

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-CA-02073

DIALYSIS SOLUTION, LLC

APPELLANT/PLAINTIFF

VS.

MISSISSIPPI STATE DEPARTMENT OF
HEATH; ED THOMPSON, IN HIS OFFICIAL
CAPACITY AS THE EXECUTIVE DIRECTOR
OF THE DEPARTMENT OF HEALTH; STATE
OF MISSISSIPPI AND RCG-MONTGOMERY, LLC

APPELLEES/DEFENDANTS

APPEAL FROM THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
HONORABLE J. DEWAYNE THOMAS, CHANCERY JUDGE; CAUSE NO. G2007-1990 T/I

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
STATEMENT REGARDING ORAL ARGUMENT.....	ii
TABLE OF AUTHORITIES.....	iii
REBUTTAL ARGUMENT	1
I. ANY EXTENSIONS OF A CON GRANTED BY MSDH MUST BE DONE BEFORE THE STATED EXPIRATION AND ONCE THE TIME STATED IN THE CON HAS LAPSED, THE CON IS VOID AND NO EXTENSIONS CAN BE GRANTED. MSDH DOES NOT HAVE THE LEGAL AUTHORITY TO EXTEND A LAPSED CON AND MUST REISSUE THE CON IN ACCORDANCE WITH CON STATUTORY PROVISIONS.....	1
II. WHERE THE APPELLANT'S ORIGINAL ACTION WAS TIMELY AND WHERE IT HAS PROMPTLY PROSECUTED ITS APPEAL, THE COMPLETION OF AN ACT BASE UPON IMPROPER AUTHORITY DOES NOT LEGITIMIZE THE ACT OR RENDER THE LEGAL ISSUES MOOT.....	4
CONCLUSION.....	6
CERTIFICATE OF SERVICE.....	7

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STATEMENT REGARDING ORAL ARGUMENT

I, Bryant W. Clark, attorney for Appellant/Plaintiff respectfully request oral argument. The core issue in this case-- whether the Mississippi Department of Health has the legal authority to grant an extension of a Certificate of Need, after the expiration of the time period stated on the Certificate of Need has expired --is one of first impression for this court and is of considerable importance. Resolution of the issue depends on a proper understanding of Plaintiffs' claim and relevant case law. Oral argument will aid the Court in evaluating the case.

DATED, this the 27th day of July, 2009.



BRYANT W. CLARK
Attorney for the Appellant/Plaintiff

TABLE OF AUTHORITIES

CASES

<i>Durant vs. Humphrey Cty Memorial Hospital</i> 587 So.2d 244 (Miss. 1991)	5
<i>Gill v. Mississippi Dept. Of Wildlife Conservation,</i> 574 So. 2d 587 (Miss. 1990)	3
<i>Madison v. Hopskins,</i> 857 So.2d 43 (Miss. 2003)	4
<i>Public Service Comm. v. Miss. Power & Light Co,</i> 593 So.2d 997, 999 (Miss. 1991)	3
<i>Sprouse v. Miss. Employment Sec. Comm'n.,</i> 639 So.2d 901, 902 (Miss. 1994)	6

STATUTES

Miss. Code Ann. § 41-7-195, (1972).....	1,2,4,6
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MISSISSIPPI ATTORNEY GENERAL OPINIONS

<i>Att'y Gen. Op.</i> 2007-00467 (Oct. 12, 2007)	5
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REBUTTAL ARGUMENT

The core issue before the Court is whether the Mississippi Department of Health (MSDH) has the legal authority to grant an extension of a Certificate of Need (CON), after the expiration of the time period stated on the Certificate of Need has expired.

Despite their efforts to distance themselves from both the law and the facts, the Appellees cannot escape the reality: that Miss. Code Ann. § 41-7-195 (1972) provides that “***a certificate of need shall be valid for the period of time specified therein”; the stated expiration date on the CON issued to RGC was December 16, 2005 (R. at 310 & 312) and RCG did not make its first request for an extension until January 8, 2007, over a year after it had expired. (R. at 305). Indeed, the facts and law of this issue are so clear the Appellees can not offer any defense to this issue so they virtually resorted to not addressing it in their brief.

However, in arguing that the certificate of need issued to RCG was valid the Appellees make two basic points: (1) Mississippi Department of Health promulgated temporary and permanent rules to address the validity, duration and extension of CONs and RCG complied with those rules and (2) the dialysis facility is now open and operational and it would be a grave injustice to impede the operation of the facility. We rebut each argument in turn.

- A. Any extensions of a CON granted by MSDH must be done before the stated expiration and once the time stated in the CON has lapsed, the CON is void and no extensions can be granted. MSDH does not have the legal authority to extend a lapsed CON and must reissue the CON in accordance with CON statutory provisions**

Miss. Code Ann. § 41-7-195 (1972) states in relevant part the following:
(1) *** A Certificate of Need shall be valid for the period of time specified therein.
(2) A certificate of need shall be issued for a period of twelve (12) months or such other lesser period as specified by the State Department of Health.

This statute expressly provides that a CON is valid only for the period stated therein. Once the time period stated in the CON has lapsed, the CON is void and no extensions can be granted. The stated effective date on the CON was December 16, 2004 and the stated expiration date was December 16, 2005. (R. at 310 & 311).

Contrary to the Appellees' argument the Appellant has no issue with the MSDH's 2007 adoption of the temporary and parenement rule changes concerning the validity, duration and extension of CONs. However, it is important that the 2007 rules change is put in the proper context as it relates to this case. First, Plaintiff Dialysis Solution filed its complaint in this cause on October 23, 2007. (R. at 306 & 01). After being served with process, MSDH proposed the Temporary Rule change on October 26, 2007 and became effective on October 29, 2007 and the MSDH permanent rule change was not effective until February 24, 2008. (R. at 306 & 323) Both the temporary and permanent rules adopted by MSDH did not take effect until after the Plaintiff filed suit in Hinds County Chancery Court. *Id.* The Appellees are erroneously applying facts that did not develop until after Plaintiff Dialysis Solution filed its complaint.

Also, subsequent actions on the part of the MSDH do not change the facts and the law as they were on October 23, 2007 when the lawsuit was filed. The fact that the Department of Heath changed its CON rules and regulations on October 29, 2007, does not

negate the fact that RCG had failed to request their first extension of its CON prior to the December 16, 2005 expiration. And, as discussed in the Appellant's, brief there is no statutory authority that gives the Department of Health the authority to revive an expired CON. After the expiration of the CON, the Department of Health must reopen the application and review process as provided by statute and regulations. The Department of Health can not grant itself broader authority through an administrative rule change than was given to it by the legislature. *Gill v. Mississippi Dept. Of Wildlife Conservation*, 574 So. 2d 587, 593 (Miss. 1990); *Public Service Comm. v. Miss. Power & Light Co*, 593 So.2d 997, 999 (Miss. 1991); *Att'y Gen. Op.* 2007-00467. The purpose of the Rule Change was to (1) clarify Section 41-7-195 and (2) prevent any future CONs from being voided as a result of the holder's failure to request an extension prior to its expiration. (R. at 306). The Department's rule changes and the CON Rules & Procedures are in themselves clear evidence that a CON is only valid for the stated period and all extensions must be requested and made before that period has lapsed. Also, the rule change is evidence that MSDH does not have the authority to revive or extend an expired CON. No where in the rule change or any where in the Department's policies and procedures does it speak about the Department reviving or extending an expired CON.

It is not disputed in the Appellees' brief nor in the lower court ruling that a CON is valid only for the amount of time stated therein. Nor is it disputed that RGC's first request for an extension was not until January 8, 2007 and the extension was not granted until January 18, 2007 over a year after the stated expiration date. Considering all, it is clear that

the CON issued to RCG is invalid or void as a matter of law. MSDH has no statutory authority to revive or extended a voided certificate of need.

As stated in the Appellant's brief in *Madison v. Hopkins*, 857 So.2d 43 (Miss. 2003), the Supreme Court stated that "Attorney General's Opinions are not binding, but they may certainly be considered by the Court." In a October 12, 2007 opinion, the Attorney General stated that "[o]nce the period in the CON has lapsed, the CON is void and no extensions can be granted. At that point, the applicant would be required to reapply for a CON . . . it is the opinion of this office that after the date of expiration, the CON is automatically void by operation of law." *Att'y Gen. Op.* 2007-00467 issued October 12, 2007. (R. at 326)

The opinion went on to state that "it is the opinion of this office that after the expiration of the CON, the department does not have the authority to grant an extension of the CON. Any extensions granted pursuant to section 41-7-195(3) must be granted prior to expiration. *Id.*

It is clear that pursuant Section 41-7-195 the Department Health does not have the authority to grant an extension of a Certificate of Need, after the expiration of the time period stated in the Certificate of Need. Therefore, the only remedy that MSDH has is to reissue the certificate of need in accordance to provisions provided by the legislature.

B. Where the appellant's original action was timely and where it has promptly prosecuted its appeal, the completion of an act base upon improper authority does not legitimize the act or render the legal issues moot.

In Appellees' brief they argue that the CON has been fully implemented and the

dialysis facility is currently operational. Appellees contend that it would cause a graver injustice to the public to impede the operation of this facility. However, as previously mentioned Dialysis Solution filed its action in this cause on October 23, 2007, almost a year before the construction on the facility was complete. In fact, the land for the facility was not purchased until March 17, 2008, which is five months after the Appellant brought this action. (R. 296).

In *Durant vs. Humphrey Cty Memorial Hospital* 587 So.2d 244, 249 (Miss. 1991) this Court held that “.... where the appellant’s original action was timely and where he has promptly prosecuted his appeal, the completion of an act base upon improper authority does not legitimate the act or render the legal issues moot..... Here the Plaintiff sued within a reasonable time of learning of the outstanding CON and while HCMH/ECF’s construction was in its infancy.”

In this cause, on September 27, 2007, Dialysis Solution sent a letter to MSDH informing it that pursuant to Section 41-7-195, RCG’s certification had expired as a matter of law and requested that MSDH revoke the certificate of need. *Joint Stipulation of fact exhibit D* (R. At 320). In a response letter dated October 12, 2007, from Dr. F. E. Thompson, State Health Officer, the MSDH denied Dialysis Solution’s request to revoke the CON. (R. At 157). On October 26, 2007, Dialysis Solution filed this action in the Chancery Court of the First Judicial District of Hinds County. (R. At 1). Like the *Durant* case, Dialysis Solution filed its action in a reasonable time after receiving the letter from MSDH. Also, as previously mentioned at the time this action was brought, not only, had construction not

commenced but the property for the facility had not been acquired. Following the reasoning of the *Durant* case, Dialysis Solution's original action was timely and it promptly prosecuted its appeal. Thus, the completion of construction that was based upon improper authority does not legitimize the act or render the legal issues moot.

CONCLUSION

This court has held that its review of decisions by administrative agencies are limited. "We will reverse only when an agency's decision is (1) unsupported by substantial evidence, (2) arbitrary and capricious, (3) beyond the powers of the Board to make, or (4) in violation of a statutory or constitutional right of the complaining party." *Sprouse v. Mississippi Employment Sec. Comm'n*, 639 So.2d 901, 902 (Miss.1994). It is clear that the Department of Health does not have the authority to grant an extension of a certificate of need, after the expiration of the time period stated on the certificate of need has expired. MSDH has exceeded its powers and violated Section 41-7-195. The certificate of need issued to RCG-Montgomery should be declared void by operation of law and the Department of Health should be ordered to reissue the certificate of need for a 6 station ESRD facility in Montgomery County in compliance with Mississippi statute and Department procedures.

Appellant/Petitioner Dialysis Solution respectfully request that the order of the Chancery Court of Hinds County be reversed and remanded with instructions to declare the certificate of need issued to RCG-Montgomery be void by operation of law and order the Department of Health to reissue the certificate of need for a ESRD facility in Montgomery County in compliance with Mississippi statute and department procedures.

CERTIFICATE OF SERVICE

I. Bryant W. Clark, one of the attorneys for Appellant Dialysis Solution, LLC, certify that I have this day filed the foregoing Brief of Appellant with the Supreme Court Clerk and served a copy of these documents via United States Mail, postage prepaid, on the following:

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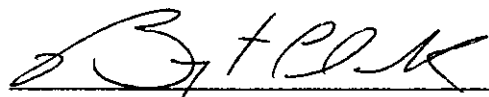
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Honorable J. Dewayne Thompson
HINDS COUNTY CHANCERY JUDGE
P.O. Box 686
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Dated, this the 27th day of July, 2009.


Bryant W. Clark