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

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

1. Diamond Grove Center, LLC (Appellant).

2. Thomas L. Kirkland, Jr., Allison C. Simpson, and Andy Lowry (counsel for Appellants).

3. Vicksburg Healthcare, LLC, d/b/a River Region Health System, Vicksburg (Appellee).

4. Kathryn R. Gilchrist, Esq. and Brant Ryan, Esq. of Adams & Reese, LLP (counsel for River Region).

5. Mississippi State Department of Health (Appellee).

6. Bea M. Tolsdorf, Esq. (counsel for the Department).

7. Cassandra Walter, Esq. (hearing officer).

8. Mary Currier, M.D., M.P.H. (State Health Officer).

9. The Honorable J. Dewayne Thomas, Chancellor.

Respectfully submitted,

Andy Lowry
Counsel for Appellant

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STATEMENT OF THE ISSUES

I. Miss. Code Ann. § 41–7–191(4)(a)(iii) allowed the Department to issue a CON despite a general moratorium and without any showing of need. The Department has already done this once. Does the statute allow the Department to keep granting more CONs, or should the exception be construed narrowly?

II. If the aforesaid exception does not apply, then can the Department issue a CON contrary to a statutory moratorium and without any showing of need?

STATEMENT OF THE CASE

I. Course of Proceedings Below

Vicksburg Healthcare, LLC, which does business as "River Region Health System, Vicksburg," applied in March 2010 for a certificate of need ("CON") from the Mississippi State Department of Health. River Region and the Department are the appellees in this case.

The CON application proposed to renovate or add 20 beds for child/adolescent psychiatric services. The Department's staff recommended approval. As an "affected person" under the CON Review Manual and governing statutes, the present appellant, Diamond Grove Center, LLC, requested a hearing during the course of review, challenging the legal and factual validity of River Region's application.

After all parties had presented testimony and other evidence at the hearing in November 2010—excluding any evidence of need, which the hearing officer did not allow—the hearing officer in February 2011 recommended approval of River Region's application. This the State Health Officer did in March 2011, and Diamond Grove timely appealed to the Hinds Chancery Court.

The chancery court (Thomas, J.) on July 25, 2011, issued its opinion and judgment affirming the award of the CON to River Region. Diamond Grove timely appealed on August 3, 2011. R.E. 2, 3.[1]

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[1] "R.E." refers to the Record Excerpts for Appellant; the hearing transcript is cited as "T.__."

II. Relevant Facts

The Mississippi Legislature has imposed a moratorium on child/adolescent psychiatric beds, so that a CON for such beds can be granted only pursuant to an express statutory exception. Miss. Code Ann. § 41–7–191(4)(a). This case arises under what is alleged to be one of those exceptions, as stated at subsection (iii) of the statute:

> (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.
>
> 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.

Id. at § 41–7–191(4)(a)(iii).

The legislative history of this bill has been set forth in prior litigation regarding subsection (iii). R.E. 7. The second paragraph ("If by January 1 . . .") was added by House Bill 767 in 2001, purporting to revoke the CON that had been issued by the Department pursuant to subsection (iii) to Children's Hospital of Vicksburg, LLC. R.E. 7 at 4. The second paragraph may thus be called the "2001 Amendment."

Children's Hospital then filed suit to challenge the legality of the 2001 Amendment. R.E. 7 at 5. While that suit was pending, the Legislature enacted a second provision (the "2002 Amendment") directing the Department to take an unrelated CON and give it to River Region. R.E. 7 at 5. Children's Hospital amended its complaint to challenge that statute as well. R.E. 7 at 5.

The Hinds Chancery Court (Wise, J.) in October 2002 issued its decision striking both the 2001 and 2002 Amendments. R.E. 7. In particular, the chancery court held that the 2001 Amendment violated both the constitutional separation of powers and the right of Children's Hospital to due process of law, so that the Amendment was "unconstitutional and . . . of no force and effect." R.E. 7 at 11. The court concluded that the 2001 Amendment was "void and of no effect." R.E. 7 at 18. The Department never appealed this decision, which thus remains in force. R.E. 2 at 8.

Thus, the CON granted to Children's Hospital pursuant to subsection (iii) remained in effect; however, years later, it was revoked by the Department for failure to make satisfactory progress, and the Mississippi Court of Appeals affirmed that revocation. *See generally Brentwood Health Mgmt. of Miss., LLC v. Miss. State Dep't of Health*, 29 So. 3d 775 (Miss. Ct. App. 2009). This Court denied certiorari in March 2010, the same month that River Region swooped in to file its CON application.

It was River Region's theory that, with the CON held by Children's Hospital having been revoked, River Region could now apply for a CON under subsection (iii). As shown by the staff analysis, R.E. 4, the Department actually relied upon the unconstitutional 2001 Amendment in recommending approval for the project. R.E. 4 at 3.

SUMMARY OF THE ARGUMENT

The Legislature has placed a moratorium on any new CON being granted for child/adolescent psychiatric beds. A statutory exception was made to allow a CON for 20 such beds in Warren County, waiving any showing of need, but that CON has already been granted and then revoked years later.

Exceptions to general statutes are construed narrowly. Looking at the plain language of the statute, the Legislature did not intend for the Department to have the authority to keep granting CONs under the exception, a reading that would lead to absurd results and would be inconsistent with the duty to interpret the statute narrowly. Moreover, in an amendment to the statute (later overturned as unconstitutional), the Legislature granted the power to issue a new CON if the first one expired, thus proving that no such intent underlay the original statute. This Court should also find persuasive the Attorney General's reasoning that when a CON is issued pursuant to a statutory exception but then ceases to be in effect, the moratorium controls and a new CON cannot be issued under the same exception. Finally, the Department cannot at this late date claim that the second sentence of the stricken amendment is severable; even if the argument were made, the two sentences of the amendment were so interconnected as to be inseparable, and the Legislature by reenacting the language unchanged has acquiesced in the chancery court's interpretation.

Once the statutory exception claimed by the Department in this case is held not to apply, the CON must be revoked, both because of the statutory moratorium and because the applicant could not and did not show need for the project.

ARGUMENT

The standard of review of a final order of the Department is controlled by Miss. Code Ann. § 41–7–201(2)(f), which provides in part:

> [t]he 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 is not supported by substantial evidence, is contrary to the manifest weight of the evidence, **is in excess of the statutory authority** or jurisdiction [Department], or violates any vested constitutional rights of any party involved in the appeal. ...

(emphasis added). This statute is "nothing more than a statutory restatement of familiar limitations upon the scope of judicial review of administrative agency decisions." *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 976 (Miss. 1999) (citation omitted). Because this Court reviews the agency's decision, not the chancellor's, it does not defer to the chancellor's decision on appeal from the agency, but reviews the chancery court's decision de novo. *Miss. State Dep't of Health v. Miss. Baptist Med. Ctr.*, 663 So. 2d 563, 574 (Miss. 1995).

Errors of law are reviewed de novo in administrative appeals. *Dialysis Solution, LLC v. Miss. State Dep't of Health*, 31 So. 3d 1204, 1211 (Miss. 2009). This Court has typically given deferential consideration to agency interpretations of their governing statutes, on the following basis:

> This duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate.

Gill v. Miss. Dep't of Wildlife Conserv., 574 So. 2d 586, 593 (Miss. 1990). But "whatever the precise content of [this Court's] duty of deference, it has no material force where agency action is contrary to the statutory language." *Id.*

I. Subsection (iii) Does Not Authorize River Region's CON.

There is no dispute that subsection (iii) authorized the issuance of a CON despite the moratorium—to Children's Hospital in 1995. But that CON has been revoked. What is at issue, then, is whether the statutory exception at subsection (iii) is to be construed narrowly, so as to allow a one-time award of a CON, or so broadly as to give the Department power to issue however many CONs it deems necessary under the statute.

A. The Moratorium Exception Must Be Narrowly Construed.

Exceptions to statutes are construed narrowly:

> 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.** These rules are particularly applicable **where the statute promotes the public welfare,** or where, in general, the law itself is entitled to a liberal construction....
>
> ....
>
> **Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption.**

Miss. Dep't of Wildlife, Fisheries & Parks v. Miss. Wildlife Enforcement Officers' Ass'n, Inc., 740 So. 2d 925, 932 (Miss. 1999) (quoting 73 Am. Jur. 2d *Statutes* § 313 at 463-64 (1974)) (ellipses in original; emphasis added).

Subsection (iii), absent the 2001 Amendment stricken in 2002, says:

> (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.

This statute authorizes the Department to issue one or more certificates up to 20 beds. By its plain language, that is all it does. It does not give perpetual authority to issue an indefinite number of CONs if the CON granted pursuant to the statute expires or is revoked. The latter interpretation would fly in the face of this Court's holding that a statutory exception, like this exception to the moratorium declared by § 41–7–191(4)(a), must be construed narrowly, "particularly . . . where the statute promotes the public welfare." Here, the moratorium on child/adolescent psychiatric beds, like the moratorium on nursing-home beds, promotes the public welfare by limiting healthcare costs (especially Medicaid costs); this Court should therefore follow its usual rule and interpret the exception as narrowly as possible.

B. The Department's Reading Is Contrary to the Letter and Intent of the Statute.

But the Department will claim that it is owed some deference in the interpretation of CON statutes. That is so, except where the interpretation is contrary to the statute, or is contrary to the Legislature's intent. *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So. 3d 600, 608 (Miss. 2009). Here, the Department's reading of subsection (iii) is contrary to the statute and to the intent behind it.

First, the statute does not require the Department to issue a CON, but says only that it "may" do so. A "shall" command implicitly suspends any rules to the contrary. *See Oktibbeha County Hosp. v. Miss. State Dep't of Health*, 956 So. 2d 207, 209-10 (Miss. 2007). No such intent can be read into the use of "may." If the Legislature had meant to require the Department to keep a CON in place in Warren County for the beds in question, it would have said "shall," not "may."

Second, it is in the nature of a CON to expire after one year, barring renewal by the Department. The Court of Appeals, looking to the 2001 Amendment, noted that "the Legislature did not intend for the CONs to exist in perpetuity." *Brentwood Health Mgmt. of Miss., LLC v. Miss. State Dep't of Health*, 29 So. 3d 775, 779 (Miss. Ct. App. 2009). This was a correct statement of the law, but not for the reason cited by the Court of Appeals, i.e. the stricken 2001 Amendment. Rather, the plain language of the CON Law makes it clear that *no* CON can "exist in perpetuity," because § 41–7–195 says that a CON is valid only for a limited time (12 months, with a 6-month extension).

It was the Department's practice of ignoring this statute that led this Court, in the *Dialysis Solution* case, to hold that, despite any deference due to an agency's statutory interpretation, the Department's understanding of the CON Law was contrary to the language of the statute. *Dialysis Solution*, 31 So. 3d at 1214. "Presumably, the Legislature would not have enacted Section 41–7–195 if it had intended CONs to remain valid indefinitely or until the MSDH chose to revoke them." *Id.* at 1213. *See also Zumwalt v. Jones County Bd. of Supervisors*, 19 So. 3d 672, 687 (Miss. 2009) ("the CON laws apply only to the construction, development, or establishment of health care facilities").

Here, the Legislature in subsection (iii) authorized a CON grant for Warren County—a CON it did not mean to "remain valid indefinitely." It makes no sense to suppose that the Legislature intended to authorize successive grants of CONs under subsection (iii). On that reading, 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! That would make no sense, but that is the reading urged by the appellees in this case. Nothing in subsection (iii) makes the grant of a CON contingent on the number of psychiatric beds already operating in Warren County. Indeed, subsection (iii) expressly says that need for the beds is not a consideration.

No, the statutory exception at subsection (iii) must be construed narrowly, in accordance with this Court's precedents and the evident intent of the Legislature, to authorize a one-time grant of a CON, not a grant of perpetual power to the Department.

More evidence of that intent is supplied by the language of the unconstitutional 2001 Amendment, which, although stricken, retains interest for its showing of legislative intent. This Court will look to a later act by the Legislature to help understand its legislative intent in an earlier part of the CON Law, as with any statute. *Grant Ctr. Hosp., Inc. v. Health Group of Jackson, Inc.*, 528 So. 2d 804, 810 (Miss. 1988).

The second sentence of the 2001 Amendment says: "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." In other words, the Legislature considered it necessary to *expressly state* that an expired CON would allow the Department to accept applications for a new CON under subsection (iii). So far as the Legislature was concerned, that power did not exist under the first paragraph of subsection (iii)—otherwise, why grant it in the 2001 Amendment?

This Court will not construe a legislative enactment to be "mere surplusage." *Miss. Ins. Guar. Ass'n v. Vaughn*, 529 So. 2d 540, 544 (Miss. 1988). Thus, however

unconstitutional the 2001 Amendment was, it nonetheless indicates that the Legislature did not understand the first paragraph of subsection (iii) (i.e., the only part still in force today) to authorize the Department to issue a second CON after the CON granted under subsection (iii) ceased to be in effect.

C. The Attorney General Has Opined That an Expired CON Cannot Be Reissued Contrary to a Moratorium.

Finally, this Court may also wish to compare the present case with the situation addressed by the Attorney General regarding the similar moratorium on nursing-home beds. R.E. 8. The State Health Officer had asked the Attorney General to interpret Miss. Code Ann. § 41–7–191(2)(q)(i), which provided for a specific exception to that moratorium:

> Beginning on July 1, 1999, the State Department of Health shall issue certificates of need during each of the next four (4) fiscal years for the construction or expansion of nursing facility beds or the conversion of other beds to nursing facility beds in each county in the state having a need for fifty (50) or more additional nursing facility beds, as shown in the fiscal year 1999 State Health Plan, in the manner provided in this paragraph (q). The total number of nursing facility beds that may be authorized by any certificate of need authorized under this paragraph (q) shall not exceed sixty (60) beds.

As described in the Attorney General's opinion, the Department had issued one or more CONs pursuant to this exception, but they had expired without the granted beds' having been implemented. R.E. 8 at 2.

While this situation is partially distinguishable due to the time limits set by the Legislature (CONs to issue only over four fiscal years), the Attorney General's opinion did not rely solely upon those time limits. Rather, it stated: "The fact that a facility was never built and the CON allowed to expire does not alter the fact that the moratorium

is still in place. Therefore, it is the opinion of this office that the moratorium now prohibits" issuance of a CON under the statute. R.E. 8 at 2.

The Attorney General's opinion should be persuasive, because the same logic applies here: the fact that the Children's Hospital psychiatric beds were never implemented, and the CON is no longer in effect, "does not alter the fact that the moratorium is still in place." Even without a time limit like the one in § 41–7–191(2)(q)(i), the moratorium on child/adolescent psychiatric beds remains in place absent an express exception by the Legislature, and that exception was "used up" when the Department used its authority under subsection (iii) to grant a CON to Children's Hospital. To hold otherwise would require this Court to find that the Legislature intended to permanently suspend the moratorium in Warren County; but that is not consistent with the plain language or evident intent of the statute.

D. The Department Could Rely Only Upon the Part of Subsection (iii) Not Stricken by the 2002 Decision.

As noted in the Statement of the Case above, the staff analysis relied upon the 2001 Amendment which was declared unconstitutional. We have presented above the argument that subsection (iii) does not itself justify the Department's asserted power in this case; here, we examine briefly the notion that the 2002 decision did not really strike the entire 2001 Amendment.

The language of the 2002 decision is clear: the 2001 Amendment is "void and of no effect." R.E. 7 at 17-18. It is "prohibited," "unconstitutional," and "of no force and effect." R.E. 7 at 11. Nowhere at all does the 2002 decision distinguish between one sentence of the Amendment as unconstitutional and another as valid. If the Department had wanted to dispute whether the chancery court was correct in striking the 2001

Amendment in its entirety, the time and manner of doing so was filing an appeal to this Court within 30 days of the 2002 decision. The Department chose not to do so, and it is bound by the 2002 decision of a court of competent jurisdiction. *See McCorkle v. Loumiss Timber Co.*, 760 So. 2d 845, 852 (Miss. Ct. App. 2000) (unappealed order of trial court is final).

For the same reason, arguments as to severability of the second sentence of the 2001 Amendment are too late. Even if the issue were properly before this Court, some ten years after the chancery court's ruling, the Department's position would lack merit.[2]

The 2002 decision expressly found that the 2001 Amendment was the result of a "compromise" within the Legislature: rather than expressly transferring the beds from Children's Hospital to River Region, as the amendment's sponsor (Senator Mike Chaney of Vicksburg) had originally intended, the Amendment as enacted set a time limit for the CON to expire (in the Amendment's first sentence) and then provided for new applications if the CON did expire (second sentence). R.E. 7 at 4.

This Court's position on severability of a statutory provision has been stated as follows:

> it is the Court's duty in passing on the constitutionality of a statute to separate the valid from the invalid part, if this can be done, and to permit the valid part to stand **unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all cannot be carried into effect, it would not have enacted the residue independently.**

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[2]On the appeal of the present case, the chancery court did not even reach any severability argument: "The 2001 Amendment was declared unconstitutional and void. Therefore, the same cannot be utilized by the Department in subsequent granting of CONs." R.E. 2 at 8. Here at least the chancery court did not err.

Quinn v. Branning, 404 So. 2d 1018, 1020 (Miss. 1981) (emphasis added) (quoting *Wilson v. Jones County Board of Supervisors*, 342 So. 2d 1293, 1296 (Miss. 1977)). Here, the first and second sentences of the 2001 Amendment are indeed "intimately connected" and logically interdependent: the CON will expire by such and such a date, and should that condition be met, then a new application can be made. Given the evidence that this language was not the original form of the proposed Amendment, but rather the result of a legislative compromise, R.E. 7 at 4, this Court by severing the first sentence would risk enacting a statute unintended by the Legislature.

It also bears mention that the Legislature has amended § 41–7–191 many times since the 2002 decision without changing the language of subsection (iii).[3] Regarding its doctrine of *stare decisis*, this Court has held that "legislative silence amounts to acquiescence" in judicial interpretations of statutes, "because of the Legislature's tacit adoption" of the interpretation. *Caves v. Yarbrough*, 991 So. 2d 142, 154 (Miss. 2008). The reasoning of *Caves* does not suggest its logic is any less applicable where, as here, a chancery court has stricken a statute as unconstitutional.

Thus, even if the issue of severability were somehow before this Court today, the evidence would support the 2002 decision's holding that the 2001 Amendment was stricken in its entirety. The Department was not entitled to rely on any portion of the 2001 Amendment in giving River Region a CON.

For all these reasons, subsection (iii) does not authorize the Department to issue a second CON to River Region, after having already granted a CON pursuant to subsection (iii). This Court should so hold.

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[3]Miss. Laws, 2003, ch. 393, § 2; Miss. Laws, 2004, ch. 438, § 1; Miss. Laws, 2006, ch. 513, § 1; Miss. Laws, 2007, ch. 514, § 21

II. Without Subsection (iii), the Department Cannot Award the CON.

Absent an exception to the moratorium on child/adolescent psychiatric beds, the River Region application could not have been approved. Not only was the application barred by the moratorium, but River Region relied on subsection (iii)'s exemption from showing need for the project. The Department conceded that "there's an excess of adolescent psychiatric beds." T.356. Thus, without the exemption from showing need, the application was admittedly not in compliance with the State Health Plan. T.106, 108.

Absent an express statutory exception, the Department cannot be relieved of its "duty under the statute to review the project for need pursuant to any applicable service specific requirements of the State Health Plan and the relevant general considerations of the Certificate of Need Review Manual." *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 728 So. 2d 81, 84 (Miss. 1998). This Court has held that "a showing of substantial evidence of need is required in order for an applicant to secure a certificate of need for any health care proposal to which the CON laws apply." *Miss. Baptist Med. Ctr., Inc.*, 663 So. 2d at 579.

Therefore, the only way River Region could be awarded its CON was for subsection (iii) to grant it both an exception from the moratorium and an exemption from a showing of need. But subsection (iii) does not apply here, and therefore, the CON should not have been awarded. This Court should so hold.

CONCLUSION

For all the reasons set forth above, 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 ***18th*** day of January, 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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