IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DIAMOND GROVE CENTER, LLC **APPELLANT**

VS. **CIVIL ACTION NO. 2011-SA-01128**

MISSISSIPPI STATE DEPARTMENT OF HEALTH AND VICKSBUG HEALTHCARE, LLC d/b/a RIVER REGION HEALTH SYSTEM, VICKSBURG **APPELLEES**

APPEAL FROM THE DECISION OF THE
HINDS COUNTY CHANCERY COURT, FIRST JUDICIAL DISTRICT

VICKSBURG HEALTHCARE d/b/a RIVER REGION HEALTH SYSTEM'S BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

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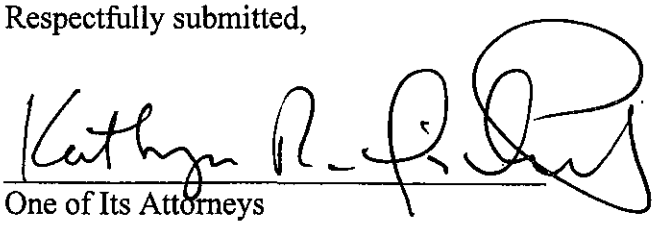
CERTIFICATE OF INTERESTED PARTIES

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 refusal.

1. Diamond Grove Center, LLC – Appellant.
2. Thomas L. Kirkland, Jr., Allison C. Simpson, and Andy Lowery – Counsel for Appellants.
3. Vicksburg Healthcare, LLC, d/b/a River Region Health System, Vicksburg – Appellee.
4. Kathryn R. Gilchrist and Brant J. Ryan – Counsel for Vicksburg Healthcare, LLC, d/b/a River Region Health System, Vicksburg – Appellee.
5. Mississippi State Department of Health – Appellee.
6. Bea M. Tolsdorf – Counsel for Mississippi Sate Department of Health – Appellee.
7. Cassandra Walter – Hearing Officer.
8. Mary Currier, M.D., M.P.H. – State Health Officer.
9. The Honorable J. Dewayne Thomas, Chancellor.

Respectfully submitted,



One of Its Attorneys
Counsel for Vicksburg Healthcare, LLC, d/b/a
River Region Health System, Vicksburg – Appellee

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STATEMENT OF THE ISSUE

Whether the exception to the statutory moratorium on adolescent psychiatric beds in *Miss. Code Ann.* §41-7-191(4)(a)(iii) remains effective, and permits the issuance of the certificate of need applied for by River Region.[1]

[1] River Region objects to Diamond Grove's statement of the issues on appeal because they assume the existence of rules of law which do not exist or are not true. River Region, thus, provides its own statement of the single issue before the Court in this appeal. Diamond Grove raised no issue in this Court regarding whether River Region complied with all applicable requirements imposed by the State Health Plan and CON Review Manual. Therefore, any arguments as to those matters are considered abandoned and waived. *Randolph v. State*, 852 So. 2d 547, 558 (Miss. 2002); *City of Vicksburg v. Cooper*, 909 So. 2d 126, 130 (Miss. App. 2005). Moreover, as it has from the beginning, River Region concedes that if the Court finds that the exception to the moratorium has been exhausted, then the moratorium on child/adolescent psychiatric beds bars its application for a certificate of need. Therefore, River Region will not address the second issue presented by Diamond Grove in its Initial Brief.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

This is an appeal from a decision of the Mississippi State Department of Health (the "Department") on a Certificate of Need ("CON") Application. The Applicant (and one of the Appellees), Vicksburg Healthcare, LLC d/b/a River Region Health System ("River Region"), is a 372 bed general acute care hospital located in Vicksburg, Mississippi, in Warren County.[2] Reynolds, Tr. at 134. River Region currently offers a full range of acute care services, with the exception of neurosurgery, and operates a behavioral health center on its west campus which provides adult and geriatric inpatient psychiatric services, as well as adult and adolescent chemical dependency services. *Id.* River Region proposes to renovate space on the west campus and add twenty (20) acute care beds which will be designated for the inpatient care of adolescent psychiatric patients in Warren County. Hrg. Ex. 3, Staff Analysis, at 1; D.G. R.E. 4 (Staff Analysis).

On January 25, 2010, River Region submitted a Notice of Intent to file the subject Certificate of Need application. The CON Application was filed on March 1, 2010. All supplemental filings were made in a timely manner as requested by the Department.
Upon filing the application, River Region acknowledged the existence of a legislatively imposed state-wide moratorium on beds of this type, but relied as the basis for its application on an exception to the moratorium set forth in *Miss. Code Ann.* §41-7-191(4)(a)(iii), wherein the State Legislature expressly authorized twenty (20) beds to be put into service in Warren County, Mississippi (the "moratorium exception"). Hrg. Ex. 23. The moratorium exception provides,

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[2] References to exhibits introduced at the administrative hearing of this matter are designated as "Hrg. Ex. ___." Referenced portions of the transcript for the administrative hearing are made by the name of the witness and the transcript page number as "Witness Name, Tr. at ___." For ease of reference, where cited documents are also contained in Diamond Grove's Record Excerpts, they will be cited next to the hearing exhibit references as "D.G. R.E. __."

among other things, that the Department may issue one or more certificates of need for up to a maximum of twenty (20) additional child or adolescent psychiatric beds in Warren County, and that as to those beds, the requirement to show need under the State Health Plan is waived, and there shall be imposed no prohibition or restriction on Medicaid participation. Hrg. Ex. 23. River Region asserted in the application that all other applicable criteria in both the 2010 State Health Plan and the Certificate of Need Review Manual were fully satisfied. Hrg. Ex. 2, CON Application.

The Department's staff reviewed the application and recommended approval. Diamond Grove Center, LLC, d/b/a Diamond Grove Center, Louisville ("Diamond Grove"), a behavioral health center located 130 miles across the state in Winston County, Mississippi, requested a Hearing During the Course of Review.[3]

A five-day hearing was held in November, 2010. Prior to the hearing, River Region submitted a motion for a ruling on whether *Miss. Code Ann.* §41-7-191(4)(a)(iii) remained viable and continued to grant the Department the current authority to approve a CON for the twenty (20) adolescent psychiatric beds applied for, and if so, whether compliance with the need requirement as set forth in the State Health Plan would be waived, as that statutory provision expressly states. After oral argument and briefing by both parties, the independent Hearing Officer ruled that the exemption was viable, that it conveyed current authority to the Department to approve the requested CON (if all other CON requirements were met), and that the requirement to demonstrate need for the beds was waived. *See* Hrg. Ex. 2, Order dated October 29, 2010; and *Joint Motion to Supplement the Record* at Exhibit E (Dec. 5, 2011).

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[3] Diamond Grove, located completely on the other side of the State, is nonetheless an "affected party" because the entire State is defined as the service area for adolescent psychiatric services. Brown, Tr. at 40.

Following the hearing, the Hearing Officer found that the application was governed first by *Miss. Code Ann.* §41-7-191(4)(a)(iii), and that because no beds have ever been established in Warren County under that section, the exception to the moratorium on adolescent psychiatric beds remains available to the Department. Hrg. Off. Op. at 7; and D.G. R.E. 5 (Hearing Officer's Findings, Conclusions, and Recommendations). As a result, the Department determined that there is no legislative impediment to the application submitted by River Region, and compliance with the need criterion set forth in the State Health Plan as to beds of this nature is not applicable in this case. Hrg. Off. Op. at 4. The Department further found that River Region had fully met its burden of proof as to every applicable specific and general review criterion, and that it had demonstrated substantial compliance with the general goals of the State Health Plan, and awarded the CON to River Region. D.G. R.E. 6 (Final Order).

Diamond Grove appealed the Department's decision to the Hinds County Chancery Court, arguing that the exception to the moratorium is no longer effective and that the Department has no authority to approve the beds. The Chancery Court, after hearing oral argument and considering the briefs of the parties, affirmed the Department's decision. D.G. R.E. 2 (Opinion of the court). Diamond Grove now appeals to this Honorable Court.

II. Statement of Facts

Although wholly irrelevant for this Court's analysis, Diamond Grove discusses the history surrounding the CON previously issued to Children's Hospital of Vicksburg under section 41-7-191 (4)(A)(iii) and the litigation subsequent to the Department's revocation of that CON. Those circumstances do not impact the Department's authority to grant River Region's application; however, they do explain the motive behind Diamond Grove's present objection.

The statutory exception to the moratorium on adolescent psychiatric beds was passed in 1994. Hrg. Off. Op. at 5; and D.G. R.E. 5 (Hearing Officer's Findings, Conclusions, and

Recommendations). A year later, in 1995, pursuant to the exception, the Department granted a CON for twenty (20) adolescent psychiatric beds in Warren County to Children's Hospital of Vicksburg. Hrg. Off. Op. at 5. Several years later, while the beds remained undeveloped, that CON became the property of Brentwood Behavioral Health Center ("Brentwood"). Brentwood is the sister company of Diamond Grove, the Appellant here. Eicher, Tr. at 17. Brentwood never implemented the twenty beds, opting instead to simply hold the CON and lobby the Legislature for a statutory amendment that would permit the twenty beds to be moved to a different county. Brentwood aimed to locate the beds in a county where it already operated a facility. The Legislature steadfastly refused to amend the exception, requiring that Brentwood implement the beds in Warren County as originally set forth in the exception. *See Miss. Code Ann.* §41-7-191(4)(a)(iii).

After five years of unsuccessful attempts by Brentwood to persuade the Legislature, and after repeated warnings from the Department that it would revoke the CON if Brentwood did not put the beds in service in Warren County, the Department revoked the CON in 2007. Eicher, Tr. at 19-20. Although Brentwood appealed this ruling, the Department's decision to revoke the CON was upheld. *See* 29 So. 3d 775 (Miss. App. 2009), *cert denied* No. 2008-CT-00169-COA. River Region submitted its CON application immediately following the final action on Brentwood's appeal, and Diamond Grove has opposed River Region at every turn.

III. Standards of Review

The scope of judicial review of a final order from the Department is extremely limited in nature. *Mississippi State Dep't of Health v. Southwest Mississippi Regional Medical Center*, 580 So. 2d 1238, 1239 (Miss. 1991). No order of the Department may:

> . . . be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order . . . 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 [Department], or violates any vested constitutional

rights of any party involved in the appeal. . . .

Miss. Code Ann. §41-7-201(2)(f). Substantial evidence means "more than a scintilla or a suspicion." *Mississippi State Department of Health, et al. v. Natchez Community Hospital*, 743 So. 2d 973, 977 (Miss. 1999) (citing *Mississippi Real Estate Comm'n v. Anding*, 732 So. 2d 192, 196 (Miss.1999)). "[A] presumption of validity is attached to agency action, and the burden of proof rests with the party challenging such action." *Mississippi State Dep't of Health v. Mississippi Baptist Medical Ctr.*, 663 So. 2d 563, 579 (Miss. 1995).

The Department is the agency chosen to administer the CON statute; therefore, its interpretation of the statute should be accorded deference. *Ricks v. Miss. State Dep't of Health*, 719 So. 2d 173, 179 (Miss. 1998) (citing *Williams v. Puckett*, 624 So. 2d 496, 499 (Miss. 1993)). "[U]nless the Department's interpretation is repugnant to the plain meaning thereof, the court is to defer to the agency's interpretation." *Id.* This deference is due to the Department's uniquely superior knowledge and experience in the realm of its own administrative setting. *Gill v. Dept. of Wildlife Conserv.*, 574 So. 2d 586, 593 (Miss. 1990) (recognizing that "no court can hope to replicate" the administrative agency's knowledge and understanding of its own duties and regulations). "[T]he same deference due the department's finding must also be given to the chancellor who, on appeal, affirms and adopts the department's finding." *Greenwood Leflore Hosp. v. Miss. State Dep't of Health*, 980 So. 2d 931, 934 (Miss. 2008).

Aside from purely legal issues which are reviewed *de novo*, the statutorily established standard controls and must apply to every CON appeal. Because there is no basis under the applicable standard of review for reversal the Department's interpretation of the CON statute and its decision to award the CON to River Region must be affirmed.

SUMMARY OF THE ARGUMENT

The Final Judgment of the Hinds County Chancery Court, First Judicial District affirming the Final Order of the Mississippi State Department of Health must be upheld. *See* D.G. R.E. 3 (Final Judgment, July 25, 2011).

First, this matter is clearly governed by the exception to the moratorium on adolescent psychiatric inpatient beds. That exception, found at *Miss Code Ann.* §41-7-191 (4)(a)(iii), plainly and unambiguously gives the Department permission to issue one or more certificates of need so that an additional twenty (20) Medicaid certified adolescent psychiatric beds may be put into service in Warren County. Diamond Grove's interpretation of the CON statute would prevent its practical application. The Department's interpretation of the exception's scope is sound, reasonable, and in harmony with the plain language of the CON statute. As the Chancellor concluded, that interpretation and the resulting decision to approve this CON must stand.

Second, Diamond Grove's "one-time award" argument is premised on an incorrect statement of the position espoused by both the Department and River Region. Construing the moratorium exception to mandate that the Department's authority to grant a CON expires upon the mere approval of a CON which is subsequently voided because the CON was never implemented is illogical and actually would serve to completely defeat the legislature's clear purpose in the exception. Where as here, the Department voided the first CON issued under the exception because the holder of that CON refused to implement it as the legislature had provided, the Department is unquestionably within its proper authority to issue a subsequent CON for those same beds.

Furthermore, Diamond Grove's reliance on neither the *Thompson* opinion issued by the Attorney General's office in 2008, nor the 2002 Order and Opinion of the First Judicial District

of the Hinds County Chancery Court (Judge Wise) provide any support for its "one-time award" argument. *Thompson* is factually distinguishable because of the Legislative time limit contained in the moratorium exception therein. And the 2002 Order and Opinion of the Hinds County Chancery Court left the original moratorium language (upon which the Department relied to grant River Region's CON) untouched. As a result, the Department's authority to grant the subject CON was unaffected by that decision.

For these reasons, the Court should affirm the Final Judgment of the Hinds County Chancery Court, First Judicial District affirming the Final Order of the Mississippi State Department of Health.

ARGUMENT

I. The Exception to the Moratorium on Adolescent Psychiatric Beds is Valid and Controlling.

There is no basis to overturn the Department's action granting River Region's application for a certificate of need. The Department acted within its authority to grant, and correctly granted, the CON as expressly authorized by *Miss. Code Ann.* §41-7-191(4)(a)(iii).

The Department properly concluded this matter is governed by *Miss. Code Ann.* §41-7-191(4)(a)(iii). This section contains an exception to the long-standing moratorium on the approval of any additional Medicaid-certified adolescent psychiatric beds in the State. It provides in pertinent part:

> The Department may issue a certificate or certificates of need for the construction or expansion of child/adolescent psychiatric beds or the conversion of other beds to child/adolescent psychiatric beds in Warren County. For purposes of this subparagraph (iii), the provisions of Section 41-7-193(1) requiring substantial compliance with the projection of need as reported in the current State Health Plan are waived. The total number of beds that may be authorized under the authority of this subparagraph shall not exceed twenty (20) beds. There shall be no prohibition or restrictions on participation in the Medicaid program (Section 43-13-101 *et seq.*) for the person receiving the certificate of need authorized under this subparagraph or for the beds converted pursuant to the authority of that certificate of need.

Miss. Code Ann. §41-7-191(4)(a)(iii).

Diamond Grove argues that this statutory exception is no longer effective because it was "used up" by the Department when a CON was granted under its authority some years ago, even though **no beds were ever put into service in Warren County under that CON**. For the reasons that follow, Diamond Grove's argument is meritless.

A. The Plain, Unambiguous Language of the Statute Makes Its Purpose Clear.

When a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation. *Mississippi Methodist Hospital and Rehabilitation Center, Inc. v. Mississippi Div. of Medicaid*, 21 So. 3d 600, 607 (Miss. 2009).

Rather, courts have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the Legislature. *Marx v. Broom*, 632 So. 2d 1315, 1318 (Miss. 1994).

The language of the exception in §41-7-191(4)(a)(iii) is clear and unambiguous. It expressly provides that the "Department may issue a **certificate or certificates** of need ...." *Miss. Code Ann.* §41-7-191(4)(a)(iii) (emphasis added). The Legislature was clear in its expression – and thus its intent is obvious – to authorize the Department to issue one or multiple certificates of need so that an additional twenty (20) Medicaid certified adolescent psychiatric beds may be put into service in Warren County. *Id.*

As the Department concluded, "there is no cognizable argument to be made that ambiguity exists in the subject statutory provision." Hrg. Off. Op. at 11; and D.G. R.E. 5 (Hearing Officer's Findings, Conclusions, and Recommendations) & 6 (Final Order). According to the "plain, unambiguous language in the statute, it is clear that the exception continues to authorize the Department to grant certificates of need as it sees fit up to a maximum of twenty (20) additional adolescent psychiatric beds in Warren County."[4] Hrg. Off. Op. at 11. Thus, there was "no legislative impediment to the application submitted by River Region." *Id.* at 4. Furthermore, the Department's interpretation "effectuates that clear purpose [of the Legislature] by allowing a subsequent CON for up to twenty (20) child/adolescent psychiatric beds in Warren County" and this interpretation should be afforded deference. D.G. R.E. 2 at page 10 (Chancery Court Opinion).

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[4] Diamond Grove suggests that River Region asks this Court find that the Department may, under the subject statutory exception, "issue however many CONs it deems necessary...." Diamond Grove Brf. at 7. That is false. River Region's position, and the clear intent of the Legislature, was to authorize the Department to issue however many CONs are necessary to put up to twenty beds in place in Warren County. To date, no beds have been placed pursuant to the exception. Thus, the Legislature's stated purpose has not yet been fulfilled.

B. Even if Ambiguity Were Found, the Legislature's Intent is Clear and Must Prevail.

As detailed above, the statutory moratorium is unambiguous. However, if it was arguably determined to be ambiguous, the Department's decision must be upheld. This Court has declared that if a statute is susceptible to more than one interpretation it "must be given that which will best effectuate [its] purposes rather than one which would defeat them." *Brady v. John Hancock Mutual Life Ins. Co.*, 342 So. 2d 295, 303 (Miss. 1977). When ascertaining the legislative purpose in a statute determined to be ambiguous, a court looks not only to the plain language of the statute, but also to the statute's "purpose and the objects to be accomplished." *Narkeeta Timber Co. v. Jenkins*, 777 So. 2d 39, 41 (Miss. 2000). The end goal of this review is to "get at the design and scope of the statute. **Only that construction will be justified which evidently carries out the purpose of the law.**" *Coker v. Wilkinson*, 106 So. 886, 887-88 (Miss. 1926) (emphasis added).

The Legislature's purpose in Mississippi Code Annotated §41-7-191(4)(a)(iii) is clear – to make available twenty (20) additional Medicaid-certified adolescent psychiatric beds in Warren County. Therefore, "even if could be concluded that this entirely transparent statute is somehow ambiguous, the rules of construction applied by the Supreme Court would nonetheless empower the Department to grant River Region's application for these twenty beds in Warren County, because that is the only construction of the statute that could be considered consistent with the Legislature's intent." Hrg. Off. Op. at 12; and D.G. R.E. 5 (Hearing Officer's Findings, Conclusions, and Recommendations). The statute's language is unambiguous, but even if it were, the Legislature's clear intent would carry the day, requiring the Department's decision to be affirmed.

C. There is No Basis for Diamond Grove's "One-Time Award" Argument.

Diamond Grove creates a false dichotomy in arguing that the Court must choose between either a "one-time award of a CON" or the "perpetual authority to issue an indefinite number of CONs." Diamond Grove Brf. at 7-8. Its premise is flawed and mischaracterizes River Region's actual argument: that the moratorium exception must be interpreted and applied in a manner that is consistent with the plain language of the statute.

This Court must affirm the Department's decision to act under the express language of the statutory exception so that the beds authorized thereby can finally be put into service in Warren County. Adopting Diamond Grove's "one-time award" argument would be contrary to the judicial duty to give the CON statute a practical application consistent with its wording.[5] *See generally Miss. Dep't of Wildlife, Fisheries & Parks v. Miss. Wildlife Enforcement Officers' Ass'n, Inc.*, 740 So. 2d 925 (Miss. 1999); *Marx v. Broom*, 632 So. 2d 1315, 1318 (Miss. 1994);

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[5] In its brief, Diamond Grove chose to omit appropriate context of this Court's opinion in *Miss. Dep't of Wildlife, Fisheries & Parks v. Miss. Wildlife Enforcement Officers' Ass'n* when it argues that the moratorium exception should be narrowly construed. *See* Diamond Grove Brf. at 7 (citing 740 So. 2d 925, 932 (Miss. 1999)). That case was an appeal of an administrative body's denial of a Mississippi Public Records Act ("MPRA") request. The administrative body argued that the requested records were exempt from production even though such a disclosure was not explicitly exempt according to the statute. *Id.* This Court explained that a statutory exemption could not be created by construction, and ordinarily "an exception must appear plainly from the express words or necessary intendment of the statue." *Id.* Immediately following the citation to secondary authority that Diamond Grove selectively quoted, this Court stated:

> It is also important to note that this Court has held that courts have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature. Thus, if a statute is not ambiguous, the court should simply apply the statute according to its plain meaning... The ultimate goal of the court is to discern and give effect to the legislative intent.

Id. at 932 (internal citations omitted). This appeal is clearly distinguishable from the case above because the CON statute contains an explicit exception, unlike the case above. The plain language of that exception demonstrates that the Legislature intended for the Department to have authority to issue one or more CONs for "the construction or expansion of child/adolescent psychiatric beds or the conversion of other beds to child/adolescent psychiatric beds in Warren County" not to exceed twenty beds. *Miss. Code Ann.* §41-7-191(4)(a)(iii). The Court's reasoning in the *Miss. Dep't of Wildlife, Fisheries & Parks* case (that an explicit exception must appear in the statute) clearly supports River Region's interpretation and the Department's ultimate decision.

West v. State, 725 So. 2d 872, 878 (Miss. 1998) ("[U]nless there is sufficient language to the contrary, the words of a statute are to be interpreted according to their usual and most common sense meaning, and ... statutes will be given a practical application consistent with their wording, unless the application is inconsistent with the obvious intent of the legislature").

It cannot reasonably be argued that the Legislature intended to only give the Department authority to grant an applicant permission to put adolescent psychiatric beds in service, without actually putting the beds in service. And yet that is precisely the position Diamond Grove takes here – that the mere grant of a CON which was never implemented and which was ultimately revoked fulfilled the Legislature's intent and "used up" the statutory exception. Such an interpretation expressly fails to give effect to the purpose of the statute and would lead to absurd results in this, and many future cases. Specifically, Diamond Grove's "one-time grant" argument undermines the purpose of the exception and would allow an applicant to obtain a CON, refuse to make a good faith effort to implement it, and thereafter bar the establishment of that facility or service by another qualified applicant in the absence of further legislative action. Such an outcome is antithetical to the Department's mission of promoting and protecting the health of Mississippi's citizens and cannot be the statutory interpretation endorsed by this Court.

The language in the original moratorium exception has never changed, despite repeated lobbying efforts by Diamond Grove's sister company. Nor was there any time limit placed on the authority the exception conferred on the Department to grant one or more certificates of need for beds in Warren County. "[B]ecause no beds have ever been established in Warren County under that section, and there being no time limit imposed by that section in which to make application, the exception to the moratorium on adolescent psychiatric beds remains available to the Department." Hrg. Off. Op. at 4; and D.G. R.E. 5 (Hearing Officer's Findings, Conclusions, and Recommendations).

Diamond Grove argues that because "it is the nature of a CON to expire after one year, barring renewal by the Department," "if River Region prevails in this case and implements its 20 psychiatric beds, the CON in question will cease to remain valid – and once there is no CON in place, the Department will have authority to issue another CON for 20 more beds!" Diamond Grove Brf. at 9-10. This argument is nonsensical and misrepresents the positions of both River Region and the Department. If River Region prevails in this case and implements the 20 beds there will no longer exist any authority under the current moratorium exception. Indeed, had Brentwood implemented the twenty beds during the more than five years that it held its CON, there would not now remain any authority for the Department to grant the requested CON because the maximum allowable beds under the exception would have been put in place.

Diamond Grove continues to ignore that no beds have ever been added to Warren County under the exception in §41-7-191(4)(a)(iii). Barring further legislative action, once the authorized twenty beds are implemented in Warren County, then and only then, will the Department's authority under the exception be exhausted. The Department's interpretation of the moratorium exception is "sound and reasonable and in harmony with the plain language of the relevant statute," and should be affirmed by this Court. D.G. R.E. 2 at page 11 (Chancery Court Opinion).

D. Diamond Grove's Reliance on the Cited AG Opinion is Misplaced.

As support for its "one-time award" argument, Diamond Grove relies on an Attorney General's opinion that is wholly distinguishable from the present facts. *See* Diamond Grove Brf. at 11-12; and *Thompson*, 2008 Miss. AG LEXIS 275 (Oct. 31, 2008). For the reasons set forth below, Diamond Grove's reliance on that opinion is entirely misplaced.[6]

[6] Interestingly, after relying on the AG opinion as controlling in the pre-hearing and hearing proceedings as well as the chancery court appeal, Diamond Grove now concedes that the opinion is "partially distinguishable" and serves only as "persuasive" authority here. *See* Diamond Grove Brf. at 11-

In the situation addressed by the Attorney General, the Legislature had authorized an exception to the then-existing moratorium on nursing home beds. 2008 Miss. AG LEXIS 275 at **2-3. "The statutory exemption to the moratorium enacted in 1999 authorized MSDH to issue a CON for nursing home beds in certain enumerated counties (as determined by MSDH based upon need), for the fiscal years 1999, 2000, 2001, and 2002." *Id.* at *3. Pursuant to that exception, the Department granted a CON for sixty (60) beds in Attala County in 2002. *Id.* However, as in the present case, the recipient of the CON never put the beds in service despite holding the CON for six years. *Id.* at *3 . The CON was finally revoked by the Department in 2008. *Id.* In 2008, after the CON was revoked, another entity applied for the sixty (60) beds and the Department sought direction from the Attorney General as to whether it could issue another CON.

The statutory exception considered by the Attorney General contained an express restriction on the time period during which the Department could exercise its authority to issue CONs for those beds. It stated "**[b]eginning on July 1, 1999**, the State Department of Health shall issue certificates of need **during each of the next four (4) fiscal years** . . . ." *Id.* at *2 (emphasis added). In fact, according to the Attorney General, the time limit in the statutory language was precisely what prompted the State Health Officer to request the opinion. *Id.* at **2-3. The Department indicated that it was concerned whether it had authority to issue another CON "**since the 1999 exemption only allowed for issuance of CONs during 1999 through 2002**." *Id.* at *3 (emphasis added). Finally, contrary to Diamond Grove's assertion, the Attorney General's determination concerning the Department's inability to issue another CON was based **entirely** on the time limitation. The Attorney General stated, in pertinent part, as follows:

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12. In fact, the opinion is not remotely persuasive because it is completely distinguishable. Diamond Grove has repeatedly misrepresented the AG's conclusions and restricted its discussion to limited aspects of the AG opinion. As is readily discernible from the express language of the opinion, it has no application here.

> The statutory exemption to the moratorium enacted in 1999 authorized MSDH to issue a CON . . . **for the fiscal years 1999, 2000, 2001, and 2002**. While the fourth and last CON . . ., issued in 2002 was never acted upon . . ., it is the opinion of this office that **the time period for issuance of that CON has long past** [sic].

Id. at *4 (emphasis added). The Attorney General expressly concluded that the exemption was limited to "four fiscal years," and that the Department was thereafter precluded from issuing any additional CONs because "the window established by the exemption to the moratorium, 1999 through 2002, has long since passed." *Id.*; *see also* D.G. R.E. 2 at page 9 (Chancery Court Opinion) ("a close reading of the Attorney General Opinion reveals that the moratorium exception at issue in that matter contained a legislatively imposed time limit"). The opinion does not set forth any alternative bases for its ultimate finding that the statutory exception had expired.

While the Legislature could easily have imposed a similar time limit on the exception at issue in this case – it did not. *See* D.G. R.E. 2 at page 9 (Chancery Court Opinion). According to this Court, the presumption as a result of that legislative inaction must be that the Legislature **chose** not to impose any time limit. *See Dialysis Solutions v. Mississippi State Department of Health, et al.*, 31 So. 3d 1204 (Miss. 2010). Where the Legislature imposes no time restriction on the exception to the moratorium it intends no time restriction. Therefore, the exception which has never been given effect continues to be valid today.

E. Judge Wise's Chancery Court Opinion Does Not Control.

The original moratorium exception language clearly grants the Department authority to issue a CON for the adolescent psychiatric beds in question. Judge Wise's Chancery Court opinion cited by Diamond Grove is not controlling in the instant case for the following reasons.

1. The Original Moratorium Exception Language Was Unaffected.

It is undisputed that Judge Wise's opinion left the original moratorium exception language unaffected. In the chancery court opinion cited by Diamond Grove, Judge Wise did not

declare *Miss. Code Ann.* §41-7-191(4)(a)(iii) unconstitutional. Her opinion was, instead, exclusively focused on the amendment to the original exception in (4)(a)(iii), and within that amendment, on the first sentence. That first sentence contained a mandate from the Legislature to the Department of Health to rescind the 1995 CON if it was not implemented by a certain date.[7] Despite the staff's reliance on the amendment language in its analysis, "the Hearing Officer and the State Health Officer both determined that the 2001 Amendment was not necessary for the Department to issue the 2011 CON to River Region." D.G. R.E. 2 at page 8 (Chancery Court Opinion). Therefore, with or without the amendment, the original moratorium exception is sufficient to support the Department's decision.

2. Judicial Doctrines Preclude Any Binding Effect of the Chancellor's Opinion on This Court.

The doctrines of collateral estoppel, *stare decisis* and severability undercut Diamond Grove's argument that Judge Wise's decision has any bearing here.

(a) Collateral Estoppel

In order for collateral estoppel[8] to apply, and for the parties here to be bound by Judge Wise's decision, four "identities" must be present: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of a person against whom the claim is made. *EMC Mortgage Corp. v. Bettye Carmichael*, 17 So. 3d 1087, 1090 (Miss. 2009). The identity of parties (also known as the mutuality doctrine) requires that the parties to the subsequent action must be the same as those in the prior action. *Walker v. Kerr-McGee Chemical Corporation*, 793 F. Supp.

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[7] The Chancery Court held that the statutory mandate to the Department violated the Mississippi Constitution's provision for separation of powers, and that rescission of the CON with no notice to or hearing for the holder of the CON would violate its due process rights. D.G. R.E. 7 (Chancery Court Opinion in *Children's Hosp. of Vicksburg, LLC v. State of Mississippi*).

[8] Unlike the doctrine of res judicata, collateral estoppel applies only to questions actually litigated in a prior suit, and not to questions which might have been litigated. *Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Mississippi, Inc.*, 932 So. 2d 44, 59 (Miss. 2006).

688, 695 (N.D. Miss. 1992). A final decision of an issue on its merits is normally viewed as preclusive "only if there is an identity of parties from one suit to the next." *State of Mississippi ex rel. Moore v. Molpus*, 578 So. 2d 624, 640 (Miss. 1991). Where the parties are not the same, nor fall within the definition of parties in privity, the doctrine is not applicable. *Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Mississippi, Inc.*, 932 So. 2d 44, 59 (Miss. 2006).

> Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. The statement that a person is bound . . . as a privy is a short method of stating that under the circumstances and for the purpose of the case at hand he is bound by . . . all or some of the rules of *res judicata* by way of merger, bar or collateral estoppel.

Hogan v. Buckingham, 730 So. 2d 15, 18 (Miss. 1998). Courts have characterized Mississippi's adherence to the mutuality requirement as being as "rigid as any now extant." *Walker*, 793 F. Supp. at 696. The mutuality requirement is not met in this case because River Region was not a party to the suit filed by Children's Hospital challenging the constitutionality of the 2001 amendment. Because River Region had no connection to the prior action it cannot be bound under the doctrine of collateral estoppel by the judgment rendered therein. *Hogan*, 730 So. 2d at 18.

(b) *Stare Decisis*

Neither can the doctrine of *stare decisis* operate to bind the parties here to Judge Wise's decision. To support its *stare decisis* argument Diamond Grove relies on this Court's decision in *Caves v. Yarbrough*. Diamond Grove Brf. at 14 (citing 991 So. 2d 142 (Miss. 2008)). In *Caves*, the Court summarized its precedent applying the theory explaining that even if the **Mississippi Supreme Court's** previous interpretation of a statute was (in the Court's view) erroneous, it must continue to apply the incorrect interpretation unless the Court considered it "pernicious,

impractical or mischievous in effect, and resulting in detriment to the public." *See Caves*, 991 So. 2d 142, 152 (Miss. 2008) .

Diamond Grove's reliance on this theory is misplaced for the following reasons. First, the *Caves* opinion discusses precedent established by a previous interpretation of this Court, which publishes its decisions, as opposed to unpublished opinions by the Chancery Court. *Id.* at 152. The clear purpose of publishing cases is to inform the public (including the Legislature) of decisions that impact and interpret the law. Chancery court opinions are not published, and as a result, neither the Legislature nor any other member of the public, can be expected to have actual or constructive knowledge of them.

The fact that state chancery court opinions are not published also undermines Diamond Grove's statutory reenactment argument. *See* Diamond Grove Brf. at 14. The Court in *Caves* held that in cases where this Court "concludes a statute was incorrectly interpreted in a previous case – we will nevertheless continue to apply the previous interpretation pursuant to the doctrine of *stare decisis*, upon finding the Legislature amended or reenacted the statute without correcting the prior interpretation." *Caves*, 991 So. 2d at 153. Following Judge Wise's decision, this Court never interpreted the statute; therefore, a necessary prerequisite regarding statutory reenactment never occurred. Furthermore, the presumption that the Legislature was aware of Judge Wise's opinion is farfetched because the opinion was never published; therefore, the Legislature could not be presumed to know and tacitly approve it.

Despite the fact that this Court never interpreted the subparagraph in question, should it consider applying the doctrine of *stare decisis* it is free to now reach a different conclusion. This Court has not hesitated to reverse numerous prior cases which wrongly interpreted a statutory provision without finding that the pernicious or mischievous standard was met. *Caves*, 991 So. 2d at 153.

> Since the "pernicious/mischievous" test has virtually never been met, one would think this Court has virtually never reversed a prior statutory interpretation. Not so. Without any finding of "pernicious" or "mischievous," this Court has not hesitated to reverse numerous prior cases which wrongly interpreted a statutory provision.

Id.

Because this Court never interpreted the subparagraph in question, it is not prohibited from overturning Judge Wise's previous opinion which wrongly interpreted the amendment in question.

(c) Severance

If the Court finds that Judge Wise's interpretation of the amendment to §41-7-191(4)(a)(iii) is relevant to the current appeal, the exception to the moratorium nonetheless grants the Department the authority to issue the CON based on the presumption of severability.

As Mr. Munford, an expert in the areas of statutory construction, constitutional law and legislation, testified at the hearing, the second paragraph of *Miss. Code Ann.* §41-7-191(4)(a)(iii) was not declared unconstitutional in its entirety by Judge Wise's opinion, but rather only its first sentence was addressed. Munford, Tr. at 693-94. Regardless whether Judge Wise intended to strike the entire second paragraph, the second sentence of the amendment should have remained intact because of the Mississippi Code section addressing severance. *Id.* at 695. Specifically, Mr. Munford testified that in light of *Miss. Code Ann.* §1-3-77, there is a presumption in favor of severability. Munford, Tr. at 695. That section provides:

> If any section, paragraph, sentence, clause, phrase or any part of any act passed hereafter is declared to be unconstitutional or void, or if for any reason is declared to be invalid or of no effect, the remaining sections, paragraphs, sentences, clauses, phrases or parts thereof shall be in no manner affected thereby but shall remain in full force and effect.
>
> **Unless the contrary intent shall clearly appear in the particular act in question, each and every act passed hereafter shall be read and construed as though the provisions of the first paragraph of this section form an integral part thereof, whether expressly set out therein or not.**

Miss. Code Ann. §1-3-77 (emphasis added). As the Hearing Officer concluded, "[e]ven if Judge Wise did intend to strike all of the second paragraph ... *Miss. Code Ann.* §1-3-77 leaves no room for doubt that her decision . . . would be in violation of Mississippi severance law ... [h]ere there is no prohibition against severance in the statute, and the second sentence was never questioned by Judge Wise. Thus, it must remain in full force and effect." Hrg. Off. Op. at 9-10; and D.G. R.E. 5 (Hearing Officer's Findings, Conclusions, and Recommendations). The mere conclusory arguments offered by Diamond Grove, in the absence of any supporting evidence, are not enough to overcome this legislative presumption in favor of severance.

Finally, should this Court determine that the Chancellor's decision is binding upon it, the language of the amendment can provide assistance in understanding the Legislature's intent. *Warner v. Board of Trustees*, 359 So. 2d 345, 348 (Miss. 1978). Based on the plain language of the amendment it is clear that the intent of the Legislature was to permit the addition of twenty (20) child/adolescent psychiatric beds in Warren County.[9] As a result, the Department's interpretation is fully supported and should be afforded deference.

[9] The referenced amendment language reads: "If by January 1, 2002, there has been no significant commencement of construction of the beds authorized under this subparagraph (iii), or no significant action taken to convert existing beds to the beds authorized under this subparagraph, then the certificate of need that was previously issued under this subparagraph shall expire. If the previously issued certificate of need expires, the department may accept applications for issuance of another certificate of need for the beds authorized under this subparagraph, and may issue a certificate of need to authorize the construction, expansion or conversion of the beds authorized under this subparagraph." *Miss. Code Ann.* §41-7-191(4)(a)(iii).

CONCLUSION

For all of the reasons set forth in detail above, and in consideration of all of the evidence contained in the record in this matter, the Department's decision must be affirmed.

Dated this the 15th day of March, 2012.

Respectfully submitted,
VICKSBURG HEALTHCARE d/b/a
RIVER REGION HEALTH SYSTEM

By: Kathryn R. Gilchrist
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CERTIFICATE OF SERVICE

I certify that I have this day caused to be hand-delivered the original and three copies of Vicksburg Healthcare d/b/a River Region Health System's Brief of Appellee and a condensed disk of the brief for filing to:

Ms. Kathy Gillis, Clerk
Mississippi Supreme Court
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I certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of Vicksburg Healthcare d/b/a River Region Health System's Brief of Appellee to:

Honorable J. Dewayne Thomas
Hinds Chancery Court
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I certify that I have this day caused to be hand-delivered a true and correct copy of Vicksburg Healthcare d/b/a River Region Health System's Brief of Appellee to:

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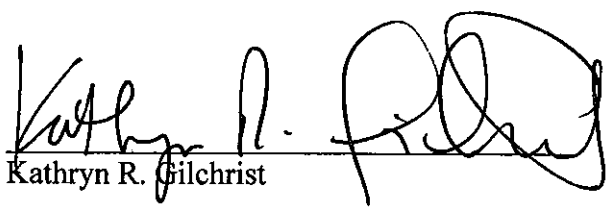
This the 15th day of March, 2012.



Kathryn R. Gilchrist

APPENDIX