IN THE SUPREME COURT OF MISSISSIPPI

CITY OF CLEVELAND and MISSISSIPPI STATE DEPARTMENT OF HEALTH — **APPELLANTS**

V. — **NO. 2008-SA-00223**

MID-SOUTH ASSOCIATES, LLC — **APPELLEE**

APPEAL FROM THE DECISION OF THE DESOTO CHANCERY COURT

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. City of Cleveland, Mississippi and Mississippi State Department of Health (Appellants).
2. Thomas L. Kirkland, Jr., Allison C. Simpson, Esq., Andy Lowry, Esq., and Jamie F. Jacks, Esq., counsel for City of Cleveland, Mississippi.
3. Donald E. Eicher, III, Esq. and Sondra McLemore, Esq., counsel for the Department.
4. Mid-South Associates, LLC (Appellee).
5. John L. Maxey, Esq., William Hussey, Esq., and Malenda Meacham, Esq., counsel for Appellee.
6. Covenant Dove, Inc. (a Tennessee corporation) and Judy Ullery (its president).
7. Joy Health & Rehab of Cleveland, LLC (a Delaware corporation).
8. Cassandra Walter, Esq. (hearing officer).
9. F.E. Thompson, M.D. (State Health Officer)
10. The Honorable Vicki Cobb, Chancellor.

Respectfully submitted,

Andy Lowry
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STATEMENT OF THE ISSUES

I. Whether the Chancery Court Wrongly Reviewed This Matter *De Novo*, Rather Than Deferring to the Department.

II. Whether the Rejection of Mid-South's Application Was Supported by Substantial Evidence.

STATEMENT OF THE CASE

I. Course of Proceedings Below

Mid-South Associates, LLC ("Mid-South") filed its Certificate of Need ("CON") application on December 12, 2006, seeking to relocate 75 nursing-home beds from Bolivar County to DeSoto County at a capital cost of $4,895,000.00. R.E. 3 (hearing officer's proposed findings and conclusions) at 1.[1] The staff of the Mississippi State Department of Health ("the Department") in March 2007 provided its analysis recommending that the application be disapproved due to its substantial adverse impact on Bolivar County's population and its consequent failure to comply with the State Health Plan and the CON Review Manual's applicable criteria. R.E. 3 at 1; R.E. 4 (staff analysis) at 12-13.

On May 7, 2007, the City of Cleveland ("the City"), where the existing 75-bed facility is located, entered its appearance to participate in the hearing during the course of review as an "affected person." R.E. 3 at 1-2. This hearing was held in June 2007. The hearing officer requested draft findings and conclusions from both parties, and adopted those jointly submitted by the City and the Department as her proposed findings and conclusions which she transmitted to the State Health Officer. On September 27, 2007, the State Health Officer adopted the staff analysis and the findings and conclusions of the hearing officer, and issued his Final Order disapproving the CON. R.E. 5 (Final Order).

Mid-South, exercising its option under Miss. Code Ann. § 41-7-201(a) to appeal to the DeSoto Chancery Court rather than to the Hinds Chancery Court, First Judicial District, did so,

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[1]Record excerpts are cited by tab number. Where a page number is also given, it refers to the pagination of the original document. Record excerpt 8 includes those pages of the hearing transcript cited in this brief, and those pages are cited as "T.__."

and obtained a decision from that court on January 25, 2008, holding that relocating the 75 beds from Bolivar County to DeSoto County should have been approved and that that Department erred in failing to see the wisdom of this proposal. R.E. 2 (Court's Ruling).

The Department and the City timely appealed to this Court.

II. Relevant Facts

Mid-South, a Delaware company operating out of Cordova, Tennessee, "owns/leases" Bolivar Health and Rehabilitation Center ("BHRC") in Cleveland, Bolivar County, Mississippi. R.E. 4 at 1. That facility is operated presently by Joy Health & Rehab of Cleveland Mississippi, LLC ("Joy Health"), another Delaware company out of Cordova, Tennessee. R.E. 4 at 1 (see also the publicly available information at the Secretary of State's website). Judy Ullery, president of Joy Health, is also president and chairman of the board of Covenant Dove, Inc., "a general partner for 13 nursing homes," two in Mississippi. R.E. 8 (T.335, 337).[2]

Mid-South applied to move the 75 beds at BHRC to a new, $4.895 million facility in Hernando, DeSoto County, Mississippi. R.E. 3 at 1. It would not have been possible for Mid-South simply to build a 75-bed nursing home in Hernando, because the Legislature has imposed a moratorium on CONs for building, adding to, or expanding any nursing home in the State unless via an express statutory authorization. Miss. Code Ann. § 41-7-191(2); R.E. 3 at 3. By

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[2]As Ms. Ullery's testimony (T.376-80) suggests, it was never clear who actually owned the license for BHRC at the time the CON application was filed — certainly not Mid-South. R.E. 3 at 2. The licensee was Dynamic Cleveland Operating Co., LLC at the time of filing, an entity as to which Ms. Ullery disavowed any certain knowledge. (See the directory of facilities on the Department's website.)

The City moved to dismiss the appeal on the basis that there was no evidence that the correct party had filed the CON application, but this motion was denied at the hearing. R.E. 3 at 2-3.

the same token, once the beds were moved from Bolivar County, they could not be replaced by a new or expanded facility. R.E. 3 at 3.

After the Department's staff recommended disapproval, and the City entered the case as a party affected by the relocation, a hearing during the course of review was held where testimony was heard from the following 19 individuals:

- Sam Dawkins, the Department's director of its Office of Health Policy and Planning, who testified that the application did not meet the Department's criteria.
- Chip Johnson, mayor of Hernando, who supported the relocation.
- Jean Beard, a Covenant Dove employee with a B.A. in accounting and a certificate as a Compliance Specialist, whose job appeared to consist largely in auditing facilities for regulatory compliance and in finding lucrative markets for nursing homes. R.E. 8 (T.99-102). The City objected to her admission as an expert in strategic health care planning, but this objection was denied by the hearing officer. R.E. 8 (T.104-05).
- John Mayo, a state representative for Coahoma, Tunica, and DeSoto Counties, who supported the relocation. He admitted not having sought in the Legislature to amend the moratorium statute to provide an exception for any new beds in DeSoto County.[3] R.E. 8 (T.159-60, 164).
- David Work, Sr., mayor of Cleveland, who opposed the relocation.
- Judy Ullery, for the relocation.

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[3]Inspection of Miss. Code Ann. § 41-7-191 will show that it consists in large part of legislative authorizations to build facilities, including nursing homes, at various places in the State. *See also* R.E. 8 (T.162-163) (reviewing statute with Mr. Mayo).

- Marilyn Winborne, the Department's director of the Bureau of Health Facilities under the Licensure and Certification Division, who appeared by subpoena to discuss licensure and regulatory issues.
- Willie Lee Simmons, a state senator for Bolivar, Humphreys, and Sunflower Counties, who rebutted Mid-South's testimony as regards allegations about the neighborhood where BHRC is located and who testified to the "devastating" impact the relocation would have on the Medicaid-eligible population. R.E. 8 (T.446-48).
- Maurice Smith, a City alderman for the ward where BHRC is now located in Cleveland, similarly described the negative impact on "low socioeconomic level" citizens. R.E. 8 (T.480).
- John Lindsey, chief administrative officer for the City of Cleveland, testified against the relocation, discussing the "impact of the — the people not being able to stay in the community where they've chosen to live." R.E. 8 (T.484).
- Carolyn Lucas, whose mother lives at BHRC, and who opposed the relocation.
- Bud Carroll, whose wife lives at BHRC, and who opposed the relocation.
- Dr. Steven Clark, the medical director for BHRC, who testified to the importance of residents' being close to family and friends, and that relocation outside the Cleveland area "would be lethal for some of the residents." R.E. 8 (T.507). He also testified, based on his experience as medical director at BHRC and at another nursing home in Cleveland, that the community would not "have adequate care if we lost the beds available at [BHRC]." R.E. 8 (T.517).
- Louise Bell, whose father lives at BHRC, and who opposed the relocation.
- Sara McClure, whose father-in-law lives at BHRC, and who opposed the relocation.

- Gloria Rash, a 28-year employee of the BHRC facility, whose 23-year-old nephew is a resident at BHRC, and who opposed the relocation.
- Sherry Davis, the administrator of BHRC, who testified as to the high quality of care provided at the existing facility.
- Kathy Bryant, the director of nursing at BHRC, who testified to the negative effects of a relocation out of town for her residents, and who opposed the relocation. R.E. 8 (T.556-58, 564-66).
- John Hyde, a professor of health services research and health care management at the University of Mississippi Medical Center, who was accepted as an expert in health care management, planning, and statistics, and who testified to his complete agreement with the staff analysis of Mid-South's application. R.E. 8 (T.574).

Having heard the evidence presented and endorsed the proposed findings and conclusions filed by the City and the Department, the hearing officer forwarded them to the State Health Officer, who adopted them along with the staff analysis and issued his order disapproving the relocation.

Mid-South, feeling aggrieved, appealed to the DeSoto Chancery Court the denial of its proposal to move beds to DeSoto County, and obtained an order from that court, reversing the denial of the CON. The City and the Department then appealed to this Court for the reinstatement of the Department's decision.

Further facts relevant to this appeal will be set forth as appropriate in the Argument.

SUMMARY OF THE ARGUMENT

The chancery court impermissibly reweighed the evidence in this matter, citing as its excuse the hearing officer's adoption of the proposed findings and conclusions submitted by the City and the Department. The chancellor erred as a matter of law by disregarding the separation-of-powers considerations, statutory and constitutional, which require the judicial branch to defer to the decisions of administrative agencies. Regardless of who drafted the findings ultimately adopted, the bottom line must remain that if the Department had substantial evidence to support its decision, that decision must be affirmed.

Substantial evidence supported the rejection of the proposed relocation. The Department's CON criteria include consideration of a relocation's impact on the health care provided to the population presently served, especially any negative impact on underserved persons such as those with low incomes. On that criterion alone, the relocation obviously had a negative impact on the health care available in Bolivar County, which by itself supported the denial of the application. The State Health Plan expressly forbids approving a CON with a significant negative impact on indigent care, and the Department had substantial evidence of such an impact in the present case, most obviously due to Mid-South's projection of sharply reduced Medicaid utilization if the beds went to DeSoto.

The Department was fully within its rights to hold that the needs of affluent DeSoto County must not be gratified by depriving the economically disadvantaged residents of Bolivar County. The Department's decision rested on substantial evidence, was neither arbitrary nor capricious, and rested on no error of law. It should have been affirmed by the DeSoto court, and this Court should reverse and render.

ARGUMENT

I. The Chancery Court Wrongly Reviewed This Matter *De Novo* Rather Than Deferring to the Department.

Unusually for any appeal of an administrative agency's decision, the standard of review is a disputed issue in this case. The chancery court refused to follow the ordinary standard of deferential review, on the basis that the hearing officer's proposed findings and conclusions, which were adopted by the State Health Officer, had been drafted by counsel for the City. R.E. 2 at 2. In so doing, the chancery court acted contrary to law, misinterpreted the teachings of this Court, and ignored fundamental issues requiring judicial deference to administrative decisions.

A. Deferential Review Is Mandated by the Legislature and the Mississippi Constitution.

The Legislature has directed the courts how they are to review the final orders of the Department in CON cases:

> The order [of the Department] shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health 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 State Department of Health, or violates any vested constitutional rights of any party involved in the appeal.

Miss. Code Ann. § 41-7-201(f). That should settle the issue of the standard of review right there, unless the chancery court was entitled to read exceptions into the statute.

In CON cases as in other administrative appeals, this Court has always strictly adhered to this "familiar limitation[] 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).

> **[O]ur Constitution** does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies. **Our courts are not permitted**

> **to make administrative decisions and perform the functions of an administrative agency**. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal to hear the appeal. The appeal is a limited one ... since the courts cannot enter the field of administrative agency.

Id. (quoting *Cook v. Mardi Gras Casino Corp.*, 697 So. 2d 378, 380 (Miss. 1997) (emphasis altered).

The just-quoted language ultimately derives from this Court's landmark decision in *Mississippi State Tax Commission v. Mississippi-Alabama State Fair*, 222 So. 2d 664 (Miss. 1969). In that case, this Court firmly recognized and re-affirmed the principle of judicial deference to agency decisions, resting upon our State Constitution's firm separation of the legislative, executive, and judicial powers: "the powers of government under our Constitution are divided into three distinct departments, and . . . persons acting or belonging to one of such departments [are] prevented from exercising power in any other department." *Id.* (citing *Loftin v. George County Bd. of Educ.*, 183 So. 2d 621, 623 (Miss. 1966)). As did the *Loftin* Court, we cite to Article 1, Sections 1 and 2 of the Mississippi Constitution of 1890:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.
>
> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.

(quoted in *Loftin*, 183 So. 2d at 623).

The case law of this State is replete with instance of this judicial deference to agency decisions:

- The agency's decision "is afforded great deference upon judicial review." *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health,* 728 So. 2d 81, 83 (Miss. 1998) (quoting *Miss. Dep't of Health v. S.W. Miss. Reg'l. Hosp.,* 580 So. 2d 1238, 1240 (Miss. 1991)).
- This "great deference" creates a presumption that the agency's decision is valid. *Miss. State Dep't of Health v. Miss. Baptist Med. Ctr.*, 663 So. 2d 563, 579 (Miss. 1995).
- This Court does not defer to the chancellor's decision on appeal from the agency, but reviews the chancery court *de novo*. *Id.* at 574.
- It is the challenging party's burden to establish that the agency's conduct is arbitrary and capricious. *Jackson HMA, Inc. v. Miss. State Dep't of Health*, 822 So. 2d 968, 970 (Miss. 2002).
- A decision which is "fairly debatable" as to its correctness is not arbitrary and capricious. *Falco Lime, Inc. v. Mayor & Aldermen of City of Vicksburg*, 836 So. 2d 711, 721 (Miss. 2002).
- The courts may not substitute their judgment for that of the agency. *Melody Manor Convalescent Ctr. v. Miss. State Dep't of Health*, 546 So. 2d 972, 974 (Miss. 1989).
- Nor may a court reviewing an agency's decision engage in reweighing the facts of the case. *Pub. Employees' Ret. Sys. v. Ross*, 829 So. 2d 1238, 1240 (Miss. 2002).
- "Therefore, if the evidence is there, the decision stands even though the Chancellor or this Court might have made a different decision." *United Cement Co. v. Safe Air for the Envir., Inc.*, 558 So. 2d 840, 842 (Miss. 1990).
- The agency's decision need only have relied upon "substantial" evidence, i.e., "more than a scintilla or a suspicion." *Natchez Cmty.*, 743 So. 2d at 977.

- It need only be "such relevant evidence as reasonable minds *might* accept as adequate to support a conclusion." *Pub. Employees' Ret. Sys. v. Dearman*, 846 So. 2d 1014, 1017 (Miss. 2003) (emphasis added).
- The agency, as finder of fact, is free to choose between two conflicting positions, each of which is supported by substantial, credible evidence. *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224-25 (Miss. 1997).
- Findings of credibility are for the agency, not for the appellate courts, to make, where substantial evidence appears in the record. *Boyles v. Miss. State Oil & Gas Bd.*, 794 So. 2d 149, 156-57 (Miss. 2001).

The above citations are merely a small fraction of those in which this Court has stated the rule and implications of its deference to administrative agencies' decisions. Nonetheless, in the present case, the chancellor held that she "must review the record de novo." R.E. 2 at 2. How did this happen?

B. The Lower Court Erred in Applying This Court's Decision in Mississippi Department of Transportation v. Johnson *to the Present Case.*

Despite the Legislature's having mandated a deferential standard of review, the chancery court improperly applied this Court's holding that, in a bench trial, the trial court sitting as finder of fact must be reviewed *de novo* where it adopts one party's proposed findings and conclusions as its own. R.E. 2 at 2 (citing *Miss. Dep't of Transp. v. Johnson*, 873 So. 2d 108 (Miss. 2004)).[4] That decision, which enlarged this Court's prior scope of review, had a curious history, but in any event is fully distinguishable from the present case.

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[4]Miscited by the chancery court as "837 So. 2d 108."

The *Johnson* decision was largely based upon this Court's prior holding in *Brooks v. Brooks*, 652 So. 2d 1113 (Miss. 1995).[5] In *Brooks*, this Court was reviewing a chancellor's findings regarding an allegation of adultery in a divorce suit, and noted that the chancery court had adopted a litigant's proposed findings as its own. *Brooks*, 652 So. 2d at 1118. This Court in *Brooks* noted earlier cases which it summarized as requiring that, in such cases, the reviewing court "analyzes such cases with greater care" and subjects the evidence to "heightened scrutiny." *Id.* (citing *OmniBank v. United So. Bank*, 607 So. 2d 76, 83 (Miss. 1992) and *Matter of Estate of Ford*, 552 So. 2d 1065, 1068 (Miss. 1987)). Although neither *OmniBank* nor *Ford* applied a *de novo* standard of review, however, the *Brooks* Court nonetheless relied upon those precedents as authority for such *de novo* review, and this Court in *Johnson* relied upon *Brooks* likewise.

The holdings relied upon in *OmniBank* and *Ford* themselves rested on a single case also cited in *Brooks*, this Court's decision in *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259 (Miss. 1987). In that case, the trial court approved "almost verbatim" proposed findings of one party. *Id.* at 1265. This Court noted that it could not apply the usual deference in reviewing such decisions:

> These findings simply are not the same as findings independently made by the trial judge after impartially and judiciously sifting through the conflicts and nuances of the trial testimony and exhibits. The matter is important, because **the primary reason the law limits our scope of review** is that the trial judge [is] uniquely situated, both institutionally and pragmatically, to "smell the smoke of the battle." *Culbreath v. Johnson*, 427 So.2d 705, 708 (Miss.1983). Here the trial judge was a non-smoker.
>
> **Still, we cannot and will not review this case de novo**. Obviously, the Chancery Court was of the view that over all Defendants Williams, et al., had the

[5]In addition to *Brooks*, the *Johnson* Court cited another case, which however itself relied upon *Brooks*. *See Holden v. Frasher-Holden*, 680 So. 2d 795, 798 (Miss. 1996).

> better of the battle. **That determination is entitled to deference, though sensibly not as much as in the ordinary case.**

Id. (emphasis added). Remarkably, the foundational case for *Mississippi Department of Transportation v. Johnson* turns out to be a decision in which this Court *expressly declined* to review the adopted findings of the trial court *de novo* but rather held that it must still defer to those findings, just "not as much as in the ordinary case." The "heightened scrutiny" recognized in *OmniBank* and *Ford* is a straightforward application of this holding. In *Brooks* and then in *Johnson*, by contrast, this Court cited earlier precedents as requiring *de novo* review when in fact those precedents did not venture so far from the norm.

The foregoing genealogy of the precedents underlying the *Johnson* decision is not an attack on that decision's merits, of course. Those merits are *not even before this Court* on the present appeal, because *Johnson* can and must be distinguished.

Neither *Johnson*, nor *Brooks*, nor *OmniBank*, nor *Ford*, nor *Hiter*, involved the appeal of an administrative agency's decision. (*Johnson*, though a suit against MDOT, was a tort action in which the plaintiff hit a cow in the road.) In none of those cases was there cited a Legislative mandate of the correct standard of review such as is found at Miss. Code Ann. § 41-7-201(f). In none of those cases did the Constitutional issue of the separation of powers arise as regards the proper standard of review.

Rather, in all five of those cases, this Court was exercising its judicial authority as the head of the judicial department of the State of Mississippi, delineating for the trial courts how they are to exercise their fact-finding powers and how their exercise of those powers will be reviewed on appeal. As subissue A, above, demonstrated, that is a whole different kettle of fish

than the separation-of-powers issue which dictate this Court's deferential review of agency decisions.[6]

A final basis for distinguishing *Johnson* is that the present case is distinguishable on its facts from cases where the lower court framed its decision entirely by the adopted findings of a party. In the present case, the State Health Officer expressly adopted *both* the hearing officer's proposed findings *and* the staff analysis prepared by the Department, which itself recommended rejection of the Mid-South application. R.E. 5. Both the staff's recommendation and that of the hearing officer formed the basis of the Final Order. Therefore, even if this Court were inclined to apply the *Johnson* decision, the present case would fall outside its scope. "We will . . . deviate from a deferential standard only when, as precedence suggests, only one party's findings of fact are adopted *in toto*." *Delta Reg'l Med. Ctr. v. Venton*, 964 So. 2d 500, 504 (Miss. 2007).

Therefore, the lower court erred as a matter of law in applying *Johnson* to this case.

C. The Only Issue on Appeal Must Be Whether the Department Had Substantial Evidence for Its Decision.

As this Court noted in *Hiter*, "the primary reason the law limits our scope of review" in the ordinary case is that the appellate court, which pronounces only upon errors of law, must defer to the finder of fact. That is *not* "the primary reason" why the law limits this Court's scope of review in administrative agency cases in general, in CON cases in particular, and therefore in the present case. That "primary reason" is instead the bedrock principle of separation of powers,

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[6]There are, admittedly, certain constitutional limits on this Court's power to substitute itself for the trier of fact in non-agency cases. This Court possesses "such jurisdiction as properly belongs to a court of appeals," Miss. Const. art. 6, § 146, and that jurisdiction does not appear to extend to the power of fact-finding. *See Hill v. State*, 659 So. 2d 547, 552 (Miss. 1994). However, this train of thought merits only a footnote in the present case. We come to distinguish *Johnson*, not to bury it.

engraved in the first two articles of the Mississippi Constitution, and controlling upon both the DeSoto Chancery Court and upon this honorable Court today. This Court may have discretion to review factual findings of trial courts (sitting without a jury) *de novo*. We respectfully submit that the DeSoto Chancery Court, like this Court, did *not* have the discretion to disregard Miss. Code § 41-7-201(f)'s standard of review, let alone Article 1, Sections 1 and 2 of the Mississippi Constitution as interpreted in this Court's important decisions in *Loftin* and *Mississippi-Alabama State Fair*.

It has long been the practice of the Department's hearing officers, in conducting hearings during the course of review on CON applications, to direct the parties to submit proposed findings of fact and conclusions of law, which the hearing officer may then rewrite, adopt in part, disregard in favor of her own findings and conclusions, or — in some cases, like the present one — to adopt one party's submission (perhaps drafted by attorneys who frequently practice before the Department and are thoroughly familiar with its rules and duties) as agreeing with her own evaluation of the case. This practice may or may not seem particularly wise to this Court. Still,

> [i]t is not the function of the circuit court [or any other] on appeal from an administrative agency to determine whether the action of the agency is **right or wrong, correct or incorrect, wise or unwise, advisable or best fitted to the situation involved**. If there is substantial evidence to sustain the legal action of the legislative agency, the court will not substitute its judgment for that of the agency.

Falco Lime, 836 So. 2d at 722 (quoting *Alcorn County Bd. of Educ. v. Parents & Custodians of Students at Rienzi Sch. Attendance Ctr.*, 168 So. 2d 814, 819 (Miss. 1964)) (emphasis added). This rule applies perfectly well to the situation at bar.

If the adopted findings and conclusions demonstrate that substantial evidence existed for the Department's determination in this case, then it does not matter who originally drafted them

— the fact remains that the Department acted on substantial evidence, and even where substantial evidence existed for the opposite result, or this Court might have opted differently were it in the Department's shoes, the enactment of the Legislature and the mandate of the Mississippi Constitution require that such a decision be affirmed.

Whether this Court can even adopt the "heightened scrutiny" standard of review from *Hiter* and *Ford* in a review of an administrative agency decision, in light of the authoritative precedents limiting the standard of review, is open to question. It has noted a chancery court's doing so, without pronouncing on the issue either way. *Attala County Bd. of Supervisors v. Miss. State Dep't of Health*, 867 So. 2d 1019, 1021 n.1 (Miss. 2004). In that case, the chancery court apparently relied upon *Brooks* and *OmniBank*, as well as the Mississippi Court of Appeals' decision in *Greenwood Utilities v. Williams*, 801 So. 2d 783 (Miss. Ct. App. 2001). In that decision, the intermediate court stated: "We find no decision in which the Supreme Court has found similar considerations to apply when reviewing the decision of an administrative agency. Nonetheless, we find the rationale of the rule to be equally applicable." *Williams*, 801 So. 2d at 788. However, the court of appeals did not address any of the separation-of-powers issues that we have raised above.

That issue may not need to be resolved in the present case, however. For as our following discussion of the merits demonstrates, this was not even a particularly close case: even on a heightened scrutiny of the record, this Court will readily determine that substantial evidence supported the decision of the Department. "Heightened scrutiny" certainly does not suffice to describe the chancery court's blatant re-weighing of the evidence, as we will see.

We conclude by noting that the final paragraph of the DeSoto Chancery Court's rather brief opinion "found" that the Department acted arbitrarily and capriciously and that its findings

were "against the overwhelming weight of the evidence." R.E. 2 at 4. These are terms of art in this Court's standard of review. Where there is "substantial evidence" for a finding, the evidence for the opposite finding cannot, therefore, be "overwhelming." *See, e.g., River Reg. Med. Corp. v. Patterson*, 975 So. 2d 205, 207 (Miss. 2007) (discussing directed-verdict standard):

> If the facts so considered **point so overwhelmingly** in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand **if there is substantial evidence in support of the verdict**, that is, **evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions**, affirmance is required.

(emphasis added) (quoting *Twin County Elec. Power Ass'n v. McKenzie*, 823 So. 2d 464, 468 (Miss. 2002)).

As for when a decision is "arbitrary and capricious," this Court has said:

> 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.

Natchez Cmty. Hosp., 743 So. 2d at 977. However, as this Court noted in *Falco Lime*, "a holding which is supported by substantial evidence cannot be arbitrary and capricious." *Falco Lime*, 836 So. 2d at 721 (quoting *Miss. Bur. of Narcotics v. Stacy*, 817 So. 2d 523, 526 (Miss. 2002)). Similarly, this Court has "defined 'fairly debatable' as mutually exclusive with 'arbitrary and capricious.' " *Id.* (quoting *Stacy*, 817 So. 2d at 526-27). Since "fairly debatable" is a two-word way of saying "of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions," it seems that in the present case, if the Department's decision had substantial evidence to support it, then it cannot have been "arbitrary and capricious."

The question before this Court is therefore a simple one: did the Department have substantial evidence to support rejecting the CON application filed by Mid-South? To that question we now turn.

II. The Rejection of Mid-South's Application Was Supported by Substantial Evidence.

When this Court considers the staff analysis and hearing officer's findings, it will see that the Department did indeed have substantial evidence for its rejection of Mid-South's application to relocate nursing-home beds from Bolivar County to DeSoto County. Whatever the alleged need for beds in DeSoto County, the negative effects upon the health care environment in Bolivar County were substantially documented and a more than sufficient basis for the Department's refusing to approve the CON application.

State law requires that a CON shall not be granted where such a proposal would not be consistent with the Department's "specifications and criteria." Miss. Code Ann. § 41-7-193; *see Miss. State Dep't of Health v. Rush Care, Inc.*, 882 So. 2d 205, 207 (Miss. 2004). This sets a high bar for CON applications, since if an application fails to meet any one of those criteria, it should be disapproved.

While the State Health Plan does set forth criteria for need for new nursing-home beds, it does not state any criteria governing the relocation of existing beds. R.E. 3 at 8. That means that the governing criteria are the "General Considerations" set forth by the Department in its CON Review Manual. R.E. 3 at 8; *see* R.E. 7 (Manual excerpt). These considerations expressly incorporate the criteria and goals of the State Health Plan. R.E. 7. The General Considerations also reiterate the point made above, that any CON project "may be denied if the Department determines that the project does not sufficiently meet one or more of the criteria." R.E. 7.

We remind this Court that the Department is not required to accept substantial evidence offered by the applicant in support of its project, provided that there is also substantial evidence in favor of rejecting the project. "If the evidence is there, the decision stands even though the Chancellor or this Court might have made a different decision." *United Cement Co.*, 558 So. 2d at 842.

A. The Department Had Substantial Evidence That the Project Failed to Meet the General Need Criterion.

The "General Considerations," which apply to all CON projects, consist of 16 criteria, number five of which is "Need for the Project." Criterion 5 on need has five subparts (a) through (e), "[o]ne or more" of which "may be considered in determining whether a need for the project exists." R.E. 7.

1. General Criteria 5(a) and 5(b).

Subpart (a) of criterion 5 addresses the "need that the population served or to be served has for the services proposed," as well as the access to those services of the area's residents, "in particular low income persons, racial and ethnic minorities," and "other underserved groups." R.E. 7. Criterion 5(b) is similar:

> In the case of a relocation of a facility or service, **the need that the population presently served has for the service, the extent to which that need will be met adequately by the proposed relocation** or by alternative arrangements, **and the effect of the relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly, to obtain needed health care.**

R.E. 7 (emphasis added).

The Department's witness at the hearing, Dawkins, testified that "the population served" in criterion 5(a) as applied to this case is the population in Bolivar County (as opposed to the population "to be served" in DeSoto County). R.E. 3 at 8-9. The Department had substantial

evidence that Bolivar's population is "medically underserved" as that term is defined by federal criteria. R.E. 3 at 10-11. Calculations performed in 1984 found that Bolivar qualified as medically underserved, and the Department had substantial evidence that the same calculations on present-day information showed that Bolivar continues to be medically underserved. R.E. 3 at 11.

Although Mid-South pointed to DeSoto County's having been likewise designated as "medically underserved" in 1978, the Department had substantial evidence that this designation was no longer appropriate in fact, given the transformation of DeSoto County in recent years. R.E. 3 at 11. The Department's own ranking of counties by the general health of their residents places Bolivar 50th out of 82, and DeSoto *first* out of all the counties in the State. R.E. 3. at 11. Nothing requires the Department to wear blinders as regards the actual facts on the ground, and to venerate 30-year-old findings that are obviously invalid. The Department thus had substantial evidence from which it could conclude that the underserved population in Bolivar County would have their access to long-term care negatively affected by the proposed relocation.

The staff analysis found that the existing facility "had an occupancy rate of 75.75% in 2005, indicating that there is a need for this facility in Bolivar County." R.E. 4 at 6. The staff also found that the area typically had about 25 vacant beds in other nursing homes, raising a "concern that those 25 beds will be filled with [the facility's] patients, creating a waiting list for other patients." R.E. 4 at 6. The staff further noted that despite the decrease in Bolivar County's being projected for a slight decrease in population, from 39,945 in 2005 to 38,316 in 2010, its "projected population for persons age 65 through 85+ (the age group most likely to use nursing home care) increased from 4,809 to 5,085 for Bolivar County." R.E. 4 at 6. The staff found this indicated "a continued need for nursing home beds in the county." R.E. 4 at 6.

As regards service of low-income persons, the staff noted the shift in Medicaid payors from 62% at the present facility to a projected 33% at the new facility, a drop of almost half. R.E. 4 at 7. The staff further noted that "care for the elderly takes into account the close proximity of loved ones and friends," and that relocating the facility 105 miles away in Hernando would make it functionally inaccessible for low-income family members. R.E. 4 at 7.

The Department thus had substantial evidence that, even while the overall population of Bolivar County was trending downward, the percentage of elderly residents is rising, so that the projection is for a net increase in the nursing-home beds needed in Bolivar, which would be ill-served by the relocation. R.E. 3 at 13-14. While there may be a similar increase in DeSoto County's need for beds, criterion 5(b) does not require that the harm threatened to the presently-served population be cancelled out by the project's benefits for the to-be-served population. Robbing Peter of nursing-home beds to give them to Paul is not how the Department is required to conduct health-care policy.

Mid-South offered evidence to the Department that Bolivar County would have a sufficient number of nursing-home beds after the loss of the 75 beds proposed to be relocated to DeSoto County. R.E. 3 at 18. The Department found that this assertion depended upon the re-licensing of 60 de-licensed beds "held in abeyance" at a different nursing home, Shelby Nursing and Rehabilitation Center ("Shelby").[7] R.E. 3 at 18. The staff analysis had treated those beds as irrelevant due to their status. R.E. 4 at 7. Mid-South could present no evidence that those beds would or could in fact be licensed if its Bolivar facility were relocated out of the

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[7]The Department allows a facility to physically take down its beds and hold them in abeyance, thus avoiding the need to meet licensure requirements for those beds without losing ownership of the beds. R.E. 8 (T.440). However, the facility must then re-apply to open those beds and pass an inspection before their license is restored. R.E. 8 (T.441).

county. R.E. 3 at 18. Mid-South's own expert conceded that, without taking those 60 beds into account, the loss of 75 beds from the county would leave it with a future bed need of 43 beds. R.E. 3 at 19. (This is actually even worse than the staff analysis's estimate of 32 beds needed. R.E. 4 at 7.) Thus, even on the testimony of Mid-South's witness, the Department had substantial evidence that relocating the facility would result in the needs of Bolivar's residents for long-term care being unmet, and it had a reasonable basis for finding Mid-South's proffered evidence not credible, since it treated the "phantom beds" at Shelby as effectively available.

In the face of substantial evidence that relocating dozens of elderly, infirm residents 105 miles from Cleveland to Hernando would be dangerous to many of them, R.E. 8 (T.506-07), Mid-South offered its "alternative arrangements" (per criterion 5(b)) for the present residents in the Bolivar County facility. Remarkably, the president of the company presently managing the facility, Judy Ullery of Joy Health and Covenant Dove, testified that this "alternative" would amount to stopping new admissions and waiting for almost everyone residing in the facility to die:

> There's a lot of concern about residents being transferred and moved to other buildings. It is our intention to stop admissions, if you will, and **allow the resident population by attrition and by quietly as people pass on** — . . . within a year to 14 or 15 months, we would be **down to very few residents** that would even require a relocation at that time . . . . [W]e will accommodate the needs of the residents by just not admitting, **and through attrition, allow them to either pass on, or go home, or whatever happens**.

R.E. 8 (T.374) (emphasis added). Thus, not only would the community's access to beds in the facility be shut off more than a year before the facility moved, but the facility would have an active interest in seeing its residents "pass on" or "whatever happens" (residents who can "go home" do not typically stay in nursing homes in the first place) so that it could move those beds to its new facility in DeSoto County. The Department evidently agreed with the facility's

medical director, Dr. Steven Clark, whose reaction to Ms. Ullery's modest proposal was, "I don't think killing everybody off is a good solution to this whole thing here." R.E. 3 at 15 (quoting T.514). The Department had substantial evidence from which to conclude that this "alternative arrangement," itself only one part of criterion 5(b), was not acceptable and would not address the long-term-care needs of Bolivar County's population at present or in future.

Finally, the Department found that the proposed relocation would impair the ability of underserved groups "to obtain needed health care" under criterion 5(b), because of the relocation's negative effect on the area's other health care providers. Note that criterion 5(b) does not say "needed health care of the same type provided by the relocated facility," but "needed health care" in general.

We have already seen that the staff analysis predicted waiting lists for nursing home care if the Bolivar facility's 75 beds were relocated to DeSoto, and observed that low-income persons are precisely those least likely to be able to journey out of town some distance to visit their loved ones in other nursing homes. (Though the Department did not mention the recent increases in gasoline prices, that is undoubtedly another factor making it difficult or impossible for low-income persons to make regular, frequent visits to their parents, spouses, or other loved ones in a nursing home miles away. Senator Simmons made this point at the hearing, back when gasoline was $3.00 a gallon. R.E. 8 (T.450.))

Furthermore, in considering "the impact the relocation will have on Bolivar County's hospital," R.E. 3 at 11, the Department found that this hospital, Bolivar Medical Center, opposed the relocation. R.E. 3 at 11 n.9. The Department found that a shortage of locally available nursing-home beds into which it could move patients would tend to require it to keep patients in acute-care beds without being reimbursed at an acute-care rate. R.E. 3 at 12. Obviously, this

both harms the hospital's financial viability (always a concern for smaller facilities like a hospital in the Delta) and the availability of acute-care beds for patients in genuine need of acute care.

The Department also found a negative impact on Bolivar County's physicians, depriving them of patients and "further exacerbating" the "domino" effect of physicians' tending to leave the area for more prosperous markets. R.E. 3 at 12. Relocating residents out of the county would make it more likely that physicians and other caregivers in those other counties would provide health care to those residents. R.E. 3 at 15.

Therefore, in considering the closely-related requirements of need criteria 5(a) and 5(b), the Department had substantial evidence that those criteria were not met by the project. Exercising its proper standard of review, this Court should affirm the Department's rejection of the proposed relocation.

2. General Criterion 5(e).

Need criterion 5(e) allows the Department to consider, not only community support for a new facility or relocation, but "significant opposition to the proposal" in writing or at a hearing; "the opposition may be considered an adverse factor and weighed against endorsements received." R.E. 7. The staff analysis noted that eleven letters endorsing the relocation had been received from the community in DeSoto County. R.E. 4 at 8. The staff weighed these against "over 200 letters of opposition" from numerous residents, leaders, and businesspeople in Bolivar County. R.E. 4 at 8. The staff found from this "overwhelming community opposition" that an adverse impact from the relocation was likely. No letters from Bolivar County supported the move. R.E. 8 (T.67). After the staff analysis was written, over one thousand additional letters opposing the relocation were received by the Department. R.E. 8 (T.20).

At the hearing, additional community testimony was offered. One resident's daughter testified that she makes sure that she or someone else can visit her mother every day, and that she mistrusts the care offered by other nursing homes in Cleveland. R.E. 3 at 25 n.21. Another resident's husband said it would be "impossible" for him to visit his wife twice daily at an out-of-town facility as he does at the present location. R.E. 3 at 25 n.21. Two other family members of residents testified that they preferred the care at the existing facility to that provided by other Bolivar nursing homes. R.E. 3 at 25 n.21.

The mayor of Cleveland, David Work, Sr., testified that he knew of no one in Cleveland who favored the relocation, and that the City of Cleveland had offered Mid-South the eight acres adjacent to the current facility if it wished to expand or rebuild, but that Mid-South would not consider the offer. R.E. 3 at 25-26.

In short, the Department had substantial evidence from which it could find that need criterion 5(e) weighed against the relocation. This, along with the project's failure to meet need criteria 5(a) and 5(b), showed that the Department had substantial evidence from which to conclude that Mid-South's application should be disapproved.

3. The Chancery Court Improperly Reweighed the Evidence as Regards Need.

The staff analysis and the testimony of Mid-South's own expert provided substantial evidence that Bolivar County would have a shortage of nursing-home beds if the 75 beds at the Cleveland facility were relocated to Hernando. Further, there was substantial evidence that the 60 beds held in abeyance in Shelby should not be considered in the analysis. However, in Mid-South's appeal, the chancellor's focus in her ruling was the potential use of these 60 beds."

Reweighing the evidence, the chancellor opined that the 60 de-licensed beds at Shelby "could be put back into use," without considering the Department's finding that there was no

way to assure itself that Shelby would seek to do so, or that it would be able to meet the licensure requirements if it did so. (We note that the Department discounted the 60 "banked" beds in its staff analysis, even before adopting the hearing officer's findings. R.E. 4 at 7.)

The chancery court also argued from policy:

> Bolivar County cannot force [Mid-South] to stay in Bolivar County and keep its nursing home open. If [Mid-South] decides to close its Cleveland nursing home and relocate to DeSoto County anyway and seek relief from the Legislature to get new beds there, Cleveland is still going to be using 75 less beds than it is now.

R.E. 2 at 4. Policy, of course, is for the Department, not for the courts. The chancery court could not err more egregiously than to substitute its own judgment for that of the state agency to which the Legislature has delegated health care policy. Not only that, but the chancery court's reasoning is flawed and contrary to CON law. The assumption is that Mid-South could "close its Cleveland nursing home" and "relocate to DeSoto County anyway," lobbying the Legislature successfully for new beds. Of course, under the Department's rules, the CON for those new beds could be applied for by competing facilities (per criterion 15 in the Review Manual — see R.E. 7 — not just Mid South. Therefore, Mid-South would have no assurance of winning the CON for those new beds.

Regardless, under the moratorium on new nursing-home beds, the Cleveland facility's license is a valuable asset worth a great deal of money. While Mid-South could conceivably shut it down out of spite, that would not only be a major financial sacrifice, it would also impose negative effects on the nursing-home availability in Bolivar County in return for no benefit whatsoever to Mid-South.

Of course, if Mid-South were to lobby the Legislature for more beds in DeSoto County, *and* were to win the CON for those beds, there is no apparent reason why it could not operate

that facility and the Bolivar facility as well. There is thus no necessary connection between closing the Bolivar facility and "seek[ing] relief from the Legislature to get new beds" in DeSoto County. The chancery court simply does not appear to understand how CONs for nursing homes work.

The chancery court's faulty reasoning in this cause is an example of why the courts should not substitute themselves for the administrative agencies whose expertise those courts are supposed to respect. The judiciary's "duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate." *Dunn v. Miss. State Dep't of Health*, 708 So.2d 67, 72 (Miss. 1998). This Court owes the chancery court's opinion no deference on appeal, and none is warranted.

B. The Department Had Substantial Evidence That the Project Was Not Consistent with the State Health Plan.

There is no dispute that the State Health Plan's four overarching "purposes" are among the criteria which must be considered by the Department; they direct and bind the Department in its "health planning and health regulatory activities." R.E. 6 (Plan excerpt). The Department has expressly incorporated the State Health Plan's requirements into its criteria for CON review: "No project may be approved unless it is consistent with the State Health Plan." R.E. 7 (emphasis added).

The State Health Plan's four purposes are "to prevent unnecessary duplication of health resources, to provide cost containment, to improve the health of Mississippi residents, [and] to increase the accessibility, acceptability, continuity, and quality of health services." R.E. 6. While the first two are the "primary purposes," all four are "important." R.E. 6. Further, the

Department "intends to disapprove CON applications if such approval would have *a significant adverse effect on the ability of an existing facility or service to provide indigent care.*" R.E. 6 (emphasis added).

Mid-South sought to shift beds around inside Long-Term Care Planning District 1, relocating 75 beds from Bolivar County to a location 105 miles away in DeSoto County. R.E. 4 at 7. The Department found it unnecessary to build a new facility for the same beds, absent a showing of need. R.E. 3 at 4 ("The Plan does not allow applicants to move beds from one county to another every time an area of the state grows more than another without a demonstration that such a relocation of services is necessary."). As we saw at subissue A above, the project failed to meet the need criterion applicable to it.

The Department found that cost containment would not be served by moving beds from economically disadvantaged Bolivar County to a more expensive environment in DeSoto County, relying upon credible testimony from John Hyde, an expert in health care planning; Hyde testified that the same services were likely to cost more in DeSoto County than in Bolivar. R.E. 3 at 5 (citing T.582-83). We might add that building a new $4.9 million facility for the same beds is not an obvious way to contain costs; if this Court were to exercise a "heightened scrutiny" in this case, that would certainly be a permissible inference.

As regards the third purpose of the Plan, the Department had substantial evidence that even if the project would (arguably) improve the long-term care options in DeSoto County, it would have a negative effect on the health care environment in Bolivar County. R.E. 3 at 6.

The fourth purpose was found by the staff analysis not to be met:

> Although the applicant proposes to relocate to an area with greater need, the relocation will create a void in Bolivar County, a medically underserved area. Residents will either be relocated 105 miles from their families or will be forced

> to seek care elsewhere. Therefore, this project does not promote accessibility, continuity, and quality of health services for the patients of Bolivar County.

R.E. 4 at 3.

While the Department considered that DeSoto County, on paper, has a need for 567 long-term care beds, R.E. 8 (T.10), it was not required to simply approve a project to move the facility's 75 beds to the county with the greater need. The Department also had substantial credible evidence from an expert in health care planning, John Hyde, who testified that the Department's figures for DeSoto County's bed need were not plausible. R.E. 8 (T.655-657). None of the nursing homes in DeSoto is full, and as was repeatedly shown during the hearing, no figures were provided for bed vacancy in Shelby County, Tennessee, an area which obviously provides health care services to DeSoto County. R.E. 8 (T.656).

In short, the Department had substantial evidence from which to conclude that the project did not meet all four goals of the State Health Plan and was therefore not consistent with them.

The Department also had substantial evidence that the relocation would have a significant adverse effect on the facility's ability to provide indigent care. As seen above, the facility projects slashing its Medicaid rolls by almost half, from 62% to 33%. That alone indicates that indigent care will be substantially reduced, on the applicant's own projections in its application.

This Court has previously viewed with skepticism a relocation of hospital beds from a less affluent part of the city of Jackson to a more affluent one: "this conclusion does not lend itself to confidence in the Health Officer's finding that the primary 'advantage' of the new hospital is the benefits which it will provide to indigent patients." *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 728 So. 2d 81, 86 (Miss. 1998) (reversing grant of CON). In the present case, the Department has made a much more plausible finding that indigent care

will in fact be decreased. R.E. 3 at 23-24. The proposed relocation appeared to the Department to be driven in large part by profit-seeking, not health care, and to show a lack of sufficient concern for the needs of Bolivar County. R.E. 8 (T.55, 58).

The State Health Plan requires that a CON application be disapproved if it "would have a significant adverse effect on the ability of an existing facility or service to provide indigent care." That is obviously the case with the present application. The Department had substantial evidence for that conclusion, and for the conclusion that the four goals of the Plan were not met. That alone provided a reasonable basis for denying the application. This Court should reverse the chancery court's decision and affirm the Department's ruling.

CONCLUSION

For the reasons stated above, the decision of the DeSoto Chancery Court should be reversed, and the Department's denial of the CON to Mid-South should be affirmed.

Respectfully submitted, this the *1st* day of July, 2008.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby attests that he has caused the foregoing document to be served via United States mail (postage prepaid) on the persons listed below:

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