* adopted the following guidelines to govern cases involving omissions in an otherwise timely-filed notice of appeal: (1) such omission in the notice of appeal will not cause the appeal to be dismissed unless the omission is substantially prejudicial to a party in interest; and (2) the burden rests on the appellant to establish the absence of such substantial prejudice. *Id.*

In *Sussex Medical*, on which the Board relies, the Superior Court declined to extend this Court's holding in *Howard* to appeals to the Superior Court. 1997 WL 524065, at *3. Instead, that court analyzed whether the omitted parties were indispensable under Rule 19(b), and, upon finding that they were, analyzed whether the notice of appeal could be amended pursuant to Super. Ct. Civ. R. 15 to include them.[9]

[9] While the court in *Sussex Medical* found the omitted parties indispensable in that case, it noted "[t]he weight to be given each factor in a Rule 19(b) analysis must be determined by the trial court in light of the controlling

Sussex Medical, however, is almost 20 years old, and the Superior Court has since adopted a different approach on this issue, holding that *Howard* does apply to administrative appeals. *Yellow Cab*, 2006 WL 2567677, at *1.[10] As such, even if the Board did not waive this defense, the test is not whether Eden Hill is an indispensable party and whether the notice of appeal can be amended to add it, but whether Eden Hill was substantially prejudiced by the omission. Simply put, it was not.

The case law provides that an applicant may suffer substantial prejudice if they began construction and/or operations based on the permit received from the agency, *Sussex Medical*, 1997 WL 524065, at *8, but that is not the case here. Indeed, it appears from the public record before the Board that Eden Hill has "made no progress at all" on its facility, choosing

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equity and good conscience test and in terms of the facts and circumstances of each particular case." 1997 WL 524065, at *11. Had the Board raised this issue below, Genesis would have vigorously disputed whether Eden Hill qualifies as an indispensable party based on the facts and circumstances of this case.

[10] The Supreme Court endorsed *Sussex Medical* in *Hackett*, on which the Board also relies. However, as recognized by the court in *Yellow Cab*, *Hackett* dealt with a writ of *certiorari* to the Superior Court rather than an appeal, and the *certiorari* process contains certain strictures not required in other appeals. *Yellow Cab*, 2006 WL 2567677, at *2. The court in *Yellow Cab* noted that because the appeal at issue, like this one, did not contain those strictures, "there is no principled reason for the court to favor an inflexible approach over the long string of modern authority allowing amendment to add a party to a timely administrative appeal, if the appellant demonstrates that the appellee has not been prejudiced by the oversight." *Id.*

instead to wait for the outcome of this litigation. AR1-AR2. As such, Eden Hill has not suffered substantial prejudice from its omission from this appeal.[11]

C. Genesis Complied with the Superior Court Rules.

To the extent Genesis was required to name Eden Hill as a party to its appeal, Genesis fell victim to what this Court has already described as an "erroneous" rule. *CCS Investors, LLC v. Brown*, 977 A.2d 301 (Del. 2009). *CCS Investors* similarly dealt with an administrative appeal in which the appellant named only the administrative agency and not the other parties to the administrative proceeding in its appeal. The appellant argued that in doing so it relied on Super. Ct. Civ. R. 72, which addresses appeals to the Superior Court from administrative boards, and the corresponding model form found on the Superior Court website. Both the rule and the form indicate the appellant need name only the agency as a defendant. After finding that the parties to the administrative proceeding were necessary parties to the appeal at issue, this Court noted the following:

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[11] Even if Eden Hill had taken some small steps pursuant to its CPR, that does not rise to the level of prejudice. The court in *Yellow Cab* found that the successful applicant – a taxi cab company that had received medallions to operate additional taxis – had purchased new vehicles and hired new drivers in reliance on the agency's decision, but held that did not rise to the level of prejudice necessary to justify dismissing the appeal. 2006 WL 2567677, at *1.

> "[I]t is understandable why [appellant's counsel] was misled into naming only the [agency]. The official Superior Court form (erroneously) prescribes that very approach, and nothing in Superior Court Civil Rule 72 indicates the contrary or provides any useful guidance. The Superior Court should amend its Rule 72 and the counterpart official form to conform with our opinion in this case."

Id. at 325.

The rule and form discussed in *CCS Investors* have not been amended since that decision. Accordingly, it is reasonable that parties would name only the agency as a defendant when appealing an agency decision. This Court should not dismiss Genesis' appeal at this late stage when it complied with this rule.

This Court stressed in *Howard* "the importance of reaching and deciding the substantive merits of appeals whenever possible." 420 A.2d at 137. In a situation such as this, where Genesis complied with the Superior Court rules and forms governing appeals from administrative agencies, where Eden Hill has suffered no prejudice from its omission, and where the Board waited until appeal to the Supreme Court to raise this defense for the first time, it would be grossly inequitable to refuse to decide this appeal on its substantive merits.

CONCLUSION

WHEREFORE, for the reasons stated herein and in Appellant's Opening Brief, Appellant Genesis Healthcare respectfully requests this Court reverse the finding of the Superior Court, and order such other relief as the Court finds just and proper.

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Dated: July 30, 2015

CERTIFICATE OF SERVICE

I, Thomas P. McGonigle, Esquire, hereby certify that on this 30th day of July, 2015, a copy of the attached *Appellant's Reply Brief* was served via File & ServeXpress on the following:

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