

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2011-TS-01041**

DIALYSIS SOLUTION, LLC

APPELLANT

VS.

**MISSISSIPPI STATE DEPARTMENT OF
HEATH; MARY CURRIER , IN HER OFFICIAL
CAPACITY AS THE EXECUTIVE DIRECTOR
OF THE DEPARTMENT OF HEALTH;
AND RCG-MONTGOMERY, LLC**

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

A. Appellant:

- Dr. Walter Roberts; Dialysis Solution, LLC

B. Appellant's Counsel:

- Robert G. Clark, III; Bryant W. Clark; Clark & Clark, PLLC

C. Appellees:

- Mississippi State Department Of Heath; Mary Currier, In Her Official Capacity

As The Executive Director Of The Department Of Health; State Of Mississippi and RCG-

Montgomery, LLC

D. Appellees' Counsel:

- Barry Cockrell; Baker Donleson, P.A.

E. Attorney General of the State of Mississippi

- Hon. Jim Hood; Attorney General of the State of Mississippi

DATED, this the 28th day of September, 2011.

A handwritten signature in black ink, appearing to read "Bryant W. Clark", is written over a horizontal line.

BRYANT W. CLARK

Attorney of Record for Dialysis Solution, LLC

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STATEMENT OF ISSUE PRESENTED

Whether Section 1 of 2011 Mississippi Laws Chapter 540 is constitutional under Mississippi Constitution Article 6, Section 146 and Whether the Mississippi Supreme Court has appellate jurisdiction over a direct appeal from a decision of the Department of Health

STATEMENT OF THE CASE

A. Introduction.

This is an appeal before the en banc Court on its own motion. By notice of appeal filed on July 19, 2011, the appellant brought this direct appeal from the June 30, 2011, decision of the Mississippi State Department of Health, denying the appellant's request for a certificate of need. This direct appeal was brought in accordance to Section 1 of 2011 Mississippi Laws Chapter 540 (HB 826) (effective on July 1, 2011) which amended Mississippi Code Annotated Section 41-7-201 to provide that appeals of final orders of the State Department of Health pertaining to certificates of need for health-care facilities shall be made directly to the Supreme Court. The amendment to Section 41-7-201 present a substantial question as to whether the said amendment is constitutional under Mississippi Constitutional Article 6, Section 146. On July 28, 2011, this Court issued an Order directing all parties and the Mississippi Attorney General to submit simultaneous briefs addressing whether Section 1 of 2011 Mississippi Law Chapter 540 is constitutional and whether the Supreme Court has appellate jurisdiction over direct appeals from decisions of the Department of Health.

B. Factual Background

During the 2011 regular session, the Mississippi legislature passed HB 826 which amended Mississippi Code Annotated Section 41-7-201 to provide that appeals of final administrative orders of the State Department of Health pertaining to certificates of need for health-care facilities shall be made directly to the Supreme Court.

Prior to the 2011 amendment, Section 41-7-201 provided that any party aggrieved by any such final order of the State Department of Health shall have the right of appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi, which appeal must be filed within thirty (30) days after the date of the final order. Provided, however, that any appeal of an order disapproving an application for such a certificate of need may be made to the chancery court of the county where the proposed construction, expansion or alteration was to be located or the new service or purpose of the capital expenditure was to be located. Such appeal must be filed in accordance with the thirty (30) days for filing as heretofore provided. *Miss. Code Ann.* §41-7-201 (1999).

On July 28, 2011, the Appellant, Dialysis Solutions, LCC, filed its notice of appeal with this Court appealing the Mississippi Department Of Health's administrative decision denying the Appellant's application to establish a End-Stage Renal Dialysis facility. The new change in statue raised a substantial question of whether this Court has appellate jurisdiction over a direct appeal form a decision of the Department of Health.

On August 28, 2011, this Honorable Court issued an order requiring all parties and the Mississippi Attorney General to submit simultaneous brief addressing whether the new

law violates the Mississippi Constitution.

ARGUMENT

During the 2011 legislature regular session Section 41-7-201, Mississippi Code of 1972, was amended as follow:

41-7-201. * * * The provisions of this section shall apply to any party appealing any final order of the State Department of Health pertaining to a certificate of need for any health care facility as defined in Section 41-7-173(h) * * *.

(a) There shall be a "stay of proceedings" of any final order issued by the State Department of Health pertaining to the issuance of a certificate of need for the establishment, construction, expansion or replacement of a health care facility for a period of thirty (30) days from the date of the order, if an existing provider located in the same service area where the health care facility is or will be located has requested a hearing during the course of review in opposition to the issuance of the certificate of need. The stay of proceedings shall expire at the termination of thirty (30) days; however, no construction, renovation or other capital expenditure that is the subject of the order shall be undertaken, no license to operate any facility that is the subject of the order shall be issued by the licensing agency, and no certification to participate in the Title XVIII or Title XIX programs of the Social Security Act shall be granted, until all statutory appeals have been exhausted or the time for those appeals has expired. Notwithstanding the foregoing, the filing of an appeal from a final order of the State Department of Health * * * for the issuance of a certificate of need shall not prevent the purchase of medical equipment or development or offering of institutional health services granted in a certificate of need issued by the State Department of Health.

(b) In addition to other remedies now available at law or in equity, any party aggrieved by any such final order of the State Department of Health shall have the right of direct appeal to the Mississippi Supreme Court, which appeal must be filed within twenty (20) days after the date of the final order. * * * Any appeal shall state briefly the nature of the proceedings before the State Department of Health and shall specify the order complained of.

(C) Upon the filing of such an appeal, the Clerk of the Supreme Court shall serve notice thereof upon the State Department of Health, whereupon the State Department of Health shall, within thirty (30) days of the date of the filing of the appeal, certify to the * * * court the record in the case, which records shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; * * * however, * * * the parties and the State Department of Health may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal. * * *

(d) 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 loss of costs, fees, expenses and attorney's fees incurred in defense of the appeal, approved by the Supreme Court within five (5) days of the date of filing the appeal.

(e) No new or additional evidence shall be introduced in the Supreme Court, but the case shall be determined upon the record certified to the court.

(f) The Supreme Court * * * 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 any 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) if the court affirms 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. * * *

* * *

(g) Within thirty (30) days from the date of a final order by the Supreme Court * * * that modifies or wholly or partly vacates the final order of the State Department of Health granting a certificate of need, the State Department of

Health shall issue another order in conformity with the final order of the Supreme Court * * *. *Section 1 of 2011 Mississippi Laws Chapter 540 (HB 826)*

Section 1 of 2011 Mississippi Laws Chapter 540 (HB 826) takes the authority from the chancery court to hear and examine the administrative decision of the Department of Health and confers that authority to the Supreme Court. HB 826 provides for a total bypass of any trial court and gives this authority to the Court that Constitution has giving appellate Jurisdiction.

Mississippi Constitution Article 6 § 146 provides:

The 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. The Legislature may by general law provide for the Supreme Court to have original and appellate jurisdiction as to any appeal directly from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility. The Supreme Court shall consider cases and proceedings for modification of public utility rates in an expeditious manner regardless of their position on the court docket.

This Court has held that when interpreting the Constitution the “analysis must be guided by the plain language of the Constitution of 1890, the basic compact of government for the State of Mississippi and the yard stick which all Mississippi law must be measured.” *Dye v. State ex rel Hale*, 507 So.2d 332, 349 (Miss. 1987).

Section 146 of the state constitution expressly provides that the Supreme Court has original jurisdiction as to any appeal directly for approval or disapproval of rate sought to be charged the public by an public utility. To find that a statute is unconstitutional is must be

demonstrated that the statute is in direct conflict with clear language of the constitution. *PHE Inc. v. State*, 877 So.2d 1135, 1136 (1999). Section 146 only provides for direct appeals from administrative decision where it deals with the approval rate change for public utility. Due to the fact, Section 146 mentions no other administrative appeal, an analysis guided by the plain language of this section would show that this statute conflict with the clear language of the constitution.

Although a direct appeal from an administrative agency may appear to be appellate in nature, this court has held that “the jurisdiction which properly belongs to a court of appeals includes only such as is of revisory character, and necessarily implies that the matter revised must be a judicial decision, rendered by a tribunal clothed with judicial power. *Glenn v. Herring*, 415 So.2d 695 (Miss. 1982); *Ill. Cent. R.R. v Dodd*, 61 So. 743 (1913). This court expressly requires the matter to be revised must be a judicial decision which was rendered by tribunal clothed with judicial power. A direct administrative appeal fails to meet two important requirements set forth in the *Glen* case, such appeals are not judicial decisions nor rendered by tribunal clothed with judicial power. In the case at bar, the trial court has not rendered a judicial decision on the subject matter, so there is no judgement to be reviewed on appeal. This statute creates original jurisdiction with the Supreme which is a violation of Section 146 of the Mississippi Constitution.

While the Legislature has the constitutional power to determine appellate jurisdiction, Section 146 of the Constitution specifically limits the Supreme Court jurisdiction to appellate matters. The framers of the Constitution never intended that the Legislature to have the

power to grant authority to the Supreme Court to hear direct appeals from an administrative decisions, other than rate utility increase.

This court has long held that the Supreme Court's authority to hear direct appeals from administrative agencies is limited by Section 146. In fact in *Illinois Central Rail Road v. Dodd*, 61 So. 743 (Miss. 1913) this Court struck down a statute that permitted a direct appeal from the Railroad Commission.

The State of Mississippi has over fifty state agencies and many other licencing boards or commissions. Many of these entities regularly conduct administrative proceeding where administrative decisions are rendered. If you believe that Section 146 grants the legislature the authority to allow the Supreme Court hear direct appeals from the Department of Health, it would also mean that the legislature could demand a direct appeal from any other state agency or commission. To allow direct appeals would overwhelm this court, the State's highest court, with direct appeals from administrative agencies and would not support judicial efficiency. Under section 146 of the Constitution, the Supreme Court is an appellate court, and not a court of original jurisdiction.

CONCLUSION

For the above stated reasons it is clear that Section 1 of 2011 Mississippi Laws Chapter 540 (HB 826) is a violation of Section 146 of the Mississippi Constitution. Section 146 clearly prohibits the Supreme Court from hearing direct appeals from the Mississippi Department of health. The amended statute not only clearly contradicts the plain language of the Constitution but totally contradict the spirt of the appellate process.

Respectfully submitted,

DIALYSIS SOLUTION, LLC, Appellant,

By: 

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CERTIFICATE OF SERVICE

I, Bryant W. Clark, one of the attorneys for Appellant Dialysis Solution, LLC, certify that I have this day filed the foregoing Brief of Appellant with the Supreme Court Clerk and served a copy of these documents via United States Mail, postage prepaid, on the following:

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Dated, this the 28th day of September, 2011.


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