# IN THE SUPREME COURT OF MISSISSIPPI

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

**V.** — **NO. 2008-CA-00778**

**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**

# BRIEF FOR APPELLANTS

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Johnny Burnett, Danny Spradley, Barry E. Saul, Andy Dial, and Jerome Wyatt, Jones County Board of Supervisors (Appellee).

2. South Central Regional Medical Center (Appellee).

3. Mississippi State Department of Health (Appellee).

4. Donna D. Zumwalt and Zumwalt, Inc. (Appellants).

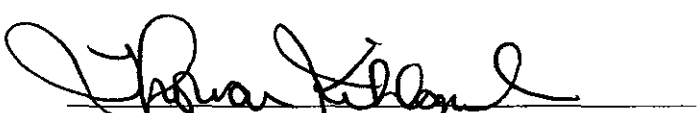
5. Thomas L. Kirkland, Jr., Julie B. Mitchell, Esq., and Andy Lowry, Esq. of Copeland, Cook, Taylor & Bush, P.A., counsel for Appellants.

6. Fred L. Banks, Jr., Esq., James W. Craig, Esq., Thomas N. Jamerson, Esq., and Jeffrey S. Moore, Esq., of Phelps Dunbar, LLP, counsel for Jones County Board of Supervisors and South Central Regional Medical Center.

7. Bea M. Tolsdorf, Esq., Sarah E. Berry, Esq. and Donald E. Eicher, III, Esq., counsel (past and present) for the Department.

8. The Honorable Patricia Wise, Chancellor.

Respectfully submitted,



Thomas L. Kirkland, Jr.
Attorney of record for Appellants

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## STATEMENT OF THE CASE

### I. Course of Proceedings Below.

The present suit was filed by the Jones County Board of Supervisors ("Jones County") and South Central Regional Medical Center ("South Central") on December 15, 2005, seeking a declaratory judgment as to the ownership of authority to operate the Jones County Rest Home ("Home" or "Rest Home"), which authority Jones County had leased to South Central. R.1.[1] Defendants, Donna D. Zumwalt and Zumwalt, Inc. (collectively "Zumwalt"), timely filed their answer, which included a counterclaim against the plaintiffs and a cross-claim against the Mississippi State Department of Health ("the Department"). R.512. Zumwalt declared that she was the due holder of the license to operate the Home; that Jones County, South Central, and the Department had unlawfully deprived her of the license without due process of law; and that those parties were liable for her losses as a result of their usurping her license.

The chancellor (Wise, J.) heard the case in September and November of 2007, and issued her opinion on April 16, 2008, finding against Zumwalt on all issues. R.1777; R.E. 75. Zumwalt timely appealed to this Court.

### II. Statement of Relevant Facts.

Prior to 1964, Jones County operated what was known in those more literal times as "a home for the poor" or "home for indigents," erected in 1953 to replace the previous such structure. T.269; R.877-78. Residents who "didn't have anything, . . . it was a place for them to come and stay, and at that time . . . they farmed, they had cows, and the ones that was able,

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[1]Pages from the record are cited as "R.__"; pages from the trial transcript, as "T.__"; and record excerpts are cited as "R.E.__." The first 74 record excerpts are the trial exhibits, so that their numbers correspond: trial exhibit 4 = R.E. 4, etc. All cited pages from the trial transcript are copied as R.E. 77, which will not be further cited hereafter.

they worked at the time." T.269. This home for the poor was financially supported by Jones County until 1964 or 1965, when the Medicare program began. T.268, 269. Before that time, the indigents' home did not employ any nursing staff. T.285.

In 1964, Jones County leased the premises of the Home to H.A. Smith. R.879-80. The lease document expressly conveyed "that certain parcel of property" and "the home thereon situated" to H.A. Smith, and provided that if H.A. Smith "should fail to qualify as a 'Licensee' for the operation of 'an institution for the aged or infirm' as defined in Section 6994-01, Miss. Code 1942, Recompiled, this Lease Agreement shall be null and void." R.879-80. After this lease was entered into, at no time did Jones County pay any compensation to the owner/administrator or his successors; rather, H.A. Smith and his successors paid rent to the county for the physical structure in which they operated the Home. T.273.

H.A. Smith duly applied for and received, in his own name, License No. 160 to operate the Jones County Rest Home, and this license was renewed annually as required by law. When H.A. Smith conveyed his operation of the Rest Home to his son, Charles T. Smith, Charles became the new licensee of License No. 160. Although records at the Mississippi State Department of Health were destroyed in the Easter flood of 1979, records from 1980 onwards demonstrate that the license continued to be held by Charles T. Smith and his successors. R.E. 15.

The January 15, 1979 license application on file with the Department distinguishes between the owner of the building in which the facility is operated (Jones County) and the operator of the facility (Charles T. Smith). T.153-54; R.E. 27. The licensee is defined as "the owner or the chairman of governing body" of the facility. T.154-55; R.E. 27. The application also includes a space to fill out if the licensee is a "governmental unit," and that space is blank.

T.156; R.E. 27. Testimony demonstrated in abundant detail that these elements remained the same, except for the transfer of the license to Smith's daughter Donna Zumwalt, in succeeding years. R.E. 28-53.

Once the facility was operated under license, Jones County did not play any role in the operations of the facility. For example, when Andy Dial became a Jones County supervisor in 1996, the county exercised no oversight over the operations of the Home. T.251-52. It received and requested no reports from the licensed owner/administrator as to finances or quality of care. T.253. The county did not authorize the owner/administrator to spend county funds on the facility. T.261. The county was never sued for any alleged negligence or other care issues arising at the Home, and never claimed sovereign immunity for any such claims. T.262. *See also* T.323-24.

When in 1981 a CON was applied for to add 45 beds to the Home, that application was not made in Jones County's name, but in the name of the owner/administrator of the facility, Charles T. Smith, doing business as Jones County Rest Home. T.274. Smith acted in the dual capacity of owner and administrator. T.278. He paid the necessary fees and the CON was issued to him. R.E. 76 at 3. On later occasions, Smith applied to add further beds, which in each case were awarded to him in his name. R.E. 76 at 4. The Rest Home ultimately stood at 122 beds. R.E. 76 at 4.

When Charles T. Smith renewed his lease, for example in 1995, the conveyance described by the lease was "[a] certain parcel of land," which Smith was to use "in Lessee's usual business that he currently operates on the premises." R.E. 67; T.281. The lease further referred to the premises' being used "for the purposes of operating Lessee's normal business." R.E. 67.

In 1995, Charles T. Smith sold his "usual business" to his daughter, Donna Zumwalt. T.316; R.E. 68. A letter was sent to notify the Department of this change. T.317; R.E. 17. The state Division of Medicaid was likewise notified. T.318; R.E. 69. Zumwalt filed the license application in 1995 on behalf of Zumwalt, Inc., "Dba JONES COUNTY REST HOME" and identifying herself as the licensee. T.319-20; R.E. 25. A license was duly issued in her name. T.320.

In March 2002, Zumwalt leased her authority to operate the nursing home, including the license and other associated assets possessed by Zumwalt, to Daleson Enterprises ("Daleson"). R.E. 76 at 5-6. The lease provided for Daleson to buy the license and assets at the end of 2005 when the lease expired, for a price of $750,000.00. R.E. 76 at 6. Daleson subleased the building in which the nursing home operated, with the approval of Jones County. R.E. 76 at 6. The Department was fully apprised of these facts and accordingly issued License No. 160 with Daleson's name. R.E. 76 at 6.

After Daleson in 2005 approached Jones County about improving the building or replacing it, Jones County made inquiries to the Department about the Certificate of Need ("CON"), if any, for the nursing home. R.E. 76 at 6. The Department gave different answers on different occasions. On March 28, 2005, the Department wrote to Jones County that there was no CON for the facility because it had been operated before the CON law took effect, and suggested that the county inquire of the Department's licensure division if it wanted to investigate licensing or ownership. T.100; R.E. 2. However, on May 23, 2005, the Department issued a new letter, purporting to determine that Jones County owned a "historical CON." T.101; R.E. 6. This letter, unlike the February 18 letter, was not drafted by the director of health

policy and planning, but by the Department's attorney, Sarah Berry. T.101-02. It advanced no authority for the definition or existence of such a thing as a "historical CON." R.E. 6.

Meanwhile, Daleson filed for bankruptcy. R.E. 76 at 7. The bankruptcy court initially entered an order finding that Jones County was "the owner of the historical certificate of need with respect to the facility," but backtracked in a later order and deleted any such finding. R.E. 9, 10.

In December 2005 and January 2006, Jones County leased the building and nursing home to South Central Regional Medical Center ("South Central"), which preemptively filed a change of ownership with the Department in November 2005. R.E. 76 at 7-8. The Department issued License No. 160 to South Central and directed Daleson to return its license to the Department. R.E. 76 at 8. Zumwalt was enjoined from entering the premises. R.E. 76 at 8. Her family having obtained the initial license, operated the nursing home during its entire history up to 2002, and retained their property interest in the license after 2002, Donna Zumwalt was left with nothing, by fiat of the Department and Jones County.

## SUMMARY OF THE ARGUMENT

This case turns upon the lower court's fundamental misunderstanding of what a Certificate of Need ("CON") actually is. The chancery court agreed with Jones County that a CON is a property interest bestowing ownership of the operations of a health care facility, but that notion has no basis in the CON Law or anywhere else. In fact, because the Rest Home was built and licensed before the CON Law, there is no CON for it at all, as the Department admitted at trial. Rather, the authority to operate a nursing home on the premises inhered in the *license* issued by the Department to Zumwalt and her predecessors in interest. Jones County, having stood purely as a landlord for the Rest Home for 40 years, now seeks to get something for nothing by invoking the chimerical notion of a "historical CON," a notion without any foundation in the Department's rules and regulations, but with which the Department was all too ready to play along.

That being the case, the Department had no legal basis to deprive Zumwalt of the license without due process of law. The fact that Zumwalt leased the licensed authority to a third party did not deprive her of that property interest, and in awarding her license to South Central, the Department violated the Takings Clause and other laws.

Finally, Zumwalt is also entitled to damages for the period of time during which the operation of the nursing home has been illegally and unjustly taken from her, and the chancellor erred in holding that Zumwalt's counterclaim to that effect was barred by the Mississippi Tort Claims Act, which has no application to counterclaims in suits brought by governmental bodies.

For the foregoing reasons, this Court should reverse the decision of the chancery court.

## ARGUMENT

The standard of review in this case for the chancellor's findings of fact is governed by "the familiar manifest error/substantial evidence rule." *Miss. State Tax Comm'n v. Med. Devices, Inc.*, 624 So. 2d 987, 989 (Miss. 1993). Applications of law are reviewed *de novo*. *Id.*

The standard of review for decisions of the Department is the same as in CON cases generally, which itself is "nothing more than a statutory restatement of familiar limitations upon the scope of judicial review of administrative agency decisions." *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 976 (Miss. 1999) (citation omitted). The Department's action must be reversed if it is "not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction [of the Department], or violates any vested constitutional rights of any party involved in the appeal." *Id.* (quoting Miss. Code Ann. § 41-7-201 (2)(f)). "Substantial evidence" must be "more than a scintilla." *Id.* The equivalent of a decision made "without substantial evidence" is one which is "arbitrary and capricious." *Id.*

> An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. An action is capricious if done without reason, in a whimsical manner, **implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles**.

*Id.* (citing *Burks v. Amite County Sch. Dist.*, 708 So. 2d 1366, 1370 (Miss. 1998)). Of course, as the statute says, matters of law are reviewed *de novo*.

While the burden of proof rests with the party challenging agency action, *Pub. Employees' Ret. Sys. v. Marquez*, 774 So. 2d 421, 425 (Miss. 2000), the reviewing court "must look at the full record before it in deciding whether the agency's findings were supported by substantial evidence," and in its review, "it is not relegated to wearing blinders." *Id.* at 427.

## I. Whether Jones County Has a "Historical" Certificate of Need.

The chancery court ruled that Jones County possessed a "historical" Certificate of Need ("CON") without ever considering just what a CON actually is. Had the lower court done so, it would have seen why the term "historical CON" is not defined in the Department's rules and regulations: because that term makes no sense, so that there is no such thing as a "historical" CON.

### *A. A Certificate of Need Merely Allows a Party to Obtain a License.*

The CON Law, Miss. Code Ann. § 41-7-171 *et seq.*, defines a CON as a written finding of the Department that a proposed health care facility, or capital expenditure thereon, meets the Department's rules and regulations promulgated under the CON law. Miss. Code Ann. § 41-7-173(b). Section 41-7-191 sets forth the activities which may not be pursued without first obtaining a CON, including building a facility and adding or altering its beds. Certificates of Need are issued for up to twelve (12) months, with a maximum extension of six (6) months, within which time "commencement of construction or other preparation" must be "substantially undertaken" on the project, or else the Department has the right to revoke the CON. Miss. Code Ann. § 41-7-195.

In an early case interpreting the CON Law, this Court observed that "[t]he CON procedure was conceived as 'the basic component in an overall effort to control the unnecessary capital expenditures which contribute so greatly to the total national health bill.' " *Grant Ctr. Hosp. of Miss., Inc. v. Health Group of Jackson, Miss., Inc.*, 528 So. 2d 804, 806 (Miss. 1988) (quoting *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 385-86 (1981)).

Thus, we see that a CON is a *prerequisite* to building a health care facility, making major expenditures upon it, or altering it in a manner that would affect health care costs, such as adding beds. In other words, the CON Law controls "capital expenditures" as this Court noted in *Grant Center Hospital*. In fact, once a provider has begun to construct or alter a facility as allowed by a CON, the CON actually expires, as provided at § 41-7-195.

What a CON does *not* do is to confer authority to operate a nursing home. That authority is conferred by a *license*. Miss. Code Ann. § 43-11-5 requires licensure by the Department to "establish, conduct, or maintain" a nursing home. This license, "unless suspended or revoked, *shall* be renewable annually" upon payment of the licensing fee. Miss. Code Ann. § 43-11-9(1) (emphasis added). Suspension or revocation of a license requires notice and the opportunity for a hearing, i.e., substantial due process. Miss. Code Ann. § 43-11-11.

### *B. There Is No Certificate of Need for the Jones County Rest Home, and Thus, Nothing for Jones County to Convey.*

Given the foregoing statutes, this Court can see that it was arbitrary and capricious for the Department to find that Jones County had a "historical" CON. The Department admitted at trial that "since the Certificate of Need Law came into existence in 1979, there was no Certificate of Need issued" for the Home. T.62; R.E. 2. While such a facility is unofficially referred to as having a "historical Certificate of Need," that "just means . . . a pre-Certificate of Need Law facility." T.65. No rule, regulation, or statute defines that term. T.107.

Therefore, a "historical" CON is just a synonym for a facility that was never required to obtain a CON, having been in existence and operation before the CON Law took effect. Because the Rest Home already had a license, obtained by H.A. Smith and his successors in interest and *never* by Jones County, it did not need a CON.

Despite the law and the facts, the chancery court accepted the Department's assertion that "the ownership authority of the beds[2] and authority to operate the facility lies with the Jones County Board of Supervisors." R.E. 76 at 11. The chancery court erred in doing so, because the Department's assertion lacked any foundation in law or substantial evidence. Both the Department and the chancery court based their rulings on the undisputed fact that the successive leases by Jones County conveyed an interest only in the "bricks and mortar" of the Rest Home, not in any authority to operate the nursing home. *But Jones County never had any such authority to convey.* There *was* no authority to operate a nursing home until H.A. Smith obtained a license to do so. The record is devoid of any evidence to the contrary. The absence of any such authority's being conveyed in the leases is not positive evidence that Jones County ever possessed such authority, any more than my failure to convey the Hope Diamond when I contract to sell my car means that I possess an interest in that troubled gem.

It is commonplace in Mississippi health care law that the word "facility" does not mean "the building structure and physical contents" but rather "the operation of a particular form of health care." Op. Miss. Att'y Gen., 2000 WL 192249, at *2 (Jan. 28, 2000). Jones County's ownership of the building in which H.A. Smith and his successors operated a nursing home does not make Jones County the owner of that nursing home, particularly where, as the facts of this case demonstrate, Jones County has never had any involvement in the operation of that nursing home.

The fact that Jones County required H.A. Smith and his successors to have a license to operate the facility does not imply that Jones County had any ownership interest in that license,

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[2]"Bed" is a term of art here: not the physical bed in which a resident rests, but the legal authority to care for a resident. A 60-bed nursing home can have up to 60 residents.

any more than Domino's Pizza owns its employee's automobile because their employment contract requires the employee to provide his own car.

In short, possessing a "historical CON" amounts to possessing no CON at all. Where nothing is possessed, nothing can be conveyed. Jones County owned no interest in the nursing home facility. Rather, that interest belonged to the people who applied for the license, renewed it annually, met the Department's requirements, paid the staff, provided the care, assumed the legal liability for any alleged failures of care, and in short actually ran a nursing home business: H.A. Smith and his successors in interest, including his granddaughter, Donna Zumwalt. Jones County seeks to profit from their 40 years of labor by inventing a legal phantom and taking possession of what does not rightfully belong to it.

### *C. Cases from Other States Do Not Support Jones County's Position.*

The chancery court's reliance on the Fourth Circuit's decision in *Rutherford Hospital, Inc. v. RNH Partnership*, 168 F.3d 693 (4th Cir. 1999), was misplaced. In fact, that case supports Zumwalt's position. The key language of the federal court's decision is as follows:

> It is the public policy of North Carolina to regulate the construction and operation of health care facilities. *See* N.C. Gen. Stat. § 131E-175 *et seq.* (describing "certificate of need" requirements). Accordingly, any person proposing the development and provision of "new institutional health services," including certain changes in existing services, is **required by law to obtain a "certificate of need" from the state before going forward with the project**. *See id.* §§ 131E-178 & -190. Each certificate of need is particularized as to the person to whom and the project for which permission to build and offer health care services is granted. *See id.* § 131E-181. In essence, **a certificate of need is a special kind of license needed to construct and operate** any "new" health care facility in North Carolina. *See id.* § 131E-176(16) (defining "new institutional health services").
>
> The certificate of need law does not apply, however, to projects which received the requisite federal approval prior to January 1, 1979, and on which construction commenced before January 1, 1980. *In re Wilkesboro, Ltd.*, 55 N.C. App. 313, 315-16, 285 S.E.2d 626 (1982). The nursing home at issue in this case

> was exempted from the law's requirements under this "grandfather" provision. Furthermore, **no certificate of need is required simply to continue operating a nursing home**, unless certain types of changes are made in any of its facilities, equipment, or services. *See* N.C. Gen. Stat. § 131E-176(16). The mere expiration of a lease agreement pursuant to which one party manages a nursing home owned by another is not one of the qualifying changes listed in the statute. *See id.* Thus, so long as no qualifying changes are made to the Woodlands Skilled Nursing Center following the expiration of Rutherford's leases with RNH, no certificate of need will be required to continue operating the facility in the future.
>
> The central question that Rutherford's declaratory judgment action seeks to answer is whether it or RNH owns the future "operating rights" for the nursing home, separate and apart "from the rights encompassed by the two Leases." *See* Ruth. Br. 3, 20. In answering this question, the main point that the parties and the district court seem to have lost sight of is the undisputed fact that **no certificate of need pertaining to the Rutherford Nursing Center was ever issued** to RNH, ISO, or to any other party. Furthermore, no certificate of need has since been issued for its successor, the Woodlands Skilled Nursing Center. **Since no certificate of need for the nursing home existed as of the date of the bankruptcy court's sale of ISO's assets to Rutherford, Rutherford could not have acquired, and does not now possess, such a license for the facility**.

*Rutherford Hosp.*, 168 F.3d at 698 (boldfacing added & footnote omitted). Allowing for one essential difference between North Carolina law (as represented in the opinion) and Mississippi law, this language correctly describes the present case. Where no CON exists, none can be acquired or possessed (or conveyed). As in Mississippi, a CON is a prerequisite to "going forward" with a project.

The one essential difference, however, is that in Mississippi, nothing in the CON law refers to the CON's granting any authority to *operate* a nursing home. While the Fourth Circuit refers to a CON as conferring that authority, we have already seen that in Mississippi, a separate license under Title 43, Section 11 is required to "establish, conduct, or maintain" a nursing home. A perusal of titles 41 and 43 will demonstrate that such licenses are uniformly required for all sorts of health care facilities, irrespective of any CON requirement. North Carolina law appears to have been different at the time addressed in *Rutherford Hospital*:

> **Rutherford's position in this case rests upon a fundamental misconception, namely, that all health care facilities in North Carolina may only operate with the express approval of the state.** This is not correct. Like the nursing home here, not all health care facilities in North Carolina are subject to the certificate of need statute's requirements. Moreover, **other than a certificate of need, there is no "operating authority" or "broader grant or franchise" that a health care provider must secure from the state** in order to develop and offer its services to the public.

*Id.* at 700 (emphasis added). Obviously, in Mississippi, a nursing home "may only operate with the express approval of the state" — a license, which is the "operating authority . . . that a health care provider must secure from the state." To the extent, therefore, that the Fourth Circuit characterized the "right to operate the nursing home" as remaining with the owner of the physical structure, *id.*, that may have been valid under North Carolina law, but the holding was premised upon a very different legal framework from that which Mississippi has established.[3] The "right to operate the nursing home" is in fact conferred by the Legislature upon the holder of the license, and upon no other entity, including the landlord.

Further, the chancery court misapprehended the import of the Maryland case adduced by Zumwalt, *Catonsville Nursing Home, Inc. v. Loveman*, 709 A.2d 749 (Md. Ct. App. 1998). The relevance of *Loveman* was not that the owner of the facility had abandoned his rights. Rather, that decision was relevant for its holding that any "exemption" from Maryland's CON law due to having been grandfathered in, was held by "the health care project and the party operating that

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[3]Whether the Fourth Circuit got North Carolina's law right is a separate question. *See* N.C. Gen. Stat. § 131E-102 ("No person shall operate a nursing home without a license obtained from the Department."). What matters for our purposes is simply whether a CON authorizes the *operation* of a facility, or the *construction* of a facility — and in Mississippi, it's clearly the latter, as we saw in examining our statutory scheme. To the extent that *Rutherford Hospital* represented otherwise, based on its apprehension of North Carolina law, it was error for the chancery court to rely on a decision interpreting materially different state law.

health care project." *Loveman*, 709 A.2d at 757. We further note that in Maryland, as in Mississippi, a facility could be exempt from the CON Law but still required to obtain a license:

> As we have discussed, the health care project known in 1978 as Shangri-La Nursing Home was then exempt from obtaining a CON. Nonetheless, the project was dependant upon a license for operation. Shangri-La was exempt from the requirement of **possessing a CON in order to qualify properly as a potential licensee.**

*Id.* at 758 (emphasis added). This language neatly describes the situation in Mississippi as well: a CON is a prerequisite for possible licensure, except where the facility was licensed before the CON Law took effect. This distinction is also reflected in a Washington state decision:

> Thus, the 1972 certificate of need merely conferred the right to *expand* the Center into a 250-bed nursing home facility, a right which expired, at the latest, in 1974 when construction of the Center's new building was completed. On the other hand, the right to *maintain*, in the sense of the right to *operate*, a particular nursing home facility is the exclusive right of a licensed operator.

*Watkins v. Restorative Care Ctr., Inc.*, 831 P.2d 1085, 1090 (Wash. Ct. App. 1992). Note that in Washington, as in Mississippi, a CON confers a right which expires when the construction or other expenditure takes place, and that a separate *license* confers the authority to operate the nursing home.

In short, to the extent to which this Court may look to foreign law in the present case, that law favors Zumwalt, not Jones County. Jones County never possessed any right to operate a nursing home, and thus could not convey that right to South Central or anyone else.

For those reasons, the chancery court erred as a matter of law and this Court should reverse and render for Zumwalt.

### *D. In the Alternative, Zumwalt Owns at Least a "CON" for 62 of the Beds.*

While Zumwalt by no means concedes that Jones County enjoys any ownership interest in the nursing home (as opposed to the building wherein it was operated), should this Court

incline to recognize the existence of any "historical CON," Zumwalt could argue in the alternative and point out that the *actual* CON for 62 of the beds was indisputedly applied for and obtained by Charles T. Smith, not by Jones County. R.E. 76 at 3-4. While Jones County did authorize an application for 60 beds in 1977, no such application was ever made. R.E. 76 at 3. Smith paid the application fee, submitted the application, and got the additional beds.

Therefore, if a CON did, contrary to the language of the statute, persist after its expiration, and carry some sort of property interest decades later, then that interest would inhere in Zumwalt insofar as the 62 beds are concerned which her father, Charles T. Smith, applied for and received. This would give Zumwalt a majority interest in the nursing home, in which event Jones County and the Department obviously acted unjustly and contrary to law in depriving Zumwalt of that property interest.

Really, we think this argument reduces the "historical CON" argument to absurdity: it certainly seems as if the Department considered Smith, not Jones County, to "have" the "historical CON" if it was letting him be the one to apply for additions, which were reflected on his license in the total bed count of the facility.

Regardless, Jones County cannot have it both ways: either a CON provides no possessory interest (as Zumwalt argues), or else it does (as the chancery court held), in which case Zumwalt continues to possess a 51.67% interest in the nursing home (62 out of 120 beds), and is entitled not only to profits in that proportion, but to exercise that amount of control over the nursing home, including any decisions to lease it to South Central or anyone else. But this Court need not judge as Solomon pretended to judge in the case of the disputed baby (2 Kings 3:16-28). Rather, this Court should look to the interest of the true parent which gave birth to the

nursing home, nurtured it, and raised it up into a business concern worth $750,000.00 — namely, Appellants.

## II. Whether the Health Department Could Deprive Zumwalt of the License Without Due Process of Law.

Issue I is largely dispositive of the present case. If Jones County possessed no interest in the nursing home facility, then it could not convey that interest to South Central. Therefore, the Department had no authority to take the Rest Home's license and give it to South Central. Any other result would be contrary to law and would incidentally wreak havoc on the health care industry in Mississippi.

As this Court has seen, a nursing home license, "unless suspended or revoked, *shall* be renewable annually" upon payment of the licensing fee. Miss. Code Ann. § 43-11-9(1) (emphasis added). Suspension or revocation of a license requires notice and the opportunity for a hearing, i.e., substantial due process. Miss. Code Ann. § 43-11-11.

Mississippi law is clear that professional licenses are a form of property, protected by the Takings Clause of the United States Constitution as well as by the similar protections of the Mississippi Constitution:

> Life, liberty and property may not be deprived without due process of law. U.S Const. Amend. V & Amend XIV, § 1; Miss. Const. Art. 3, § 14. Withdrawing a license needed for the practice of one's profession takes a property interest. *Mississippi State Bd. of Nursing v. Wilson*, 624 So.2d 485, 494 (Miss.1993).

*Broady v. Miss. State Bd. of Architecture*, 936 So. 2d 441, 447 (Miss. Ct. App. 2006) (Southwick, J.). *See also Montvalo v. Miss. State Bd. of Med. Licensure*, 671 So. 2d 53, 57 (Miss. 1996) ("the license to practice medicine is a valuable property right").

In the present case, Zumwalt assigned her interest in the license to Daleson Enterprises via a lease agreement. That interest did not vanish when Daleson filed for bankruptcy; rather,

it reverted to the lessor. By no means did it somehow fall into the lap of Jones County or South Regional.

But the chancery court, misapplying the Department's rules and regulations, held that because a license is "surrendered" upon "change of ownership," then Zumwalt lost any right to the license when she leased it to Daleson Enterprises. R.E. 76 at 14. This holding misunderstands the ministerial nature of "issuing" a license. The testimony of Marilyn Winborne, the head of the Department's division of licensure, was clear that a license follows the ownership of the nursing home's operations:

> Q. If [entities] own or have control of a license, they can sell the operations and they can agree to allow the license to be transferred to the new operator, correct?
> A. Through a change of ownership.
> Q. Right. And that happens all the time, doesn't it?
> A. Uh-huh (yes).
> Q. And there's nothing illegal or wrong about Zumwalt if in fact the Zumwalt corporation did own the rights to the license for them to transfer operations to Daleson and then ask the department through the change of ownership mechanism to assign or issue a new license to Daleson, correct?
> A. We would issue a new license to the operator as a result of the change of ownership.
> . . . .
> Q. And that was done at the request of Zumwalt, correct?
> A. Based on the lease agreement or the lease contract.

T.191. What the foregoing demonstrates is that the license follows the ownership, "based on the lease agreement or the lease contract." The Department is supposed to follow those documents.

While the license issued to Daleson was a "new license" in the sense of not having Zumwalt's name on it, it was the *same* License No. 160 that had been granted to H.A. Smith in 1964 and which was renewed by him and his successors. The "nontransferability" of the license merely means that the Department requires to be kept apprised of who's running a facility. The

undersigned cannot borrow Donna Zumwalt's license, operate a nursing home, and when the Department pays a call, point to the license on the wall and say, "it's okay, folks, Donna let me borrow hers." Barring the suspension or revocation of the license, which never happened — because no due process was afforded to Zumwalt — the Department is required to respect the licensee's property interest by issuing new licenses upon changes of ownership, as Ms. Winborne testified.

As the chancery court recognized, the expiration of a leasehold interest (like Daleson's) is a change of ownership. R.E. 76 at 14 (citing Miss. Code Ann. § 41-7-173(d)). Where the chancery court erred was in supposing that the expiration of that interest somehow caused Zumwalt to forfeit any property interest in the license, a license which, according to her contract with Daleson, was valued by those arms'-length parties at $750,000.00. There is no doubt, based on the Department's testimony at the hearing, that if Zumwalt had sold the facility to Daleson for that sum, the Department would have respected the change of ownership and transferred the license accordingly. Indeed, that is what happened when Zumwalt leased the facility to Daleson. It was therefore arbitrary and capricious in the extreme, when Daleson's interest reverted to Zumwalt, for the Department to whimsically change its course and refuse to issue License No. 160 to Zumwalt.

Of course, the Department did not *just for kicks* decide not to issue the license to Zumwalt. Rather, it rested its decision upon the erroneous notion of a "historical CON" which did not in fact exist. Where the agency's decision rests upon an error of law, this Court reviews that decision *de novo*. Because the Department deprived Zumwalt of her undisputed property interest, without due process of law, on a mistaken legal theory, this Court should reverse and render for Zumwalt.

To affirm the chancery court on this matter would be to hold, in effect, that no one who operates a nursing home under license can sell or lease that authority. As we saw from Ms. Winborne's testimony quoted above, that has not been the Department's practice. And especially because no new nursing home beds can be opened in Mississippi, due to the Legislature's moratorium at Miss. Code Ann. § 41-7-191(2), the only way anyone can enter the nursing home business is by acquiring, via sale or lease, an existing nursing home facility. The chancery court's ruling implies that anyone who leases an operating interest in a nursing home has permanently forfeited that property interest, because the Department is free to award the license to whomever else it pleases once the lessee ceases to operate the facility. That cannot be right, as a matter of law or equity. The consequences for the nursing home market in Mississippi, where many facilities are indeed operated under a lease of the lessor's license, are difficult to calculate but awful to contemplate.[4] The effect of affirming the chancery court on this issue would reach far beyond the present parties to this case, and would work great mischief to property owners not parties to this case. This Court is respectfully urged to consider this wider scope in reaching its decision on the present issue.

## III. Zumwalt Is Entitled to Recover at Law or Equity from Jones County and/or South Central.

Since December 2005, License No. 160 has been in the possession of South Central, which has operated the Rest Home and has enjoyed the profits therefrom. As shown at Issues I and II above, South Central enjoyed no right to the license, and Jones County and the

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[4]And of course, we are not just talking about nursing homes here — the chancery court's logic seems to apply to all licensed health care facilities. Counties that lease community hospitals to outside managers who operate the hospitals, and who obtain licenses accordingly, would have forfeited their licenses and property interests therein; the counties would have no assurance that the Department would reissue the licenses back to them at the end of the lease.

Department acted arbitrarily, capriciously, and contrary to law in bestowing the license upon South Central. Accordingly, Zumwalt counterclaimed for conversion and tortious interference with contractual and business relations. R.521-22.

But the chancery court rejected this counterclaim on the theory that Zumwalt had not complied with the notice of claim requirements of the Mississippi Tort Claims Act, Miss. Code Ann.§ 11-46-11. This statute requires that a notice of claim be filed 90 days before an action.

However, compulsory counterclaims must be stated in the defendant's answer. M.R.C.P. 13(a). We do not find any case law addressing the issue of whether a defendant, sued by a governmental entity, and having 30 days to file an answer with any counterclaim, is required to file a notice of claim and wait for 90 days — upon which the counterclaim is subject to being stricken as overdue. This Court may therefore be presented with an issue of first impression.

Further, there is no practical issue as to Jones County's actual notice that Zumwalt disputed Jones County's possession of the nursing home facility, since this suit originated in Jones County's filing for a declaratory judgment on that issue.

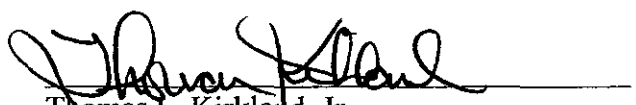
Zumwalt thus asks this Court to reverse the chancery court and remand for a hearing to determine the loss to Zumwalt due to her being deprived of the fruits of her nursing home.

## CONCLUSION

For all the reasons set forth above, 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 ***14th*** day of November, 2008.

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

By: 
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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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