IN THE SUPREME COURT OF MISSISSIPPI

THE MISSISSIPPI METHODIST HOSPITAL AND REHABILITATION CENTER, INC., d/b/a METHODIST SPECIALTY CARE CENTER — **APPELLANT**

V. — **CIVIL ACTION NO. 2008-CA-01558**

MISSISSIPPI DIVISION OF MEDICAID and ROBERT L. ROBINSON, in his official capacity as Director of Mississippi Division of Medicaid — **APPELLEES**

APPEAL FROM THE HINDS CHANCERY COURT
FIRST JUDICIAL DISTRICT

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

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REBUTTAL ARGUMENT

As Methodist observed at part I.D. of the Argument in its initial brief, Medicaid relied heavily in the chancery court upon the notion that Methodist's costs were "unreasonable" and thus in need of being curtailed by Medicaid's State Plan Amendment 2006-006. In Medicaid's brief to this Court, the agency continues to press that argument, despite its irrelevance to the issue of whether or not SPA 2006-006 violates Miss. Code Ann. § 43-13-117(44).

In what follows, Methodist will rebut the "unreasonableness" argument and then proceed to address Medicaid's arguments on the merits of the case.

I. "Reasonable Cost" Is Not an Issue Properly Before This Court.

Methodist has already demonstrated to this Court that Medicaid's own rules and regulations provide for a desk audit of costs which Medicaid suspects of being unreasonable. Methodist Br. at 14-15. Methodist has already shown that, in fact, Medicaid conducted such an audit, and failed to find that Methodist's costs were unreasonable. Methodist Br. at 15-17.

In its brief, Medicaid pretends that it magnanimously "chose not to make a stand on this issue." Medicaid Br. at 4. (This is only one of many statements in Medicaid's brief with no citation to the record and no support therein; we caution this Court not to accept Medicaid's averments in its brief as facts cognizable by this Court on appeal.) What actually happened, as we saw in Methodist's brief, was that Medicaid argued for paying Methodist a per diem of only $650.00, but its *own audit* showed that a rate of $989.52 was reasonable. Methodist Br. at 17 (citing R.209-10).[1]

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[1]While the issue of how much Methodist should be paid is not properly before this Court — and thus there is no record developed on the subject — we cannot help noting that Methodist's reimbursement would be significantly less today, even if this Court reverses Medicaid in the present matter.

Comically, Medicaid claims that it "chose not to make a stand" here "absent a policy describing 'reasonableness.' " Medicaid Br. at 4. That's a remarkable confession, since in the very same paragraph (Medicaid Br. at 3), Medicaid had admitted that its rates are required by federal law to be "*reasonable* and adequate" (emphasis added). In other words, a state agency required by law to reimburse at reasonable rates, has not even developed a policy defining what's reasonable. Medicaid rebuts itself probably better than we could hope to achieve here.

Regardless of Medicaid's confusion, the issue here is whether it was arbitrary and capricious of Medicaid to ignore its own policies and procedures for addressing the reasonableness of costs, and to seek to accomplish by SPA 2006-006 what it could not accomplish by following its own rules.

> An administrative agency's decision is arbitrary if not done according to reason or judgment, but dependent 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**.

Miss. State Dep't of Health v. Natchez Cmty. Hosp., 743 So. 2d 973, 977 (Miss. 1999) (citation omitted & emphasis added). "Controlling principles" must include an agency's own principles as set forth in its own rules and regulations. *See Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986) ("The failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct.").

There is no "implication" here of disregard for the "settled controlling principles"; rather, that disregard is clear and obvious. Rather than follow its own policy for addressing allegedly unreasonable costs, Medicaid decided to accomplish by fiat what it would not or could not do in accordance with that self-promulgated policy. Rather than defend this indefensible manner of proceeding, Medicaid falls back upon invective (Methodist "should be embarrassed," we are

told — Medicaid Br. at 9).[2] It is also illogical that Medicaid focuses so much upon Methodist's start-up costs, which by the very nature of any start-up were on the high side, in attempting to justify a rule change that arbitrarily limits Methodist's *present-day* reimbursements. Medicaid is simply grabbing for any argument it can find, regardless of its validity or relevance.

Medicaid delineates its version of the facts about administrative and direct-care costs at page 9 of its brief, none of which has any support in the record. *See Ditto v. Hinds County*, 665 So. 2d 878, 880 (Miss. 1995) (appellate court "may not act upon or consider matters which do not appear in the record and must confine itself to what actually does appear in the record") (quoting *Shelton v. Kindred*, 279 So. 2d 642, 644 (Miss. 1973)). Given that Medicaid's own audit failed to find that Methodist's reimbursement was unreasonable, and that Medicaid has resorted to reinterpreting Miss. Code Ann. § 43-13-117(44) rather than pursuing the alleged unreasonableness of Methodist's costs through the proper channels, this Court would do well to question the good faith of Medicaid's arguments.[3]

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[2]Medicaid also complains that Methodist "has not proposed another rate" (Medicaid Br. at 5), as if vexed that Methodist thinks that its reimbursement should be set by impartial application of legal rules, rather than by bargaining. The present appeal does not reach the issue of what Methodist's reimbursement should be; rather, the issue is whether Medicaid has violated the law in reimbursing Methodist's costs as if Methodist belonged to another category of nursing facility. Once again, Medicaid seeks to distract the Court from the matters properly before it.

It does seem that, by implying that Methodist ought to make a counteroffer, Medicaid is admitting that the present rate is neither fair nor rationally based.

[3]Regarding the "return on equity" raised by Medicaid (at 9), Methodist simply notes that, in the absence of any ceiling on this aspect of reimbursement, it suffered no harm from Medicaid's categorization. Methodist is not litigating the present matter on hypertechnical or idealistic grounds; rather, it's before this Court because Medicaid's violation of § 43-13-117(44) is jeopardizing the facility's ability to stay open, as set forth in the Motion to Expedite Appeal filed with this Court.

This Court simply *does not have a record before it* that would allow it to adjudicate the issue of whether or not Methodist's costs are reasonable or unreasonable. That is not the issue on appeal, and Medicaid is wasting this Court's valuable time in pursuing the issue. Methodist is not afraid of defending its costs, but the issue, and the record required to decide it, are not before the Court.

If and when Medicaid genuinely cares to pursue the question of reasonable costs — perhaps sometime after it gets around to drafting a policy defining "reasonable," so that it can comply with its own legal obligations — then Medicaid can follow its own rules, audit Methodist's costs, and deny reimbursement for any costs which are proved unreasonable, after which Methodist could appeal if necessary, and the appellate courts could review a record that would allow them to determine whether Medicaid's decision was based on substantial evidence.

But that is not the case presently before the Court. Medicaid's arguments to the contrary should be disregarded, and this Court should decide the present appeal on the merits, to which we now turn.

II. Medicaid's SPA 2006-006 Violates Miss. Code Ann. § 43-13-117(44).

To the extent that Medicaid pauses to address the issue before the Court, it relies on the fallacy we saw in the chancery court's decision: according to Medicaid, Methodist is being reimbursed uniquely, because the *total* reimbursement is unique, and the fact that Medicaid has expressly chosen to reimburse Methodist's administrative and operating costs as if it belonged to another category of nursing facility therefore does not violate Miss. Code Ann. § 43-13-117(44), which expressly requires Medicaid to reimburse Methodist "as a separate category of nursing facility." Medicaid Br. at 7-8. Thus says the agency.

However, the chancery court's reasoning does not become any less fallacious when it's parroted by Medicaid. It's as if one were legally obligated to dress one's child in clothes fitted for him uniquely, and then gave him pants that were two sizes too short: "But the overall outfit is unique!" Medicaid would apparently say. The fact remains that the statute requires Methodist's costs to be reimbursed as a *separate* category of nursing facility, and that Medicaid has deliberately and expressly opted to reimburse part of Methodist's costs as if Medicaid were a "small nursing facility" with the staff and administrative needs of such a facility.

Analogy aside, the flaw in the reasoning of Medicaid (and of the chancery court) can also be illustrated by a simple example. Suppose that Medicaid were allowed to reimburse certain of Methodist's costs as if Methodist were a small nursing facility; that is what Medicaid is doing via SPA 2006-006. Now suppose that Medicaid goes on to impose a ceiling on the remainder of Methodist's costs, perhaps using a "medium" or "large nursing facility" average per diem as the ceiling. Would that reimburse Methodist as "a separate category of nursing facility"? By Medicaid's logic, the answer is *yes* — because no other facility (presumably) is reimbursed in that hybrid manner (small + medium). Or, Medicaid could reimburse all of Methodist's costs at the same rate as a small nursing facility but add one dollar to the reimbursement, thus making it "unique." In either case, such an interpretation robs the Legislature's directive in § 43-13-117(44) of any meaning. Thus, Medicaid's argument proves too much, and "[t]o so hold would be foolish." *Luter v. Oakhurst Assocs., Ltd.*, 529 So. 2d 889, 896 (Miss. 1988) (rejecting argument that "proves way too much"); *see Nash v. Damson Oil Corp.*, 480 So. 2d 1095, 1100 (Miss. 1985) (argument "proves too much" when, carried to its "rational limits," it yields absurd result). Medicaid's applying a different type of facility's ceiling on reimbursement results in

Methodist's not being reimbursed "as a separate category of nursing facility," and to argue otherwise is to strain not only logic, but deference to the Legislature.

Medicaid's reimbursement of Methodist's costs is not required *by § 43-13-117(44)* to cover the facility's "reasonable costs." As Medicaid helpfully points out (Br. at 3), 42 C.F.R. § 447.253 requires Medicaid to provide reimbursement that is "reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers." If and when Medicaid issues proper findings that Methodist is not "efficiently and economically operated" or that its costs are not "reasonable," that will be the time for the courts to address those findings.

What § 43-13-117(44) forbids is Medicaid's reimbursing Methodist based on a methodology applicable to some other kind of provider but not tailored to Methodist's unique needs as the only Nursing Facility for the Severely Disabled in the state of Mississippi. That simple requirement was met by Medicaid until SPA 2006-006, and this Court should order Medicaid to withdraw that Plan amendment and cease attempting to shoehorn Methodist into some other category of nursing facility.

III. Medicaid Violated Its Own Rules by Failing to Provide Notice to Methodist.

Medicaid simply regurgitates its chancery briefs on this issue, coyly confessing that "it did not provide a copy of the public notice [of SPA 2006-006] to Methodist. But, there is no requirement in state or federal law that it do so." Br. at 15. This might even be true, depending on how one defines "state law." Methodist however had thought that Medicaid's *own rules* had the effect of law — a position that Medicaid, in our experience, is never slow to assert in other circumstances. And we have already shown that Medicaid, in this instance as well, disregarded its own rules:

> Section 1-8 of the Plan provides that "[a]ll Nursing Facilities . . . will receive a copy of the public notice" whenever Medicaid offers "any significant proposed change in its methods and standards for setting payment rates for services." Plan at pp. 42-43. Medicaid conceded its failure to comply. R.182.

Methodist Br. at 19-20. Medicaid does not address this failure in its brief, presumably because it cannot do so. (We do not presume to argue that Medicaid should be "embarrassed" by its rulebreaking.)

If this Court rules in Methodist's favor on the central issue in this appeal (the previous issue regarding § 43-13-117(44)), then the present issue may seem moot. Nonetheless, what's illustrated here is the same reckless disregard of "controlling principles." Medicaid, as evidenced by the record evidence in this appeal, is acting arbitrarily and capriciously as a matter of course. It cannot be constrained by its own rules or even by the Legislature's statutes. The only recourse for providers like Methodist who are victimized by the agency's arbitrary and capricious behavior is to appeal to the courts to rein Medicaid in and remind that agency that it too must obey the rule of law. That is the fundamental issue raised by the present appeal, and that is why this Court should reverse the chancery court's decision below.

CONCLUSION

For all the reasons stated above and in the Brief for Appellant, Methodist asks that this Court reverse the decision of the Hinds Chancery Court, First Judicial District in this cause, and render a decision requiring Medicaid to withdraw SPA 2006-006 and enjoining Medicaid from reimbursing any of Methodist's costs in the same category as any other type of nursing facility.

Respectfully submitted, this the *2d* day of February, 2009.

THE MISSISSIPPI METHODIST HOSPITAL & REHABILITATION CENTER

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CERTIFICATE OF SERVICE

The undersigned attorney for Appellant hereby attests that a true and complete copy of the foregoing document has today been served upon the following via U.S. mail, postage prepaid:

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So certified, this the *2d* day of February, 2009.

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