IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI DIVISION OF MEDICAID and ROBERT L. ROBINSON, in his Official Capacity as Executive Director of Mississippi Division of Medicaid — **APPELLANTS**

CROSSGATES RIVER OAKS HOSPITAL (f/k/a RANKIN MEDICAL CENTER), et al. — **APPELLEES**
NO. 2013-IA-00438-SCT

Consolidated With

ALLIANCE HEALTH CENTER (f/k/a LAURELWOOD CENTER) — **NO. 2013-IA-00436-SCT**

APPELLANTS' REPLY BRIEF

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The sole question in this appeal is where jurisdiction lies for the review of a DOM decision made after a full evidentiary, transcribed hearing on the merits, in the absence of an appeal statute. Because Mississippi provides a method for such review in Miss. Code Ann. §§ 11-51-93 and 11-51-95, these appeals should have been filed in Circuit Court through the *writ of certiorari* procedure. The providers' failure to perfect an appeal by filing in Circuit Court and posting a supersedeas bond requires dismissal of these appeals.

Each of the providers in this case had a full hearing at the administrative level at DOM, where each one presented all of its arguments on the merits, presented witnesses, cross-examined witnesses and filed a post-hearing brief outlining its position. The hearing officer evaluated the testimony and applied the law to the facts presented at the hearing, and made a recommendation to the Executive Director, who accepted the recommendation, similarly applying the law to the facts.

Each provider lost at the administrative level. Thus, each provider had to decide where to seek review of DOM's decision. It was not DOM's place or responsibility to tell the providers where to appeal. Each provider hired its own counsel to represent it, and each had the responsibility (as all appellants do) to properly perfect an appeal if it wished to seek review of a DOM decision. Each chose to request a review in the Chancery Court. The providers' attempt to shift the burden to DOM to decide for them where to appeal is a transparent attempt to escape the consequences of choosing the

wrong court. This attempt should be rejected.

And, each of the providers in these consolidated appeals did file in the wrong court. The Circuit Court has exclusive jurisdiction to review the decision of an administrative agency's decision made after a quasi-judicial proceeding, where there is no statutory right or method to appeal.

Agencies are a hybrid of the three governmental branches; which branch the agency falls into depends upon what the agency is doing. If the agency held a hearing in which it allowed the party to present evidence and arguments to support its view of an agency ruling, it becomes quasi-judicial, and the review of its final decision is through the *writ of certiorari* procedure in Circuit Court as outlined in Miss. Code Ann. §§ 11-51-93 and 11-51-95 if no other appeal statute exists. *Gill v. Miss. Dep't of Wildlife Conservation,* 574 So. 2d 586, 590 (Miss. 1990). If an agency makes a decision without a hearing or record, or adopts a new rule, the agency is acting more like the executive or legislative branch. Since in these circumstances there is no record for the Circuit Court to review and the agency is not acting as a tribunal in adopting a new rule or entering into a contract, the party has no adequate remedy at law under Miss. Code Ann. §§ 11-51-93 and 11-51-95. Accordingly, those reviews must go to the Chancery Court. *Miss. Transp. Comm'n v. Eng'g Ass'n,* 39 So. 3d 1 (Miss 2010).

The providers simply do not address this dichotomy, and continue to assert, without basis, that they have no remedy at law. But, the Mississippi statutes do provide a remedy at law for a party aggrieved by an agency decision made after a recorded hearing - a *writ of certiorari* to the Circuit Court has always given the providers a method

of review of such an agency decision.

The providers' primary argument is that DOM did not object to jurisdiction and agreed with Crossgates' attorney that Chancery Court was proper based on past practice. The providers also argue that DOM previously argued that a *writ of mandamus* action (which is not the same as an appeal) should have been filed in Chancery Court, and contends that is inconsistent with DOM's argument in these appeals. But even if that were true, nothing DOM has done can create jurisdiction where there is none. Either jurisdiction is proper or it is not. A party's action or inaction cannot create jurisdiction. In this case, the Chancery Court does not have jurisdiction of these appeals.

Secondarily, the providers argue that DOM's hearing process is not quasi-judicial and thus, Circuit Court is not appropriate. However, the Mississippi Supreme Court has ruled many times that a hearing at an agency where the aggrieved party is given an opportunity to present its evidence and arguments is a quasi-judicial hearing, including cases where the final decision rests with the head of the agency. The providers' attempt to require the equivalent of a full court hearing has never been adopted.

I. History of DOM Litigation - DOM is Acting Fairly in Raising the Jurisdictional Question

As the providers readily acknowledge, the parties cannot simply agree to confer jurisdiction on a particular court. Appellees' Brief at 24. Indeed, the Mississippi Supreme Court has ruled numerous times that any objection to subject matter jurisdiction is not waivable and can be raised at any time. *Miss. Dept. of Rev. v. AT&T Corp.*, 101 So. 3d 1139, 1143 (Miss. 2012). *Bell v. Finnegan*, 82 So. 3d 608, 611

(Miss. 2012). The Court has also ruled that jurisdiction cannot be conferred by agreement. *Carney v. Moore*, 130 Miss. 658, 669 94 So. 890 (1922) (a party cannot agree to subject matter jurisdiction); *McMillan v. Tate,* 260 So. 2d 832, 833 (Miss. 1972) (subject matter jurisdiction may not be waived). Yet, much of the providers' brief centers around an argument that DOM has agreed to jurisdiction or is judicially estopped from raising the jurisdictional issue, which is simply another way to say that DOM has agreed to jurisdiction. This argument is legally irrelevant because the parties cannot create subject matter jurisdiction by agreement or inaction.

However, to address the implicit argument that " this is not fair," DOM will show the history and why DOM's raising of subject matter jurisdiction is entirely fair. In 1997, the legislature enacted Miss. Code Ann. § 43-13-117(d)(x) which provided a nursing home appeal of a cost report decision, affecting the reimbursement rate, was to be appealed to the Hinds County Chancery Court.[1] This provision was later removed. However, *Beverly Enters. v. Miss. Div. of Medicaid*, 808 So. 2d 939 (Miss. 2002), (cited by the providers to show jurisdiction in Chancery is proper), actually involved a nursing home appeal under the then existing statute. *Id* at 940. *Beverly Enterprises* was properly appealed to Chancery Court because the statue required nursing home appeals to be filed in Chancery Court. Accordingly, *Beverly Enterprises* does not provide guidance in the present case because the providers are not nursing homes and no statutory appeal scheme existed for appeals from a DOM administrative hearing when the present appeals were filed.

[1] For the Court's convenience, the old statue is attached as Appendix A.

Nevertheless, after the appeal statute was repealed, providers continued to file appeals in Chancery Court. In *Noxubee Gen. Hosp. v. State of Miss. Div. of Medicaid*, Cause No. G-2002-2191 W/4 (Supp. R. at 68), which is the case referred to by providers at 12-13 of their brief, a nursing home filed its appeal in Chancery Court after the statute was repealed, leaving no statutory appeal process. DOM filed a Motion to Dismiss for lack of subject matter jurisdiction, arguing (as DOM does here) that the appeal should be through the Circuit Court *writ of certiorari* procedure. In 2005, the Chancery Court (Judge Pat Wise) denied the motion, holding that in the absence of an appeal statute and where the aggrieved party has no adequate remedy at law, Chancery Court had jurisdiction to review the administrative decision. Supp. R. at 70-72. That case was not appealed to the Mississippi Supreme Court. And, thereafter, DOM did not raise jurisdiction in its answers, accepting the Chancery Court's decision. And, when George Ritter, representing Crossgates, told Chuck Quarterman he knew there was no statutory procedure for appeal and intended to file his appeal in Chancery Court, Mr. Quarterman stated that was consistent with past practices, which was true since the *Noxubee General* case had not been appealed.[2]

Noxubee General demonstrates DOM raised the jurisdictional issue at its first opportunity and took the exact same position then that it takes now----the Chancery Court did not have jurisdiction of an appeal of an administrative decision made after a recorded hearing. The Chancery Court rejected that position, and held it did have jurisdiction. DOM accepted the ruling of the Chancery Court, and did not raise or

[2] It should be obvious that a party represented by counsel is not entitled to rely on the party opponent's legal advice.

challenge jurisdiction in Chancery Court until the present appeal.[3]

In 2010, a provider sought a *writ of mandamus* from the Circuit Court of Hinds County seeking a *writ of mandamus* to compel DOM to complete a hearing and to force DOM to pay the provider after DOM removed it as a qualified provider because of the owner's criminal convictions. *Patients' Choice Med. Ctr. of Humphreys Cnty., LLC v. State of Miss., Div. of Medicaid,* No. 251-10-71CIV (Cir. Ct. Hinds Co., Miss., 1st Jud. Dist.) (2010), (cited extensively by the providers in Appellees' Brief at 8, 22.)[4] There, DOM sought to have the case dismissed or alternatively transferred to Chancery Court because the hearing had not been completed and because a *writ of mandamus,* which is in the nature of an injunction, did not belong in Circuit Court. DOM noted that Chancery Court would have jurisdiction once the administrative appeal was complete, consistent with the *Noxubee General* holding in 2005. The Circuit Court refused to dismiss the action, and issued the *writ of mandamus*. Accordingly, DOM now had conflicting rulings from the Chancery and Circuit Courts, each claiming it had exclusive jurisdiction of provider appeals from DOM. DOM filed a petition for interlocutory appeal, which the Mississippi Supreme Court granted on the jurisdiction issues, *inter alia*. However, the case settled before a decision was reached. *Supr. Ct. Docket 2012-M-01265*.

At this point, DOM had a ruling from the Chancery Court that it had jurisdiction of provider appeals and a separate ruling from the Circuit Court that it had jurisdiction.

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[3]DOM also filed a Motion to Dismiss in CES v. DOM (Case No. 3:12-cv-00182-CWR-FKB, Docket Entry #15.)

[4]A *writ of mandamus* differs substantially from a *writ of certiorari*, discussed *infra* at 13-15.

With these two contradictory rulings, DOM filed Motions to Dismiss or Alternatively to Transfer to Circuit Court in all of the administrative appeal cases pending in Chancery Court, consistent with its original positions taken after the repeal of the appeal statute.

II. The Circuit Court Has Exclusive Jurisdiction of the Administrative Appeals Involved in This Appeal

In the absence of an appellate procedure prescribed by statute for review of an agency decision, one must look to see what the agency decision was and how it was reached to determine whether the proper court is Chancery Court, or that the proper court is by *writ of certiorari* to Circuit Court. In all cases where there has been a purely administrative decision, or without a hearing and record, then Chancery Court is proper. *Miss. Transp. Comm'n. v. Eng'g. Ass'n.*, 39 So. 3d 1 (Miss. 2010). However, where there has been a quasi-judicial proceeding that led to the decision, then the only proper method of appeal is by *writ of certiorari* to the Circuit Court. *See Gill v. Miss. Dep't. of Wildlife Conservation*, 574 So. 2d 586, 590 (Miss. 1990).

In each of these appeals, the provider hospitals were sent recoupment letters seeking return of overpayments Medicaid made to the hospital. Once the provider hospital submitted its final cost report, each hospital received a new inpatient rate calculated based on the data the hospital submitted. Each case involved factual determinations of whether the correct data was used, whether the correct report was used, and whether DOM had applied the correct formula under its State Plan. All of this is contained in the transcript of testimony where DOM explained what data it used, how it calculated the rates, and why it used the formula it did to make those calculations. Each provider presented factual testimony as well.

The hearing officer then wrote a detailed report making recommendations to the Executive Director, who had the final decision. A complete record, including the providers' evidentiary presentations was made and available to the Executive Director. In each case, the hearing officer made findings, applying the facts developed at the hearing and applied the State Plan, Mississippi law, and Medicare rules to those facts. In each case, the Executive Director issued a final decision based on the hearing officer's recommendations and findings, and on the record before him.

A. The *Writ of Certiorari* Procedure in Circuit Court Provides Full Relief to Providers

The *writ of certiorari* procedure has been provided for review of lower tribunal decisions for many years. It is specifically designed to cover those situations where a record was created but no specific appeal procedure is statutorily available. It is a catch-all statutory method of appeal. *Smith v. Univ. of Miss.,* 797 So. 2d 956, 960 (Miss. 2001). ("This Court has repeatedly recognized the availability of the *writ of certiorari* under § 11-51-95 for the review of decisions of inferior state administrative tribunals.") The Supreme Court has many times ruled that if the *writ of certiorari* method is available, then filing in Chancery Court is improper.

In each case, the providers seek a reversal of the Executive Director's final decision, which is relief clearly available in Circuit Court. There is no other relief requested beyond a reversal and the enforcement of a reversal. (Crossgates R. at 13, 246, 324, 338, 394, 433; Alliance R. at 4; RE at 29-72)

B. The Medicaid Administrative Appeal Proceeding Is an Administrative Tribunal

The primary reason providers argue that Circuit Court is not proper is their

erroneous assertion that DOM's procedure is not quasi-judicial, and does not qualify as a tribunal. A quasi-judicial proceeding in an agency does not have all of the attributes of a court. It simply has to provide the aggrieved party an opportunity to be heard, and make a decision applying the law to the facts. The DOM appeal procedure does precisely that.

In this case, DOM set prospective rates. Accordingly, the administrative decision to set rates occurred long before any providers' challenge. DOM reviewed each providers' cost report, and applied to DOM's rules to calculate the rate the hospital should have been paid. It then sent a recoupment letter to the provider. Each provider appealed the rate calculated and requested a hearing. Each provider challenged the rate calculated for it individually. None challenged the original rule setting the rate. In each case, evidence was presented regarding the cost report. The final decision applied its rules to calculate the rate, and decided what those rules were.

The DOM hearing procedure, use of a hearing officer, with the final decision based on an application of the law to the facts, is precisely the type of proceeding that qualifies as a quasi-judicial proceeding, from which an appeal must be taken by *writ of certiorari* to the Circuit Court. *See Dodd v. Herring*, 61 So. 743, 743 (Miss. 1913) ("a judicial function occurs where a tribunal is the ultimate finder of fact and where it is empowered to render a binding decision after applying the law to the facts.") *See also Johnson v. Sysco Food Servs.*, 86 So. 3d 242, 246-47 (Miss. 2012).

In 1931, the Mississippi Supreme Court explained the difference between actions of a board or agency that are quasi-judicial in nature and those that are legislative in nature rejecting the Circuit Court writ of certiorari review of a school board

decision to annex a school district. *Mabry v. Sch. Bd. of Carroll Cnty.*, 162 Miss. 632,137 So. 105, 106 (Miss. 1931):

> A judicial act determines what the law is, and what the rights of the parties are, with reference to transactions already had, while a legislative act prescribes what the law shall be in future cases arising under it. The court decides what the law is upon existing cases, while the Legislature makes the law so applied.

In fact, in *Alford v. Miss. Div. of Medicaid,* 30 So. 3d 1212,1221 (Miss. 2010) the Mississippi Supreme Court recognized that the Medicaid appeal procedures constitute an administrative tribunal. There, a beneficiary sought a relief in Chancery Court prior to using the procedures available to review her claim. The Court ruled she had to exhaust her administrative remedies first, noting:

> This Court also has described the doctrine of primary jurisdiction, which is relevant to the case *sub judice*:
>
> > The courts cannot or will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal prior to the decision of that question by the administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the regulatory statute administered. *Ill. Cent. R.R. Co. v. M.T. Reed Const. Co.,* 51 So. 2d 573, 575 (Miss. 1951) (quoting 42 Am. Jur. Public Administrative Law, § 254).

30 So. 3d at 1221.

Moreover, the providers misconstrue *Dialysis Solutions, LLC v. Miss. State Dep't of Health*, 96 So. 3d 713 (Miss. 2012). There, the question was whether the Department of Health could be considered a court from whom the legislature could give a direct appeal to the Mississippi Supreme Court. DOM is not a court and does not

claim to be. The DOM administrative hearing does, however, constitute a tribunal and a quasi-judicial proceeding. Whether a proceeding qualifies as a court rather than a quasi-judicial proceeding are entirely different questions and involve different analysis. But, to qualify as a "tribunal inferior" or a quasi-judicial proceeding, the procedure does not have to have all the attributes of a court. It simply has to give the party an opportunity to be heard. The Mississippi Supreme Court held that the Department of Health procedure was not a court. However, it specifically pointed out that it was a quasi-judicial proceeding. *Id.* at 719. The Court concluded that the procedure of the Mississippi State Department of Health has the attributes of a "tribunal inferior":

> Based upon *Section 41-7-197(2)*, this Court has little doubt that the "Final Order" of the State Health Officer involves the application...of the law to a state of facts proved, or admitted to be true, and a declaration of the consequences which follow." *Dodd, 61 So. at 743* (quoting *Le Blanc v. R.R. Co., 73 Miss. 463, 19 So. 211, 212 (1896))*. Thus, MDH does exercise some "quasi-judicial" function. *Boyles, 794 So. 2d at 157*. *See also McCaffrey's Food Market, Inc. v. Mississippi Milk Comm'n, 227 So. 2d 459, 463 (Miss. 1969)* ("[t]he quasi-judicial inquiry declares and enforces liabilities on present or past facts on law already existing"). Furthermore, based upon either the pre- or post-amendment versions of *Section 41-7-201*, this Court has no doubt that a final order of the MDH is subject to review. *See Glenn, 415 So. 2d at 697* ("appellate jurisdiction necessarily implies that the subject matter must have been acted upon by [a] tribunal whose judgments or proceedings are to be reviewed.").

Id. at 719. The Court ruled, however, that the Final Order was not from a "court" and held that a direct appeal was not permissible:

> Because of these distinguishing factors, inter alia, this Court concludes that MDH lacks the indicia to be considered "a tribunal of the character from which the Legislature is authorized to grant appeals direct to this [C]ourt." *Dodd, 61 So. at 745.* As such, the direct appeal of a final order of the MDS impermissibly confers original jurisdiction upon this Court.

Id. at 719-20. The *Dialysis Solutions* decision recognizes that there is a difference

between a decision made in a judicial proceeding, such as a court or hearing with all the attributes of a court, and a quasi-judicial proceeding. DOM provides parties aggrieved by its decisions a quasi-judicial hearing.

Likewise, the providers claim that the issues are purely administrative and do not involve applying the law to the facts. This is simply incorrect, as a review of any of the hearing transcripts or the final decisions will demonstrate. An administrative decision, unlike an evidentiary proceeding, which was had here, is a decision where the administrative agency adopts a ruling, enters into a contract, or otherwise takes administrative action, which is to take place in the future. Here, each of the providers appealed the decision about its cost report and reimbursement rate, and presented evidence from which the hearing officer found facts, and then applied the law both through statutes and through the Mississippi State plan, which governs Medicaid to the facts as presented at the hearing. As the Mississippi Supreme Court has often said, all that a tribunal needs to do is apply the law to the facts, whether those facts are contested or stipulated.

Moreover, the fact that the Executive Director has the final decision does not impact the quasi-judicial requirement. All of the universities have similar procedures. In each case, the university decides to terminate or otherwise take disciplinary action against the party. The party is then entitled to a hearing (although in those cases, the appellant does not have the opportunity to present evidence or cross-examine witnesses) when the ultimate decision is made by the head of the university. The agency itself decides whether the initial decision should be reversed, affirmed or modified. In those cases the Courts have held the procedure is quasi-judicial and must

be reviewed by the Circuit Court through the *writ of certiorari* procedure. *Smith v. Univ. of Miss.*, 797 So. 2d 956, 959 (Miss. 2001). *See also Jackson State University v. Upsilon Epsilon Chapter of Omega Psi Phi Fraternity, Inc.*, 952 So. 2d 184, 186 (Miss. 2007). *See also Jones v. Alcorn State University*, 2011-SA-01004 (Miss. Court of Appeals August 27, 2013).

C. DOM Not Estopped From Raising the Jurisdictional Issue

The providers next argue that DOM is judicially estopped to deny Chancery Court has jurisdiction because, they claim, DOM took a different position in *Patients' Choice Med. Ctr. of Humphreys Cnty., LLC v. State of Miss., Div. of Medicaid,* No. 251-10-71CIV (Cir. Ct. Hinds Co., Miss., 1st Jud. Dist.) (2010). However, *Patients' Choice* and the instant case do not involve the same issue related to jurisdiction. Even if they did, a party's jurisdictional argument cannot confer jurisdiction or deprive a court of jurisdiction. Judicial estoppel does not apply to a jurisdictional argument. *Bell v. Finnegan*, 82 So. 3d 608, 611 (Miss. 2012). And, in any event, a party is not estopped from making a different jurisdictional argument after it loses the original argument.

1. The Issues in Patients' Choice and the Instant Case Are Not the Same

In the *Patients' Choice* case there were two issues. An administrative hearing was suspended and no final decision was reached. As a result, *Patients' Choice* did not involve an appeal of a final DOM decision after a recorded hearing on the merits, which is the only issue in the current appeal. The provider sought a *writ of mandamus* from the Circuit Court to force DOM to conclude the hearing and to resume payments to the provider, which had been suspended because of the owner's criminal conviction.

Accordingly, DOM argued that jurisdiction in the Circuit Court through a *writ of mandamus* was not proper. And, a *writ of mandamus*, to the extent one would have been available at all, should have been filed in the Chancery Court. Because there was no administrative hearing on the record, DOM argued that Chancery Court would have jurisdiction and that Circuit Court was not the proper jurisdiction. DOM lost. DOM filed a Petition for Interlocutory Appeal (attached as Appendix A to Appellees' Brief). According to the Supreme Court's docket, the Petition for Interlocutory Appeal was granted to determine, in part, whether Chancery Court or Circuit Court properly had jurisdiction. The appeal was dismissed when the parties settled. *See* Supreme Court docket for Cause No. 2012-IA-01265-SCT.

Apparently, the Providers are confused and believe that a *writ of certiorari* and a *writ of mandamus* are the same. However, a *writ of certiorari* is used to review a lower tribunal's ruling, and is wholly different from seeking a *writ of mandamus* to force an official or lower court to do something. A *writ of certiorari* is a request for the record to be transmitted so that the court can review a lower tribunal's record and ruling. Certiorari is defined as:

> A writ of common law origin issued by a superior court to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities.

Black's Law Dictionary, 6th Edition 1990) at 228.

On the other hand, a *writ of mandamus* seeks a court order that commands a person against whom it is issued to do something and is in the nature of an injunction. Mandamus is defined as:

> This is the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

Black's Law Dictionary (6th Edition 1990) at 961.

The Appellees are comparing apples and oranges. As DOM has pointed out in its Brief, there are some instances in which it is proper to challenge a decision of DOM in Chancery Court – where there is not a record or quasi-judicial hearing, where the decision is purely administrative, or where the party does not have an adequate remedy at law. Appellants' Brief at 10, 22-27. Where there is a record of a quasi-judicial hearing, however, then a party appealing a DOM decision must use the *writ of certiorari* procedure under Miss. Code Ann. §§ 11-51-93 and 11-51-95 in Circuit Court.

The Appellees/Providers continue a fundamental misunderstanding of the appeal of an administrative decision. The Appellees focus only on the name of the agency from which the appeal arises. Instead, without a statutory method of appeal, the question is the nature of the decision appealed. If it is a completed administrative appeal and a record made, with both parties having had the opportunity to present their arguments, the only proper place to appeal or seek review of the DOM administrative decision is through the Circuit Court through the *writ of certiorari* procedure. If, however, it is an administrative decision only without a hearing, then Chancery Court is appropriate.

2. Judicial Estoppel Cannot Create Jurisdiction

Judicial estoppel cannot create jurisdiction. This Court has held that it must look

to the merits of an argument with respect to the Court's jurisdiction:

> "[J]udicial estoppel arises from the taking of a position by a party to a suit that is inconsistent with the position previously asserted in prior litigation." *Ivy v. Harrington, 644 So. 2d 1218, 122 (Miss. 1994)*. Generally, this Court will employ judicial estoppel to preclude a party from gaining an advantage by asserting as error an issue which it created. See *Derr Plantation, 14 So. 3d at 720-21*(Randolph, J., specially concurring). However, we do not reach Finnegan's judicial-estoppel argument. Because the issue is one of a court's jurisdiction, we deem it appropriate to address the merits of the issue.

Bell v. Finnegan, 82 So. 3d 608, 611 (Miss. 2012).

3. Judicial Estoppel Does Not Apply to a Losing Argument

The Appellees quote extensively from DOM's briefing from *Patients' Choice* and use the argument throughout its Brief that DOM is "changing horses" and should be judicially estopped from pointing out that Chancery Court lacks jurisdiction of DOM's decision following an administrative appeal with an evidentiary hearing. The providers correctly note that DOM states in its motion to dismiss in *Patients' Choice* that the Chancery Court would have jurisdiction of its appeal once the hearing was complete, consistent with *Noxubee County.* What the Appellees fail to tell the Court, however, is that the Circuit Court rejected DOM's argument and issued the *writ of mandamus*. This is apparent in the Petition for Interlocutory Appeal filed by DOM, which the Appellees attach as Exhibit "A" to their Brief. That is to say, DOM made an argument which was rejected by the court of record. Appellees' position apparently is that DOM must continue to make a losing argument, even in the face of a final ruling that its argument is incorrect. In fact, what this shows is that the Circuit Court had accepted jurisdiction, ruled that the Chancery Court was not the Court of proper jurisdiction for the *writ of mandamus*, then issued the injunction itself. Judicial estoppel has never been used to

keep a party from changing its argument once it has lost the argument. *Johnson v. Parker Tractor & Implement Co.*, 2012-CA-01684-SCT, *1, *10-11 (Miss. 2014):

> But a necessary element of estoppel is that the estopped party previously benefitted by adopting the earlier, inconsistent position. "Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation." *Dockins v. Allred*, 849 So. 2d 151, 155 (Miss. 2003). In its order finding the garnishment action time-barred, the circuit court stated:
>
> > using various theories, all of which prove to be unsuccessful. Now its position is that if the judgment was ever valid, it is now invalid, as it is time barred. Here, Parker Tractor did not change its position. Even if it did change, it did not benefit from its earlier position. Thus, Johnson cannot prevail on his judicial-estoppel claim.
>
> The circuit court is correct. Parker Tractor never prevailed on the argument that the judgment was unenforceable. Therefore, if Parker Tractor is indeed now taking an inconsistent position, the doctrine of estoppel will not apply.

See also Clark v. Neese, 131 So. 3d 556, 560 (Miss. 2013) (one of the requirements of judicial estoppel is that the court accepted the previous position.) Instead, the parties are required to follow the law as ruled upon by the courts. In this case, the ruling was that Circuit Court was the proper jurisdiction. The Appellees cannot use the *Patients' Choice* arguments, which were rejected by the Circuit Court, to estop DOM from making the argument in this case that Circuit Court is the correct jurisdiction.

D. The Mississippi Supreme Court Has Never Ruled Chancery Court Has Jurisdiction

The providers seek to convince the Court that it has previously made a decision that all appeals from the Division of Medicaid go to Chancery Court. This is simply not the case. The Mississippi Supreme Court has never specifically addressed the

jurisdiction of either the Circuit or Chancery court over a disputed, appealed Medicaid decision after a full and recorded hearing. Jurisdiction was not discussed one way or the other. As the Court has noted, a decision which does not discuss the particular issue is not dispositive of that issue. *See Yazoo & M.V.R. Co. v. Adams*, 81, Miss. 90, 32 So. 937 (1902)("The question of *stare decisis*, and its consequent effects, can be only invoked as to the questions directly involved, and expressly decided, or which were necessarily considered and determined by the court, and without which such consideration and determination the decision could not have been rendered.")

III. The Chancery Court Does Not Have Jurisdiction

A. Charter and EDS Do Not Hold Chancery Court Has Jurisdiction

The providers argue that *Charter Medical Corp. v. Mississippi Health Planning and Development Agency*, 362 So. 2d 180, 182 (Miss. 1978) and *Electronic Data Systems Corp. v. Miss. Div. of Medicaid*, 853 So. 2d 1192 (Miss. 2003) give it authority to appeal to the Chancery Court. Both of those cases stand for the proposition that if a party does not have a full complete remedy at law and there is no appeal statute from an agency decision, then the Chancery Court may review the administrative decision. However, neither Charter nor EDS answer the question that is before the Court now. In these cases the providers ask for a reversal of the agency decision, nothing more. In *Charter*, the party asked for an injunction to force the Department of Health to issue a certificate of need. Although there was a hearing, it was not clear from the opinion whether it was an evidentiary hearing, whether it was recorded or transcribed, whether the parties were both allowed to have witnesses and be present at the hearing, or what

the nature of the hearing was. In any event, *Charter* does not address the issue present in this case. In fact, the Supreme Court explained its ruling in Charter in *Miss. Transp. Comm'n. v. Eng'g Ass'n*, 39 So. 3d 1 (Miss. 2010):

> Further, EAI erroneously relies on *Tucker v. Prisock,* 791 So. 2d 190, 191-92 (Miss. 2001), and *Charter Medical Corp. v. Mississippi Health Planning and Development Agency*, 362 So. 2d 180, 182 (Miss. 1978), for its argument that "a court" always has appellate jurisdiction over an agency's decision, despite the lack of a statutory appeals process. But these cases provide the rule that an action for an *injunction* will lie in *chancery court* where there is no statutory right to an appeal from a state board or agency's decision, and the aggrieved party *does not have an adequate remedy at law*. *Tucker*, 791 So. 2d at 191-92; *Charter Med. Corp.*, 362 So. 2d at 182. Considering the arguments presented by EAI, we find that EAI did have an adequate remedy at law. (emphasis in original)

In this instant case, the providers now argue that they request an injunction; however, the relief requested is reversal and to the extent that any provider uses the term "injunction," it is merely to enforce the reversal, which is wholly unnecessary since a final court ruling has the force of law. The *EDS* case ultimately involved whether or not the Division of Medicaid could hire a new fiscal agent. It was apparent that there was no transcribed hearing of any kind with respect to that particular issue. The Division of Medicaid decided to enter into a contract with the new fiscal agent, and the board which approves contracts with the State, approved the new agreement. The appeal from the board decision was to go to a court of competent jurisdiction (just as the Division of Medicaid). No specific court was designated because jurisdiction can change depending on what the nature of the proceedings. If only one court had jurisdiction, the legislature simply would have designated that particular court. In this particular case, the Supreme Court held that the Chancery Court was the proper place to have the appeal. Not only did the aggrieved party seek injunctive relief in the form of

prohibiting the new fiscal agent from beginning the contract, there did not appear to have been any contested hearing at the administrative level, which would qualify as a tribunal.

Neither *EDS* nor *Charter* are particularly instructive on the case at issue. [5]

B. The New Statute Does Not Create Jurisdiction for These Providers

During the most recent legislative session, the legislature enacted a statute requiring appeals of final DOM providers decisions be filed in Chancery Court. Miss. Code Ann. § 43-13-121. DOM proposed the change to a single court to avoid confusion in the future. *See Appellees' Brief* at 27-28. The legislature chose the Chancery Court for provider appeals and enacted a date on which the new appeal statue was to take place - July 1, 2014. It does not affect currently pending appeals.

The statue previously said that DOM could begin recoupment proceedings if the provider failed to appeal to a court of competent jurisdiction within thirty (30) days. It did not specify which court. Again, absent a statute specifying jurisdiction, the question of which court has jurisdiction of appeals from DOM proceedings depends on the nature of what DOM decided. That the legislature enacted a statute specifying which court has jurisdiction is a change and recognition that it needed to specify one court to avoid the confusion that arises from determining the nature of the proceedings. Because the Chancery Court lacked jurisdiction of these provider appeals, the appeals

[5] The providers' reliance on *Bd of Trustees v. Brewer*, 732 So. 2d 934 (Miss. 1999) is misplaced. As the Court explained in *Smith v. Univ. of Miss*., 797 So. 2d 956, 961 (Miss. 2001), Brewer was not seeking a reversal of the administrative decision. Accordingly, he was permitted to file an independent action for breach of a contract, which still had three years to run.

must be dismissed.

IV. Dismissal is the Appropriate Remedy

Dismissal rather than transfer is appropriate. Unlike a case that is simply filed in the wrong court, which may be transferred to the correct court, failure to properly perfect an appeal deprives any court of jurisdiction. *Khurana v. Miss. Dep't of Revenue,* 85 So. 3d 851 (Miss. 2012); *Miss. Transp. Comm'n v. Eng'g Ass'n*, 39 So. 3d 1 (Miss. 2012); *Jackson State Univ. v. Epsilon Chapter of Omego Psi Phi Fraternity, Inc.*, 952 So. 2d 184 (Miss. 2007).

The providers only response to this is to claim that DOM is estopped from asserting jurisdiction, which is discussed *supra* at 3-4, 15-17. Estoppel simply cannot create jurisdiction where there is none. Moreover, for equitable estoppel to apply, the providers must show they reasonably relied upon DOM and changed their position as a result of the representation. The providers did not reasonably rely on DOM to create jurisdiction. The sole responsibility for determining where to file was with the providers. The providers did not hire DOM to give it legal advice. They hired their own lawyers. The only provider which even spoke with DOM about jurisdiction was Crossgates, and it stated it was filing in Chancery Court prior to any communication from DOM. So, it did not change its position based on anything DOM said. There is no record of any other provider discussing where to file its appeal. Accordingly, none of the providers can demonstrate either a justifiable reliance on the legal advice of DOM or that they changed their position as a result. Even if equitable estoppel could create jurisdiction, the providers could not meet the requirement that they reasonably relied upon DOM.

At the end of the day, this Court could have raised subject matter jurisdiction *sua*

sponte. The providers and only the providers are responsible for the decision to file their appeals in Chancery Court.

V. Conclusion

The Circuit Court has exclusive jurisdiction of these provider appeals. The providers' failure to file a *writ of certiorari* in Circuit Court within six (6) months of the decision and post a supercedeas bond is fatal. These appeals should be dismissed.

Respectfully submitted this the 9th day of June, 2014.

MISSISSIPPI DIVISION OF MEDICAID and
ROBERT L. ROBINSON, in his Official Capacity

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CERTIFICATE OF SERVICE

I, Janet D. McMurtray, hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the following parties:

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