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NO. COA10-1552  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

In the Matter of:

A.C.G.

Davidson County  
No. 05 JA 199

Appeal by Piedmont Behavioral Health from Order entered 28 July 2010 by Judge April C. Wood in Davidson County District Court. Heard in the Court of Appeals 11 May 2011.

*Michael K. Newby, for Davidson County Department of Social Services.*

*Laura Bodenheimer, for Guardian ad Litem program.*

*Nelson, Mullins, Riley & Scarborough, LLP, by Stephen D. Martin, for Piedmont Behavioral Health.*

HUNTER, JR., Robert N., Judge.

Piedmont Behavioral Health ("PBH") appeals from a civil contempt order, arguing the Order is punitive and not supported by findings of fact sufficient to conclude PBH is in willful contempt of court. PBH also contends it is entitled to sovereign immunity as a contractor for the North Carolina

Department of Health and Human Services. We affirm in part, and vacate in part.

### **I. Factual & Procedural History**

On 20 March 2006, Oliver,<sup>1</sup> a minor child, was found to be an abused and neglected juvenile. On 4 December 2006, Oliver's biological father signed a relinquishment of his parental rights and consented to Oliver being adopted. On 22 March 2007, the trial court entered an Order terminating the parental rights of Oliver's biological mother due to her abandonment of Oliver. Davidson County Department of Social Services ("DSS") was appointed as Oliver's guardian. DSS subsequently determined that Oliver, an indigent child, needed state mental health services and sought appropriate treatment for Oliver with PBH.

PBH facilitates multi-county mental health services, developmental disabilities services, and substance abuse services pursuant to N.C. Gen. Stat. § 122C-115(c) and was established by the Boards of Commissioners of Cabarrus, Davidson, Rowan, Stanly, and Union Counties. PBH acts as a "local management entity" ("LME"), a local political subdivision that provides oversight of mental health care providers by planning and coordinating certain behavioral health services in

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<sup>1</sup> A pseudonym conceals the minor child's identity.

a defined geographic area. See N.C. Gen. Stat. § 122C-115.4 (2009). PBH does not provide these services, but connects those who require such services with service providers.

Pursuant to an agreement between PBH, the federal Center for Medicare and Medicaid Services ("CMS"), and the North Carolina Department of Health and Human Services, Division of Medical Assistance ("DMA"), PBH operates as a Prepaid Inpatient Health Plan ("PIHP"). A PIHP is a federally-recognized managed care organization pursuant to 42 C.F.R. § 438.2, and operates under federal Medicaid waivers pursuant to §§ 1915(b) and 1915(c) of the Social Security Act (42 U.S.C. §§ 1396n(b) and (c)). As a PIHP, PBH may only use Medicaid funds to pay for Medicaid services that are deemed "medically necessary" pursuant to 42 U.S.C. § 1396n(b). To qualify for services, an enrollee must meet certain criteria defined by Medicaid. Pursuant to PBH's contract with DMA, PBH is authorized to review requests by consumers to determine whether the requested services are "medically necessary," that is, whether they meet all of the established criteria.

In August, September, and October of 2009, DSS, as Oliver's guardian, requested that PBH approve certain Medicaid behavioral healthcare services on behalf of Oliver, including approval to

place Oliver in a psychiatric residential treatment facility ("PRTF"). PBH denied these requests, finding that Oliver did not meet the "medically necessary" admission criteria required for PRTF placement. On 9 November 2009, DSS initiated an appeal from this denial in the North Carolina Office of Administrative Hearings ("OAH"). On 18 August 2011, Chief Administrative Law Judge Julian Mann, III, of the OAH granted summary judgment in favor of DSS.<sup>2</sup>

On 26 March 2010, the Davidson County District Court entered a Post Termination Review Order in which it directed PBH to provide an appropriate PRTF placement for Oliver and "provide the other services necessary to meet his mental health needs or in the alternative to appear and explain to the Court why the [requested facility] or other PTRF [sic] placement is not part of an appropriate treatment plan." The Order further directed Dr. Hummel, Dr. Baker, or the current clinical director of PBH to appear at a 7 April 2010 hearing to explain PBH's denial, along with any other treating psychiatrist having the ability to describe in detail how PBH proposes to meet Oliver's "considerable needs."

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<sup>2</sup> As the order granting summary judgment was filed after the record on appeal in this case, we take judicial notice of the order.

PBH received the Order on 31 March 2010 and acknowledged receipt of the Order in a 5 April 2010 Notice. On 5 April 2010, PBH filed an objection to the Order, asserting the court lacked jurisdiction, since the matters were already pending before the OAH in a Medicaid appeal. Without waiving these objections, PBH advised the court that Dr. Hummel was out of the country, Dr. Baker was no longer employed by PBH, there was currently no clinical director of PBH, and there were no treating psychiatrists on staff at PBH familiar with Oliver's case.

On 7 April 2010, the trial court conducted a post termination of parental rights review. PBH did not attend the hearing. On 5 May 2010, the trial court entered a Show Cause Order, directing the Area Director/CEO of PBH, Dan Coughlin, to appear and show cause why PBH should not be held in civil contempt for failing to comply with the 26 March 2010 Order.

On 2 June 2010, the trial court conducted a hearing on the Show Cause Order. Coughlin testified to the factual basis of PBH's prior objection, that none of the requested parties were available to attend the 7 April 2010 hearing. Coughlin testified that he made no attempt to contact Dr. Baker or otherwise obtain her attendance at the hearing.

On cross-examination, Coughlin stated that although Dr. Baker was no longer employed by PBH, she was still a consultant for PBH. Coughlin responded to cross-examination as follows:

Q. Well, could you not retain [Dr. Baker] to come to court to assist PBH in, uh, uh, explaining to the Court the appropriate treatment, uh, protocols for [Oliver]?

A. Yeah. Uh, could I? Theoretically, I could; whether she'd accept such an assignment or not, I don't know.

Q. Did you try?

A. I did not.

Q. Okay. What other efforts did you make to - in order to comply with the Court's order?

A. Other than?

Q. Other than just say, "Well, Dr. Hummel's not in the country." What else did you do in order to comply with the Court's order?

A. We didn't do anything else.

In a 28 July 2010 Order, the trial court held PBH in civil contempt. The trial court's Order stated, in part:

5. PBH, through its counsel of record, filed a pleading in this cause relating to the April 7th hearing alleging its inability to comply with the Court's order and asking the Court to continue the hearing on April 7th; however, no one from PBH or representing PBH was present at the call of the case on April 7th to explain to the Court whether or not

PBH was able to comply with the Court's order. . . .

. . . .

7. At today's hearing, Mr. Coughlin testified concerning PBH's efforts to comply with the Court's March 26 order. He testified that when he received a copy of the order, he inquired about the availability of Dr. Hummel and was informed he was out of the county. He further testified that said inquiry was the extent of his efforts to comply with the Court's order.

8. Neither Mr. Coughlin nor any representative of PBH attempted to obtain the appearance of Dr. Baker. . . . Mr. Coughlin testified that Dr. Baker continued to consult on [Oliver's] case and that his case was the only case for which she is currently a consultant.

. . . .

11. By its lack of effort in complying with the Court's March 26 order without legal justification, despite its ongoing ability to do so, PBH is in willful civil contempt of court.

The Order stated that PBH could purge itself of contempt by producing Dr. Hummel "or the current medical director along with any other treating psychiatrist who has the ability to describe in detail how PBH proposes to meet [Oliver]'s considerable needs" for testimony at a hearing on 17 June 2010, and by paying a fine of \$10,000.00.

On 17 June 2010, Dr. Hummel appeared before Judge April C. Wood in Davidson County Juvenile Court. PBH filed its Notice of Appeal from the order of contempt on 3 August 2010. PBH appeals and argues that the trial court erred in holding PBH in contempt of the 26 March 2010 Order and fining PBH \$10,000.00 to ensure compliance with its Order.

## **II. Jurisdiction & Standard of Review**

This Court exercises jurisdiction over the matter pursuant to General Statutes section 5A-24. See N.C. Gen. Stat. § 5A-24 (2009) ("A person found in civil contempt may appeal in the manner provided for appeals in civil actions."). Further, "review of contempt proceedings is confined to whether there is competent evidence to support the [trial court's] findings of fact and whether those findings support the judgment." *McKillop v. Onslow Cnty.*, 139 N.C. App. 53, 58, 532 S.E.2d 594, 598 (2000) (quotation marks omitted) (citation omitted) (alteration in original).

## **III. Analysis**

### **A. Sovereign Immunity**

PBH contends the trial court erred in holding PBH in civil contempt, on the grounds that as a contractor for the State of North Carolina, PBH enjoys sovereign immunity. We disagree.



Under North Carolina law, an agent of the State of North Carolina is not subject to contempt. See *N.C. Dep't of Transp. v. Davenport*, 334 N.C. 428, 430, 432 S.E.2d 303, 304 (1993) ("Since the superior court's order was directed to an administrative agency . . . the threshold question is whether the court had authority to hold the sovereign in contempt. We conclude the court could not do so."). However, there is "no authority in this State which recognizes a contractor's right to assert governmental immunity in a . . . claim which arises out of the performance of a contract with the State." *Knighten v. Barnhill Contr. Co.*, 122 N.C. App. 109, 113, 468 S.E.2d 564, 566 (1996).

In the instant case, PBH contracted with DMA, a state agency. PBH contends that this contractual relationship extended sovereign immunity to PBH. PBH further argues that it is governed by federal Medicaid waivers in the five-county catchment area, and also operates a PIHP. Because PBH operates a federally-recognized managed care organization pursuant to 42 C.F.R. § 438.2, PBH argues the Medicaid waivers under which it operates supersede Chapter 122C of our General Statutes.

A PIHP "[p]rovides medical services to enrollees under contract with the State agency, and on the basis of prepaid

capitation payments, or other payment arrangements that do not use State plan payment rates.” 42 C.F.R. § 438.2. While PBH acts as a PIHP, a federally recognized managed care organization, PBH does so under contract with the State. The two Medicaid waivers under which PBH operates are combination waivers that allow states to provide non-traditional long-term care services or to use a limited pool of providers to provide these services. 2005 Health L. Handbook § 12:7. As these waivers are employed by the State to select providers of services, they reinforce the contractual nature of PBH’s provision of services.

The contract between PBH and DMA expressly provides that

[t]he Contractor [(PBH)] is and *shall be deemed to be an independent contractor* in the performance of this contract and as such shall be wholly responsible for the work to be performed and for the supervision of its employees. (Emphasis added.)

Since PBH was acting as an independent contractor and not as an agent of the State, it is not entitled to the protection of the State’s sovereign immunity. See *Knighten*, 122 N.C. App. at 113, 468 S.E.2d at 566. Therefore, PBH’s argument is without merit and we find PBH was not entitled to the defense of sovereign immunity.

**B. Willful Contempt**

PBH argues the trial court erred in concluding that PBH was in willful contempt of court. We disagree.

Failure to comply with a court order creates a continuing civil contempt so long as four elements are satisfied: (1) the original court order must remain in force, (2) its purpose may still be satisfied by compliance, (3) non-compliance must be willful, and (4) the non-compliant party must be able to comply or take reasonable measures that would enable the party to comply. N.C. Gen. Stat. § 5A-21(a) (2009).

PBH does not contest the findings of fact of the trial court's 28 July Order. PBH argues the findings do not support the conclusion that PBH was in willful contempt because the findings show it was impossible for PBH to comply with the court's Order as it could not compel Dr. Baker to appear at the 7 April 2010 hearing.

Although PBH argues it could not compel Dr. Baker to testify, Dr. Baker continued to act as a consultant on Oliver's case. Coughlin's testimony that PBH could have retained Dr. Baker is evidence of their ability to comply with the Order. Given PBH's ability to retain Dr. Baker as a consultant, the complete lack of effort to comply with the Order supports the

trial court's contempt Order. For this reason, we affirm the trial court's finding of civil contempt.

**C. Fine for Contempt**

PBH contends the trial court erred in ordering it to pay a \$10,000 fine in its contempt Order arguing that the fine was punitive rather than coercive in nature. We agree.

In *Jolly v. Wright*, our Supreme Court identified the purpose of issuance of civil contempt fines, namely to coerce compliance with a court order. 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) ("The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court."), *overruled on other grounds, McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *see also Hicks ex. Rel Feiock v. Feiock*, 485 U.S. 624, 99 L.E.2d 721 (1988) (civil contempt non-remittable fines are acceptable forms of coercion for compliance with court orders); *Bishop v. Bishop*, 90 N.C. App. 499, 505, 369 S.E.2d 106, 109 (1988) (adopting *Hicks*). If the court imposes a fine as part of civil contempt, the fine "is lifted as soon as [the contemnor] decides to comply with the order of the court, or when it becomes apparent that compliance with the order is no longer feasible." *Jolly*, 300

N.C. at 92, 265 S.E.2d at 142. The \$10,000 fine should have been lifted, in accordance with *Jolly*, on 17 June 2010, after Dr. Hummel testified in the trial court and complied with the dictates of the 26 March 2010 Order. Accordingly, we vacate the trial court's imposition of the fine against PBH.

#### **IV. Conclusion**

The trial court did not err by holding PBH in contempt, as there was competent evidence supporting a finding of contempt. Further, PBH was not protected by sovereign immunity. However, the trial court did err in imposing a fine against PBH after PBH complied with its Order. Therefore, the Order of the trial court is

Affirmed in part, and vacated in part.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).