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 FOR APPELLANT

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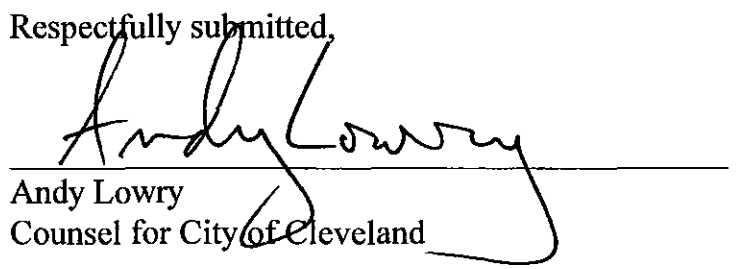
CERTIFICATE OF INTERESTED PERSONS

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 (Appellant).
2. Thomas L. Kirkland, Jr. and Andy Lowry, counsel for City of Cleveland, Mississippi.
3. Mid-South Associates, LLC (Appellee).
4. John L. Maxey II, Esq., Malenda Meacham, Esq., and William Holcomb Hussey, Esq., counsel for Appellee.
5. Covenant Dove, Inc. (a Tennessee corporation) and Judy Ullery (its president).
6. Joy Health & Rehab of Cleveland, LLC (a Delaware corporation).
7. The Mississippi State Department of Health (affected party).
8. The Honorable Vicki B. Cobb, Chancellor.

Respectfully submitted,



Andy Lowry
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

STATEMENT OF THE ISSUES

I. When the State Health Officer's final order in a Certificate of Need case is reversed by the chancery court but then ultimately affirmed, is the party defending the final order entitled to attorney's fees and costs under Miss. Code Ann. § 41-7-201(2)(f)?

II. After the chancery court reverses the State Health Officer, must the party defending the final order seek attorney's fees in its appeal from the chancery court, or is the proper procedure to seek them by motion after the chancery court's order is reversed?

STATEMENT OF THE CASE

I. Course of Proceedings Below

This is a case about awarding attorney's fees, arising out of a Certificate of Need ("CON") appeal that has already been resolved on its merits. In 2006, Mid-South Associates, LLC ("Mid-South") filed a CON application to relocate 75 nursing-home beds from Bolivar County to DeSoto County. *Miss. Dep't of Health v. Mid-South Associates, LLC*, 25 So. 3d 358, 359 (Miss. Ct. App. 2009). The City of Cleveland ("the City") joined the case as an affected party opposing the relocation. *Id.* at 360. In 2007, the State Health Officer of the Mississippi State Department of Health ("the Department") issued a final order disapproving the CON. *Id.*

This final order was reversed by the DeSoto Chancery Court (Cobb, J.) in January 2008, but the City and the Department appealed, and the Mississippi Court of Appeals unanimously reversed the chancery court's order and reinstated the final order of the Department, a decision which this Court declined to review on *certiorari*. *Id.* at 364; *see* 24 So. 3d 1038 (Miss. 2010) (table) (denial of review).

Having thus reinstated the final order, the City of Cleveland[1] on January 27, 2010 filed its motion seeking a statutory award of attorney's fees and costs pursuant to Miss.

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[1]The Department did not join the motion or seek attorney's fees, and thus is not a direct party to this appeal. Typically the Department does not seek fees in CON cases, as it is afforded representation by the Attorney General's office.

Code Ann. § 41-7-201(2)(f). R. 18.[2] At the April 19 hearing of the motion, the chancery court denied same from the bench, and its order to that effect was entered May 12, 2010, incorporating its bench opinion. T. 31 (R.E. 3); R. 96 (R.E. 2). The City timely appealed to this Court. R. 97.

II. Relevant Facts

Mississippi law provides for an award of attorney's fees when the Department's final order in a CON matter is challenged on appeal but ultimately upheld. Miss. Code Ann. § 41-7-201(2)(f). Because the statute provides for appeal first to chancery court and then to this Court, there are three ways the final order can be affirmed: (1) the chancery court can affirm (and be upheld on any future appeal), (2) the chancery court can decline to rule within 120 days (and likewise be upheld if appealed), or (3) the chancery court can reverse the final order and itself then be reversed on appeal.

Number (3) is what actually happened in the present case. First, despite the statutory requirement of "the giving of a bond by the appellant(s) sufficient to secure the appellee against the loss of costs, fees, expenses and attorney's fees incurred in defense of the appeal," Miss. Code Ann. § 41-7-201(d), the chancery court allowed Mid-South to effectively evade this requirement by allowing a risibly inadequate bond of only *five hundred dollars*, signing onto an order presented *ex parte* by Mid-South.[3] R. 1 (R.E. 1);

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[2]Citations to "R. __" are to the clerk papers; citations to "T. __" are to the hearing transcript.

[3]Why Mid-South was favored with having its order entered without the appearance or consent as to form of other parties, remains an unanswered question.

T. 10 (R.E. 3). Then, the chancery court ordered the posting of a more reasonable $20,000.00 bond – on the exact same date, however, that the chancery court also reversed the Department. T. 10 (R.E. 3). (Mid-South *never* complied with the chancery court's order and *never* posted the $20,000.00 bond. T. 17 (R.E. 3).) Finally, on further appeal, the chancery court's order was itself reversed unanimously, and the final order of the Department was reinstated. *Mid-South*, 25 So. 3d at 364.

Thus, once the final order was affirmed, the City's right to attorney's fees vested, and it filed its motion to recover them. The present appeal arises because the chancery court held that Miss. Code Ann. § 41-7-201(2)(f) does not address possibility (3) above, but only (1) and (2); because the literal language of the statute does not award attorney's fees where (3) is the case, that court reasoned, no award is proper. This even though the final order was ultimately upheld, and *never mind* what the Legislature might have intended: "I don't intend to try to determine what the legislative intent was," the chancery court confessed. T. 26 (R.E. 3).

Further discussion would take us into the Argument of this brief, to which we now turn.

SUMMARY OF THE ARGUMENT

Statutes will not be construed so literally as to frustrate the intent of the Legislature, which has always been the paramount consideration of this Court. The chancery court's reading of Miss. Code Ann. § 41-7-201(2)(f) frustrates the manifest intent of the Legislature, which is that a party which unsuccessfully challenges a CON final order must pay its opponent's attorney's fees. While the interpretation of this statute is an issue of first impression, this Court's jurisprudence has long held that "the manifest intent of the legislature will prevail over the literal import of the words."

Instead, the chancery court got the law backward, expressly disavowing any effort to discern legislative intent, and preferring a hyperliteral application of the statute, despite the lack of any reason why the Legislature would deny attorney's fees where the final order is vindicated on appeal, and despite the fact that the reversal of a reversal is legally the same as an affirmance. The chancery court's order should be reversed.

Nor is there any merit to Mid-South's argument that attorney's fees were waived by the City when it did not seek them in the Court of Appeals during the appeal of the chancery court's reversal of the Department's final order. The appellate courts do not as a rule engage in the fact-finding required to support an award of attorney's fees, and § 41-7-201(2)(f)'s text suggests that the chancery court is where the issue should be raised after a final determination on the merits.

Thus, the order below should be reversed and rendered, or alternatively, reversed and remanded for an award of reasonable attorney's fees and costs.

ARGUMENT

The issues on appeal are confined to statutory interpretation, a pure question of law with a *de novo* standard of review on appeal and no deference to the decision below. *Finn v. State*, 978 So. 2d 1270, 1272 (Miss. 2008).

I. Attorney's Fees Shall Be Awarded Where the Final Order Is Ultimately Affirmed.

A. The Clear Legislative Intent Is to Award Attorney's Fees.

The issue in this case is how to interpret the portion of the CON Law providing for an award of attorney's fees. We begin with the statutory text in question:

> (f) The 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 in part **and may make an award of costs, fees, expenses and attorney's fees**, as the case may be; but in case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the State Department of Health for such further proceedings, not inconsistent with the court's order, as, in the opinion of the court, justice may require. 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). This portion of the statute should be compared to subsection (2)(c) of the same statute:

> 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.

Id. at § 41-7-201(2)(c) (emphasis added).

What we have, then, is a mandate that the chancery court *shall* award attorney's fees if it affirms the final order, and that the chancery court *shall* award attorney's fees if the chancery court fails to rule on the final order and this Court affirms the final order. Moreover, as the emphasized language in subsection (f) makes clear, the chancery court has the discretion to award attorney's fees *regardless* of the outcome of the case.

This Court has never before interpreted the attorney's fees provisions of § 41-7-201(2)(f), leaving the Bar to interpret the law by its own best lights.[4]

The issue now before this Court is whether the Legislature intended to *disallow* an award of attorney's fees in the instance where the final order is reversed by the chancery court, but reaffirmed by this Court or the Court of Appeals, while otherwise mandating the recovery of those fees in *every other instance* where the final order is affirmed. No such absurd intention should be attributed to the Legislature.

Mid-South argued below to construe the statute with unfailing literalness so that no such award is intended, because no such instance is addressed by the statute. The chancery court agreed with Mid-South:

> 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 additional meaning to the statute.

T. 26 (R.E. 3) (emphasis added). The chancellor thus stated a principle in *direct contradiction* to the consistent, decades-old teachings of this Court:

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[4]As the exhibits in the record on appeal suggest, attorneys in CON cases have generally resolved the fees issue by agreement, without litigation.

> **The primary rule of construction of statutes is to ascertain and declare the intention of the legislature.** And the court in construing a statute of this kind will seek to ascertain and give effect to the legislative intent.
>
> **It often happens that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning.** In such case, the carrying out of the legislative intention, which is **the prime and sole object** of all rules of construction, **can only be accomplished by departure from the literal interpretation of the language employed.** Hence it is a general rule that **the manifest intent of the legislature will prevail over the literal import of the words.**

State v. Necaise, 87 So. 2d 922, 925 (Miss. 1956) (emphasis added). Therefore, the chancery court simply erred in preferring a literal meaning over an examination of the legislative intent. If this Court agrees that the Legislature's manifest intent was that anyone unsuccessfully challenging a final order would be on the hook for attorney's fees and expenses, and that there is no reason to imagine that the Legislature intended to grant or deny fees based on the vagaries of an intermediate appellate decision, then that intent must be allowed to control over inartfully drafted statutory language.

"It is our duty to support a construction which would purge the legislative purpose of any **invalidity, absurdity or unjust inequality**." *U.S. Fid. & Guar. Co. v. Conservatorship of Melson*, 809 So. 2d 647, 660 (Miss. 2002) (quoting *Quitman County v. Turner*, 18 So. 2d 122, 124 (Miss. 1944)) (emphasis in *Melson*). On the chancery court's logic, the City was entitled to attorney's fees had the chancery court affirmed and then been affirmed by the Court of Appeals . . . but because of a legally erroneous and unanimously reversed decision by the chancery court, the City recovers nothing. *That* is

an "unjust inequality" and, we respectfully submit, "absurd" as well. There is no reason to believe that the Legislature intended such a result.

The absurdity of a literal application of the statute is easily demonstrated by a hypothetical example. Suppose that, on appeal to the chancery court, Mid-South had lost, and the final order of the Department had been affirmed. Suppose further that Mid-South had appealed to this Court and prevailed, reversing the chancery decision and reinstating the final order. On Mid-South's logic, because the City would have won at the *chancery* level, the City would have been entitled to an award of attorney's fees under § 41-7-201(2)(f) – despite the chancery court's having been later reversed! That *cannot* be the correct interpretation. The literal language cannot control to the point of subverting the contrary intent of the Legislature.

It is a "well-settled rule in Mississippi regarding statutory construction" that "[u]nthought of results must be avoided if possible, *especially if injustice follows*, and unwise purpose will not be imputed to the Legislature when a reasonable construction is possible." *Anderson v. Lambert*, 494 So. 2d 370, 373 (Miss. 1986) (emphasis added) (quoting *Gambrill v. Gulf States Creosoting Co.*, 62 So. 2d 772, 775 (Miss. 1953)).

Here, Mid-South claims to find a loophole whereby attorney's fees appear unavailable, despite the final affirmance of the Department's order, in the single instance where the chancery court erroneously reverses that officer and is itself reversed on appeal. But this Court does not stand to the Legislature's statutes as a tax lawyer does to the IRS code. Any such loophole is exactly the kind of "unthought-of result" that this

Court must seek to avoid, "especially" given the "injustice" of inability to recover even though the final order was ultimately affirmed.

In the chancery court, Mid-South relied merely upon the rule that "attorney's fees are not to be awarded unless a statute or other authority so provides." *Miss. Dep't of Wildlife, Fisheries & Parks v. Miss. Wildlife Enforcement Officers' Ass'n*, 740 So. 2d 925, 937 (Miss. 1999). But the City contends precisely that, properly construed according to the teachings of this Court on interpretation of the Legislature's intent, the statute *does* so provide.

Section 41-7-201 does not *require* the award of attorney's fees except where the final order is *affirmed*. The statute thus penalizes those who unsuccessfully challenge a CON final order. The manifest intent and public policy of the Legislature is to encourage parties to think twice before seeking to overturn a final order in a CON matter. That intent is not served if the party can evade the penalty by luckily securing an erroneous reversal at the chancery level, even if that chancery decision is then unanimously reversed on appeal – as was the case here.

Note also that the party challenging a CON *denial* can do so either in the Hinds Chancery Court *or* in the county where the proposed project would be located, as happened in the present case. Miss. Code Ann. § 41-7-201(2)(b). The potential for judge-shopping here, especially in the common instance where a denied project might inure to the county's benefit, is obvious; it would be egregious to add a ruling that, where "home cooking" secures a reversal of the final order, no penalty of paying attorney's fees

attaches, even when the order is later affirmed.[5] That would hamstring the legislative purpose of penalizing ill-founded appeals.

"[I]n construing statutes of doubtful meaning, the Supreme Court is required to consider consequences of a particular construction as to whether the result of such construction is good or bad." *Aikerson v. State*, 274 So. 2d 124, 127 (Miss. 1973) (*overruled on other grounds*, *Conley v. State*, 790 So. 2d 773, 796 (Miss. 2001)); *quoted in Pegram v. Bailey*, 694 So. 2d 664, 671 (Miss. 1996)). The policy effect of setting aside the legislative penalty for an unsuccessful CON appeal is a "consequence" that cannot be ignored and that burdens the Department and the courts. Where a statute's construction is doubtful, "it must be given that which will best effect its purpose, rather than one which would defeat it." *Thornhill v. Ford*, 56 So. 2d 23, 30 (Miss. 1952), *quoted in Delta Reg'l Med. Ctr. v. Green*, No. 2009-IA-00299-SCT, at ¶ 13 (Miss. July 22, 2010).

The only logical conclusion to be drawn from the statute is that the Legislature simply omitted to make its literal language conform with its evident intent, and that this Court's duty to carry out the legislative intent "can only be accomplished by departure from the literal interpretation of the language employed" in the statute:

> Words or phrases may, however, be supplied by the courts and inserted in a statute, where that is necessary **to obviate repugnancy and inconsistency in the statute, complete the sense thereof, and give effect to the intention of the legislature manifested therein.** The rule prevails

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[5]Of course, we make no insinuation that anything of the kind occurred in the present case.

> **where words have been omitted from a statute through clerical error, or by accident or inadvertence.**

Claypool v. Mladineo, 724 So. 2d 373, 382 (Miss. 1998) (quoting *Evans v. Boyle Flying Serv.*, 680 So. 2d 821, 825 (Miss. 1996)) (emphasis added). The Legislature's inadvertent omission to mention the instance of a chancery reversal that is itself reversed, provides a classic example of when this Court must look to the intention of the Legislature and not to language that is repugnant and inconsistent when read hyperliterally. "The letter killeth, but the spirit giveth life." *Turner*, 18 So. 2d at 126 (quoting 2 Cor. 3:6).

The Legislature did not intend any irrationally narrow scope for the award of attorney's fees, as is also shown by the "may award" language at subsection (2)(f). This plainly allows the chancery court to award attorney's fees, in its discretion, regardless of the outcome of the case. Given such a broad discretionary exception to the normal rule where each party bears its own attorney's fees, there is no reason to imagine that the Legislature intended the *mandatory* award of fees upon affirmance of the Department to be dependent upon different paths (affirmance or reversal by the chancery court) to the same outcome (affirmance of the Department).

Attorney'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. The chancery court's order denying attorney's fees should be reversed.

Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law"); *Hill v. State*, 659 So. 2d 547, 552 (Miss. 1994) ("this Court cannot constitutionally make fact findings and weigh facts").

There is thus no basis for the suggestion that the City of Cleveland waived its entitlement to attorney's fees because it did not ask the Court of Appeals to award them. Obviously, until the mandate issued, the chancery court's order had not been finally reversed, and there *was no* entitlement to attorney's fees; and once the mandate *did* issue, the entitlement vested, and the award by the chancery court became mandatory, for the reasons shown in Issue I above.

We would also note that, insofar as it speaks to the issue, § 41-7-201(2)(c) suggests that the chancery court is the place to seek attorney's fees. The reference there to this Court's remand of a case for that purpose should not be exaggerated, as Mid-South urged the chancery court, into the draconian result that, because the Court of Appeals *rendered* and did not *remand* in the present case, the City's right to attorney's fees was extinguished. Nothing in the statute requires such a result, and there is no reason to impose it – particularly where, as here, the attorney's-fees provisions of the statute have never been interpreted by this Court, and the Bar has thus been left to practice according to its best estimate of the statute's meaning.

Rather, a post-mandate motion for attorney's fees was the best application of the statute. Until the Court of Appeals issued its mandate, the chancery court's decision had

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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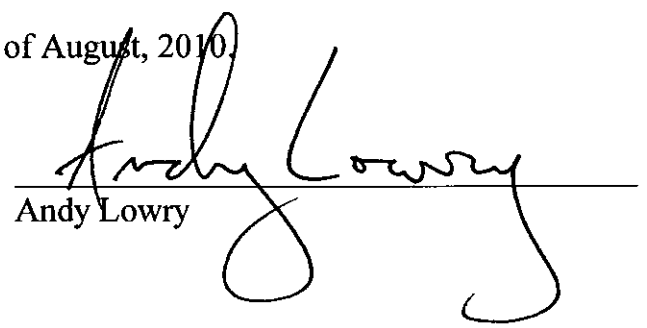
So certified, this the ***12th*** day of August, 2010.



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