IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JO CAROL ALFORD	**APPELLANT**
V.	**NO. 2008-CA-01984**
ARTHUR RANDALL ALFORD and the DIVISION OF MEDICAID	**APPELLEES**

REPLY BRIEF OF JO CAROL ALFORD, APPELLANT

ORAL ARGUMENT IS REQUESTED

On Appeal from the Madison County Chancery Court, Canton, Mississippi
Cause no. 2008-993-B
The Honorable Cynthia L. Brewer Presiding

Respectfully Submitted,

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REBUTTAL

I. THE "PUBLIC INTEREST EXCEPTION" ALLOWS THIS APPEAL TO BE HEARD.

The Division of Medicaid is correct in its assertion of the general rule that appeals relating to rights which have ceased to exist should be dismissed. *McDaniel v. Hurt*, 92 Miss. 197, 41 So. 381 (Miss. 1907). However, the Division of Medicaid ignores the Supreme Court of Mississippi's well-established "public interest" exception to this general rule. Specifically, "the rule [of mootness] will not be applied when the question or questions involved in are matters affecting the public interest." *Allred v. Webb*, 641 So. 2d 1218 (Miss. 1994) (citing *Sartin v. Barlow*, 196 Miss. 159, 16 So.2d, 376 (Miss. 1944)).

> [T]here is an exception to the general rule as respects moot cases, when the question concerns a matter of such a nature that it would be distinctly detrimental to the public interest that there should be a failure by the dismissal to declare and enforce a rule for future conduct.

Allred v. Webb, 641 So. 2d 1218, 1220 (Miss. 1994); *Strong v. Bostick*, 420 So.2d 1356, 1359 (Miss. 1982) (citing 4 C.J.S. Appeal and Error §1354; *Sartin*, 16 So. 2d at 376)). In *Allred*, the Court determined that the question of whether a particular appointed district attorney could dismiss or replace a specific assistant district attorney was "clearly not a mere private dispute between two parties since future district attorneys inevitably will find themselves in the same quandary." *Allred v. Webb*, 641 So. 2d 1218, 1220 (Miss. 1994). In the instant case, the Division of Medicaid admits as much in its Brief noting

that "a decision [in this case] would affect all future Medicaid applicants". See Reply Brief filed by the Division of Medicaid at 2. Therefore, it is very likely, indeed inevitable, that the Division of Medicaid will find itself in the "same quandary" with future Medicaid applicants that wish to apply for an increase in the CSRA and MMNA via the judicial method.

Further, the Mississippi Supreme Court also, correctly, continued to hear an appeal involving another federal statute, the Education of the Handicapped Act, citing a New York district court case which said "'even if later events [such as the death of Mr. Alford in the instant matter] have reduced the practical importance of a case to the parties, the question is whether the allegedly wrongful behavior could not reasonably be expected to recur.'" *Board of Trustees of Pascagoula Mun. Separate School Dist. v. Doe,* 508 So.2d 1081, 1084 (Miss. 1987) (citing *Sherry v. New York State Dep't of Education,* 479 F.Supp. 1328, 1334 (D.C.West.Dist. N.Y. 1979)). With the segment of the population receiving Medicaid benefits rising each year due to the increasing age and health problems of the baby-boom generation, there is no question that the Division of Medicaid's failure to recognize the judicial method by which an increase in the CSRA and MMNA may be sought will "reasonably be expected to recur". According to the Center for Medicare and Medicaid Services, the total Medicaid population across the United States rose by 13,560,262 people from 1997 to 2006. See the National Summary of Medicaid Managed Care Programs and Enrollment, June 30, 2006 attached hereto as

Exhibit "A". Since 2001, the Mississippi Division of Medicaid's "Nursing Facility Expenditures", the monies specifically expended on nursing home residents, almost doubled increasing from $379 million to $673 million per year. See the Mississippi Division of Medicaid's 2007 and 2008 Annual Report attached hereto as Exhibits "B" and "C", respectively. At the same time, the overall population of elderly individuals within the state is also rising. See U.S. Census Bureau, Population Division, Interim State Population Projections, 2005 attached hereto as Exhibit "D". These facts and reports are indicative of the increasing number of Medicaid recipients throughout the state and are drastically different than the 200,000 Mississippi residents on Medicaid in 1970. See First Annual Report of Mississippi Medicaid Commission, June, 1970 attached hereto as Exhibit "E".

In fact, in 2006 Medicaid recipients made up 27% of the state's total population. See Mississippi: Medicaid Enrollment as a Percent of Total Population, 2006, Kaiser Family Foundation, attached hereto as Exhibit "F". As such, the likelihood of this question of law being repeated with other potential Medicaid applicants is a virtual certainty and absent the guideline of this Court, will result in a patchwork of trial court decisions across the state. Therefore, the Division of Medicaid and future Medicaid applicants will no doubt find themselves "in the same quandary" as Ms. Alford, and for that reason, this appeal should be heard. The Mississippi Supreme Court defined the limits of the "public interest exception" doctrine in *J.E.W. v. T.G.S.* which involved a

custody matter between parents. The Court refused to apply the exception in that case because it clearly involved a dispute between two private parties as it involved child custody and did "not involve matters of such public interest present in *Allred, Doe,* and *Sartin*". *J.E.W. v. T.G.S.,* 953 So.2d 954, 961 (Miss. 2006). That is certainly not the case here.

The Illinois Supreme Court applied the following three (3) prong test to determine when the public interest exception applies: "(1) the question presented [is] of a public nature, (2) an authoritative resolution is desirable to guide public officers, and (3) the question is likely to recur." *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.,* 886 N.E.2d 1011 (Ill. 2008).[1] There is no dispute that a decision in the instant case will affect the public at large and is a question of a public nature. "An authoritative resolution" from this Court is necessary to guide Medicaid caseworkers and Chancellors across Mississippi.

In fact, the Arkansas Supreme Court, in a case relied on heavily by the Division of Medicaid, ruled on the precise issue before this Court after the issue became moot as a result of, as in this case, the intervening death of the institutionalized spouse. *AR Dep't of Health and Human Services v. Honorable Vann Smith,* 262 S.W.3d 167 (Ark. 2007). While the Arkansas court did not specifically articulate its basis for continuing that appeal, the

[1] The public interest exception to the "mootness doctrine" should be considered separately from the "capable of repetition, yet evading review" exception because the repetition is likely to affect the public rather than the original complaining plaintiff. *Taylor v. Gill Street Investments,* 743 P.2d 345 (Alaska 1987)

important public policy questions remaining to be answered were, no doubt, a compelling reason.

The issues presented by the instant case are vitally important, and have such a profound impact on the planning and application of so many future Medicaid applicants that the case should not be dismissed on the grounds of mootness as it clearly falls within the public interest exception.

II. THE DIVISION OF MEDICAID MUST OPERATE WITHIN THE CONFINES OF FEDERAL LAW

In 1965, the federal Medicaid program was established through Title XIX of the Social Security Act and is funded through federal and state funds. "Participation is voluntary, but if a state decides to participate, it must comply with all federal statutory and regulatory requirements." *Lankford, et. al. v. Sherman,* 451 F.3d 496, 510 (8th Cir. 2006) (citing *Shweiker v. Gray Panthers,* 453 U.S. 34, 37 (1981); *Bowlin v. Montanez,* 446 F.3d 817, 818 (8th Cir. 2006) citing *Kai v. Ross,* 336 F.3d 650, 651 (8th Cir. 2003)) ; 42 U.S.C. §1396a(a) (West current through 2009). "[O]nce the state voluntarily accepts the conditions imposed by Congress, the Supremacy Clause obliges it to comply with federal requirements." *Lankford,* 451 F.3d 496, 510 (citing *Jackson v. Rapps,* 947 F.2d 332, 336 (8th Cir. 1991). In 1969, Mississippi established the Mississippi Medicaid Commission, and by January 1, 1970, the state plan was written and approved by the appropriate federal authorities. Miss. Code Ann. §43-13-101 *et. seq.*; See Exhibit "E", Page 3. In 2007 alone,

the Mississippi Division of Medicaid received $2.4 billion federal dollars to fund the Medicaid program. The federal contribution consisted of 73% of the Mississippi Division of Medicaid's overall funding. See Mississippi Division of Medicaid Annual Report for 2007 attached hereto as Exhibit "B", Page 4. There is no dispute that the Division of Medicaid receives and utilizes the federal funds, and therefore, the Division of Medicaid is bound to act within the confines of federal law.

When dealing with federal Medicaid laws, "there is no explicit or implicit federal preemption." *Martin v. City of Rochester*, 642 N.W.2d 1, 11 (Minn. 2002). State Medicaid laws will only be preempted if the state laws conflict "with specific federal Medicaid law[s] or [are] an obstacle to federal Medicaid purposes." *Martin*, 642 N.W.2d 1, 11 (Minn. 2002). The Mississippi Division of Medicaid's policy allowing court orders only **after** Medicaid has made a decision regarding spousal shares is in direct conflict with the federal statute, which specifically allows a pre-application increase in the CSRA and the MMNA through a court order. 42 U.S.C. 1396r—5 (West current through 2009).

The Division of Medicaid completely ignores the federal statute and asks this Court to rule that the federal provision has no meaning, and that it alone should be allowed to make decisions regarding CSRA and MMNA increases subject only to limited judicial review. "The Medicaid statute, in which the MCCA is implanted, is designed to advance cooperative federalism." *Wisconsin Dept. of Health and Family Services v. Blumer*, 534 U.S. 473, 495 (2002) (citing *Harris v. McRae*, 448 U.S. 297, 308

(1980)). As such, the Mississippi Division of Medicaid must be compelled to follow the federal statute and honor the judicial method as laid out in the federal statute. Taking away an avenue for relief specifically allowed under the federal law is an oppression of Ms. Alford's constitutional rights and a violation of the Supremacy Clause of the United States constitution, and this Court should determine that trial court has jurisdiction to increase the CSRA and MMNA.

III. THE INCREASE IN THE COMMUNITY SPOUSE RESOURCE ALLOWANCE AND THE MINIMUN MONTHLY MAINTENANCE NEEDS ALLOWANCE IS NOT UNREASONABLE.

The entire purpose of the evidentiary hearing in this case was to determine the reasonableness of expenses and spouse's need for an increase in the Medicaid resource and income limits. The Division of Medicaid never challenged the reasonableness of those needs at trial and has waived the right to do so now on appeal. The trial judge ruled that the expenses were in fact reasonable, albeit under different authority than originally sought, without challenge or contest by the Division of Medicaid. The issue before this Court is not the reasonableness of the awarded increase, but the authority of the Court to actually make the award pursuant to 42 U.S.C. 1396r—5. The Division of Medicaid's sole argument is that they already allow $109,560 to be retained by every Community Spouse, and that is all that any spouse needs, regardless of age or other factors; anything above that number is

unreasonable, according to Medicaid. They all but admit that anyone with assets above that number will be denied, and indeed, their regulations require the denial. This is in direct violation of federal law. According to the Division of Medicaid, a 99 year old and a 55 year old require the same level of support and resource allowance. This ignores entirely the spousal impoverishment provision of Federal law and the precise reason that Congress provided a method for increasing that support. Medicaid's claim of hardship is unsubstantiated, and in any event is irrelevant. Federal law requires minimum standards for those states choosing to participate in the program. The Division of Medicaid's argument appears to be that "we cannot afford that particular provision so we will write it out of our manual." This is not an option. The state may either participate in the Medicaid system, or elect not to participate in the system. But if it participates, it must participate in full, and cannot pick and choose the provisions of the law that it is willing to accept.

In the instant case, Jo Carol Alford requested an increase of the CSRA of $413,147.00. This amount when viewed together with the other facts at hand is absolutely reasonable. Ms. Alford is a relatively young community spouse. In contrast, most community spouses are elderly and have significantly shorter life expectancies, and significantly fewer expenses, and as such, $109,560 is more than sufficient to supplement their income and allow them to live comfortably. As a 58 year old housewife, Ms. Alford has a life expectancy of 25 years and health problems

of her own as well as a complete absence of meaningful job experience, and as such, the likelihood of her gaining any type of meaningful employment is extremely low. Through expert testimony, it was established that if Ms. Alford received **all** of the requested relief, found a job for which she was qualified, and Mr. Alford qualified for Medicaid, she would be destitute by 2022. Trial Tr. 28:23-29:11; Tr. Ex. 4. The sole reason for the CSRA exception is to prevent spousal impoverishment. In cases like this, the default limits are woefully inadequate. For that reason, Congress provided two other methods by which a community spouse can obtain an increase. Counsel for Medicaid places no faith in our state trial court's ability to differentiate between legitimate needs which justify a resource increase and frivolous requests made by greedy people seeking to game the system for personal selfish gain. Yet, those are exactly the types of decisions that our Chancellor's make every day. Medicaid's unsubstantiated claim of opened floodgates and Pandora's box notwithstanding, Congress has already recognized the wisdom in allowing trial courts to make these types of decisions, even if Medicaid does not.

Medicaid goes so far as to suggest that the relief requested herein – keeping a young woman from becoming destitute by age 71 – is unreasonable. The MCCA was enacted precisely to prevent people, like Ms. Alford, from "pauperization". As such, Ms. Alford's requests are well-founded, permitted by law, and this Court should determine that her choice of pre-application judicial review is an alternate and

appropriate method by which a Community Spouse can seek an increase the otherwise capped resource limits.

CONCLUSION

This Court should continue this appeal on the basis of the "public interest" exception. Further, this Court should determine that the Division of Medicaid must operate within the confines of federal law, particularly those statutes that which allow a Community Spouse to seek an increase of the CSRA and MMNA through the pre-application judicial method.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

I, the undersigned counsel of record herein, do hereby certify that I have this day, September 2, 2009, via U.S. Mail prepaid, delivered a true and correct copy of the above and foregoing pleading, to the below listed counsel of record.

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