

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-00778**

DONNA D. ZUMWALT AND ZUMWALT, INC,

APPELLANTS

vs.

**JONES COUNTY BOARD OF SUPERVISORS,
SOUTH CENTRAL REGIONAL MEDICAL
CENTER, AND THE MISSISSIPPI STATE
DEPARTMENT OF HEALTH**

APPELLEES

**APPEAL FROM THE DECISION OF THE HINDS COUNTY
CHANCERY COURT, FIRST JUDICIAL DISTRICT**

**BRIEF OF APPELLEES JONES COUNTY BOARD OF SUPERVISORS,
SOUTH CENTRAL REGIONAL MEDICAL CENTER**

**FRED L. BANKS, JR., MB [REDACTED]
JAMES W. CRAIG, MB [REDACTED]
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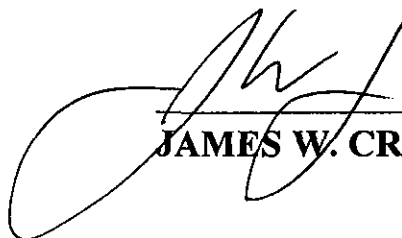
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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

1. Donna D. Zumwalt and Zumwalt, Inc., Appellants.
2. Daleson Enterprises, Inc., aligned with Appellants.
3. Thomas L. Kirkland, Jr., Julie B. Mitchell, and Andy Lowry of Copeland, Cook, Taylor & Bush, P.A., Attorneys for Appellants.
4. Jones County Board of Supervisors, Appellee.
5. South Central Regional Medical Center, Appellee.
6. James W. Craig, Fred L. Banks, Jr., Jeffrey Moore, and R. Gregg Mayer, Phelps Dunbar LLP, Attorneys for Jones County Board of Supervisors and South Central Regional Medical Center.
7. Mississippi State Department of Health, Appellee.
8. Bea M. Tosdorf, Donald E. Eicher, III, Attorneys for Appellee.
9. Sarah E. Berry, former attorney for Appellee.
10. The Honorable Patricia D. Wise, Chancellor.

SO CERTIFIED, this the 17th day of February, 2009.



JAMES W. CRAIG

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STATEMENT REGARDING ORAL ARGUMENT

The precise issue presented in this case, whether a public body that constructed a health care facility prior to enactment of the Certificate of Need law continues to possess the rights otherwise conferred by a Certificate of Need, has never been addressed by this Court. However, this Court has, on numerous occasions, affirmed its deference to the Mississippi State Department of Health on the proper interpretation of the Certificate of Need Law. That deference suggests that the Department of Health's answer to that question -- here, that the Board of Supervisors of Jones County owns the CON rights to the Jones County Rest Home -- should be effectuated. For this reason, this Court can affirm the Chancellor without the necessity of oral argument.

INTRODUCTION

In all the years since the Jones County Board of Supervisors ("Jones County") built, operated, and then leased the Jones County Rest Home ("Facility"), it never lost ownership or the right to operate the Facility. The Mississippi Department of Health and the Hinds County Chancery Court recognized this. This Court should do likewise by affirming the Chancellor's judgment.

Donna D. Zumwalt and her company Zumwalt, Inc. (collectively "Zumwalt"), like her father and grandfather before her, leased the Facility from

Jones County and never acquired any “ownership” interest in the property or the rights to operate it. On the contrary, leases through the years expressly provided that Jones County owned both the Facility and its improvements. Jones County demanded each lessee run the Facility as Jones County wanted them to: as a skilled nursing facility under the previous and current Mississippi Code provisions authorizing same. Repeatedly, lessees had to renew lease agreements, seek Jones County’s permission to make changes, and even pay higher rent based on the bed-count within the Facility because Jones County owns the beds too.

Having signed an agreement to “sell” her interest in the Facility to Daleson Enterprises, Zumwalt sought to exploit the fact that, since the Facility was built prior to the enactment of Certificate of Need (“CON”) statutes, no paper Certificate of Need was ever issued for the Facility. The Department of Health, however, determined that Jones County, as the undisputed owner of the “bricks and mortar,” had the rights otherwise associated with the holder of a CON. Appellants cannot point to anything in the record demonstrating any conveyance of those CON rights from Jones County to Zumwalt.

In short, despite the lengthy road of facts to get from the beginning to the end, the answer stays the same: Jones County owned the Facility when it was built, and Jones County owns the Facility today.

STATEMENT OF THE ISSUES

- I. Whether Jones County Owns The Right To Operate The Jones County Rest Home
- II. Whether Zumwalt Surrendered Her License To The Department of Health In 2002
- III. Whether The Tort Claims Act Bars Zumwalt's Counter-Claim for Damages.

STATEMENT OF THE CASE

Course of Proceedings. On December 15, 2005, the Jones County Board of Supervisors ("Jones County") and South Central Regional Medical Center ("South Central") sought a declaratory judgment that Jones County owned the rights to operate the Jones County Rest Home, including ownership of the "historical" Certificate of Need ("CON"). Donna D. Zumwalt, owner of Zumwalt Inc., had previously leased the facility from Jones County.

Donna D. Zumwalt, owner of Zumwalt Inc., filed a response and counterclaim to the declaratory action. Zumwalt, who had previously leased the Facility from Jones County, alleged she maintained the ownership rights to the Facility. Zumwalt also sought damages against Jones County for an alleged deprivation of property without due process of law.

A trial was heard over three days in September and November 2007. Hinds County Chancellor Patricia Wise issued her opinion on April 16, 2008, finding Jones County owned the right to operate the Facility, including the “historical” certificate of need. The Chancellor decided against Zumwalt on the remaining issues.

Zumwalt appealed.

Statement of the Facts. Jones County acquired the real property at issue in this case by warranty deed in 1896. Exhibit 4. In 1952, Jones County authorized issuance of bonds to construct the County Home for Indigents and thereafter constructed what was then known as the Jones County Poor Home and which is now known as the Jones County Rest Home (the “Facility”). Ex. 5-E (Board Meeting of May 13, 1952); Ex. 5-F (Board Meeting of June 10, 1952). At the hearing in this case, Zumwalt stipulated that Jones County is the owner of the real property and improvements on which the Jones County Rest Home (now known as the Jones County Poor Home) is located. Tr. 15.

From the time after the building was constructed through 1964, H.A. Smith was an employee of Jones County employed as manager of the Facility. Exs. 5-A, 5-B, and 5-C. In 1964, H.A. Smith left the county’s employ and, as an independent contractor, entered into a lease of the Facility with the Board

pursuant to which he assumed management of the daily operation of the Facility.
Ex. 5-K.

That lease, executed by Zumwalt's predecessor in interest, recited that "[t]here came on for consideration the matter of leasing certain property of the County on which heretofore has been operating the Jones County Home for the care and keeping of old, infirm, or indigent persons." (emphasis added).

At the trial below, Sam Dawkins, the Director of the MSDH's Office of Health Policy and Planning, testified that this language in the lease tracked the language of the then-existing statute, Miss. Code §6964-01 (1942) (Ex. 63-ID), which granted counties authority to own and operate "homes for the old, infirm, and indigent," and which was the predecessor to the current Miss. Code Ann. §43-11-1, the statute which controls licensure of skilled nursing facilities. Tr. 110-111.

Indeed, the same language is still found in the Department's regulations governing skilled nursing homes. Tr. 111-112. Because of this, it was Mr. Dawkins' opinion that the County, prior to the first lease with H.A. Smith, operated the Facility as a home under the auspices of the statute governing this case. Id.

The same testimony, in more detail, was given by Marilyn Winborne, the Director of the MSDH's Bureau of Health Facilities, Licensure, and Certification. Tr. 204-210.

The 1964 Lease (Ex. 5-K) required, among other things, that H.A. Smith obtain the necessary license from the State to lawfully operate the Facility; that he maintain the Facility; and that all improvements to the Facility became the property of Jones County upon expiration of the lease term. By amendment, the lease also provided that Jones County would pay an amount to assist in the provision of the Facility. Ex. 5-L. In fact, Jones County did pay for additions to the Facility. Ex. 5-M.

From 1964 until December 31, 2005, Jones County leased the Facility to Zumwalt and her predecessors; each lease recites that the real property and improvements belong to Jones County, and requires, among other things, that (1) the lessee operate a home of the aged and infirm; (2) the lessee obtain the necessary license from the State to lawfully operate the Facility; (3) that the lessee maintain the Facility; and (4) that all improvements to the Facility became the property of Jones County upon expiration of the lease term. Exs. 5-N, 5-O, 5-P, 5-Q, 5-S, 5-T, 5-V, 5-W, 5-X, 5-Y, 5-Z, 5-AA, 5-BB, 5-CC, 5-DD, 5-HH, 5-II, 5-JJ, 5-KK, 5-LL, 5-NN.

It was Mr. Dawkins' opinion that these provisions demonstrated that Jones County placed conditions on its leases, requiring H.A. Smith and his successors as lessees to operate the Facility as a home for serving the needs of the aged and infirm. Tr. 113.

The parties agree that H.A. Smith became a duly licensed operator of the Facility in 1964, pursuant to a license applied for and issued by the MSDH. No licensure documents before 1976 exist at the MSDH. Tr. 211. The Board continued to lease the Facility to H.A. Smith pursuant to several consecutively executed leases, approved by the Board, through 1972. See Exs. 5-N, 5-O, 5-P

In 1973, Charles T. Smith, H.A. Smith's son, assumed management of the daily operations of the Facility from H.A. Smith and executed a lease of the Facility from Jones County. Ex. 5-Q. Charles Smith and Jones County entered into leases from 1973 until 2000. 5-Q, 5-S, 5-T, 5-V, 5-W, 5-X, 5-Y, 5-Z, 5-AA, 5-BB, 5-CC, 5-DD, 5-HH, 5-II, 5-JJ.

The parties agree that Charles T. Smith applied for a license from the MSDH and was issued one from the State on a yearly basis. See also Exs. 27-30; Exs. 32-33; Exs. 35-36; Exs. 38-47.

During the years that Charles Smith was the Lessee of the Jones County Rest Home, the parties continued to acknowledge Jones County's ultimate control of the Rest Home. In 1977, when the certificate of need requirement was pending

but before it was enacted into law, Jones County's Board of Supervisors authorized an "application to the State Health Planning and Development Agency for a Certificate of Need for a sixty bed dual certification nursing facility." Ex. 5-U. In 1985, Jones County authorized Charles Smith to write a letter to the Mississippi Health Care Commission for permission to secure six additional beds at the Rest Home. Ex. 5-EE.

From time to time, the Board authorized the issuance of bonds for construction of additional space. See Ex. 5-M. Ultimately, Smith paid for one such addition, but in return his lease payments were reduced. Exs 5-FF and 5-GG. Jones County continued to own both the real property and the improvements pursuant to the leases.

Also, the leases between Jones County and Charles Smith came to include a provision that increased the rent owed the County, on a per-bed basis, should the Rest Home be approved for additional beds by MSDH. Ex. 5-JJ at Paragraph 3. Such a provision makes no sense if all the County had to lease was the real property itself. Rather, the parties recognized Jones County, not Smith, owned the ultimate right to provide nursing home services, that is, the equivalent of a Certificate of Need.

In 1995, Donna D. Zumwalt, daughter of Charles T. Smith, assumed management of the daily operations of the Facility and purchased the business

from her father through her company, Zumwalt, Inc. Ex. 68. In the contract, Charles Smith listed the property to be sold to Ms. Zumwalt:

The Seller agrees to sell and Buyer agrees to purchase the Nursing facility business now owned and operated by the Seller . . . the good will of the business as a going concern, all of the Seller's rights under his licenses, contracts and agreements involved in the operation of the nursing facility, and all assets and property owned and used by the Seller in the day to day operation of the nursing facility which does business under the name of "Jones County Rest Home.

Nothing in Exhibit 68, however, indicates that Charles Smith purported to own, or to sell, a Certificate of Need for the Jones County Rest Home. Ms. Zumwalt assumed management and operation of the Facility under the contract.

On September 15, 2000, with the 1995 Lease set to expire at the end of the year, Ms. Zumwalt wrote Jones County asking that she be allowed to lease the Rest Home in her name. Ex. 73. Importantly, Ms. Zumwalt made no mention of owning a certificate of need or other "licensing authority" for the Rest Home. Instead, she wrote in that letter to the Board:

As you are aware, Jones County Rest Home has been **leased and managed** by my family for more than 40 years.

Ex. 73; Tr. 338 (emphasis added).

In November 2000, the Board and Zumwalt entered into a lease effective from November 20, 2000 through December 31, 2005. Ex. 5-KK. The lease has

restrictions on the use of the property at Paragraph 4, and makes clear that Jones County owns any improvements on the property, Paragraph 6. As with the 1995 lease, this lease with Ms. Zumwalt includes a provision that increases the rental on a per-bed basis, should the Rest Home be authorized to serve more than 122 persons. *Id.* at Paragraph 3.

Donna D. Zumwalt, like her father and grandfather, became a duly licensed operator of the Facility pursuant to a license applied for and issued by the MSDH. Exs. 21, 25.

In 2002, Ms. Zumwalt asked the Board for permission to assign her rights to operate the Facility to Daleson Enterprises, LLC (“Daleson”). Tr. 241-43 (Testimony of Mr. Andy Dial, Board President). The Board approved the assignment at its February 25, 2002 meeting. Ex. 5-MM. According to Mr. Dial, the Board did not see the agreement between Zumwalt and Daleson. Tr. 243. In fact, the agreements between Zumwalt and Daleson were entered into in March 2002 -- after the Board’s meeting. Exs. 54, 71. Thus, those agreements -- which, unlike the contract between Zumwalt and her predecessor, purport to transfer a Certificate of Need -- were never seen by Jones County.

Zumwalt was last licensed to operate the Facility on March 31, 2002, on which date its then-current license expired. Ex. 21; Tr. 138. MSDH did not “revoke” Ms. Zumwalt’s license. *Id.*; see also Tr. 126. Indeed, Zumwalt did not

even apply for a license to operate the Facility after 2002. Rather, by assigning her interest in the lease to Daleson, and acquiescing in Daleson's application for licensure, Zumwalt surrendered her license to the State. Tr. 133, citing Section 303.4 of the Minimum Standards for Institutions of the Aged and Infirm; see also Tr. 138.

At the hearing Ms. Zumwalt admitted these important facts on cross-examination:

Q. What is the date, Ms. Zumwalt, of the last year in which you or Zumwalt, Inc. held a license to provide nursing care at the Jones County Rest Home?

A. March 31st, 2002.

Q. Okay. On April 1st, 2002, did the Health Department take your license away?

A. No sir, they didn't.

Q. They didn't revoke the license?

A. No, sir, they didn't.

Q. And you didn't apply for a renewal of that license; did you?

A. No, sir.

Q. And to this good day, you haven't applied for a renewal of the license, have you?

A. No, sir, I haven't.

Tr. 349.

At the hearing, Zumwalt spent a great deal of time focusing on one section of the licensure application which specifies the “owner” of the Facility. However, as Ms. Winborne testified, this section does not seek the name of the owner of the Facility’s Certificate of Need, but rather of the operator of the Facility. Tr. 219. This is borne out by the licensure application filled out by Daleson after its assignment from Zumwalt. Ex. 26. That application stated that “Daleson Enterprises” was the “owner,” despite the fact that Zumwalt only assigned or subleased her interest to Daleson.

Zumwalt now contends that a license to operate a skilled nursing facility can be “banked” or “held in abeyance.” However, Zumwalt did not request the MSDH to “bank” her license, or hold the license in abeyance, prior to its expiration on March 31, 2002. So then, at the time that this lawsuit was commenced, neither of the Zumwalt Defendants held a license to operate the Facility, or, for that matter, any other skilled nursing facility. Rather, as of December 1, 2005, Daleson, not Zumwalt, was licensed by MSDH to operate the Facility. Ex. 21.

Although Daleson’s license to operate a skilled nursing facility did not expire until March 31, 2006, Daleson’s rights under the 2000 Lease with Jones County expired December 31, 2005. Ex. 5-LL.

In 2005, the Board became concerned about the status of the Facility. Tr. 244. Daleson was facing adverse financial conditions and filed for bankruptcy protection that same year. Daleson had indicated that the bankruptcy would not disturb operations, but the Board became aware of creditors who had not been paid for services and goods provided to the rest Home. Id. There was also a concern that Daleson might move the Rest Home out of the county. Tr. 248.

The Board wrote the MSDH inquiring about the legal status of the Board's rights with respect to the operation of the Facility as a skilled nursing home. Ex. 1.

On May 23, 2005, the MSDH responded to the Board. Ex. 6. The MSDH stated that after a careful review of its files, it determined that "there is nothing to indicate that Ms. Zumwalt, or any other lessee, ever acquired anything other than authority to rent, lease, and operate the facility. Consequently, based on the information before the department at this time, ownership of the Jones County Rest Home lies with the Board of Supervisors, and the authority to operate the facility reverts back to the Board upon expiration of the lease by its own terms." Ex. 6.

As MSDH recognized in its May 23, 2005 letter, the Board has never been expressly granted a CON with respect to the Facility because the Facility was constructed prior to the enactment in 1979 of Mississippi's CON statutes, § 43-7-

191, et seq. The MSDH deems the Facility, and all other such facilities that pre-existed the CON statutes, to hold a “historical” or “grandfathered” CON because the Board and the Facility have remained in compliance at all times with the applicable statutory and regulatory requirements since enactment of the CON legislation. Tr. 65-67. Put another way, the Board has an exemption from the CON statute by virtue of its ownership of a licensed Facility prior to the enactment of the CON statutes.

Mr. Dawkins testified that when adjudicating the ownership of the rights usually held by the possessor of a Certificate of Need, in a case involving a pre-1979 skilled nursing facility, MSDH considers the ownership of the “bricks and mortar” to be very important. Tr. 66-67. On cross-examination, Zumwalt confronted Mr. Dawkins with examples where this seemed not to be the case; however, on re-direct examination, Dawkins explained that in the specific instances cited by Zumwalt’s counsel, the original owner of the real property where nursing home services were delivered was considered by the Department to be the owner of the “historical CON.” Tr. 121-23.

After receiving the letter from MSDH, in late 2005, the Board notified Daleson that it was not going to renew the current lease of the Facility with Zumwalt and that, upon expiration of the lease on December 31, 2005, the Facility and the right to operate it would be granted to a new operator.

Daleson, which was at that point a debtor-in-possession under Title 11, Chapter 11 of the U.S. Bankruptcy Code, agreed in resolution of proceedings in the bankruptcy case brought by the Board that the lease was expiring and that it would vacate the Facility and relinquish possession thereof to the Board. Ex. 7, 9, and 10. Daleson had previously been advised by the State that if it wished, it could file a Request for Determination of Reviewability with MSDH to seek adjudication whether Daleson, or Zumwalt, held any interest other than a terminable license to operate the Rest Home. Tr. 70. If Daleson wanted to show the Department that its lessor, Zumwalt, had the rights otherwise conferred by a Certificate of Need, it could have done so in that Request. Id. Neither Daleson nor Zumwalt filed any such Request. Tr. 71. Daleson has made no further application for a license and is not a party to these proceedings.

As of December 31, 2005, Zumwalt had no license of any kind from the MSDH. On December 29, 2005, Zumwalt's lawyers wrote the MSDH, asking that its license be "banked", and requesting a hearing for the Department "to show cause as to why License No. 160 is being revoked." Ex. 14.

In response, the MSDH wrote Zumwalt's lawyers as follows:

With respect to any contention that Zumwalt is the "owner" of a license, or that she has a valid license, please take note that her last license expired on March 31, 2002, that she has not been licensed since that time, and that she has not submitted any applications for licensure of the subject facility.

Ex. 13.

The Department's position was based on its findings:

[T]here was nothing to indicate that Ms. Zumwalt or any other lessee ever acquired anything other than authority to rent, lease, or operate the facility. Consequently, based on the information before the Department at this time, ownership of Jones County Rest Home lies with the Board of Supervisors, or the authority to operate the facility reverts back to the Board upon expiration of the lease by its own terms.

Tr. 78-79.

Effective January 1, 2006, the Board leased the Facility to SCRMC. Ex. 8. SCRMC became a duly licensed operator of the Facility pursuant to a license applied for and granted by the MSDH, and SCRMC remains the licensee and lessee of the Facility. Ex. 60; 23.

Zumwalt also seeks to prove claims for damages against Jones County and MSDH. However, Zumwalt did not serve any notice of claim upon Jones County and MSDH as required by the Mississippi Tort Claims Act; therefore, any such claim is barred from review. Moreover, Zumwalt did not prove that Jones County misappropriated any of her personal property; rather, Daleson represented to Jones County that all the personal property within the Rest Home was Daleson's to sell.

Daleson received value from Jones County for these items; thus Zumwalt's claim, if any, is against Daleson.

On April 16, 2008, the Chancery Court of Hinds County, in agreement with the Department of Health, determined that Jones County owned the "historical" CON for the facility and the right to operate it. Further, the Court determined Zumwalt never acquired ownership of the CON. In its analysis, the Court explained:

Pursuant to Miss. Code Ann. § 43-7-191(2), the only way to acquire a CON, other than issuance thereof by the MSDH, is by fee simple transfer from the owner, and documentation is required to be filed with the MSDH and its approval is required in order to do so. There is no proof of any of the foregoing in the record. The Board, for many years through leases of the Facility and attendant rights relating thereto, delegated its rights as owners to the lessee parties to operate the Facility, but there is no set of facts that results in Zumwalt having acquired any rights other than those which were limited and temporary in nature.

SUMMARY OF THE ARGUMENT

Jones County owns the right to operate the Jones County Rest Home. Both the Department of Health and the Hinds County Chancery Court concluded Zumwalt and her predecessors possessed nothing more than a lease to the Facility.

Jones County spent taxpayer funds to build the Facility. Later, Jones County leased the Facility to an independent contractor to manage the operations. Nowhere in the record can Zumwalt identify where Jones County relinquished, sold, or conveyed its ownership rights in the Facility. By contrast, Zumwalt surrendered her rights to the license to the Facility in 2002 when she filed a change of ownership with the Department of Health. Zumwalt has never reapplied.

Zumwalt purported to file a counterclaim against Jones County for money damages for personalty that it claimed was misappropriated by the County after it resumed physical control of the Facility. Notwithstanding that Zumwalt has no substantive claims, Zumwalt is also barred from asserting monetary damages against Jones County because she failed to comply with the Mississippi Tort Claims Act. Under the Act, parties must file requisite notice to the public body before asserting claims. Zumwalt never filed this notice. Nothing in the Tort

Claims Act provides a waiver of this requirement if the public body files a lawsuit first.

In sum, Zumwalt does not “own” the license she claims was revoked. Moreover, she voluntarily surrendered her license in 2002, and she is barred from bringing claims against the Department of Health or Jones County because she failed to comply with the requirements of the Tort Claims Act. This Court should affirm the decisions of the Hinds County Chancery Court and the Department of Health.

LAW AND ARGUMENT

Judicial review of a Mississippi Department of Health determination, as with any state agency, is a limited one. *Attala County Board of Supervisors v. Mississippi State Department of Health*, 867 So.2d 1019 1023 (Miss. 2004). As explained in *Attala County*:

The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the Court finds that the order of the State Department of Health is not supported by substantial evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal.

Attala County Board of Supervisors, 867 So. 2d at 1023; *see also* Miss. Code Ann. § 41-7-201; *HTI Health Servs. Of Mississippi, Inc. v. Mississippi Dep't Of Health*, 603 So. 2d 848 (Miss. 1992) (“significant limits” on judicial review of Health Department decision).

“There is a rebuttable presumption in favor of the decision rendered by an agency.” *Attala County Board of Supervisors*, 867 So. 2d at 1023 (court “cannot substitute its judgment for that of the agency or reweigh the facts of the case”). Further, the burden of proving the contrary is on the challenging party. *Delta Regional Medical Center v. Mississippi State Dep't of Health*, 759 So. 2d. 1174, 1176 (Miss. 1999).

Issue One: Jones County Owns The Equivalent of CON Rights to Operate the Jones County Rest Home as a Skilled Nursing Facility

Certificate of Need laws in the United States originated from local community efforts to allocate philanthropic and federal funding so that new hospitals would be built where they were most needed. See Clark C. Havighurst, *Regulation of Health Facilities and Services by "Certificate of Need"*, 59 *Va.L.Rev.* 1143, 1148 (1973). Throughout the Great Depression and World War II, few new hospitals were built in the United States, yet many existing hospitals became obsolete. Patrick John McGinley, "Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a "Managed Competition" System, 23 *Fla. State.U.L.Rev.* 141, 151 (Summer 1995).

The ensuing crisis was exacerbated by an inadequate distribution of hospitals among and within the states. *Id.* In response, community fund-raising and charitable activities of the 1940's evolved into organized community plans for hospital development.

In 1964, New York became the first state to pass a statute of statewide effect that required a governmental determination of need before any hospital or nursing home was constructed. Havighurst, *Regulation by CON* at 1151. By 1978, thirty-six states had enacted such laws. James F. Blumstein and Frank A. Sloan, *Health Planning and Regulation Through Certificate of Need: An Overview*, 1978 *UTAH L. REV.* 3, 3 n.1 .

After 1978, almost all states enacted CON laws, primarily because the National Health Planning and Resources Development Act of 1974 (42 U.S.C. §§ 300k-300n-6 (1982)) provided substantial federal funding for state and local health planning activities. Scott D. Makar, *Antitrust Immunity Under Florida's Certificate of Need Program*, 19 FLA. ST. U. L. REV. 149, 150 (1991). Under the 1974 National Health Act, certain federal health care funds were conditioned on the state's enactment of CON laws. By 1986, forty-two states plus the District of Columbia had responded to Congressional pressure by enacting a CON program.

Mississippi was one of the states that enacted CON legislation to protect its right to federal funds. Miss. Code Ann. § 41-1-187, et seq. The statutes require anyone constructing or developing new health care facilities to obtain a certificate of need from the Mississippi State Department of Health.

A certificate of need establishes that “the services the applicant proposes are needed and will be provided with high quality control and on a cost-effective basis.” *Mississippi State Department of Health v. Mississippi Baptist Medical Center*, 663 So.2d 563, 575 (Miss. 1995), quoting *Mississippi State Department of Health v. Southwest Mississippi Regional Medical Center*, 580 So.2d 1238, 1241 (Miss. 1991). The need for these services is determined for a defined geographic scope. Miss. Code Ann. §41-7-195(1).

On or after July 1, 1979, the date Mississippi's CON legislation became effective, new nursing homes and/or the expansion of existing nursing homes in Mississippi were required to obtain a CON pursuant to Miss. Code Ann. § 41-7-191.

As testified by its staff in the Chancery Court, the MSDH has considered all pre-existing homes to hold a "historical" CON, or, alternatively, to be exempt from the requirement of holding a CON. Thus, so long as the pre-existing home complied with the new statutory requirements under Mississippi's new CON legislation, or unless application for a CON was required of the pre-existing home under the legislation (e.g., for expansion of the home's bed capacity), no CON was required for nor issued to the home.

Ownership of the "bricks and mortar"¹ plays an influential role in that decision-making process, as Sam Dawkins, the director of the Department of Health's Office of Health Policy, testified:

Q. ...[I]n terms of whether a particular entity or person owns the core rights that otherwise would be owned by someone with a paper Certificate of Need, what is the significance of the ownership of the property and the building itself? In other words, who built the facility, who actually owns the facility, the building, how important is that in determining historical Certificate of Need?

¹ Zumwalt's brief makes much ado that "Facility" does not just mean the building with the health care operation [11], so the Department of Health must have been wrong in deciding Jones County owns the Facility. The shallowness of Zumwalt's argument is clear from the testimony at trial. The Department of Health gave weight to the fact Jones County owned the bricks and mortar, but that was just one of several factors considered, not the least of which is that Zumwalt never possessed more than a lease.

A. If it is a facility that existed prior to the Certificate of Need law, that is a very important aspect as to who owns the bricks and mortar or the facility, the structure itself, where the services were offered.(66-67)

Moreover, Sam Dawkins, the director of the Department of Health's Office of Health Policy, testified that the language of the original lease to the Facility tracked language of the then-existing Miss. Code § 6964-01 (1942) (cite). Consequently, the original Facility operated as Facility owned by the county under the statute, and the lessee was required as part of the lease agreement to manage it. (110-112).

Thus, as MSDH determined in its May 23, 2005 letter, since the Rest Home existed prior to Mississippi's CON statutes, no CON has been required for the legal operation of the Facility. The MSDH's determination is that the Board has always owned the Facility and only transferred time-limited leasehold interests, and that the Board remains the sole party authorized to operate the Facility under the CON laws. As the MSDH stated in its January 13, 2006 letter to Zumwalt's lawyers, "[t]he Department is of the opinion that the ownership authority of the beds and authority to operate the facility lies with the Jones County Board of Supervisors."

Further, pursuant to the applicable statutes and MSDH rules and regulations, the only way that either of the Zumwalt Defendants could have obtained a CON for the Jones County Rest Home was by transfer of fee simple

ownership from the Board. This, of course, never happened. See Miss. Code Ann. § 43-7-191(2).

Zumwalt has not provided this Court with any reasoned basis to invalidate the MSDH's interpretation of the CON laws. Indeed, case law from other jurisdictions supports MSDH's position. This same dispute arose in an almost identical situation in North Carolina in which it was conclusively determined that the lease of a nursing home's real and personal property cannot convey a CON – or something akin to a CON – where no CON existed. *Rutherford Hospital, Inc. v. RNH Partnership*, 168 F.3d 693 (4th Cir. 1999).

In *Rutherford Hospital*, the Fourth Circuit opined that because the nursing home was built before North Carolina enacted the statute requiring a CON to build or operate a nursing home, “a certificate of need was not required to build and operate the Rutherford Nursing Center and, accordingly, one was never issued by the state to RNH, ISO, or to any other party.” *Id.* 168 F.3d at 700.

When Rutherford acquired the leases to operate the nursing home, it did not also acquire something – a CON – that did not exist. Therefore, “the right to operate the nursing home following the termination of the leases remains with its owner, RNH.” *Id.*

Just as in *Rutherford*, the right to operate the Rest Home is vested with the Board, the only owner the Facility has ever had. This makes perfect sense. In

virtually every other context, a CON establishes the right of the owner to make capital investments in the furtherance of promoting health care. Here, the Facility's land and building is owned by the Board – not by Zumwalt.

Zumwalt's attempt to distinguish *Rutherford Hospital* fails to consider the central holding from that case: the lessee, simply by managing the facility, did not acquire the ownership rights to operate the facility. Despite Zumwalt's assertion that *Rutherford Hospital* "was premised upon a very different legal framework," Zumwalt fails to explain how she maneuvers around that basic concept: the lessee did not acquire ownership rights.

Moreover, Zumwalt's repeated "**bold-faced**" quotation that "no certificate of need" [13] was issued in *Rutherford Hospital* is not in conflict with the facts here: Jones County has never claimed the State issued a paper CON; rather, similar to *Rutherford Hospital*, the Jones County Rest Home was built prior to CON law. The Department of Health has determined that Jones County, as the owner of the pre-CON Facility, owns the essential equivalent of a CON, or a "historical" CON. Based on the Department of Health's review, Jones County **owns** the right to operate the facility.

Equally misplaced is Zumwalt's reliance on *Cantonsville Nursing Home, Inc. v. Loveman*, 709 A.2d 749 (Md. Ct. App. 1998). First, contrary to Zumwalt's position, the court sided with the Maryland Health Resources Planning

Commission's determination regarding who owned the right to operate the facility. The equivalent determination here by the Department of Health declared Jones County the owner of the right to operate the facility. Deference to the Department of Health's conclusive determination is sufficient to reject Zumwalt's claims.

Second, *Loveman*, which involved Medicaid fraud, centered on whether an owner **abandoned** his right to operate the facility. Nothing in the record of this case suggests Jones County ever abandoned the Facility. To the contrary, Jones County has invested in the property, entered into multiple lease agreements, and maintained both control and oversight through its leases. Jones County required the Facility operate as a nursing home.

In fact, if any party abandoned their rights here, it was Zumwalt, not Jones County. Zumwalt acknowledged she voluntarily relinquished her license in 2002 and never reapplied for another license.

As seen in the record, Zumwalt's position on whether there exists a certificate of need – and who owns it – shifts depending on the question. On one hand, Zumwalt acknowledges that when she acquired the facility from her father, he did not sell her a certificate of need. (336). On the other hand, Zumwalt claims she was able to then sell the CON to Daleson, despite not having ever acquired it from her father:

Q. How is it that you're selling to Daleson a CON, a Certificate of Need, which you didn't buy a Certificate of Need from your father...

A. The CON in asterisks (sic) is just – it's insinuating the fact that the CON did not exist when my father first started. When he first purchased it from his grandfather, there were no Certificates of Need.

My father did secure CONS in time, but all that he had was under that because it was before a CON even existed.

Q. Well, you yourself have never seen any document that confers a Certificate of Need for the Jones County Rest Home to either your father or your grandfather, have you?

A. No, sir.

Tr. 337.

Similarly, in Zumwalt's brief at 13 she argues that no CON existed, but within a few pages she argues her father's interest was sold to her. On page 12, she calls it a "legal phantom," but within the same sentence claims the "40 years of labor" essentially justifies her having it. Her tactical inconsistency demonstrates the weakness of her position.

Zumwalt seeks to show that its licensure also conferred a CON to own the Rest Home. But by constantly equating a CON with a license, Zumwalt begs the question why the second step of a license is necessary at all. To the contrary, however, the principles of statutory construction require that the separate purposes of the two statutes -- the CON statute and the licensure

law -- be given effect. *See State ex rel. Pair v. Burroughs*, 487 So.2d 220, 226 (Miss. 1986) ("a construction which will render any part of a statute inoperative, superfluous, or meaningless is to be avoided"); *McCaffrey's Food Market, Inc. v. Mississippi Milk Commission*, 227 So.2d 459, 463 (Miss. 1969) (same).

There is a clear distinction between a License and a CON. A License confers the approval of the MSDH of the person or entity that proposes to deliver the skilled nursing services to the patients. A CON, on the other hand, approves the construction, development and establishment of the Facility itself.

Pursuant to Miss. Code Ann. § 43-7-191(2), the only way to acquire a CON, other than issuance thereof by the MSDH, is by fee simple transfer from the owner, and documentation is required to be filed with the MSDH and its approval is required in order to do so. There is no proof of any of the foregoing in the record.

The Board, for many years through leases of the Facility and attendant rights relating thereto, delegated its rights as owners to the lessee parties to operate the Facility, but there is no set of facts that results in the Zumwalt Defendants having acquired any rights other than those which were limited and temporary in nature and which have long since expired.

It would be anomalous, if not absurd, to declare that Zumwalt (or even Daleson) owned a CON for the Jones County Rest Home, when the Board, as owner of the Facility, can freely lease the property to another party. The CON laws cannot operate to divest the Board of its fee simple ownership of real property.

Here, the Department has decided that the Jones County Board of Supervisors holds the equivalent of a CON, by virtue of its ownership of the Facility from the date of its inception (which predates Mississippi's CON legislation by more than 25 years) until the present and its continued compliance with all statutes and MSDH rules during that time. See May 23, 2005 MSDH Letter.

As the Chancellor well understood, Zumwalt never held more than a leasehold interest. Jones County has always owned the Facility, and, as owner, has held the right to operate the Facility. When Zumwalt's father sold her his rights under the lease, all she acquired was his lease. To take a phrase from Zumwalt's brief: "Where nothing is possessed, nothing can be conveyed." [12]. Zumwalt's predecessors never owned the Facility or the right to operate it, and neither did Zumwalt.

Issue II: Zumwalt Relinquished Her License In 2002

Zumwalt correctly notes that Issue I is largely dispositive in this case. If the Court affirms the Chancery Court and the Department of Health, then Zumwalt has no claims for deprivation of due process. She never “owned” what she claims was taken.

Nevertheless, any interest Zumwalt may have had she concedes was voluntarily relinquished in 2002, as demonstrated by her testimony:

Q. Okay. On April 1st, 2002, did the Health Department take your license away?

A. No, sir, they didn't.

Q. They didn't revoke the license?

A. No, sir, they didn't.

Q. And you didn't apply for a renewal of that license, did you?

A. No, sir.

Q. And to this good day, you haven't applied for a renewal of the license, have you?

A. No, sir. I haven't.

Tr. 349.

Under Miss. Code Ann. § 41-7-195:

A certificate of need shall be valid only for the defined scope, physical location and person named in the application. A certificate of need shall not be transferable or assignable nor shall a project or capital expenditure project be transferred from one person to another, except with the approval of the State Department of Health. A certificate of need shall be valid for the period of time specified therein.

Similar to the statute, the Department of Health issues standards governing the licensure of institutions for the aged or infirm. In Section 303.4, the standard provides: “[t]he license for a facility is not transferable or assignable to any other person except by written approval of the licensing agency and shall be issued only for the premises named in the application.”

Moreover, a license must be surrendered when there is a change of ownership. Section 303.4 goes on to say that “The license shall be surrendered to the licensing agency on change of ownership, licensee, name and location of the institution, or in the event that the institution ceases to be operated as a facility.” It is therefore a condition of licensure that the licensee agrees to surrender its license to operate a facility when there is a change of ownership. A change of ownership includes the expiration of a leasehold interest with reversion of the Facility back to the fee simple owner. Miss. Code Ann. § 41-7-173(d). As noted in her testimony above, Zumwalt made no further applications for a license.

Thus, Zumwalt and/or Zumwalt, Inc., last held a license to operate the Facility on March 31, 2002, the date on which their last license expired and on which Daleson's license was operational. Defendants' actions in submitting a change of licensee to MSDH was a surrender of their license to operate the Jones County Rest Home. Accordingly, as of April 1, 2002, neither Donna D. Zumwalt nor Zumwalt, Inc. held any rights whatsoever as against MSDH with respect to the Jones County Rest Home.

Because Zumwalt made no further application for renewal of her license prior to its surrender in 2002, there could not have been any denial of any rights with respect to issuance of any future license. Accordingly, because neither Zumwalt or Zumwalt, Inc., retained any rights with respect to any license issued for operation of the Facility after March 31, 2002, no hearing was required with respect to issuance of the license to SCRMC as of January 1, 2006.

When Zumwalt's attorneys wrote three years later demanding to know why Zumwalt's license was revoked, the Department of Health informed them, by return letter, that Zumwalt was not the "owner":

With respect to any contention that Zumwalt is the "owner" of a license, or that she has a valid license, please take note that her last license expired on March 31, 2002, that she has not been licensed since that time, and that she has not submitted any applications for licensure of the subject facility.

As Dawkins summarized at trial:

[T]here was nothing to indicate that Ms. Zumwalt or any other lessee ever acquired anything other than authority to rent, lease, or operate the facility. Consequently, based on the information before the Department at this time, ownership of Jones County Rest Home lies with the Board of Supervisors, or the authority to operate the facility reverts back to the Board upon expiration of the lease by its own terms.

Tr. 78-79.

Thus, the Hinds County Chancery Court's holding that Zumwalt had relinquished its license is supported by the evidence. The Chancellor held:

The Court is convinced Defendants Donna D. Zumwalt and Zumwalt, Inc. held rights in the Facility only as lessees under the terms of the leases with the Board. The Court is persuaded that Defendant Zumwalt's license expired March 31, 2002; therefore, the Court hereby finds that MDSH had the authority to issue license 160 to South Central for the authority to operate Jones County Rest Home.

Since Zumwalt did not "own" the license, there can be no wrongful deprivation of due process and this Court should affirm both the Department of Health and Chancery Court.

**Issue III: Zumwalt's Monetary Claims Against Jones County Are Barred
By The Tort Claims Act**

If this Court affirms the Chancellor on Issues I and II above, this issue is moot. But if this Court should consider Zumwalt's assignment with respect to her counterclaim, it should affirm the Chancery Court's holding that Zumwalt is barred by the Tort Claims Act for her failure to give prior notice of that claim

Under Miss. Code Ann. § 11-46-11:

(1) After all procedures within a governmental entity have been exhausted, any person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim with the chief executive officer of the governmental entity.

Id.

Nothing in the Tort Claims Act provides a public body waives its protections under the Act by filing a lawsuit. Although this issue does not appear to have been addressed directly by this Court, this Court's opinion in *Madison v. DeSoto County*, 822 So. 2d 306, indicates such a waiver does not exist.

In any event, as the testimony below proved, Zumwalt represented to Jones County that any personal property within the Facility was Daleson's to sell. Jones County then paid Daleson for that personal property. Zumwalt now claims she did have an ownership interest in that property. The Chancery Court

correctly concluded Zumwalt failed to prove Jones County misappropriated any of her property.

At a minimum to preserve the issue, Zumwalt should have requested the Court to stay the action so the proper notice could be given to Jones County and the Department of Health. Zumwalt failed to do so. As a result, Zumwalt's monetary claims are barred by the Tort Claims Act.

CONCLUSION

This case presents an important question: when a health care facility has been constructed with taxpayer funds prior to enactment of the Certificate of Need law, does the public body that constructed the facility have the rights equivalent those conferred by a CON? Surely the public interest concurs with the opinion of the Department of Health and the Chancellor in this case. The citizens of Jones County built the Jones County Rest Home. They, not some private licensee, should continue to possess the right to operate it.

Respectfully submitted,

**JONES COUNTY BOARD OF
SUPERVISORS and
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CERTIFICATE OF SERVICE

I certify that I caused to be served this day a true and correct copy of the foregoing on the following persons by United States Mail, first class, with all postage prepaid:

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This the 17th day of February, 2009.



James W. Craig

SUPPLEMENTAL CERTIFICATE OF SERVICE

I certify that I caused to be served this day a true and correct copy of the foregoing on the following person by United States Mail, first class, with all postage prepaid:

Honorable Patricia D. Wise
Hinds County Chancery Court Judge
P.O. Box 686
Jackson, MS 39205-0686

This the 25th day of February, 2009.



R. Gregg Mayer