IN THE SUPREME COURT OF MISSISSIPPI

CITY OF CLEVELAND — **PETITIONER**

V. — **NO. 2010-CT-00971-SCT**

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

APPEAL FROM THE DECISION OF THE DESOTO CHANCERY COURT

PETITIONER'S SUPPLEMENTAL BRIEF UPON GRANT OF WRIT OF CERTIORARI

OF COUNSEL:

Thomas L. Kirkland, Jr. (MSB #[redacted]
Andy Lowry (MSB #[redacted])
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-8242
Counsel for the City of Cleveland

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SUPPLEMENTAL BRIEF

The merits of this appeal have been briefed in the Court of Appeals and summarized in the City of Cleveland's petition for writ of certiorari. By way of supplemental argument, the City addresses two points: (1) the propriety of statutory interpretation in this case, and (2) the legislative history and remedial purpose behind Miss. Code Ann. § 41–7–201's provisions for award of attorney's fees.[1]

I. Statutory Interpretation Is Proper in This Case.

Where the issue is whether the Legislature inadvertently *omitted* language from a statute, it is only to be expected that the plain language of the statute will not on its face appear ambiguous or unclear. However, the absence of a plain meaning is not the only proper occasion for statutory interpretation: "It is the duty of the court to ascertain the real purpose and intent of the statute, where its meaning is not plain, *or* the letter leads to an absurdity or injustice." *Anderson v. Lambert*, 494 So. 2d 370, 374 (Miss. 1986) (quoting *Robertson v. Texas Oil Co.*, 106 So. 449, 449 (Miss. 1925)) (emphasis added); *accord, City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So. 2d 742, 747 (Miss. 1996)) (unanimous Court). Thus, even plain language may require interpretation where it leads to "an absurdity or injustice." No absurd or unjust intention will be imputed to the Legislature by this Court, at least not where another interpretation is reasonable. *Drane v. State*, 493 So. 2d 294, 298 (Miss. 1986).

"To this end, not only the language but the purpose and policy which the Legislature had in view must be considered." *Anderson*, 494 So. 2d at 374 (quoting *Quitman County v. Turner*, 18 So. 2d 122, 124 (Miss. 1944)). As discussed in part II

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[1]The relevant language of § 41–7–201(2)(f) is quoted at page 6 below.

below, the Legislature in 1992 amended the CON Law to award attorney's fees where the final order of the State Health Officer was affirmed. In the present case, the chancery court and the Court of Appeals ruled that it was neither unjust nor absurd for the Legislature to deny attorney's fees where the chancery court erred as a matter of law in reversing such a final order, and then itself was reversed on appeal, resulting in the affirmance of the final order. Neither court offered any reasonable explanation of how the Legislature could be supposed to desire that no penalty be imposed on an appellant, just because the chancery court got the law wrong.

The present case, then, is a rare but apt example of this Court's duty to correct an inadvertent omission by the Legislature. Such an instance is by no means unprecedented. One example was given in the Petition for Writ of Certiorari, this Court's redressing an omission by the Legislature in § 11–3–23. *See State Farm Mut. Auto. Ins. Co. v. Eakins*, 748 So. 2d 765 (Miss. 1999). Another example of this Court's correcting an inadvertent omission by the Legislature is found in the case of *J.F. Crowe Well Servicing Contractor v. Fielder*, 80 So. 2d 29 (Miss. 1955). In *Fielder*, the issue was whether the Workers' Compensation Act set any total limit on payments for permanent partial disability: the statute set a maximum of 450 weeks or $8,600.00 for death, permanent total disability, and temporary total disability, but was *silent* as to any limit for permanent partial disability. *Fielder*, 80 So. 2d at 31-32. This Court held that "evidently the Legislature intended to include also the limitation of $8,600 in Section 8(c)(21), *supra*; that the failure to do so *was a mere omission* by the Legislature; and that the Court, in construing this act, should give effect to the legislative purpose and

policy, although such construction may go beyond the letter of the law." *Id.* at 32 (emphasis added).

Just such a case is presented here: the Legislature, in amending § 41–7–201 to award attorney's fees, "merely omitted" to provide expressly for the instance of the chancery court's being in error and then itself reversed on appeal. This Court should interpret the statute as providing for an award of attorney's fees whenever the State Health Officer's final order is ultimately affirmed on appeal, regardless of the route such an affirmance takes.

But, it may be said, the Court's duty is to apply the letter of the statute, without regard to the result. If that were the case, however, then this Court would not have held as recently as five years ago that the Legislature's intent or purpose is its "polestar consideration." *Capital One Servs., Inc. v. Page*, 942 So. 2d 760, 763 (Miss. 2006). Ruthless literalism, whether or not seasoned by the complacent observation that the Legislature can always fix the statute itself (and too bad for the present appellant), only affects deference to the Legislature's role as lawmaker; true deference would look to implementing what the Legislature intended, where as here that intent seems evident.

> Although some courts have been hesitant to supply or insert words, the better practice requires that a court enforce the legislative intent or statutory meaning where it is clearly manifested. **The inclusion of words necessary to clear expression of the intent or meaning is in aid of the legislative authority.** The denial of the power to insert words when the meaning or intent is clear is **more of a usurpation of legislative power because the result can be the destruction of the legislative purpose.**

2A Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Construction* § 47:38 at 529 (7th ed. 2007) (emphasis added).

The principle just cited is consistent with Mississippi law: "Where possible, this Court will interpret statutes so as to realize their purposes rather than defeat them." *Drane*, 493 So. 2d at 298. This Court has always placed the Legislature's intended meaning above its literal language:

> A solution which ignores all but mere words and would release the chapter from its entanglement by cutting it loose from its anchorages with the simple device of a literal interpretation, would be **as ruthless and destructive of future usefulness as the impatient cutting of an actual knot**. It is easy enough to say that the Legislature is held to mean what it has said. It is not so easy to say with assurance that it meant to say what it said. **Nor should we dismiss all doubts by employing a judicial rule of thumb whereby a presumption is indulged that whatever a statute says is always what it means. We are concerned not with what isolated words mean but what the Legislature intended to do.** Our task is not to construe a phrase but a statute. The ambiguity is not in the language of a single sentence but is begotten of a disharmony throughout the statute.

Turner, 18 So. 2d at 125 (emphasis added). Throwing up one's hands and insisting on the literal language, with no thought as to how or why the Legislature could have intended such a result, is the abdication of the judicial function, not its exercise.

In his article on statutory interpretation, Judge Leslie Southwick—by no means notorious for judicial activism—defined "literalism" as a theory of interpretation: "relyi[ing] solely on the words of a statute without considering any other factor." Hon. Leslie Southwick, "Statutes, Statutory Interpretation and Other Legislative Action," *in* 8 Jeffrey Jackson & Mary Miller, *Ency. of Miss. Law* ch. 68, at § 51 (2011). "This definition would mean that context, absurdity, obvious error, or other considerations are ignored." *Id.* As Judge Southwick observed, this Court has seldom if ever embraced such a mechanistic theory. "Case upon case is to be found in our decisions to the effect that we are not obliged to act upon literalness in legislative language when so to do

would make it embrace that which the legislature could scarcely have had in mind and which would produce grossly unjust and impolitic results." *Gulf Refining Co. v. Travis*, 29 So. 2d 100, 103 (Miss. 1947). Even statutes that must be strictly construed, such as penal statutes, will not be interpreted so "as to override common sense or statutory purpose." *Reining v. State*, 606 So. 2d 1098, 1103 (Miss. 1992).

As recently as 1981, this Court cited with approval a decision that turns 100 years old next year, *Kennington v. Hemingway*, 57 So. 809 (Miss. 1912) (in *Tutwiler v. Jones*, 394 So. 2d 1346, 1348-49 (Miss. 1981)). This Court in *Kennington* recognized the need to balance, on the one hand, the duty to impute no absurd or unjust purpose to the Legislature, and on the other, the duty not to substitute the Court's own wisdom for that of its coequal branch of government: "the enactment of a wise or a foolish statute is for the determination, not of the courts, but of the lawmakers; and *when the intention of the lawmakers is clearly understood*, the statute must be enforced as written, it matters not to what absurd results such enforcement may lead." *Kennington*, 57 So. at 811 (emphasis added). The "enforce-as-written" rule applies, then, when the purpose of the statute fits with its language. Where that is not the case, this Court correctly followed the purpose, not the letter, of the law:

> . . . In *Queen v. Clarence*, L. R. 22 Q. B. Div. 65, it was said by Lord Coleridge that "in such a matter as the construction of a statute, if the apparent logical construction of its language leads to results **which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils**, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction of the statute."

Id. (emphasis added). The City of Cleveland, which successfully defended the State Health Officer's final order through two appeals, and which now is said to be denied its

attorney's fees because of the legal error of a single judge, respectfully submits that such a result is one "which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils." If this Court agrees, then its precedents teach that the Legislature's purpose in § 41–7–201 is to be honored. The decision of the Court of Appeals should be reversed.

II. The Legislative History Supports the City's Contentions and the Statute's Remedial Purpose.

While the legislative history behind the attorney's-fees provision of § 41–7–201 is admittedly sparse, such history as exists does lend plausibility to the idea that the Legislature acted without the most thorough care in that provision, so that an inadvertent omission occurred.

The CON Law as first enacted in 1979 did not provide for an award of attorney's fees. That came only in 1992, when what had been § 41–7–201(4) became subsection (2)(f) and the following boldfaced language was added:

> (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.** The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal. **Provided, however, an order of the chancery court reversing the denial of a certificate of need by**

> **the State Department of Health shall not entitle the applicant to effectuate the certificate of need until either:**
>
> **(i) Such order of the chancery court has become final and has not been appealed to the Supreme Court; or**
>
> **(ii) The Supreme Court has entered a final order affirming the chancery court.**

Miss. Laws 1992, ch. 512, § 1 (emphasis added); *cf.* Miss. Laws 1986, ch. 437, § 44 (prior version). This 1992 amendment also added the language to subsection 2(c) of the same statute which provided for an award of attorney's fees after the chancery court failed to act within 120 days and the matter was then appealed to this Court.

The title of an act is a valid "aid in ascertaining legislative intent." *State Farm Ins. Co. v. Gay*, 526 So. 2d 534, 537 (Miss. 1988). The only evidence as to the Legislature's intention in amending § 41–7–201 is the title of the act in which it did so, which we reproduce in its full all-caps glory:

> AN ACT TO AMEND SECTION 41–7–201, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT A CERTIFICATE OF NEED ISSUED BY THE STATE DEPARTMENT OF HEALTH, WITH THE EXCEPTION OF ANY CERTIFICATE OF NEED FOR A HOME HEALTH AGENCY, SHALL TAKE EFFECT IMMEDIATELY UPON ISSUANCE; TO PROVIDE FOR AN EXPEDITED APPEALS PROCEDURE FROM A FINAL ORDER OF THE STATE DEPARTMENT OF HEALTH AND THE CHANCERY COURT IN A CERTIFICATE OF NEED PROCEEDING, WITH THE EXCEPTION OF ANY PROCEEDING PERTAINING TO A HOME HEALTH AGENCY; TO DELETE THE AUTHORITY FOR ANY SUCH PERSON WHOSE RIGHTS MAY BE MATERIALLY AFFECTED BY THE ACTION OF THE STATE DEPARTMENT OF HEALTH TO APPEAR AND BECOME A PARTY; TO AMEND SECTION 41–7–202, MISSISSIPPI CODE OF 1972, TO PROVIDE FOR A 30–DAY STAY OF PROCEEDINGS OF ANY WRITTEN DECISION OF THE STATE DEPARTMENT OF HEALTH IN CERTIFICATE OF NEED PROCEEDINGS PERTAINING TO ANY HOME HEALTH AGENCY, AND TO PROVIDE THAT NO SUCH LICENSE FOR A HOME HEALTH AGENCY SHALL BE ISSUED AND NO MEDICARE/MEDICAID CERTIFICATION SHALL BE GRANTED UNTIL THE EXHAUSTION OF ALL APPEALS OR EXPIRATION OF THE TIME FOR SUCH APPEALS; AND FOR RELATED PURPOSES.

Again, what is remarkable here is an omission: the title of chapter 512 lists numerous aspects of the amendment to § 41–7–201, but the award of attorney's fees is not even mentioned (being included, then, in the catchall "and for related purposes" in the title of the act), as the Legislature evidently had a great deal on its mind when it amended the statute. This by-the-way quality of the amendment to award attorney's fees supports the theory that the Legislature could have inadvertently omitted to consider the situation where this Court upholds a final order after that order had been reversed by the chancery court. As the Supreme Court of the United States has observed, "[i]n resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." *Cass v. United States*, 417 U.S. 72, 83 (1974) (quoting *Schmid v. United States*, 436 F.2d 987, 992 (Ct. Cl. 1971) (Nichols, J., dissenting)). To do otherwise would be to don a pair of blinders, and to ascribe to the Legislature an inerrancy of expression which even this honorable Court might hesitate to claim for itself.

The title of the act also reminds this Court that an express purpose of the 1992 amendment was to expedite CON appeals, for instance requiring the chancery court to rule within 120 days. Remedying abuses of the appeal process was thus part of the motive behind the amendment: CON final orders were tied up for years in litigation, with delay as a side effect if not a goal. The attorney's-fee penalty was meant to discourage appeals, as it was mandatory only against those who unsuccessfully challenged a final CON order. That purpose could not possibly be served by exempting from the penalty those parties who happened to secure a legally erroneous ruling from

a single chancellor but who then lost on further appeal. The incentive then would be to reward judge-shopping, not to penalize challenges against the Department.

Because the attorney's-fee provision is remedial in nature, that portion of the statute merits liberal interpretation by this Court to effect the Legislature's remedial intent. "A remedial statute is defined as one 'that intends to afford a private remedy to a person injured by the wrongful act. That is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good.' " *State ex rel. Patterson v. Warren*, 180 So. 2d 293, 311 (Miss. 1965) (quoting *Black's Law Dict.* 1457 (4th ed. 1951)). Remedial legislation is liberally construed by this Court to effect the beneficial purpose behind it. *See, e.g., Arceo v. Tolliver*, 19 So. 3d 67, 74 (Miss. 2009) (savings statute); *Spann v. Wal-Mart Stores, Inc.*, 700 So. 2d 308, 314 (Miss. 1997) (Workers' Compensation Act); *So. Farm Bureau Cas. Ins. Co. v. Brewer*, 507 So. 2d 369, 371 (Miss. 1987) (uninsured motorist act). This principle is by no means innovative, being firmly grounded in Mississippi jurisprudence. *See Griffing v. Mills*, 40 Miss. 611, 1866 WL 2936, at *3 (1866) (rejecting "very strict and literal" interpretation in favor of reading "in such manner as will promote the object in view and best subserve the intention of the legislature").

Therefore, this Court should look to the Legislature's obvious intent to award attorney's fees when the State Health Officer's final order is affirmed, not to the accidental omission of one circumstance where the chancery court errs but the final order is ultimately vindicated. The Legislature cannot be supposed to have intended to deny attorney's fees in that instance, or to require the City of Cleveland to bear attorney's fees incurred in defending the Department's final order merely because of a

legal error by the chancery court below. The role of the judiciary is to implement the statute as the Legislature intended it to be applied, not to trip up the Legislature on an accident of draftsmanship.

WHEREFORE, PREMISES CONSIDERED, the City of Cleveland asks that this Court REVERSE the August 29, 2011 Opinion of the Court of Appeals (and the October 11, 2011 order denying rehearing) in this matter, and issue its judgment REVERSING the May 12, 2010 order of the DeSoto Chancery Court and REMANDING this matter for an award of reasonable attorney fees and costs by the chancery court.

Respectfully submitted, this the ***28th*** day of December, 2011.

CITY OF CLEVELAND

By: _____

Andy Lowry
Counsel for Petitioner-Appellant

OF COUNSEL:

Thomas L. Kirkland, Jr. (MSB #[redacted]
Andy Lowry (MSB #[redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: (601) 856-7200
Facsimile: (601) 856-8242

Counsel for the City of Cleveland

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 Chancery Court
Post Office Box 1104
Batesville, Mississippi 38606

John L. Maxey II, Esq.
William Holcomb Hussey, Esq.
Maxey Wann, PLLC
Post Office Box 3977
Jackson, Mississippi 39207-0977

Malenda Meacham, Esq.
Post Office Box 566
Hernando, Mississippi 38632

So certified, this the ***28th*** day of December, 2011.

Andy Lowry

Andy Lowry