IN THE COURT OF APPEALS 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

REPLY BRIEF FOR APPELLANT

Oral Argument NOT Requested

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STATEMENT CONCERNING ORAL ARGUMENT

The issues in this case are relatively straightforward, and the City of Cleveland ("the City") believes that its briefs sufficiently set forth its arguments and authorities. The appellee, Mid-South Associates, LLC ("Mid-South"), has not complied with M.R.A.P. 34(b) (designation regarding oral argument on cover of brief), and has not stated any desire for oral argument as that rule would require if Mid-South were requesting it. Therefore, the City does not request oral argument in this case.

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REPLY ARGUMENT

Although Mid-South seems to find some tactical advantage in reversing the logical sequence of the issues raised by the City on appeal, we address them in our original order: whether the City has a statutory entitlement to seek attorney's fees is logically prior to the correct procedure for seeking them, since if there were no entitlement, the question of procedure would be moot. As this Court will see, Mid-South turns out to be at a loss for cogent argument on both issues.

I. Mid-South Does Not Deny That the Legislature's Intent Was to Award Attorney's Fees Wherever the Department's Order Is Affirmed on Appeal.

Mid-South essentially asks this Court not to decide the issue of whether the CON Law mandates the award of attorney's fees where the Department's order is reversed at the chancery level and reinstated on appeal. Leaving aside the lack of merit of Mid-South's arguments, that would also leave the Bar without much-needed guidance on this issue. This Court should reach the question of whether the Legislature intended such an award, and answer that question in the affirmative.

A. Because the Statute Is Silent, Interpretation Is Proper and Necessary.

Mid-South's first argument is rather peculiar, stating not that § 41-7-201(2)(f) is "clear," but that *the chancellor found* it to be clear. Mid-South[1] at 17 (heading), 18. We are then cited to case law on ambiguity in statutes, on the notion that if the statute is

[1]This is how we will cite to Mid-South's Brief for the Appellee.

"clear" and not "ambiguous," then no statutory interpretation is needed. Mid-South at 19-20.

But "ambiguity" is not the only criterion for whether a statute requires judicial interpretation. "[S]tatutory interpretation is appropriate if a statute is ambiguous *or is silent* on a specific issue." *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So. 3d 600, 607 (Miss. 2009) (emphasis added). "The best evidence of legislative intent is the text of the statute; the Court may also look to the statute's historical background, purpose, and objectives." *Id.*

The issue before this Court is precisely that the Legislature was "silent" on the "specific issue" of whether and how to award attorney's fees in the instance where the chancellor erroneously reversed the Department and is herself reversed on appeal to this Court or to the Mississippi Supreme Court. Mid-South's attempt to change the subject (and to distance itself from the argument by pointing fingers at the chancellor) is without merit.

Then, stating only the above-cited point that the text itself is the best evidence of Legislative intent, Mid-South goes on to quote the chancellor's statement from the bench at some length, in place of an argument — indeed, Mid-South again changes the subject to the *procedural* question (its theory that appellate remand to the chancery court was a necessary precondition for award of fees) instead of focusing on the *substantive* question of entitlement to attorney's fees, which is what it's supposed to be addressing under issue II of its brief.

The *Methodist Rehab* decision cited above provides a recent example of "the Court's duty to 'carefully review statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case.' " *Miss. Methodist*, 21 So. 3d at 608 (quoting *Caldwell v. N. Miss. Med. Ctr.*, 956 So. 2d 888, 891 (Miss. 2007)). In that case, a statute required that a particular type of nursing facility "shall be reimbursed as a separate category of nursing facilities." *Id.* (quoting Miss. Code Ann. § 43-13-117(44)). Although the statute was "silent on the specific issue" before the Court, and even despite the agency's having interpreted the statute in a particular way, the Court reversed the agency's reading because it "contravene[d] the evident legislative intent," despite the statute's being silent on the issue at hand, and because the agency's reading "yield[ed] absurd results." *Id.* at 609.

Likewise, in the present case, the chancery court's simplistic reading of the statute, which is inarguably silent on the particular situation of the parties in this case, contravenes the Legislature's evident intent that an unsuccessful challenger of a CON final order must pay the opponent's attorney's fees, and threatens the absurd result that an intermediate appellate decision by a single chancellor can exempt such a challenger from the intended statutory penalty.

Thus, statutory silence cannot simply be construed as the absence of any legislative intent. That has never been the law in Mississippi. By choosing expressly not "to try to determine what the legislative intent was," T. 26, the chancery court erred as a matter of law.

B. Mid-South Fails to Argue on the Substantive Issue.

At part II.C. of its argument, Mid-South finally puts its cards on the table regarding the substantive issue. In doing so, Mid-South cites no authority other than the statute in question and the *Martin v. Motors Insurance Corp.* case cited by the City, attempting to distinguish the latter.

Consistently, Mid-South talks around the issue of the Legislature's inadvertent silence on the path the present case took when it left the Department's jurisdiction. Instead, trying to distinguish *Martin*, Mid-South insists that the situation is different because "the underlying Department final order awarded no fees to the City of Cleveland, nor did the chancery judgment appealed to this Court." Mid-South at 23. But this is sophistry. Nowhere is the *Department* given any authority to award attorney's fees. And because the chancery court erred as a matter of law, it did not affirm the Department's final order, and thus, no entitlement to attorney's fees vested. As discussed further below, not until this Court's mandate issued, reversing the chancery court and rendering an affirmance of the final order, did the City's right to attorney's fees vest.

None of this, however, goes to the *substantive* issue: does § 41-7-201(2) indicate the Legislature's intent that an unsuccessful challenge to a Certificate of Need ("CON") final order should result in the challenger's paying the other side's attorney's fees? And that is a question that Mid-South strenuously seeks to avoid, giving the strong impression that it almost concedes the issue:

> 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.

Mid-South at 23-24 (boldfacing added). And *that* is all that Mid-South wants to say about the merits of the detailed arguments set forth by the City in its brief. Mid-South evidently hopes very much that this Court will decline to reach those merits on appeal. Without expressly conceding that the Legislature meant the statute to say what the City has argued it to intend, Mid-South certainly raises no serious challenge to that argument.

This Court should not hesitate to follow our supreme court's precedents and read the statute for the Legislature's "purpose and objectives," rather than frustrating the will of the Legislature by a hyperliteral reading that wears blinders as to what the Legislature meant. As long ago as 1866, our high court held that "the rules of a nice and fastidious verbal criticism" could not be allowed to cause "the action of the Legislature [to] often be frustrated." *Swann v. Buck*, 40 Miss. 268, 1866 WL 1882, at *17 (1866). No less an authority than the United States Supreme Court has held: "Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543 (1940) (citation omitted).

Mid-South, by failing so entirely to address the issue, has offered this Court nothing in its brief to suggest that it makes any sense to read the statute as denying the City its attorney's fees. As the Mississippi Supreme Court has said more than once, "a statute must be read sensibly, even if doing so means correcting the statute's literal language." *Bd. on Law Enforcement Officer Standards and Training v. Voyles*, 732 So. 2d 216, 221 (Miss. 1999) (quoting *Pegram v. Bailey*, 708 So. 2d 1307, 1314 (Miss. 1997)); *accord, Ryals v. Pigott*, 580 So. 2d 1140, 1148 n.15 (Miss. 1990) (citing *Gandy v. Pub. Serv. Corp. of Miss.*, 140 So. 687, 689 (Miss. 1932)). Reading § 41-7-201(2) "sensibly" in the present case requires "correcting the statute's literal language." Anything else would lead to the absurdities set forth in the City's initial brief, and more importantly, would frustrate the policy and intent of the Legislature. The Legislature meant for attorney's fees to be awarded to parties in the City's position, who have won reversal of a chancellor's reversal, and that purpose should be honored by this Court.

Two additional factors indicate that an award of attorney's fees to the City is proper. First, § 41-7-201(2)(e) provides that

> Any appeal of a final order by the State Department of Health in a certificate of need proceeding shall require the giving of a bond by the appellant(s) **sufficient to secure the appellee against the lost of costs, fees, expenses and attorney's fees** incurred in defense of the appeal, approved by the chancery court within five (5) days of the date of filing the appeal.

(emphasis added). Of course, Mid-South's *ex parte* approach to the chancellor for a $500.00 bond was plainly not "sufficient" under this statute, the first of the chancery

court's errors in this case. But the language of this subsection clearly indicates the Legislature's intent that the appellee is to be "secured" by the appellant for its attorney's fees, etc., regardless of the ultimate pathway to affirmance of the Department's order. All parts of the statute must be read *in pari materia* to ascertain the Legislature's intent. *Buckel v. Chaney*, 47 So. 3d 148, 158 (Miss. 2010) ("legislative intent [is] deduced from a consideration as a whole") (citation omitted).

Second, it has always been the case that the chancellor's opinion in a CON appeal is of no weight on further appeal: this Court or the Mississippi Supreme Court reviews the matter de novo, without any deference to the chancery court. *Miss. State Dep't of Health v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 984 So. 2d 967, 974 (Miss. 2008). It therefore would make no sense to construe the statute as giving the chancery court what amounts to unreviewable discretion to deny attorney's fees to the appellee.

The only reasonable reading of the statute, taking its parts together as a whole, is that the City is entitled to attorney's fees and expenses incurred in defending the Department's final order. This Court should so hold.

II. The City Is Not Procedurally Barred from Seeking Attorney's Fees.

As this Court has seen from reading Mid-South's brief, the strategy Mid-South relies on is not really to deny that the Legislature intended the City to be awarded its attorney's fees, but rather to argue that the City failed to make proper demand for them. That strategy however lacks merit, first and foremost because, if the Legislature did

intend parties in the City's position to be awarded attorney's fees, then the procedure for doing so cannot be interpreted so narrowly as to frustrate that intention. This Court looks to "the purpose and policy which the legislature had in view of enacting the law ... [and] will then give effect to the intent of the legislature." *Tunica County v. Gray*, 13 So. 2d 826, 830 (Miss. 2009) (quoting *State ex rel. Hood v. Madison County ex rel. Madison County Bd. of Supervisors*, 873 So. 2d 85, 88 (Miss. 2004)). The procedural requirements for obtaining attorney's fees thus should not be unreasonably construed so as to defeat the Legislature's intent. *Only if the City is shown to have disregarded an express command of the statute should its relief be denied.* But precisely because the statute was *not* clear, but rather silent, about the circumstance of this Court's reversing a chancellor's reversal of the Department, there is no such express command that the City failed to obey.

Mid-South's argument is, in our opinion, difficult to follow. First it argues that the portion of the statute directing this Court (or the supreme court) to remand to the chancery court for an award of attorney's fees "did not expressly apply" to the present case. Mid-South at 11. That is correct, because the remand language expressly applied to situations where the chancery court failed to affirm or deny the Department within 120 days of a final order. But then, in subsection I.D. of its argument, Mid-South appears to contend that this Court's decision to render, not remand, somehow deprived the City of its right to apply for attorney's fees. Mid-South at 15-16.

We think that two main points suffice to rebut whatever substance Mid-South may have interspersed in its arguments.

A. The Chancery Court's Jurisdiction to Award Attorney's Fees Did Not Expire After 120 Days.

First, the 120-day jurisdiction of the chancery court to rule on the merits of the Department's final order is not relevant to the issue of its authority to award attorney's fees. The time limit applies solely to the chancery court's ruling on the merits:

> 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). The time limit is confined to the appeal of the Department's order, not to any ancillary jurisdiction over matters like entitlement to attorney's fees.

Comparison to federal practice is helpful here. Mid-South relies on the example of a trial court's being denied jurisdiction upon the filing of a notice of appeal. Mid-South at 12 n.2 (citing *McNeil v. Hester*, 753 So. 2d 1057, 1075 (Miss. 2000)). Yet even the filing of a notice of appeal has been held by the Fifth Circuit Court of Appeals not to deprive the trial court of the power to award attorney's fees: "The district court, however,

retains jurisdiction to resolve motions for sanctions and attorneys' fees while a judgement on the merits is pending on appeal. Such motions are collateral to the merits, so the appeal does not divest the district court of jurisdiction." *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 524-25 (5th Cir. 2002).

Mississippi practice is similar. *McNeil* held that a trial court could not alter, amend, or reconsider its judgment, as under M.R.C.P. 59(e) for instance, after a notice of appeal had been filed. *McNeil*, 753 So. 2d at 1075. But the Mississippi Supreme Court "has specifically held that '... motions for reassessments of costs or for attorneys fees lie outside Rule 59(e), because they are "collateral" and do not seek a change in the judgment but "merely" what is due because of the judgment.' " *Cruse v. Nunley*, 699 So. 2d 941, 946 (Miss. 1997) (quoting *Bruce v. Bruce*, 587 So. 2d 898 (Miss. 1991)). Significantly, *Bruce* itself relied on United States Supreme Court precedent, justifying our appeal to federal precedent above. *Bruce*, 587 So. 2d at 903 (quoting *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 267 (1988)). *See also id.* at 903 n.5 (federal & state rules 59 worded identically, hence federal precedent persuasive thereon).

Therefore, the chancery court did not lose jurisdiction to rule simply because the case was appealed. Nor, applying the same case law, did the resolution of the *merits* of the Department's final order, by this Court, deprive the chancery court of jurisdiction to consider the collateral and ancillary matter of attorney's fees "due because of" that final judgment. In fact, it would have been nonsensical for the City to seek those fees before this Court's ruling, because no entitlement to those fees could even *vest* until the

Department's final order had been reinstated.[2] Therefore, the fact that this Court rendered on the merits of the appeal did not deprive the chancery court of jurisdiction over the collateral issue of attorney's fees.

While not cited by Mid-South, and not yet final and binding on the parties to this suit, the City will nonetheless also address this Court's decision in *Hendon v. Lang*, No. 2008-CA-00997-COA (Miss. Ct. App. Aug. 10, 2010), *reh'g denied* (Dec. 7, 2010), which issued just before the City filed its initial brief. In *Hendon*, the trial court had awarded attorney's fees to one party as a discovery sanction, but had not passed upon the amount sought before the other party appealed. *Hendon* at ¶¶ 21-22. This Court held that the trial court correctly determined it lacked jurisdiction to award the attorney's fees pending appeal. *Id.* at ¶ 24. This Court did not refer to *Cruse* or *Bruce* in so holding.

Regardless, *Hendon* is fully distinguishable from the present case, for in *Hendon*, the right to the attorney's fees had vested *prior to* the appeal, so that entitlement to those fees was arguably part of the trial court's judgment. In the present case, however, no entitlement had vested until this Court ruled (and its mandate issued), and the chancery court is not being asked to "modify" its judgment — this honorable Court has taken care of that already. Instead, the chancery court is now asked to rule on the collateral or

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[2]Indeed, in an abundance of caution, the City moved for attorney's fees before the mandate had issued, after the supreme court had denied Mid-South's petition for a writ of certiorari. City Brief at 16. By then, it was evident that the Department's order must be reinstated, and in view of the ambiguities of § 41-7-201(2), the City did not wish to be held at fault for lack of diligence.

ancillary issue of attorney's fees, which formed no part of Mid-South's appeal of the Department's final order and thus did not need to be addressed in the appeal of that order.

This Court should reverse the chancellor's order, and remand for her to make the necessary findings of fact and corresponding award.

B. Because Entitlement Did Not Vest Until This Court's Decision, There Was No More Appropriate Time to Seek Attorney's Fees Than When That Decision Became Final.

As we have already touched upon above, the City was entitled to attorney's fees only if and when the Department's final order was affirmed on appeal. That did not happen in the chancery court, so no motion for those fees was proper there. The Department's order was reinstated by *this* Court. Mid-South's sole remaining hope for evading the statutory award of attorney's fees, then, is to argue that the City somehow erred because it did not petition this Court for attorney's fees.

But that cannot be right, because Mid-South cites no statute or rule requiring the City to seek attorney's fees in this Court. On the contrary, as we argued in our initial brief, fact-finding as to attorney's fees is inherently not an appellate function. The chancery court sat as an *appellate* court on the merits of the Department's final order, but with regard to attorney's fees, it sat as a finder of facts in the first instance. Mid-South provides no authority for its notion that the City was required to ask this Court to remand the case to the chancery court for the award of attorney's fees.

Mid-South attempts to make much of the City's alleged concession at the hearing below that attorney's fees could be awarded only "upon remand." Mid-South at 16

(quoting T.24). No such concession was intended, certainly, and the chancellor made no reference to any such concession. Any confusion arose from the confused language of the statute itself, which does provide for an award "upon remand" where the chancery court has failed to rule, but does not speak to the procedure where the chancery court has erroneously reversed the Department. The City submits that it cannot be held in error for failing to seek a remand that is not required by the statute — particularly where, as here, the statute is simply silent on the correct procedure. It is ironic at best that such a ruthless literalness should have been imposed by a court of equity, the chancery court (the court the Legislature thought proper to hear CON appeals), given "that in certain circumstances justice requires the flexibility necessary to treat different cases differently — the rationale that underlies equity itself." *Miller v. French*, 530 U.S. 327, 361 (2000).

As the holdings in *Procter & Gamble*, *Cruse*, and *Bruce* indicate, there is no requirement that an appellate court remand a case for the lower court to exercise jurisdiction over collateral matters like attorney's fees. The reasoning of the Third Circuit is illustrative here, in a case involving a post-appeal award of attorney's fees after the appellate court had affirmed (and thus not remanded the case):

> An appellate court's decision is not final until its mandate issues. Thus, until the Clerk of Court issued the certification in lieu of a mandate on February 19, 1987, the appeal in this case was still pending and the litigation had not yet come to an end. Because defendants filed their Rule 11 motion two days before our mandate issued, the district court had jurisdiction . . . to entertain the sanctions request. **We do not rest our decision here on that limited ground, however. The district court would have had jurisdiction to consider this Rule 11 motion in any event because it was collateral to the appeal on the merits.**

> In *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982), the Supreme Court allowed an award for attorney's fees under 42 U.S.C. § 1988, requested in a petition filed more than four months after entry of an unappealed final judgment. The Court decided that **the application for fees was collateral to the main cause of action, not compensation for the injury giving rise to the litigation.** *Id.* at 451-52, 102 S. Ct. at 1166-67. The Court explained that **because the fee petition required an inquiry distinct from the decision on the merits,** it was "uniquely separable" from the matters to be proved at trial. *Id.* at 452, 102 S. Ct. at 1166-67. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 170, 59 S. Ct. 777, 781-82, 83 L. Ed. 1184 (1939) (petition for reimbursement of counsel fees represented **"an independent proceeding supplemental to the original proceeding"**).

Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 97-98 (3d Cir. 1988) (emphasis added). We note that, in the present case, the City filed its motion before the mandate issued from this Court, and thus, either of the alternative grounds set forth above in *Lingle* may prove the chancery court's continuing jurisdiction over the collateral, distinct, and independent matter of a statutory award of attorney's fees. Given the precedents of *Cruse* and *Bruce*, we think that the Mississippi Supreme Court would follow the United States Supreme Court decisions relied upon in *Lingle*, and that this Court should do likewise.

For this Court to rule as Mid-South suggests would not honor the Legislature's intent that attorney's fees be awarded against Mid-South, which raised a completely meritless challenge to the Department's final order.[3] By ruling in favor of Mid-South,

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[3]The obstinate tone of Mid-South's conclusion to its brief — carping that the City (not the Department?) "deprive[d] Mid-South of its right to risk its own capital to grow its business," etc. — suggests that Mid-South is not philosophically reconciled to the Legislature's CON Law, nor for that matter to this Court's ruling applying that law.

It also may suggest that, as an entity contemptuous of health-care public policy, and focused entirely on the financial bottom line, Mid-South is exactly the sort of litigant that the Legislature had in mind when providing for the award of attorney's fees in cases such as this.

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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So certified, this the *22d* day of December, 2010.

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