IN THE SUPREME COURT OF MISSISSIPPI

DIAMOND GROVE CENTER, LLC — **APPELLANT**

V. — **NO. 2011-SA-01128**

MISSISSIPPI STATE DEPARTMENT OF HEALTH and VICKSBURG HEALTHCARE, LLC, d/b/a River Region Health System, Vicksburg — **APPELLEES**

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

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Other Authorities:

STATEMENT REGARDING ORAL ARGUMENT

Inasmuch as the parties are unable even to agree on the issues before the Court, the present appeal involves close questions of statutory interpretation, and the Department itself claims "serious implications" for this Court's decision, Diamond Grove respectfully submits that oral argument may prove helpful to this Court in its resolution of the appeal, and thus requests same.

Oral argument may also assist the Court in forming its position on the preclusive effects of unappealed lower-court judgments striking down a statute. None of the parties has found many precedents on that question, so this Court has the opportunity to clarify an important legal question of obvious application to future cases. Parties, particularly state agencies, will be more inclined to let such adverse judgments go unchallenged if they feel comfortable that they will not be precluded from challenging them years later.

REBUTTAL ARGUMENT

River Region, the applicant for the CON in dispute, and the Department have filed similar briefs making essentially the same arguments.[1] Rather than rebut each brief separately, we focus on the issues in the case.

I. Paragraph One of Subsection 4(a)(iii) Does Not Authorize the CON.

River Region and the Department claim that the first paragraph of Miss. Code Ann. § 41–7–191(4)(a)(iii) is unambiguous in creating the exception they desire to the moratorium on child-psych beds. Here again are both paragraphs of the subsection—we will refer repeatedly to "paragraph one" and to sentences one and two of "paragraph two," so those sentences are numbered below "[1]" and "[2]" for ease of reference:

¶ 1: (iii) 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.

¶ 2: **[1]** 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. **[2]** 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

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[1]The Department titled its brief a "joinder," but we have never before seen a joinder with tables of contents and authorities, not to mention twenty pages of argument. As its certificate of service (Dep't at 30) says, the "joinder" is actually a brief.

We refer to River Region's brief as "RR" and the Department's brief as "Dep't."

to authorize the construction, expansion or conversion of the beds authorized under this subparagraph.

As Diamond Grove noted in its principal brief, one problem with the Department's interpretation of paragraph one is that it makes paragraph two (the "2001 Amendment") redundant: if paragraph one already meant that an expired CON would allow the Department to issue a new CON, then why was the second sentence of paragraph two necessary? We do not find that either River Region or the Department has addressed this point. That makes their assertions about the Legislature's supposed intent unpersuasive, based as it is on their own notions of what they would like the Legislature to have done, not on the actual text of the subsection. If paragraph one "clearly and unambiguously" meant what they say it means, then the Legislature must not have known how to read its own statute.

As for this Court's rule that statutory exceptions must be construed narrowly, River Region complains that we "chose to omit appropriate context" in citing that rule. RR at 12 n.5. That "context" was the rule that statutes are to be given "a practical application *consistent with their wording*." *Miss. Dep't of Wildlife, Fisheries & Parks v. Miss. Wildlife Enforcement Officers' Ass'n, Inc.*, 740 So. 2d 925, 932 (Miss. 1999) (emphasis added). We emphasize "consistent with their wording" because River Region seeks an application *in*consistent with the statute's wording. In cases involving statutory interpretation, it tends to be that the party arguing for a "practical" interpretation is the one whose practices are barred by the statute. This is one of those cases.

More interestingly, River Region tries to distinguish between subsection (4)(a)(iii)'s making "an explicit exception" and the statute in *Wildlife, Fisheries & Parks*. RR at 12 n.5. However, regardless of the facts in that case, the general rule on which this

Court relied has clear application to express statutory exceptions: this Court relied on the black-letter law of *American Jurisprudence 2d*, which states as follows:

> An exception exempts something absolutely from the operation of a statute **by express words in the enacting clause**; an exception takes out of the statute something that otherwise would be part of the subject matter.
>
> While there are some cases in which exceptions are liberally construed, particularly with respect to statutes subject to a strict construction, ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws. Thus, in the resolution of ambiguities, courts favor a general provision over an exception, and one seeking to be excluded from the operation of the statute must establish that the exception embraces him.

73 Am. Jur. 2d *Statutes* § 212 (emphasis added).[2] Nor, it seems, has River Region correctly characterized *Wildlife, Fisheries & Parks* as a case where an agency "argued that the requested records were exempt from production even though such a disclosure was not explicitly exempt according to the statute." RR at 12 n.5. As described by this Court, the agency certainly did argue that an express statutory exemption applied. *Wildlife, Fisheries & Parks*, 740 So. 2d at 930 (see ¶ 13). This Court simply disagreed with the agency. *Id.* at 932 (see ¶ 20).

Finally, neither River Region nor the Department likes what they aptly describe as our "one-time award" argument; but they are stronger on why they do not like it than on why the statute does not say exactly that. The problem again is that if the Department were authorized to keep issuing CONs, the second sentence of paragraph two, on which both Appellees rely in the alternative, would be superfluous.

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[2]The *Wildlife, Fisheries & Parks* decision cited § 313, which however was the source only of the portion of the Court's quotation following the four ellipsis marks. *Wildlife, Fisheries & Parks*, 740 So. 2d at 932. The former part of the quotation is from § 212.

The 2001 Amendment which added paragraph two to subsection (4)(a)(iii) has been stricken for almost ten years now, and the Legislature has not seen fit to re-enact an exception for child-psych beds in Warren County. All guesses as to the Legislature's intent, therefore, must give way to its evident acquiescence in the status quo. Whatever health or budgetary priorities may have held good in 2001 may not pertain to the present day, so that the Legislature may well prefer the state of affairs created by the chancery court's striking the 2001 Amendment. This Court should resist the invitation to second-guess the Legislature.[3]

II. The Department Is Collaterally Estopped from Challenging the 2002 Judgment.

River Region and the Department (by joinder) argue that collateral estoppel does not apply in the present case, so that the Department is free to ignore the chancery court's 2002 judgment. At least, that is the only rationale we can see for arguing against collateral estoppel, an issue evidently of such concern to Appellees that they raise it in their brief despite its not having been argued by Diamond Grove in its principal brief. River Region does say that because *it* "had no connection to the prior action it cannot be bound under the doctrine of collateral estoppel by the judgment rendered therein." RR at 18. But that makes no sense. This appeal asks this Court to reverse a final order of the State Health Officer; that is all the relief sought. River Region's participation in this appeal is as an alter ego of the Department, not as a party with any independent

[3]River Region's argument on *stare decisis*, RR at 18-20, seems to amount to the claim that lower-court judgments striking down statutes are of no practical effect. If the logic of *Caves v. Yarbrough*, 991 So. 2d 142, 153-54 (Miss. 2008), as to Legislative acquiescence does not apply to unappealed decisions from the lower courts of the judiciary, then perhaps this Court should so state. The chancery court's decision is of course not binding on this Court, but it binds the Department.

legal rights in the case: if the CON stands, good for River Region, but if the Department had no authority to issue the CON, then River Region has no alternative basis on which to argue it should somehow get the CON anyway.[4] So plainly, if collateral estoppel bars the Department from issuing the final order, that suffices for this Court to reverse and render.

River Region relies entirely on its theory that collateral estoppel cannot apply because strict identity of the parties is not present. But collateral estoppel does not require strict identity of the parties: if the parties to the prior suit who "are connected with [the present suit] in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties," then collateral estoppel applies. *Hogan v. Buckingham ex rel. Buckingham*, 730 So. 2d 15, 18 (Miss. 1998) (quoting *Little v. V & G Welding Supply, Inc.*, 704 So. 2d 1336, 1339 (Miss. 1997)).[5]

In the present case, River Region concedes that Diamond Grove is a "sister company" of Children's Hospital, which litigated the challenge to the 2001 Amendment against the Department. RR at 5. As for River Region itself, its position in the present suit is indistinguishable from that of the Department, as a comparison of their briefs

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[4]The participation of parties in River Region's position in CON appeals is a procedural fact of long standing, and we don't mean to imply there is anything improper therein. The point is only that the party to which the CON issued has an interest in seeing the final order upheld, but has no basis on which to argue other than that the Department acted properly in issuing the order.

[5]This Court in *Little* looked to the Restatement (Second) of Judgments, which also states as a general rule that "A party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue." Restatement (Second) of Judgments, § 29.

and relief sought will easily demonstrate. For purposes of collateral estoppel, then, privity exists and the identity of the parties is met.

This result makes not only legal but practical sense. Once the chancery court struck down the 2001 Amendment and the Department declined to appeal, that judgment became final against the Department. The finality of judgments would be mocked if the Department could, in the next CON case to come along regarding the statute in question, relitigate the issue from scratch based on the supposed non-identity of the parties. Collateral estoppel is supposed to bind state officers and agencies no less than private parties. *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 641 (Miss. 1991).

This Court has held that "[t]he public interest in stability and repose is so paramount that collateral estoppel protects competent judgments which are subsequently thought to be erroneous. Where the elements of estoppel have been satisfied, the court's inquiry is not 'whether the court's order was erroneous, but only that it was the final judgment of the case.' " *Molpus*, 578 So. 2d at 642 (quoting *Aetna Casualty & Surety Co. v. Espinosa*, 469 So.2d 64, 67 (Miss. 1985)). Collateral estoppel will apply even where "the substantive law was incorrectly decided and applied." *Id.* There is no question that the chancery court's judgment striking down the 2001 Amendment was final, and while we do not think that the chancery court erred as a matter of law, that is not a material point as regards collateral estoppel.

Oddly, River Region argues that strict identity of the parties *is* required, based on a federal case citing a 1970 law journal note. RR at 18, *citing Walker v. Kerr-McGee Chemical Corp.*, 793 F. Supp. 688, 696 (N.D. Miss. 1992) (quoting prior decision's citation to "Note, Collateral Estoppel–the Multiple Tort Claimant Anomaly," 41 Miss.

L.J. 497, 498 (1970)). Given that River Region had just quoted *Hogan*, which as we've seen holds that strict identity is *not* necessary, we do not understand the import of this backdoor citation to a 42-year-old secondary source that has evidently been superseded by this Court's jurisprudence. Sufficient identity of the parties exists for collateral estoppel to apply here.

Because collateral estoppel does apply, the Department cannot relitigate the issue of whether paragraph two of subsection (4)(a)(iii), which the chancery court struck down in 2002, is good law: that issue was "[1] actually litigated, [2] determined by, and [3] essential to the judgment in a former action." *Hogan*, 730 So. 2d at 18 (quoting *Norman v. Bucklew*, 684 So. 2d 1246, 1254 (Miss. 1996)). One has only to read the chancery court's decision to see that all three of these elements apply, and River Region does not argue otherwise.

III. The Attorney General's Opinion Is Relevant and Applicable.

As already noted by Diamond Grove in its initial brief, the Attorney General's opinion on the CON moratorium is not entirely on point with the present case; it thus seems strange that River Region accuses Diamond Grove of "misrepresenting" that opinion to this Court.[6] But we think the opinion's analysis supports Diamond Grove's position and merits this Court's attention.

The second question presented by the Department was this:

> Does the moratorium in Section 41-7-191(2) prohibit the issuance of another CON in those counties where the initial CON has expired without the implementation of the project?

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[6]Do parties really try to "misrepresent" materials that they have placed in their own record excerpts and thus drawn this Court's attention to?

And the Attorney General's response was this:

> Yes, the moratorium on issuance of CON's for new nursing home beds/facilities prohibits MSDH from issuing another CON.

R.E. 8 at 1. Reading the Attorney General's reasoning (R.E. 8 at 2), we cannot agree with River Region and the Department that the above response depended upon the time limits in the particular statute in question. Rather, once the Department issued a CON, it had used the power vested in it by the statutory exception. "The fact that a facility was never built and the CON allowed to expire does not alter the fact that the moratorium is now in place." R.E. 8 at 2. The consideration as to the time limits is inseparable from the fact that the statute then in question was mandatory, not permissive like in the present case: since the Legislature said "shall issue," arguably the mandate would have remained in effect had there not been a time limit expressly stated in the statute. By contrast, subsection (4)(a)(iii) is permissive ("may issue"). But the absence of a time limit does not affect the main point, which is that a general moratorium on child-psych beds is in place, and exceptions to it must be construed narrowly, not broadly.

IV. Severability Does Not Save the Second Sentence of Paragraph Two.

As a last resort, both River Region and the Department turn to the doctrine of severability—they've argued that paragraph one lets the Department issue a new CON, which is what sentence two of paragraph two expressly allows, but in the alternative, they argue that the chancery court should not have or did not actually strike sentence two, just sentence one.

To the extent that Appellees argue "should not have," that is water under the bridge of collateral estoppel, for reasons already argued above. It is too late for a collateral attack on the unappealed 2002 judgment.

As for "did not," Diamond Grove has already argued (at 12-14) that the 2002 judgment of the chancery court is unambiguous in striking the entirety of the 2001 Amendment.

To the extent that this Court deems the question of severability of paragraph two, sentence one to be properly before it, River Region's argument as to severability lacks merit. First, River Region relies on Miss. Code Ann. § 1–3–77 on the presumption of severability:

> 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.

(emphasis added). But the chancery court already followed § 1–3–77 when it struck only the 2001 Amendment, paragraph two of subsection (4)(a)(iii), and not the entire subsection: the court declared paragraph two "unconstitutional or void" but left paragraph one in place.

River Region refers to its legal expert on severability who testified at the hearing. Thus it may be relevant to refer to Diamond Grove's own legal expert, Professor Matthew Hall of the University of Mississippi School of Law, who teaches Legislation

and who was qualified by the hearing officer as an expert on that topic (T.462, 463). Professor Hall considered the position advocated by River Region and the Department:

> But then I began thinking, all right, if someone wants to argue that Judge Wise struck down only one sentence, would Judge Wise agree with that?
>
> And the portion of the Opinion that I think bolsters the plain language reading that I just articulated is also on Page 4. Here's what—Judge Wise **describes this amendment, both sentences of it, as part of a legislative compromise**.
>
> Specifically, she says: "On March 27th, 2001, the Legislature reached a compromise with regard to the Chaney amendment and revoked the two Children's Hospital Warren County bed Certificates of Need if there was no construction."
>
> And when she uses that language, that seems to me to be a Finding of Fact in which she's saying these two sentences are inextricably joined.
>
> And when you have two parts of the statute that are inextricably joined, you can't strike down just one part of it. So, in my mind, the Judge is saying this is—the paragraph, second paragraph, both sentences are part of the legislative compromise.
>
> There's a doctrine in legislation called severance. Severance is the idea that if you have a statute—and just hypothetically, say you've got a statute made up of ten sections, and you strike down one section as violative of the Constitution, severance is the idea that you can cut that one piece off, throw it away, and keep the other nine pieces in effect.
>
> And I think Judge Wise is basically saying you can't employ severance here. **This is a one-piece compromise. It's not two sentences that can be pulled apart, but it's one piece altogether. That's why the Legislature passed it.**
>
> To pick it apart would in effect undo the legislative compromise. **To pick it apart would essentially constitute legislation.**
>
> So the only thing to do in respect to the—out of respect to the Legislature is to strike it all down at once. Otherwise, you're forging a legislative compromise, which has never existed.

T.476-77 (emphasis added).

This Court has regarded the issue of severability as requiring it to ask, "Are the void provisions and the others interdependent? Would the legislature have passed the latter without the former?" *Adams v. Standard Oil Co. of Ky.*, 97 Miss. 879, 908, 53 So. 692, 696 (1910). Thus, the related nature of the two sentences of paragraph two as part

of a legislative compromise is highly relevant, and lends support to the conclusion that the chancery court did not intend, and was not required, to sever only the first sentence and not the second. *See Leavitt v. Jane L.*, 518 U.S. 137, 140-141 (1996) ("even where a savings clause exist[s], where the provisions of the statute are interrelated, it is not within the scope of the court's function to select the valid portions of the act and conjecture that they should stand independently of the portions which are invalid") (quoting *State v. Salt Lake City*,445 P. 2d 691, 696 (Utah 1968)).

Proper deference to the Legislature, and a due aversion to trespass of the constitutional separation of powers, require the holding that the two sentences of the 2001 Amendment were the interrelated products of a Legislative compromise that cannot be picked apart by the courts, but must stand or fall together—particularly since, as we've seen, sentence two of the Amendment adds to paragraph one a provision for issuance of new CONs that is not part of paragraph one. It is too late now for the Department to argue severability, but in any event, the 2001 Amendment was properly stricken in its entirety. It cannot support the CON issued in this case.

CONCLUSION

Paragraph one of subsection (4)(a)(iii) does not provide for a continuing exception to the CON moratorium after the Department once exercised its authority to grant a CON, as demonstrated by the Legislature's own understanding that the statute required amendment to provide the Department with power to grant another CON under the same exception. Paragraph two was stricken in 2002 by a judgment from which the Department did not appeal, and it is bound by that judgment today: paragraph two of the subsection was properly stricken in its entirety. The CON to River Region was granted without legal authority. If the Legislature wants its own moratorium waived again, it can pass a statute to that effect.

Therefore, and for all the reasons set forth above and in its initial brief, Diamond Grove asks that this Court REVERSE the final judgment of the Hinds Chancery Court and RENDER its decision reversing the Department's grant of a CON to River Region.

Respectfully submitted, this the ***2d*** day of April, 2012.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellant hereby certifies that he has this day caused a true and complete copy of the foregoing document to be served via United States mail (postage prepaid) upon the following:

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