IN THE SUPREME COURT OF MISSISSIPPI

DIVISION OF MEDICAID, OFFICE OF THE GOVERNOR, STATE OF MISSISSIPPI; and DR. ROBERT L. ROBINSON, in His Official Capacity as Executive Director of the Division of Medicaid, Office of the Governor	**APPELLANTS**
VS.	**NO. 2008-SA-01245**
MISSISSIPPI INDEPENDENT PHARMACIES ASSOCIATION, INC.; et al.	**APPELLEES**

APPEAL FROM THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF APPELLEES NATIONAL ASSOCIATION OF CHAIN DRUG STORES, WALGREEN CO. AND FRED'S STORES OF TENNESSEE, INC.

ORAL ARGUMENT REQUESTED

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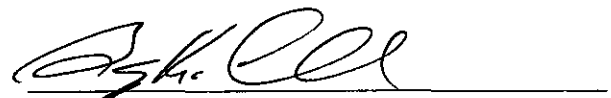
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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 disqualification or recusal.

1. Mississippi Independent Pharmacies Association, Inc. (Appellee).
2. Mississippi Pharmacists Association (Appellee).
3. National Community Pharmacists Association (Appellee).
4. John Edwin White, d/b/a Service Rexall Drugs (Appellee).
5. Professional Drugs, Inc., d/b/a Diket's Professional Drugs (Appellee).
6. Sullivan's Discount Drugs, Inc., d/b/a Sullivan's Discount Drugs (Appellee).
7. BSW, Inc., d/b/a Howell and Heggie Drug Company (Appellee).
8. Listine Mosby (Appellee).
9. Annie L. Scott (Appellee).
10. Torneita Hardin (Appellee).
11. Sherikee Grimm (Appellee).
12. National Association of Chain Drug Stores (Appellee).
13. Walgreen Co. (Appellee).
14. Fred's Stores of Tennessee, Inc. (Appellee).
15. Division of Medicaid, Office of the Governor, State of Mississippi (Appellant).
16. Dr. Robert L. Robinson, Executive Director of the Division of Medicaid (Appellant).
17. Barry K. Cockrell of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., counsel for Appellees.
18. Price Coleman, counsel for Appellees.
19. Lowry Lomax, counsel for Appellees.

20. Honorable William H. Singletary, Chancellor.

Respectfully submitted,



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I. ADOPTION OF BRIEF OF CO-APPELLEES

Pursuant to Rule 28(i) of the Mississippi Rules of Appellate Procedure, Appellees the National Association of Chain Drug Stores ("NACDS"), Walgreen Co. ("Walgreens") and Fred's Stores of Tennessee, Inc. ("Fred's") hereby adopt by reference the entire Brief submitted by Co-Appellees, Mississippi Independent Pharmacies Association, Inc. and the other independent pharmacies and pharmacists (hereinafter referred to collectively as the "Pharmacists"). The Pharmacists' Brief contains detailed arguments and authorities which demonstrate that the decision of the Chancery Court should be affirmed. NACDS, Walgreens and Fred's submit the following additional points for further review and consideration by this Court.

II. ARGUMENT

A. Judicial Deference to Administrative Agencies Does Not Extend to Agency Violations of Statutory Mandates.

In its Brief, the Division of Medicaid ("DOM") argues that, as an administrative agency, its decisions are entitled to judicial deference. Although it is clear that administrative agencies are accorded a certain degree of deference by the courts, it is equally clear that there are limits to that deference. As this Court has stated:

> [W]here an administrative agency errs as a matter of law, courts of competent jurisdiction should not hesitate to intervene. To be sure, the construction placed upon a statute by the agency charged with its administration and implementation is entitled to weight. *General Motors Corp. v. State Tax Comm'n*, 510 So.2d 498, 502 (Miss. 1987); *Gully v. Jackson International Co.*, 165 Miss. 103, 145 So. 905-907 (1933); *see also Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 380-81 89 S.Ct. 1794, 1801-02, 23 L.Ed.2d 371, 383-84 (1969). **Notwithstanding, this Court will not defer to an agency's interpretation of the statute when that interpretation is**

> **repugnant to the best reading thereof.** *See Miss. State Tax Commission v. Dyre Investment Co., Inc.*, 507 So.2d 1287, 1289 (Miss. 1987); *Universal Manufacturing Corp. v. Brady*, 320 So.2d 784, 786 (Miss. 1975).

Grant Ctr. Hosp. of Miss., Inc. v. Health Group of Jackson, Miss., Inc., 528 So.2d 804, 808 (Miss. 1988) (emphasis added). Moreover, this Court has emphasized that judicial review of administrative agency decisions, while deferential, "is by no means a rubber stamp." *Miss. State Dep't of Health v. Miss. Baptist Med. Ctr.*, 663 So.2d 563, 579 (Miss. 1995), *quoting Miss. State Bd. of Nursing v. Wilson*, 624 So.2d 485, 489 (Miss. 1993).

In interpreting a statute, the court's "duty is to carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case." *Pope v. Brock*, 912 So.2d 935, 937 (Miss. 2005). Moreover, it is the "duty of this Court to interpret the statutes as written. It is not the duty of this Court to add language where we see fit. '[O]ur primary objective when construing statutes is to adopt that interpretation which will meet the true meaning of the Legislature.'" *Maudin v. Branch*, 866 So.2d 429, 435 (Miss. 2003), *quoting Stockstill v. State*, 854 So.2d 1017, 1022-23 (Miss. 2003).

Consistent with these well-established standards of review, the Chancellor below interpreted the Mississippi Medicaid Law and determined the following:

(1) The Mississippi Medicaid Law, at *Miss. Code Ann.* § 43-13-117, sets out three specific methods and rates of payment to Mississippi pharmacies for generic drugs. This statute prohibits DOM from adopting other payment rates without prior legislative approval. *See Opinion, R.E.3, R.246-247; R.Vol.2.*

(2) DOM's new rule improperly adds a fourth method of reimbursement for generic drugs to the three methods specified by the Legislature in *Miss. Code Ann.* § 43-13-117(9)(b). *See Opinion, R.E.3, R.248-249; R.Vol.2.*

(3) There is no exception to the requirement that a legislative amendment be passed to change the generic drug rate of payment to include the State Maximum Allowable Cost ("MAC"). *See Opinion, R.E.3, R.250; R.Vol.2.*

The Chancellor's reasoning is set forth in his written Opinion, and discussed in detail in the Pharmacists' Brief. The lower court's interpretation of the Medicaid statutes was not only perfectly reasonable, but firmly grounded in, and consistent with, the clearly expressed legislative intent. As noted by the Chancellor:

> This section [of *Miss. Code Ann.* § 43-13-117] further contains a provision specifically stating that no changes in payments and rates of reimbursement by DOM shall be implemented without specific statutory authorization from the Legislature, unless required by federal law or regulation:
>
> > Notwithstanding any provision of this article, except as authorized in the following paragraph and in Section 43-13-139, neither (a) the limitations on quantity or frequency of use of or the fees or charges for any of the care or services available to recipients under this section, nor (b) the payments or rates of reimbursement to providers rendering care or services authorized under this section to recipients, may be increased, decreased or otherwise changed from the levels in effect on July 1, 1999, unless they are authorized by an amendment to this section by the Legislature. However, the restriction in this paragraph shall not prevent the division from changing the payments or rates of reimbursement to providers without an amendment to this section whenever those changes are required by federal law or regulation, or whenever those changes are necessary to correct administrative errors or omissions in calculating those payments or rates of reimbursement.
>
> Clearly, the Mississippi Legislature has set forth specific payments and rates of reimbursement for drugs and has outlined specific guidelines under which those payments and rates of reimbursement may be changed.

Opinion, R.E.3, R.246-247; R.Vol.2.

The Chancellor then rejected DOM's interpretation of the Medicaid statute as repugnant to the plain language of that provision:

> Clearly, when faced with opposition to the original proposed rule amendment, DOM attempted to use a legislative loophole to create a rule that is otherwise outside the scope of its authority. It is obvious that this attempt is still a violation of the statutory mandates of § 43-13-117 that prohibits changes in rates of payment without a legislative amendment.

Opinion, R.E.3, R.249; R.Vol.2.

In summary, the Chancellor below applied a well-reasoned interpretation of the Medicaid statutes in issue, by construing those statutes as written, and by correctly recognizing the true Legislative intent. In this instance, there is no mystery about the Legislative intent. It is expressly stated in *Miss. Code Ann.* § 43-13-117, which prohibits changes in Medicaid payments and rates of reimbursement by DOM without specific Legislative authorization. The Chancellor adhered to this statutory mandate and, consistent with the court's duty, interpreted the Medicaid statute on pharmacy reimbursement in a manner consistent with that Legislative intent.

The Chancery Court of Hinds County is the primary intermediate forum for the judicial review of administrative agency decisions. The Chancellors are intimately familiar with the standards of judicial review, the functions of administrative proceedings, and the relationship between statutory directives and administrative discretion. In this appeal, the Chancellor issued a well-reasoned decision which is firmly supported by the language of the statue, the plainly expressed legislative intent, and the undisputed facts. For these reasons, the lower court judgment should be affirmed.

B. The Division of Medicaid's Rule-Making Decision Cannot Stand Because There is Not Substantial Evidence in the Administrative Record to Support It.

The Pharmacists' Brief cites the extensive evidence presented to DOM in opposition to the proposed Medicaid rule. In contrast, the administrative record contains no evidence to support DOM's decision. It is well-settled law in this State that an administrative decision not supported by substantial evidence is, by definition, arbitrary and capricious, and cannot stand. *See, e.g., Miss. State Dep't of Health v. Natchez Community Hosp.*, 743 So.2d 973, 978 (Miss. 1999). Further, an "administrative agency cannot be vested with arbitrary and uncontrolled discretion" by being allowed to dismiss overwhelming evidence which is contrary to its decision. *See Miss. State Dep't of Health v. Miss. Baptist Med. Ctr.*, 663 So.2d at 579.

At a minimum, DOM was obliged to present, as part of the administrative, rule-making proceedings, substantial evidence to show that the proposed Medicaid rule complied with statutory requirements, as set forth in the Mississippi Medicaid Law. In that regard, the most egregious action (or actually, inaction) of DOM was its complete failure to show that the new Medicaid reimbursement rule would comply with the Legislative mandate that "pharmacist providers be reimbursed for the reasonable costs of filling and dispensing prescriptions for Medicaid beneficiaries." *Miss. Code Ann.* § 43-13-117(9)(b). The substantial and undisputed evidence in the administrative record proves that Mississippi pharmacies will **not** be reimbursed their reasonable costs of filling and dispensing prescriptions for Medicaid beneficiaries, if the new rule is adopted. Based on the state of this administrative record, there is no factual or legal basis for any court to conclude that DOM, in promulgating the new rule, fulfilled its statutory obligation to insure that pharmacies are paid their reasonable costs. Consequently, DOM's decision to adopt the rule, in the complete absence of substantial evidence to support it, is arbitrary and capricious under the standards announced by this Court.

C. The Chancellor Thoroughly Heard and Considered Arguments of All Counsel in Rendering His Opinion.

DOM contends that the lower court "ruled before being apprised of the Division's basis for its interpretation" of the proposed rule. *DOM's Brief* at p.5. According to DOM, the Chancellor decided this case without allowing DOM to submit a brief on the merits, as provided in Local Rule 25, and the court's scheduling order. In effect, DOM is suggesting that the Chancellor was not fully informed before rendering his decision.

The record, however, shows that the Chancellor heard extensive arguments from all counsel on the issues presented. On June 9, 2008, the Chancellor conducted a lengthy hearing on certain preliminary matters. *R. Vol.* 15. During the course of this proceeding, the Chancellor was fully apprised of the issues in the case, and the parties' respective positions. *Id.* In addition, the pleadings filed by all parties addressed, in significant detail, the legal issues involved and the arguments and positions of the Plaintiffs and DOM. *R.Vol.1 and 2.* The Chancellor's Opinion itself reflects that the lower court was fully informed and well-educated on the issues presented.

Moreover, it should be noted that Local Rule 25 merely sets forth a standard briefing process for Chancery Court appeals. It is within the inherent authority of a court to rule on the merits of a case, when the court has determined that the legal arguments have been adequately presented by the parties. Rule 78 of the Mississippi Rules of Civil Procedure allows judges to have considerable discretion in the advancement, conduct and disposition of civil actions. In this instance, the Court correctly determined that DOM's violation of the Mississippi Medicaid Law was so clear and fundamental that additional briefing was not required. All parties, including DOM, presented detailed written and oral arguments to the Court on several occasions. The Court, having heard and considered these arguments, properly exercised its judicial discretion in deciding the case in an expeditious manner, particularly considering the significant financial

consequences which would have continued to be suffered by Mississippi pharmacies if the illegal rule were allowed to continue in effect.

III. CONCLUSION

On the basis of the arguments and authorities set forth in this Brief, and in the brief submitted by the Pharmacists, NACDS, Walgreens and Fred's respectfully request this Court to affirm the Final Judgment of the Chancery Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF CHAIN DRUG STORES, WALGREEN CO. AND FRED'S STORES OF TENNESSEE, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellees to:

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DATED: May 22, 2009.

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