IN THE SUPREME COURT OF MISSISSIPPI

DONNA D. ZUMWALT and ZUMWALT, INC. **APPELLANTS**

V. **NO. 2008-CA-00778-SCT**

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

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

REPLY BRIEF FOR APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellees, in the course of expanding the scope of M.R.A.P. 34(b) to include a statement why oral argument need *not* be granted (Jones Br. at 3), concede that the principal issue in this suit is an issue of first impression that "has never been addressed by this Court." We respectfully submit that oral argument would be valuable for that reason, and also so that this Court may address the serious policy issue raised by Appellants at issue II of their principal brief — whether the lease of a license to operate a facility results in the lessor's losing its property interest in that license. Also, issue III likewise raises a procedural issue of first impression.

Appellees' stated basis for claiming that oral argument need not be granted — because the present case involves review of an agency decision — would eliminate any need for this Court to hear oral argument in any appeal from any agency decision, ever. This claim by Appellees need not be taken seriously.

REBUTTAL ARGUMENT

I. Zumwalt, Not Jones County, Owns the Right to Operate the Nursing Home.

A. The Department's "Historical CON" Notion Is Contrary to Law.

Jones County[1] declares that, according to the Department's testimony at the hearing, "the MSDH has considered all pre-existing [nursing] homes to hold a 'historical' CON, or, alternatively, to be exempt from the requirement of holding a CON." Jones Br. at 25. This equivocation is fatal to Jones County's case: there is a world of difference between holding some sort of certificate of need ("CON") ("historical" or otherwise), and being exempt from any requirement to hold a CON. As we demonstrated in our principal brief (at 9-12), there is no such thing as a "historical" CON. Facilities grandfathered under the CON Law were never required to have a CON in the first place, and thus never applied for one.

Although Jones County claims that we have "not provided this Court with any reasoned basis to invalidate the MSDH's interpretation of the CON laws," Jones Br. at 27, that is far from the truth. There is no reasoned basis for the Department's position. We have demonstrated from the CON statutes that a CON is merely a prerequisite, for the time period after the CON Law's passage, to obtaining a license for a health care facility. Jones County has not shown any flaw in our analysis of those statutes.

The Department has never issued any rules or regulations governing any "historical CON." Its CON Review Manual is silent on the subject. The Department cannot invoke secret

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[1]That is how we shall refer to Appellees, per M.R.A.P. 28(d). We cite their brief as "Jones Br." and our principal brief as "Zumwalt Br." Appellants are "Zumwalt."

We note that the Mississippi State Department of Health, the third appellee, did not file a brief, but rather submitted a letter (March 3, 2009) joining the other two appellees. Appellees' brief as filed, therefore, does not appear to reflect any considered opinion or argument of the Department or its legal counsel.

rules concerning "historical CON's" in order to deprive license holders of their property rights. Given that the Legislature has never given any indication that a "historical CON" exists for grandfathered facilities, the Department would have been obliged to comply with the Administrative Procedures Act, Miss. Code Ann. § 25-43-3.101 *et seq.*, before creating such an anomaly.

An even stronger argument can be made that the Department has no authority at all to create any CON outside the scope of the CON Law. The Department's powers under the CON Law are delineated at Miss. Code Ann. § 41-7-185, including the power to "[p]rescribe and promulgate such reasonable rules and regulations as may be necessary to the implementation of the purposes of Section 41-7-171, et seq., complying with Section 25-43-1, et seq." We do not believe that the Legislature intended to grant the Department the authority to invent any category of CON not set forth in the CON Law itself, especially since a "historical CON" bears no reasonable relationship to "the implementation of the purposes of" the CON Law as written.

While an agency's interpretation of the statutes it administers is entitled to some deference, that interpretation must not be sustained where "it is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Miss. State Dep't of Health v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 984 So. 2d 967, 981 (Miss. 2008) (quoting *Buelow v. Glidewell*, 757 So. 2d 216, 219 (Miss. 2000)). Ordinarily, that is a tough standard to reach; but in the present case, where the Department has ignored the letter of the CON Law, and acted on the basis of a hypothetical "historical CON" without foundation in statute, rule, or regulation, we think that standard has been met with ease.

B. The Facts Set Forth by Jones County Support Zumwalt's Position.

The long recitation of facts by Jones County does not improve their case. They concede that H.A. Smith ceased to be an employee of the county when he became the first licensee of the nursing facility, so that he did not obtain his license as the county's employee. Jones Br. at 6-7. Their claim that the facility was operated, before the licensure requirement, as a "home for the old, infirm, and indigent" (under then-Miss. Code § 6964-01), does not prove anything about who obtained and possessed the legal authority to operate the facility under license.

Moreover, their citations to the 1942 Code actually hurt their case. The Department allegedly inferred from the language of Miss. Code Ann. § 43-11-1 (definitions re: nursing home licensure) that, because "the same language is still found in the Department's regulations," then "the County, prior to the first lease with H.A. Smith, operated the Facility as a home under the auspices of the statute." Jones Br. at 7. But § 6964-01 (see R.E. 64) expressly excluded from its scope "institutions for the aged or infirm which are owned, operated and under the supervision of any governmental unit." Therefore, Jones County could not have operated such a facility "under the auspices of the statute."

The county's various recitations of improvements to the building are not material to this case, because they merely demonstrate what no one disputes, that the county owned the building.[2] Likewise immaterial is the provision (Jones Br. at 10) that the rent due would increase

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[2]Jones County tucks away in a footnote (at 25) its attempt to rebut the point that, in health care law, "facility" means "the operation of a particular form of health care." Zumwalt Br. at 11 (quoting Op. Miss. Att'y Gen., 2000 WL 192249, at *2 (Jan. 28, 2000)). The county misstates this point as " 'Facility' does *not just* mean the building with the health care operation." Jones Br. at 25 n.1 (emphasis added). For "not just," Jones County should have said, "not *at all*." That would match up with what the Attorney General said, and with the actual use of the term.

By comparison, as Hurricane Katrina recently reminded us, a church is its congregation, not the building in which they meet; wind or wave may destroy the building, but not the church.

if additional beds were approved. Jones County claims that this "makes no sense if all the County had to lease was the real property itself," but no one should be surprised that when an enterprise becomes more profitable, the landlord wants higher rent. Further, as the parties agree, Jones County paid for the additions to the building that made additional beds possible, and may have seen increased rent as its recoupment of those costs. If we are going to read the minds of contracting parties in decades past, as Jones County would have this Court do, then the inferences we describe are much more plausible than the notion that basing rent on the number of beds implies ownership of those beds (again using "bed" as a term of art for "licensed authority to admit a resident").

As for Jones County's discovery that Charles Smith did not "purport[ ] to own, or to sell, a Certificate of Need for the Jones County Rest Home," Jones Br. at 11, that merely proves that Mr. Smith understood the CON law better than Jones County does today. There never was a CON for the facility, and the Department's fertile legal minds had not yet conjured up the "historical CON," so Mr. Smith did not purport to own or sell any such thing.

This Court may wish to examine the lease agreement between Zumwalt and Daleson. R.E. 54. This contract's first page states that Zumwalt is leasing to Daleson a certain real property, and separately, the license to operate the nursing home, "for the term of this lease" only. This copy of the contract is file-stamped received by the Department's licensure division; at R.E. 55 is presented the same contract, file-stamped by the Department's health-planning division. There is thus no doubt that the Department knew Zumwalt was leasing the license to Daleson. Likewise, Jones County's board of supervisors approved the Daleson lease agreement. R.E. 5 at 112. There is no indication in those minutes that Jones County considered itself to exercise any ownership over the license; again, Jones County merely required that Daleson *have*

a license as a condition precedent. There is nothing about leasing any "historical CON," of course, since the Department had not yet invented that entity.

We note in passing that Miss. Code Ann. § 43-11-9(3) exempts any "governmental entity or agency" from paying to obtain or annually renew its nursing-home license (as of July 1, 1979 — see Laws 1979, ch. 445, §§ 7 & 13). Yet Charles T. Smith, for instance, paid $450.00 to renew the facility's license in 1981. R.E. 29. If he was renewing the license on behalf of Jones County, why didn't he claim the exemption? The answer is that he was not renewing the license on behalf of any governmental entity; he was doing it on behalf of the owner and operator of the nursing home facility, himself.

If this Court regards the present issue not as a matter of law, but as a question of fact, the record is devoid of even the "mere scintilla" which would be insufficient to meet the substantial-evidence threshold. Every licensure application filed with the Department showed that Jones County owned the building and that H.A. Smith and his successors, not any governmental entity, owned the nursing-home facility operated in the building. Nothing in the record shows that Jones County did anything to provide nursing services at its building.[3] Nothing in the record ever shows Jones County acting in any other capacity than that of landlord. It never applied for a license, never paid salaries for the nursing home's staff, never hired or fired employees, never defended any lawsuits, never invoked its sovereign immunity regarding such suits . . . it never operated a nursing home, in short. It did not retain H.A. Smith and his successors as independent contractors to do all of the foregoing — once Mr. Smith obtained a license, it simply leased him

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[3]Recall the undisputed fact that there was no nursing staff at the Rest Home before H.A. Smith began operating it as a nursing home. Zumwalt Br. at 3 (citing T.285). If Jones County operated a nursing facility, where were the nurses? Perhaps they were "historical nurses."

the building and allowed him to operate his business therein. The Department cannot pretend to believe that whoever owns a building, automatically owns the health care entity operating therein. The Department had no substantial evidence for its decision that Jones County owned the license, and the chancery court's decision to the contrary should be reversed.

C. Case Law Does Not Support Jones County's Position.

Jones County continues to rely on the dog that hunted so well for it in the lower court, *Rutherford Hospital, Inc. v. RNH Partnership*, 168 F.3d 693 (4th Cir. 1999). Jones Br. at 27-28. But we have distinguished *Rutherford Hospital*, which rests on an entirely different regulatory framework where, according to the Fourth Circuit, *neither* a CON *nor* a license is required to operate a nursing home. Zumwalt Br. at 13-14. In such a case, it's plausible that the authority to operate the facility would follow the bricks and mortar, so that as Jones County summarizes the case's holding, "the lessee, simply by managing the facility, did not acquire the ownership rights to operate the facility." Jones Br. at 28. However, at Mississippi law, the authority to operate a facility is governed by the State's licensure laws, and the record evidence in the present case shows that this authority never vested in Jones County; it was always held by H.A. Smith and his successors. Moreover, Mr. Smith and his successors did not "simply manage" the facility; they obtained and renewed a license on their own behalf, were legally responsible for the facility, defended any lawsuits that arose, and in all respects conducted themselves as the owners of the health care *facility*, though not of the building.

Jones County fails to address this distinguishing factor between North Carolina's laws and Mississippi law, and its argument must fail accordingly.

Similarly, Jones County fails to *materially* distinguish the Maryland case cited by us, *Catonsville Nursing Home v. Loveman*, 709 A.2d 749 (Md. Ct. App. 1998). The facts of

Loveman, as Jones County says, are not on point with the present case, but we cited it for a legal holding: any "exemption" from the state CON Law as a result of having been grandfathered in under that law, is held by "the health care project and the party operating that project." *Loveman*, 709 A.2d at 757. Naturally, Jones County avoids addressing this holding and prefers to look at the facts, which we never said were on point. Obviously, if legal rules could be cited only from prior cases on all fours with the case in dispute, our system of jurisprudence would look very different indeed. What matters in *Loveman* is that Maryland, unlike North Carolina in *Rutherford Hospital*, had a CON and licensure scheme materially similar to Mississippi's, and in that scheme, a pre-CON Law facility was simply *exempt* from holding a CON, and that exemption followed the *facility*, not the *building*. That is the principle which this Court should apply in the present case.

D. Zumwalt's Argument Is Not Inconsistent.

Finally, Jones County resorts to inventing supposed inconsistencies in Zumwalt's testimony and litigating position. We are told that Zumwalt said she was not sold any CON by her father. Jones Br. at 29. True. We are then told that Zumwalt claimed to have sold a CON to Daleson. Jones Br. at 29-30 (citing T.337). Not so true. As the testimony quoted by Jones County shows, Ms. Zumwalt was clear that there was no CON for the facility when it began operation. Counsel for Jones County framed its cross-examination in terms of "you're selling to Daleson a Certificate of Need," a frame which Ms. Zumwalt attempted to correct by referring to a "CON in asterisks" (she meant "quotation marks," or scare quotes as we call them).

The rest of the alleged inconsistencies are similarly baseless: "she argues that no CON existed, but within a few pages she argues her father's interest was sold to her." Jones Br. at 30. There is no inconsistency, unless one makes Jones County's mistake of equating "CON" with

"interest." Likewise, when calling a "historical CON" a "legal phantom," we did not say that Zumwalt was entitled to ownership of any such ghostly entity; we said that Zumwalt is entitled to what she owns, the legal interest in the nursing home business.

As for the argument that "Zumwalt seeks to show that its licensure also conferred a CON" and that Zumwalt "constantly equat[es] a CON with a license," Jones Br. at 30, nothing could be farther from the truth, as the absence of any citation to record or brief indicates. We were quite clear in our principal brief (at 9-10) about the difference between a CON and a license, a distinction that Jones County *must confuse to win its case*. Look at the county's argument on page 31 of its brief:

> 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.

All of this is true. However, it does not create any CON where none exists due to a facility's having been operated before the effective date of the CON Law. And Jones County goes on to misstate the law when it claims that, under Miss. Code Ann. § 41-7-191(2),[4] "the only way to acquire a CON, other than issuance thereof by the MSDH, is by fee simple transfer from the owner," etc. Jones Br. at 31. There is no such language in subsection (2), which simply enacts the moratorium on issuing new CON's for nursing homes (and the Legislature's numerous statutory exceptions thereto). It says nothing about acquiring a CON by fee simple transfer. "There is no proof . . . in the record" of any such transfer, for the simple reason that the facility has no CON to transfer; it never had one, and if it ever had, that CON long since would have expired by operation of law. Zumwalt Br. at 10 (citing Miss. Code Ann. § 41-7-195).

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[4]Miscited by it as "§ 43-7-191(2)," a nonexistent statute.

Jones County repeatedly claims to have owned "the Facility," but it never did; it owned a building in which a facility was operated. There is no "anomalous" or "absurd" claim that Zumwalt "owned a CON for the Jones County Rest Home, when the Board, as owner of the Facility [sic], can freely lease the property to another party." Jones Br. at 32. Zumwalt never claimed to own any CON; what Zumwalt owns is the legal authority to operate a nursing home facility, an authority which Jones County has never exercised, and which the Department cannot take away without due process of law, which was never extended in this case.

E. Jones County Concedes Zumwalt's "CON" for 62 Beds.

While we did not concede that one "owns" a CON, we did argue in our principal brief that, on Jones County's own theory of a CON as an asset which co-exists with a facility and gives title thereto, Zumwalt indisputably would own a "CON" for 62 of the 120 beds in the facility. Zumwalt Br. at 15-16. Jones County does not, so far as we can see, even attempt to rebut this point, effectively conceding it.

II. Zumwalt Did Not Lose Her License by Leasing It to Daleson.

The truly pernicious part of Jones County's argument, made all the moreso by the Department's joinder therein, is the notion that, by leasing her license to Daleson, Donna Zumwalt surrendered her ownership therein. Jones County, apparently unfamiliar with the nursing-home business in Mississippi, nowhere addresses the wider implications of this argument: namely, that every licensee which has leased that license to a tenant, has forfeited that license. Jones County does not deny that this would work a revolution in Mississippi health care law, and the Department merely joins Jones County's brief. (If this Court grants oral argument for no other reason, it should do so to place the Department on the record on this subject.)

Nothing in Jones County's argument rebuts the points made in our principal brief, where we noted that the "surrender" of a license is merely the Department's language for issuing the license to whomever is actually operating the facility at the time. As Ms. Winborne testified for the Department, the license to Daleson was issued "[b]ased on the lease agreement or lease contract." Zumwalt Br. at 18 (citing T.191). A "change of ownership" of a health care facility includes "lease arrangements." Miss. Code Ann. § 41-7-173(d) (definitions under CON Law). On Jones County's theory, there would be no such thing as the lease of a license, because the lessor would lose the license once it was reissued in the lessee's name. But the Department, as Ms. Winborne testifies, routinely honors the arrangements made in lease agreements.

Therefore, Zumwalt did not "surrender" the license except in the technical sense of License No. 160's being reissued in Daleson's name. Under the normal course of events, when Daleson went into bankruptcy, that would have caused the interest in the license to revert to Zumwalt, which would have then filed a change of ownership with the Department and obtained License No. 160 in Zumwalt's name. What actually happened, of course, is that, having corresponded with the Department over the course of 2005, Jones County leased its supposed interest in the license to South Central Regional Medical Center effective January 1, 2006 (Jones Br. at 15-18). After that, Zumwalt could not file a change of ownership, because the Department was denying that she had any ownership in the license. Her license was taken from her, despite the Legislature's provision that the *only* way a license may be "denied, suspended, or revoked" is after notice and the opportunity for a hearing. Miss. Code Ann. § 43-11-11.

To the extent that the Department now claims (or allows Jones County to claim — the Department knows better) that a licensee loses its property interest in a license when it leases it and "surrenders" the license pursuant to a change of ownership, the Department is acting *ultra*

vires and contrary to law; it cannot revoke a license in a manner not authorized by the Legislature, as its powers are only those expressly granted by the Legislature. *Miss. State Bd. of Pharmacy v. Steele*, 318 So. 2d 33, 35 (Miss. 1975).

As the record in this case makes clear, of course, what really happened was that the Department, under the influence of its "historical CON" theory, convinced itself that Zumwalt had no property interest in the license, and hence was owed no due process. For the reasons set forth at issue I above and in our previous brief, this Court should hold that the Department erred as a matter of law in making that baseless determination. To hold otherwise would cancel out the property interests of every health-facility license holder in this State that has leased its interest in that license. Jones County and the Department may prefer to pass over that consequence in silence; this Court, we trust, will not do so.

III. Zumwalt's Counterclaim Was Not Barred.

The chancery court dismissed Zumwalt's counterclaim on the basis that Zumwalt failed to provide 90 days' notice under Miss. Code Ann. § 11-46-11. Jones County does not cite any authority supporting that dismissal. Its reference to the court of appeals' decision[5] in *Madison v. DeSoto County*, 822 So. 2d 306 (Miss. Ct. App. 2002), is unavailing; the notice issue was one of many defenses pleaded to the counterclaim, *id.* at 308, but the lower court dismissed the counterclaim on other grounds. *Id.* at 309-10. The court of appeals affirmed on those same grounds, *id.* at 310, so that the notice issue did not arise. The inference that, because causes of

[5]It is odd that Jones County refers to the *Madison* case as "this Court's opinion" and omits for *Madison*, as for no other opinion it cites, the part of the citation identifying the court issuing the opinion. Jones Br. at 1 (table of authorities), 37. Of course, no intent to deceive can be inferred, and no implication to that effect is intended here.

action expressly prohibited under the MTCA were not allowed, sovereign immunity was not waived concerning the notice requirement, seems to us a rather long stretch.

This Court may wish to note that the Federal Tort Claims Act expressly exempts from the notice requirement "such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." 28 U.S.C. § 2675(a). Our own Legislature's silence on this point may indicate its wish to diverge from federal practice, or merely its oversight of the possibility of a counterclaim. Certainly, a governmental entity that files a suit against a private party is already "on notice" of the dispute between the parties, and where the counterclaim is compulsory, i.e., it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim," M.R.C.P. 13(a), the notice provision is arguably superfluous.

Faced with a notice provision requiring 90 days' advance notice, and a rule of civil procedure requiring a counterclaim to be stated in a responsive pleading due 30 days after service of the complaint, parties in this State might be justified in feeling themselves caught in a catch-22. Guidance from this Court on this issue of first impression surely would be welcome.

As for Jones County's efforts to argue the merits of the counterclaim, this is not the forum for such arguments. This Court should reverse and remand for the finder of fact to make appropriate determinations on the merits.

CONCLUSION

For all the reasons set forth above and in the Brief for Appellants, this Court should reverse the decision of the Hinds Chancery Court, and render a declaratory judgment that Jones County has no "historical Certificate of Need" in the Jones County Rest Home; that the Department must forthwith recognize Zumwalt's ownership of the nursing home, and issue License No. 160 to her accordingly; and remand this matter to the chancery court for a hearing as to the damages properly owed to Zumwalt on the counterclaim.

Respectfully submitted, this the ***20th*** day of April, 2009.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellants does hereby certify that he has on this day caused to be sent via United States mail (postage prepaid) a true and complete copy of the above and foregoing document to:

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