

IN THE SUPREME COURT OF MISSISSIPPI

CITY OF CLEVELAND

APPELLANT

V.

NO. 2010-CA-00971

MID-SOUTH ASSOCIATES, LLC

APPELLEE

APPEAL FROM THE DECISION OF THE  
DESOTO CHANCERY COURT

**BRIEF OF THE APPELLEE**

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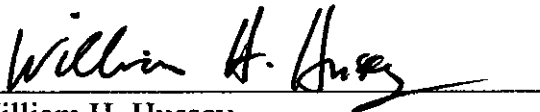
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## CERTIFICATE OF INTERESTED PERSONS

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 disqualifications or recusal.

1. Mid-South Associates, LLC, Appellee;
2. John L. Maxey II, Esq. and William H. Hussey, Esq. Maxey Wann PLLC, Jackson, Mississippi, attorneys for Mid-South Associates, LLC;
3. Malenda Harris Meacham, Esq., Hernando, Mississippi, attorney for Appellee, Mid-South Associates, LLC;
4. Thomas L. Kirkland, Jr. Esq., and Andy Lowry, Esq., Copeland, Cook, Taylor and Bush, P.A., attorneys for City of Cleveland, Mississippi;
5. The Mississippi State Department of Health (affected Party);
6. The Honorable Vicki Cobb, Chancellor; and
7. City of Cleveland, Mississippi (Appellant).

Dated this the 3<sup>rd</sup> day of November, 2010.

  
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William H. Hussey  
Counsel for Mid-South Associates, LLC

## TABLE OF CONTENTS

	<b>Page</b>
Certificate of Interested Persons.....	i
Table of Contents.....	ii
Table of Authorities.....	iv
Statement of the Case.....	1
I.    Course of Proceedings Below.....	1
II.   Relevant Facts.....	2
Summary of the Argument.....	6
Argument.....	7
I.    The DeSoto County Chancery Court Had No Jurisdiction to Make an Award of Attorney’s Fees in Favor of the City of Cleveland Following the Court of Appeals Reversal and Rendering of the Final Judgment of the Chancery Court which Reinstated the Department CON Final Order.....	7
A. <i>Like the jurisdiction of the Supreme Court to hear any                 appeal, the jurisdiction of the Chancery Court to hear                 a CON appeal and/or make an award of attorney’s fees                 in a CON appeal is granted, and limited, by statute.....</i>	<i>7</i>
B. <i>The DeSoto County Chancery Court rendered its final                 judgment in the CON appeal brought by Mid-South and                 its jurisdiction ended when the City of Cleveland perfected                 its appeal of that final judgment to this Court.....</i>	<i>11</i>
C. <i>The Court of Appeals opinion reversed and rendered the                 final judgment of the Chancery Court, reinstated the                 Department CON final order, and conferred no remand                 jurisdiction upon the Chancery Court to consider any                 issue between the parties.....</i>	<i>13</i>

D.	<i>The Chancellor found that any question of whether the statute that authorizes attorney's fees in a CON appeal mandated such fees on the facts attendant this case was waived when the City of Cleveland failed to raise the issue in its appeal and the Court of Appeals reversed and rendered the final judgment of the Chancery Court without remand.....</i>	14.
II.	<b>The Statute Authorizing the Award of Attorney's Fees in Certain CON Appeals is Clear and Unambiguous.....</b>	17
A.	<i>The Chancellor found the clear language of Miss. Code Ann. §41-7-201 inapplicable to the facts of this case, obviating any need to look beyond the statutory text to determine its meaning in application to the case at hand.....</i>	17
B.	<i>The Best Evidence of the Legislature's Intent with Regard to an Award of Attorney's Fees is the statutory text itself. The text of the statute suggests that the Supreme Court has the duty to remand for an award of attorney's fees if any fees are intended to be awarded when the Supreme Court affirms the Department final order.....</i>	20
C.	<i>The Chancellor's interpretation of the statute, suggesting a duty on the part of the Supreme Court to remand the case for a determination of fees if warranted in the case, is a reasonable interpretation consistent with the statutory text.....</i>	21
	<b>Conclusion.....</b>	24
	<b>Certificate of Service.....</b>	26

## TABLE OF AUTHORITIES

Page

### Cases:

<i>Bellsouth Telecommunications, Inc. v. Mississippi Public Service Com'n</i> , 18 So.3d 199, 203 (Miss. 2009).....	19
<i>Laurel Yamaha, Inc., v. Freeman</i> , 956 So.2d 897 (Miss. 2007).....	20
<i>Martin v. Motors Ins. Corp.</i> , 68 So.2d 869.....	22
<i>McNeil v. Hester</i> , 753 So.2d 1057, 1075 (Miss. 2000).....	12, 13
<i>Mississippi Department of Wildlife Fisheries and Parks v. Mississippi Wildlife Officers' Association, Inc.</i> , 740 So.2d 925, 937 (Miss. 1999).....	7
<i>Miss. Dep't of Health v. Mid-South Associates, LLC</i> , 25 So.3d 358 (Miss. App. 2009).....	1, 4, 13
<i>Mississippi State University v. People for Ethical Treatment of Animals, Inc.</i> , 992 So.2d 595, 606 (Miss. 2008).....	20
<i>Penrod Drilling Co. v. Bounds</i> , 433 So.2d 916, 922 (Miss. 1983).....	7
<i>Rosson v. McFarland</i> , 933 So.2d 969, 971 (Miss. 2006).....	7
<i>Tanner v. State</i> , 20 So.3d 764 (Miss. App. 2009).....	16
<i>Walters v. Walters</i> , 956 So.2d 1050, 1053 (Miss. App. 2007).....	12

### Statutes and other authorities:

Miss. Code Ann. § 41-7-201.....	passim
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## **STATEMENT OF THE CASE**

### **I. Course of Proceedings Below**

Pursuant to the right of appeal granted in Miss. Code Ann. § 41-7-201(2), Mid-South Associates, LLC (“Mid-South”) appealed to the DeSoto County Chancery Court from a final order of the Mississippi State Department of Health (“Department”) that denied Mid-South a Certificate of Need (CON) to relocate its nursing home from Cleveland, Mississippi to DeSoto County. The chancery court set aside the Department CON final order and granted Mid-South a CON for its proposed relocation.

The City of Cleveland (the “City”), a party to the chancery appeal along with the Department, appealed, and the Mississippi Court of Appeals (“Court of Appeals”) thereafter reversed and rendered the chancery court final judgment and reinstated the Department CON final order, taxing costs in the Court of Appeals to Mid-South. *Miss. Dep’t of Health v. Mid-South Associates, LLC*, 25 So.3d 358 (Miss. App. 2009). Satisfied with the judgment of the Court of Appeals to reinstate the Department CON final order, the City of Cleveland waited until it was evident that mandate would issue and then filed a post-mandate motion in the DeSoto County Chancery Court seeking an award of its attorney’s fees. (Br. 16).<sup>1</sup> Upon hearing, the chancery court denied the City’s motion, incorporating its bench ruling in its Order from which the City now appeals to this Court. (R). 96-97).

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<sup>1</sup> Citations to “Br. \_\_\_\_” are to the Brief for Appellant; citations to “Tr. \_\_\_\_” are to the hearing transcript; citations to “R.E. \_\_\_\_” are to the Record Excerpts for Appellant; citations to “R. \_\_\_\_” are to the record.

## II. Relevant Facts

Mississippi law, through statute, provides the right of appeal of Department CON final orders; the legislative language specifies the procedure to be followed in appealing CON final orders, supplies the jurisdiction for the chancery court to hear the administrative agency appeal, specifies the nature of CON appeals for which costs, fees, expenses and attorney's fees may or shall be awarded by the chancery court (and when), and supplies jurisdiction for appeals of chancery court judgments to the Supreme Court. Miss. Code Ann. § 41-7-201.

Subsection (1) of the referenced statute provides for appeals of CON final orders for home health agencies but articulates no provision for the award of attorney's fees in any scenario. Subsection (2) of the statute provides for appeals of CON final orders pertaining to health care facilities such as was sought by Mid-South; paragraph (c) of subsection (2) provides for remand to the chancery court for an award of costs, fees, expenses and attorney's fees when the chancery court fails to render a decision within the prescribed period articulated in the statute (and the Supreme Court ultimately affirms the administrative agency decision) and paragraph (f) of subsection (2) provides for an award of costs, fees, expenses and attorney's fees should the chancery court affirm the Department final order.

In providing for the award of attorney's fees where the chancery court fails to render a timely decision, the Legislature instructs that a Department CON final order is "deemed affirmed" by the failure of a chancery court to act thereon and provides

jurisdiction for the Supreme Court to then review the Department final order, *if* such appeal of the statutorily-deemed affirmed Department final order is undertaken. Miss. Code Ann. § 41-7-201(2)(c). *If* such appeal to the Supreme Court is in fact then pursued, the Legislature instructs the Supreme Court to remand the case to the chancery court for an award of costs, fees, expenses and attorney's fees *should* the Supreme Court affirm the Department final order so appealed. *Id.*

If the chancery court acts upon the appeal within the time prescribed and renders a final judgment which affirms the Department final order, the Legislature instructs the chancery court to award, as part of its final judgment, the costs, fees, expenses and attorney's fees incurred in defense of the Department final order. Miss. Code Ann. § 41-7-201(2)(f). For a party aggrieved by a final judgment of the chancery court, the Legislature supplies jurisdiction for appeal to the Supreme Court. Miss. Code Ann. § 41-7-201(2)(g); paragraph (g) of subsection (2) articulates no express provision for remand to the chancery court for an award of costs, fees, expenses and attorney's fees.

In the underlying CON matter that brings the referenced appeal statute before this Court on appeal of the DeSoto County Chancellor's order denying the City of Cleveland's motion for statutory award of attorney's fees and costs, the chancery court (1) acted within the time prescribed by Miss. Code Ann. § 41-7-201(2)(c) for rendering a decision, and (2) vacated the Department final order. Thus, once the chancery court timely rendered a decision, the statutory condition in paragraph (c) of subsection (2) that would allow or instruct the Supreme Court to remand, upon its affirmance of a statutorily-



deemed affirmed decision could not be satisfied and was inapplicable to the specific facts of this case. The City of Cleveland prosecuted an appeal of the chancery court's final judgment vacating the Department final order, pursuant to right of appeal granted in Miss. Code Ann. § 41-7-201(2)(g), and ultimately persuaded the Court of Appeals to reverse and render the chancery court final judgment in accordance with its statutory jurisdiction; the Court of Appeals expressly reinstated the underlying Department CON final order that denied Mid-South a CON, taxing costs in that court to Mid-South. Paragraph (g) of subsection (2) provided no instruction or authority for the Supreme Court/Court of Appeals to remand to the chancery court for an award of the costs, fees, expenses incurred in the prosecution of an appeal from a timely rendered decision of the chancery court, and, in any event the Court of Appeals did not so remand the case. *Mid-South*, 25 So.3d 358 at 364.

The City of Cleveland raised no issue of its entitlement to fees in its appeal of the underlying chancery court final judgment to the Court of Appeals, neither asking for remand to the chancery court to consider same, nor seeking rehearing in the event the City felt the Court of Appeals should have so remanded the case. (R). 58).

Post-mandate, the City of Cleveland moved the DeSoto County Chancery Court to award its attorney's fees incurred in the underlying matter where that court's judgment had been reversed and rendered by the Court of Appeals (R). 18). The DeSoto County Chancery Court denied the relief sought, finding, *inter alia*, it had no jurisdiction to make the award, no remand with instructions to make such factual determination having been

made by the Court of Appeals, and no remand jurisdiction having been conferred upon the chancery court (Tr. 29-31)(R.E. 3); finding the Court of Appeals assessed court costs to Mid-South in its opinion (Tr.31)(R.E. 3); finding the question of whether the chancery court was or should have been instructed to make an award of attorney's fees was waived when not raised before the Court of Appeals and otherwise not considered there (Tr. 30)(R.E. 3); and finding the subject statutory language "very clear" and its provisions regarding the mandatory award of attorney's fees inapplicable to the facts of the underlying case wherein it had timely rendered a decision vacating a Department final order (Tr. 26)(R.E. 3).

Aggrieved, the City of Cleveland perfected the instant appeal of the chancery court's order denying its fees because it feels the chancery court erred in failing to add language to the statute to the effect that all ultimately unsuccessful appeals of Department CON final orders result in the vesting of a right to attorney's fees under the applicable statute (Br. 14, 15) –despite the fact that the referenced appeal statute articulates certain CON appeal scenarios where *no* award of attorney's fees is available, and articulates other, clearly limited scenarios where such awards *are* available. Miss. Code Ann. §41-7-201(2)(none of which were found by the chancellor to apply to the facts of this case. (Tr. 26)(R.E. 3)).

## **SUMMARY OF THE ARGUMENT**

Attorney's fees are not awarded in Mississippi unless authorized by statute or other authority. Jurisdiction of a court to hear an appeal is also statutory. Below, the City of Cleveland made a post-mandate motion in the chancery court seeking the attorney's fees it feels it is entitled to under statute. Upon hearing, the chancery court found it had no jurisdiction to award the City statutory attorney's fees after its jurisdiction had been transferred to the Court of Appeals, where that court reversed and rendered that chancery final judgment without remand, taxing Court of Appeals costs to Mid-South, and issuing its judgment to reinstate the Department CON final order the chancery court had set aside.

The City argues the result of the chancery court's denial of its motion works an absurdity in the operation of the statute and hamstring the intent of the Legislature, but conceded at hearing the statute implies a duty for the Supreme Court to remand to the chancery court if fees are to be determined. The chancery court found the language of Miss. Code. Ann § 41-7-201 clear in mandating attorney's fees in certain CON appeal scenarios, none of which the court found applicable to the facts of this case.

The court found the language of the statute clear, obviating any need to look beyond the statutory language to determine its meaning or any occasion to resort statutory construction principles to infer legislative intent- the text of the statute being the best evidence of the legislative intent embodied therein.

The court found the City waived the consideration of whether it was entitled to its fees when it failed to raise the issue before the Court of Appeals.

## ARGUMENT

- I. The DeSoto County Chancery Court Had No Jurisdiction to Make an Award of Attorney's Fees in Favor of the City of Cleveland Following the Court of Appeals Reversal and Rendering of the Final Judgment of the Chancery Court which Reinstated the Department CON Final Order.

- A. *Like the jurisdiction of the Supreme Court to hear any appeal, the jurisdiction of the Chancery Court to hear a CON appeal and/or make an award of attorney's fees in a CON appeal is granted, and limited, by statute.*

“Jurisdiction’ is a broad term, and has been defined in countless ways by courts. Generally speaking, it means the power or authority of a court to hear and decide a case.” *Penrod Drilling Co. v. Bounds*, 433 So.2d 916, 922 (Miss. 1983). “[A]n appeal is not a matter of right but is subject to the statutory provisions, and the basic requirement is that appeals are only proper from a final judgment.” *Rosson v. McFarland*, 933 So.2d 969, 971 (Miss. 2006). This matter comes before this Court on appeal of a final judgment of the Chancery Court of DeSoto County to deny the motion filed by the City of Cleveland seeking an award of attorney’s fees pursuant to Miss. Code Ann. §41-7-201, the statute that authorizes and governs appeals of the administrative decisions of the Mississippi State Department of Health pertaining to Certificate of Need (CON) matters.

It is settled law in Mississippi that attorney’s fees may not be awarded absent statutory or other authority. *Mississippi Department of Wildlife Fisheries and Parks v. Mississippi Wildlife Officers’ Association, Inc.*, 740 So.2d 925, 937 (Miss. 1999). The referenced statute authorizing attorney’s fees in certain CON appeals, Miss. Code Ann. § 41-7-201, articulates and expresses the intent of the Legislature and instructs the courts

and parties, in relevant parts, with regard to the various and necessary processes, procedures and remedies attendant an appeal of an administrative decision of the State Department of Health, including the authority of the chancery court to determine and award attorney's fees. That statute articulates the procedure to be followed by a party aggrieved by a Department CON final order, confers jurisdiction upon the chancery court to hear appeals of Department CON final orders, specifies the nature of CON appeals for which costs, fees, expenses and attorney's fees may or shall be awarded by the chancery court (and when), and confers jurisdiction upon the Supreme Court to hear appeals of chancery court final judgments rendered thereunder. *Id.*

Subsection (1) of the referenced statute provides for appeals of CON final orders pertaining to home health agencies to the chancery court but articulates no provision for the award of attorney's fees. Subsection (2) of the statute provides jurisdiction to the chancery court to hear appeals of CON final orders pertaining to health care facilities such as was sought by Mid-South below, and articulates three situations in which the chancery court either has the discretion or obligation to award "costs, fees, reasonable expenses and attorney's fees." Miss. Code Ann. §41-7-201(2). That statutory authority for the chancery court to determine the merits of Mid-South's underlying CON appeal and those situations expressing the intent of the Legislature with regard to the award of attorney's fees in such an appeal are articulated as follows:

The chancery court may dispose of the appeal in termtime or vacation and may sustain or dismiss the appeal, modify or vacate the order complained of in whole or part and **may make an award of costs, fees, expenses and**

**attorney's fees, as the case may be; ...The court, as part of the final order, shall make an award of costs, fees, reasonable expenses and attorney's fees... should the court affirm the order of the State Department of Health.**

Miss. Code Ann. §41-7-201(2)(f)(emphasis added).

**The chancery court shall give preference to any such appeal from a final order by the State Department of Health in a certificate of need proceeding, and shall render a final order regarding such appeal no later than one hundred twenty (120) days from the date of the final order by the State Department of Health. If the chancery court has not rendered a final order within this 120-day period, then the final order of the State Department of Health shall be deemed to have been affirmed by the chancery court, and any party to the appeal shall have the right to appeal from the chancery court to the Supreme Court on the record certified by the State Department of Health as otherwise provided in paragraph (g) of this subsection. In the event the chancery court has not rendered a final order within the 120-day period and an appeal is made to the Supreme Court as provided herein, the Supreme Court shall remand the case to the chancery court to make an award of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) should the Supreme Court affirm the order of the State Department of Health.**

Miss. Code Ann. §41-7-201(2)(c)(emphasis added). Thus, attorney's fees *may* be awarded by the chancery court to any party to an appeal of a CON final order as part of the chancery court's final judgment (unless the appeal pertains to a CON for a home health agency for which no award of attorney's fees is authorized); attorney's fees shall be awarded in favor of appellee as part of the chancery court's final judgment should the court affirm the order of the State Department of Health, and attorney's fees shall be awarded by the chancery court on remand from the Supreme Court should the Supreme Court affirm the order of the State Department of Health. Miss. Code Ann. §41-7-201.

The same statute confers jurisdiction upon the Supreme Court to hear appeals of any party aggrieved by the chancery court's final judgment on the CON appeal first heard there pursuant to the statute. In separate paragraphs, the statute provides for appeals from the chancery court to the Supreme Court as follows:

Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

Miss. Code Ann. §41-7-201(1)(e). This paragraph of subsection (1) of the statute confers jurisdiction for the Supreme Court to hear an appeal of a final judgment of the chancery court on a Department CON final order pertaining to a home health agency, and, notably, provides no authority or instruction to remand to the chancery court for a determination or award of attorney's fees.

If the chancery court timely renders a final judgment in a CON appeal of a Department final order pertaining to a CON for a health care facility (such as was sought by Mid-South), the Legislature instructs, likewise:

Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

Miss. Code Ann. §41-7-201(2)(f). This is the statutory provision that afforded the City of Cleveland the right to appeal the final judgment of the DeSoto County Chancery Court which vacated the Department final order denying Mid-South a certificate of need to relocate its nursing home from Cleveland to DeSoto County. Notably, this paragraph, like paragraph (e) of subsection (1) of the statute, articulates no express authority or

instruction to the Supreme Court for remand of the case to the chancery court to make a determination or award of attorney's fees.

In a separate paragraph, the Legislature does articulate the express instruction to the Supreme Court to remand CON appeal cases to the chancery court to make an award of "costs, fees, reasonable expenses and attorney's fees" in those cases where the Supreme Court affirms a statutorily-deemed affirmed Department CON final order (so deemed because of a chancery court's failure to render a final judgment within the prescribed 120-day period). Miss. Code Ann. §41-7-201(2)(c).

In the appeal now before this Court, it is undisputed that the DeSoto County Chancery Court rendered its final judgment within the prescribed 120-day period. Therefore, the remand provision of paragraph (c) of subsection (2) of the statute, *supra*, did not expressly apply to the facts attendant the appeal proceedings in that court; that chancery court timely rendered its final judgment to set aside the Department final order and made no award of attorney's fees to any party, although it was expressly provided authority in the subject statute to do so. Miss. Code Ann. §41-7-201(2)(f). The City of Cleveland, pursuant to paragraph (g) of subsection (2), perfected its appeal to this Court from that final judgment of the chancery court.

*B. The DeSoto County Chancery Court rendered its final judgment in the CON appeal brought by Mid-South and its jurisdiction ended when the City of Cleveland perfected its appeal of that final judgment to this Court.*



This Court's statement in *Rosson*, *supra*, expresses the general condition for all appeals; any appeal is of right granted by statute and is necessarily a review of a final judgment of the court below. *Id.*, 933 So.2d 969. "A final, appealable, judgment is one that adjudicates the merits of the controversy which settles all issues as to all parties and requires no further action by the lower court." *Walters v. Walters*, 956 So.2d 1050, 1053 (Miss. App. 2007). The decision rendered by the DeSoto County Chancery Court was, without question, the final judgment of that court, disposing of the entirety of issues before it. The chancery court set aside the Department final order that denied Mid-South a certificate of need and made no award of attorney's fees to any party.

The City of Cleveland timely perfected an appeal of that final judgment to this Court pursuant to the authorizing statute, Miss. Code Ann. §41-7-201(2)(g), conceding the finality of the chancery court judgment and transfer of jurisdiction to the Supreme Court (ultimately deflected to the Court of Appeals)<sup>2</sup>. Upon its perfection of an appeal, the jurisdiction of the DeSoto County Chancery Court ended; the court's jurisdiction was transferred to the Supreme Court during the pendency of the appeal, as is the settled law of Mississippi: "This Court has held that the filing of a notice of appeal transfers jurisdiction of a matter from the lower court to this Court, and that the lower court is thus

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<sup>2</sup> After the chancery court set aside the Department final order denying Mid-South a certificate of need, Mid-South sought release from its appeal bond posted for the chancery appeal and was opposed by the City of Cleveland arguing the chancery court was without jurisdiction to act and admonishing Mid-South to take its questions about the appeal bond to the Supreme Court pursuant to *McNeil v. Hester*, 753 So.2d 1057, 1075, (Miss. 2000) (R.E. 1).

without the authority to amend, modify, or reconsider its judgment.” *McNeil v. Hester*, 753 So.2d 1057, 1075 (Miss. 2000). In consideration of the City of Cleveland’s motion for fees filed in the DeSoto County Chancery Court that immediately preceded the instant appeal, the chancellor found accordingly on the issue of its jurisdiction to make a determination or award of fees:

[The Court of Appeals] did not remand that back to me, and so, I don’t think I have any jurisdiction to make an award of attorney’s fees.

...I think my jurisdiction ended once I made my judgment in January ...I think my jurisdiction ended then. It went on to the Appellate Court. I don’t have any jurisdiction during the time it’s, you know, those issues are before the Appellate Court.

(Tr. 29-30)(R.E. 3). Thus, it is clear that the jurisdiction of the DeSoto County Chancery Court ended when its final judgment on the merits was appealed to this Court. How then, could the chancery court have jurisdiction to make an award of attorney’s fees, or expand or modify its original judgment in any fashion?

C. *The Court of Appeals opinion reversed and rendered the final judgment of the Chancery Court, reinstated the Department CON final order, and conferred no remand jurisdiction upon the Chancery Court to consider any issue between the parties.*

In the instant case before the DeSoto County Chancery Court, the chancellor found the Court of Appeals had reversed and rendered that court’s final judgment on the Department CON final order, reinstated the Department’s final order, and assessed costs in the appellate court to Mid-South. *Miss. Dep’t of Health v. Mid-South Associates, LLC*, 25 So.3d 358 (Miss. App. 2009). The chancellor observed:

And if you'll notice the ruling of the Court of Appeals, Paragraph –the very last paragraph, 22, the part that's in bold right before –right before they sign off on it, it says the judgment of the DeSoto County Court is reversed and rendered. They did not remand it to me; they rendered it to me.

And it also – the idea or the issue of the costs of the appeal is addressed by the Appellate Court. It said, all costs of this appeal are assessed to the appellee. That, usually –a statement to that effect about who the cost of the appeal are going to be addressed to is always the last line, usually, in their decisions. And usually, what I think they mean by that is just the costs in their court. If they do intend for attorney's fees to be awarded or not awarded, that is addressed in their decision; and they didn't make –they didn't address that.

They did not remand it to me, and so, I don't think I have any jurisdiction to make an award of attorney's fees. I don't know if – I mean because it was addressed by addressing the fact that the costs of appeal are assessed to the appellee, I think they addressed the issue by doing that.

I think [the Court of Appeals] addressed [costs] by stating that they said the costs of appeal would be assessed to appellee. They did not say anything about remanding it for me to determine the reasonableness of any other fees or whether those fees would be assessed. So I am denying your request.

(Tr. 28-29, 31)(R.E. 3). The Chancellor found the Court of Appeals conferred no remand jurisdiction upon the chancery court to make an award of fees or to make any other factual determination and yet addressed the issue of costs of the appeal in its decision. The chancellor went on to find that, if the City of Cleveland wanted to bring up the issue of assessment of attorney's fees, it should have brought it up during the appeal process. *Id.* (Tr. 29)(R.E. 3), as is discussed further below.

*D. The Chancellor found that any question of whether the statute that authorizes attorney's fees in a CON appeal mandated such fees on the facts attendant this case was waived when the City of Cleveland failed to raise the issue in its appeal and the Court of Appeals*

*reversed and rendered the final judgment of the Chancery Court without remand.*

The City of Cleveland raised no issue of its entitlement to attorney's fees in its appeal of the underlying final judgment of the chancery court in the Court of Appeals, neither asking for remand to the chancery court to consider the issue, nor seeking rehearing in the event the City felt the Court of Appeals should have so remanded the case. Thus, the chancellor found the issue had been waived:

**...And I think most of the time, the Appellate Courts, their rulings are, if its not addressed on appeal, then that issue is waived if it's not addressed. So it was not appropriate, I guess, to address it with this Court when I made my ruling, but I do believe that if you wanted to bring the issue up, it should have been brought up during the appeal process.**

**...But because it was not brought up on appeal, I think it was waived. I think my jurisdiction ended once I made my judgment in January... I think my jurisdiction ended then. It went on to the Appellate Court. I don't have any jurisdiction during the time it's, you know, those issues are before the Appellate Court. Because it was not brought up on appeal, I think it was waived.**

And then the Appellate Court has the obligation under the statute, I think, and under the inference that I would make, that if they're going to –if they want the Chancery Court to look at it further and to make a ruling with regard to the reasonableness of fees and the assessment of court costs, attorney's fees, or any other fees other than the ones that they made a ruling on, **then they would have remanded it back to me.**

And because they did not do it, and they did address in their little final statement **that they reversed and rendered, not reversed and remanded, so that did not give the jurisdiction back to me.** That just said, this is over. We've entered our final decision about it. **The attorney's fees were not addressed.**

(T. 29-30)(R.E. 3)(emphasis added). Mississippi law is clear that issues not raised on appeal, or raised for the first time in appellant's reply brief, will not be considered by the Court. "We will not consider issues raised for the first time in appellant's reply brief." *Tanner v. State*, 20 So.3d 764 (Miss. App. 2009)(citing *Sanders v. State*, 678 So.2d 663)(Miss. 1996)).

The City of Cleveland argues that it doesn't matter that it failed to raise the issue in its appeal of the chancery court judgment because the City's "entitlement" to its fees did not vest until the mandate issued from the Court of Appeals reversing the chancery court's judgment. At that point, the City argues, "the award by the chancery court became mandatory." (Br. 15). Counsel for the City of Cleveland conceded at the hearing preceding this appeal, however, that, following an appeal of a chancery judgment to the Supreme Court, the award of fees is to be determined by the chancery court upon *remand*: "[A]s it [is] implied in Subsection C [of Miss. Code Ann. § 41-7-201(2)], *that's something to be handled by the chief fact-finder upon remand*. (Tr. 24)(R.E. 3). Thus, as the City of Cleveland has argued below, and in accordance with the chancery court's ruling now before this Court, *supra*, the chancery court had no jurisdiction to make any award while the appeal of its judgment was pending before the Court of Appeals, and was conferred no jurisdiction upon that Court's reversal and *rendering* of its judgment. The City of Cleveland simply failed to raise the issue in its appeal and it is clear the Court of Appeals never considered it. The Court of Appeals did not remand the case, as counsel

for the City concedes it believes is the implied duty of that Court pursuant to the relevant statute.

When the Court of Appeals reversed and rendered the final judgment of the chancery court below, it assessed “costs” of the appeal in that court to Mid-South but conferred no remand jurisdiction upon the chancery court to consider any fact issue such as would be required in a determination of attorney’s fees available to the City of Cleveland under Miss. Code Ann. §41-7-201. Because no jurisdiction was remanded to the chancery court and because the City failed to raise the issue of attorney’s fees in its appeal (or move for rehearing), the chancery court was either without power to grant the relief now sought by the City, or the issue was waived. Therefore, it is not even necessary for this Court to consider whether the relevant statute regarding attorney’s fees applies to the facts of this case and this Court should affirm the decision of the chancery court to deny the City’s motion for statutory award of fees and expenses.

Notwithstanding these reasons to deny the relief sought by the City of Cleveland herein on jurisdictional or waiver grounds, the chancellor below found the relevant statute clearly inapplicable to the facts of this case.

II. The Statute Authorizing the Award of Attorney’s Fees in Certain CON Appeals is Clear and Unambiguous.

A. *The Chancellor found the clear language of Miss. Code Ann. §41-7-201 inapplicable to the facts of this case, obviating any need to look beyond the statutory text to determine its meaning in application to the case at hand.*

In Department CON final order appeals, the condition expressed for the mandatory award of attorney's fees sought by the City of Cleveland is expressed in the statute in the following two paragraphs, below. First:

**In the event the chancery court has not rendered a final order within the 120-day period** and an appeal is made to the Supreme Court as provided herein, the **Supreme Court shall remand** the case to the chancery court to make an award of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) **should the Supreme Court affirm the order of the State Department of Health.**

Miss. Code Ann. § 41-7-201(2)(c)(emphasis added). The second subsection of the statute which provides instructions for the chancery court with regard to a mandatory award of fees mandates, in relevant part:

The court, as part of the final order, **shall make an award** of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) **should the court affirm the order of the State Department of Health.**

Miss. Code Ann. §41-7-201(2)(f)(emphasis added). Neither of the preceding paragraphs from the statute applies to the facts of this case. The chancellor found accordingly that the clear language in the relevant sections of the statute does not address the particular instance that took place in that court when the Department's CON final order was appealed there and, finding the statutory language "very clear," found no occasion to look beyond the statutory text to discern its intended application to the facts before that court:

This court is not going to try to make new law. I'm going to try to follow the statute as I see it, as I read it, as I interpret it. **The clear language of this statute,** I don't intend to try to determine what the legislative intent was or impute some new meaning to the statute. I think it's **very clear that this statute does not**

**address the particular instance that we had here in my court where this Court reviewed the State Department of Health's decision, and I found or reversed their decision.**

Yes, the statute clearly indicates what would happen if I had not reversed their decision.. that I shall make an award of cost, fees, reasonable expenses, and attorney's fees... **should I have affirmed their decision. That's what the statute says...**

**However, that is not what happened here.** It also, up in Subsection C, the part that Mr. Hussey read, **in the event that I did not make a ruling within the 120-day period, and an appeal is made to the Supreme Court, the Supreme Court shall remand back to the Chancery Court to make that award... That didn't happen.**

**I did rule within 120 days, and I did rule against– I mean, I did reverse the state department's ruling. So this doesn't fall, you know, within either one of those situations.**

T. 26 (R.E. 3) (emphasis added). The chancellor observed that the language of the statute at issue was clear and necessitated no occasion to go beyond the statutory language to discern legislative intent or impute new meaning beyond what is stated plainly in the statute. Such is the settled law of Mississippi. "When the language used by the legislature is plain and unambiguous and the statute conveys a clear and definite meaning, the court will have no occasion to resort to the rules of statutory interpretation." *Bellsouth Telecommunications, Inc. v. Mississippi Public Service Com'n*, 18 So.3d 199, 203 (Miss. 2009). "In considering a statute passed by the legislature, the first question a court should decide is whether the statute is ambiguous; if it is not ambiguous, the court should simply apply the statute according to its plain meaning and should not use principles of statutory



construction.” *Mississippi State University v. People for Ethical Treatment of Animals, Inc.*, 992 So.2d 595, 606 (Miss. 2008).

B. *The Best Evidence of the Legislature’s Intent with Regard to an Award of Attorney’s Fees is the statutory text itself. The text of the statute suggests that the Supreme Court has the duty to remand for an award of attorney’s fees if any fees are intended to be awarded when the Supreme Court affirms the Department final order.*

“Whatever the Legislature says in the text of the statute is considered the best evidence of the legislative intent.” *Laurel Yamaha, Inc., v. Freeman*, 956 So.2d 897 (Miss. 2007). The chancellor stated below:

I did rule within 120 days, and I did rule against— I mean, I did reverse the state department’s ruling. So this doesn’t fall, you know, within either one of those situations. However, the thing that I think is— if I am going to draw any analogy or I’m going to draw any inference from reading these two subsections together, the inference that I would draw from that is that the **Supreme Court or the Appellate Court, which happened to be the Court of Appeals... but that if the Appellate Court intended for the Chancery Court to make an award of costs, attorney’s fees, or expenses, then they shall remand the case to me, to this Court, to make that decision...**

And the statute— although the statute does not exactly address what happens in this situation, I think a reading of Subsection C indicates that if the Appellate Court intended for the Chancery Court to award an attorney’s fee or to make an award of attorney’s fee, **then it is incumbent upon them to remand that issue back to me.**

And if you’ll notice the ruling of the Court of Appeals, Paragraph— the very last paragraph, 22, the part that’s in bold right before the— right before they sign off on it, it says the judgment of the DeSoto County Chancery Court is reversed and rendered. **They did not remand it to me; they rendered it to me.**

T. 27-29 (R.E. 3)(emphasis added).

The chancellor found that the two CON appeal scenarios specifically articulated in the statute providing for a mandatory award of fees were inapplicable to the facts of this case and found, further, that a reading of the two referenced sections of the statute together supports an inference that, upon the Court of Appeals review of the DeSoto County Chancery Court's final judgment, it was incumbent on the Court of Appeals to remand the case to the chancery court for any intended award of attorney's fees- as is clearly articulated by the Legislature in the instance where the chancery court fails to render a timely decision and the Supreme Court (or Court of Appeals) has occasion to hear the appeal of the then statutorily-deemed affirmance of the Department final order.

C. *The Chancellor's interpretation of the statute, suggesting a duty on the part of the Supreme Court to remand the case for a determination of fees if warranted in the case, is a reasonable interpretation consistent with the statutory text.*

The City of Cleveland claims in its brief that the intent of the Legislature is manifest that "[a]ttorney's fees are to be awarded where the final order of the Department is affirmed on appeal- regardless of what may transpire en route to that eventual affirmance." (Br. at 12). The statutory language instructing the Supreme Court (or Court of Appeals) to remand to the chancery court for a determination of attorney's fees is specifically addressed to the instance wherein the Supreme Court affirms a Department final order (after the chancery court has failed to render a timely decision). Miss Code Ann. §41-7-201(2)(c). The absence of such language instructing remand to the chancery court within paragraph (g) of the same subsection (2), if not dispositive of the issue,

supports the chancellor's interpretation that, when considering the statutory text in its entirety, it is incumbent upon the Supreme Court or Court of Appeals to remand the case to the chancery court if fees are to be awarded in cases where a chancery court decision to vacate a Department final order is reversed.

The City of Cleveland argues the Legislature manifestly intended to penalize "those who unsuccessfully challenge a CON final order" (Br. 10), and urges this Court to add language to the statute, concluding the "Legislature simply omitted to make its literal language conform with its evident intent" (*Id.*). Though the Court of Appeals *rendered* the chancery court judgment at issue and *reinstated* the Department final order, the City argues the result in that case was that the reversal of the chancery court judgment was the legal equivalent of an affirmance of the underlying Department final order. Citing *Martin v. Motors Ins. Corp*, 68 So.2d 869, the City suggests that "to reverse an intermediate reversal 'is in effect an affirmance' of the judgment or order from which the appeal was originally taken." (Br. 13). Thus, argues the City, "the decision of the Department was affirmed, and attorney's fees are properly to be awarded." (*Id.*). The *Martin* case, however, concerned a judgment of a county court in favor of a plaintiff to recover under an insurance policy. On appeal to the circuit court in that case, the county court judgment was reversed. Thereafter, the Supreme Court reversed the circuit court and held that the judgment of the county court awarding recovery under the policy was "in effect" affirmed.

Even under the theory espoused by the City in reliance upon *Martin*, the Court of Appeals opinion that announced the “reversal of a reversal” of the Department CON final order only *rendered* the decision that the Court of Appeals judged should have been made by the chancery court. However, the underlying Department final order awarded no fees to the City of Cleveland, nor did the chancery judgment appealed to this Court. Unlike the facts in *Martin*, no judgment awarding *anything* to the City of Cleveland was ever made by the Mississippi State Department of Health, the DeSoto County Chancery Court or the Court of Appeals of Mississippi (save the taxation of “costs” of the appeal in that court).

Thus, the “affirmance” of the Department CON final order *in this case* provided the City of Cleveland only with the satisfaction of having foiled the grant of a certificate of need allowing Mid-South to close its Cleveland facility and relocate to DeSoto County. The actual Court of Appeals’ opinion to reverse and render the final judgment of the DeSoto County Chancery Court expressly “reinstated” the underlying administrative decision of the Mississippi State Department of Health and denied Mid-South its certificate of need— an expressed ruling consistent with the original Department final order.

As is discussed herein, whether Miss. Code Ann. §41-7-201 provides for the award of attorney’s fees on the facts of this case, and whether the denial of the City’s motion for fees by the chancery court in this case proves to work an absurdity under the hypothetical scenarios painted by the City in its brief, *or not*, are questions that need not even be

considered by this Court in the instant appeal as the City failed to raise the issue in its underlying appeal. The DeSoto County Chancellor, in the decision now before this Court for review, found the issue was either waived by the City in its underlying appeal or was addressed by the Court of Appeals when it *reversed and rendered* the chancery court, taxed “costs” to Mid-South, and reinstated the Department order without remand to consider any issue inconsistent with that opinion.

### **CONCLUSION**

The City of Cleveland was successful in its efforts to deprive Mid-South of its right to risk its own capital to grow its business in an area of Mississippi with a documented need for Mid-South’s services. Even with no competing healthcare service of the City’s at stake in the underlying CON proceeding, the City proceeded under the appeal right afforded under statute and prevailed in its effort to reinstate the Department final order denying Mid-South’s CON –the Court of Appeals issued a judgment entirely consistent with that underlying Department final order. In its motion for attorney’s fees below, the City sought to gain something in addition to that it received from the Department final order –a bounty that is both unavailable under the application of the very same statute and outside of the DeSoto County Chancery Court’s jurisdiction to grant. The chancery court was correct in its interpretation of the whole of that statutory text to the facts of this case and it was proper for the court to deny the City’s motion.

The decision of the DeSoto County Chancery Court should be affirmed on the facts of this case.

Respectfully submitted, this the 3<sup>rd</sup> day of November, 2010.

Mid-South Associates, LLC

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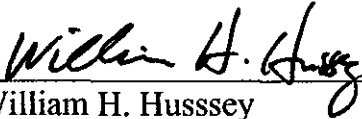
**CERTIFICATE OF SERVICE**

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:

The Honorable Vicki Cobb  
DeSoto County Chancery Court  
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So certified this the 3<sup>rd</sup> day of November, 2010.

  
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William H. Hussey