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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000308-MR

CABINET FOR HEALTH AND
FAMILY SERVICES FOR THE
COMMONWEALTH OF
KENTUCKY and
DEPARTMENT FOR MEDICAID
SERVICES FOR THE
COMMONWEALTH OF KENTUCKY — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-00281

EDGEMONT MANOR NURSING
HOME, INC. and HMS ENTERPRISES,
LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND MOORE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

MOORE, JUDGE: The Commonwealth of Kentucky's Cabinet for Health and Family Services and Department for Medicaid Services appeal the Franklin Circuit Court's order concluding that they are time-barred from recovering alleged Medicaid overpayments from Edgemont Manor Nursing Home and HMS Enterprises based upon cost reports for fiscal years 1994, 1995, and parts of fiscal year 1996. After a careful review of the record, we affirm because we agree with the circuit court's analysis.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the appellate brief filed by the Cabinet, Edgemont Manor Nursing Home is a licensed nursing facility, which participates in the Kentucky Medical Assistance Program (Medicaid). During the time periods involved in this case, long-term care facilities such as Edgemont were paid by Medicaid for services the facility provided to Medicaid recipients based upon a cost reimbursement method.[2] Medicaid established an interim per diem rate it paid the facility for providing care to a Medicaid recipient during a particular fiscal year, and at the end of the fiscal year, the facility completed a cost report and provided it to Medicaid. Medicaid completed a "desk review" of the cost report and informed the facility of its findings following the desk review. The Cabinet's Office of the Inspector General (OIG) then conducted an audit at the facility based upon the cost report. The audits required the facility to provide documented evidence of the costs the facility claimed on the cost report. Following the

[2] The Cabinet states that the method for reimbursement was changed to a price-based method in 2000 for many nursing facilities.

completion of the audit, the OIG reported the audit results to Medicaid, and Medicaid calculated the final rate it owed for the fiscal year in question. This final calculation sometimes resulted in no change in the per diem rate of reimbursement, and at other times it resulted in either an increase or a decrease in the per diem rate of reimbursement. The per diem rate that was established was then used both as a retroactive per diem rate and as a prospective per diem rate. After the final calculation was completed, Medicaid sent a settlement letter to the facility which included Medicaid's calculations and information regarding whether the per diem rate that it paid to the facility required adjustment.

Edgemont submitted its cost report for fiscal year ending (FYE) February 28, 1995 to Medicaid on May 15, 1995. Edgemont subsequently discovered errors in the original cost report concerning the total cost to be included. Consequently, Edgemont submitted an amended cost report for FYE February 28, 1995 to Medicaid on July 3, 1996. However, Medicaid used the original cost report to set per diem rates of reimbursement both retroactively and prospectively for Edgemont. Medicaid completed its audit of the original cost report on November 2, 1996, and it sent a settlement letter to Edgemont on December 16, 1997. The adjustments set forth in the settlement letter were based only on the original cost report. Edgemont appealed, and Medicaid's decision letter of December 10, 1999 reversed all adjustments in favor of Edgemont.

Then, according to the Findings of Fact entered by the Cabinet's Hearing Officer in this case,

> [o]n September 4, 2003, almost seven (7) years after the completion of its audit of the [original] February 28, 1995 cost report, Medicaid issued a Notice of Revision of Rates for 1993 to 1996 based upon the amended 1995 cost report filed on July 3, 1996. On September 12, 2003, Edgemont requested a hearing on the revised rates and raised the issue of Medicaid's claim being barred by the statute of limitations.

In October 2003, Medicaid issued its demand letter to Edgemont concerning the revised rates and seeking recoupment of its alleged overpayment of Medicaid funds to Edgemont. Medicaid alleged it had overpaid Edgemont by $162,394.00. The parties engaged in a Dispute Resolution Meeting, and Medicaid issued its final decision in March 2004, denying relief based on Edgemont's statute of limitations claim.

The Cabinet's Hearing Officer entered conclusions of law, finding that "[t]he nature of the relationship between Edgemont and Medicaid is contractual arising out of the provider contracts entered into by the parties." Therefore, the hearing officer found the fifteen-year statute of limitations for claims arising in contract was applicable, pursuant to KRS[3] 413.090(2). The hearing officer also noted that Edgemont asserted the doctrine of laches likewise applied to Medicaid's claims, but the hearing officer concluded that the "doctrine of laches does not apply to bar actions by the Medicaid Program, an agency of the Commonwealth of Kentucky." The hearing officer further found there was no evidence in the record that Edgemont had been prejudiced by Medicaid's delay in its "efforts to enforce its rights to recover funds from Edgemont." Therefore, the

[3] Kentucky Revised Statute.

hearing officer recommended affirming Medicaid's revised rates pertaining to the "fiscal year February, 1995 and fiscal year 1996 Amended Medicaid Cost Reports."

Edgemont filed exceptions to the hearing officer's Findings of Fact, Conclusions of Law, and Recommended Decision. Edgemont contended that "the nature of the relationship between Edgemont and Medicaid is not primarily contractual, but statutory and should be governed by the five-year statute of limitations and/or Medicaid's claims should have been barred by the doctrine of laches due to the long delay involved."

The Secretary of the Cabinet entered a final order affirming the Findings of Fact, Conclusions of Law and Recommended Decision of the Cabinet's Hearing Officer. Edgemont and HMS Enterprises then appealed that decision to the Franklin Circuit Court. Edgemont's attorney sent a letter to counsel for the Cabinet stating, in pertinent part, as follows:

> As I . . . informed you on Friday, the facility has been sold to HMS Enterprises, LLC which has no connection to the former owner, Edgemont Manor Nursing Home, Inc. In the Sales Agreement, Edgemont Manor Nursing Home, Inc. agreed to take full responsibility for any Medicaid liabilities existing prior to the date of closing, which occurred sometime after July 18, 2005. . . . Thus, pursuant to 907 KAR[4] 1:671, Section 2(14)[,] the Department of Medicaid Services should honor this Agreement.
>
> My client has discovered that the Department for Medicaid Services has already recouped a portion of the liability involved in this appeal from the new owners'

[4] Kentucky Administrative Regulation.

> current payments. We are, therefore, asking you to recognize this Agreement, refund the payment recouped and ensure that no further recoupments are made from the purchasers' funds.

Edgemont's attorney attached a copy of the Asset Purchase and Operations Transfer Agreement between Edgemont Manor Nursing Home, Inc., and HMS Enterprises, LLC, to the letter sent to counsel for the Cabinet, and directed counsel's attention to paragraph 19.1(D) of the Agreement, specifically. That paragraph provided that "[a]fter the Closing Date, Seller shall indemnify and hold harmless Purchaser against and in respect of: . . . all Medicare and Medicaid billing and cost reports filed with Medicare and Medicaid with respect to the Business prior to the Closing Date. . . ."

Edgemont and HMS Enterprises then moved for a restraining order in the circuit court to prohibit the Cabinet "from any further recoupment or confiscation of any funds due and payable to HMS Enterprises relating to the liabilities in this action." In support of the motion, Edgemont and HMS Enterprises attached the affidavit of Bonnie Haefer, a principal member of HMS Enterprises, LLC, stating that in

> direct contravention [of the Asset Purchase and Operations Transfer] Agreement and the Cabinet for Health Services regulation, 907 KAR 1:671 Section 2(14), the Cabinet has recouped $65,260.23 from payments owed to my facility for care to Medicaid beneficiaries since the closing date. Furthermore, it is clear that the Cabinet intends to recoup approximately $97,000.00 in liabilities out of the coming payments due to my facility. It is the apparent intention of the Cabinet

> to recoup the rest of the debt from my facility until the entire liability is satisfied.
>
> The result of this action will be to deprive this facility of needed funds to operate and provide services to its residents. The refusal of the Department for Medicaid Services to pay for services provided to its own beneficiaries endangers the welfare of these beneficiaries and others in the facility.

The circuit court held a hearing on the motion for a restraining order and concluded that HMS Enterprises, LLC would be irreparably harmed if the Cabinet was not "enjoined from recouping funds pertaining to this action from its Medicaid receipts." Therefore, the circuit court granted the motion for a restraining order and ordered that the Cabinet was restrained while this action was pending from recouping or collecting funds from HMS Enterprises, LLC regarding claims concerning the operation of Edgemont Manor prior to September 15, 2005.

The case was then ordered to be held in abeyance pending a decision in the Kentucky Supreme Court in the case of *Commonwealth v. EPI Corporation*, 2006-SC-000348, because it was believed the decision in that case may be dispositive of some or all of the issues in the present case. After the *EPI* decision was rendered, *Commonwealth v. EPI Corporation*, No. 2006-SC-000348-DG, 2008 WL 5274857, *1 (Ky. Dec. 18, 2008) (unpublished), the present case was removed from abeyance status. The Cabinet thereafter moved for summary judgment. The Cabinet argued in its motion that in *EPI*, the Supreme Court did not opine on the application of any statute of limitations, but it "only ruled on the application of the Cabinet's regulation in effect at that time," which had since been

repealed. The Cabinet asserted that the statute of limitations pertaining to issues regarding contracts, *i.e.*, KRS 413.090, was applicable in this case. Edgemont and HMS Enterprises responded to the motion for summary judgment, arguing that the facts and issues in the *EPI* case were very similar to those in the present case and, accordingly, pursuant to the reasoning in *EPI*, the Cabinet was time-barred from recouping the alleged overpayments in this case.

The circuit court entered an opinion and order reversing the final order of the Cabinet. The court reasoned that, pursuant to *EPI* and 907 KAR 1:110, Section 3,[5] the Cabinet's recoupment of Medicaid benefits based upon cost reports for fiscal years 1994 and 1995 was time-barred because more than 21 months had passed. The court also noted that "the *EPI* case arose from the same [type of Cabinet] audits challenged in this case." The circuit court also held the Cabinet was barred from recouping the alleged overpayments pursuant to the doctrine of collateral estoppel. Accordingly, the court reversed the final order of the Cabinet and ordered the Cabinet to return "any sums previously recouped for the time period prior to the effective date of the administrative regulation eliminating the regulatory statute of limitations."[6] The court further ordered the

[5] The circuit court noted that "907 KAR 1:110, Section 3 was amended in 1996 to eliminate the 21-month time limit. The 21-month limitation was effective for years 1988-1995."

[6] Although the parties and the circuit court often refer to the 21-month limitations period set forth in 907 KAR 1:110, Section 3 as a "statute of limitations," we note that it was not, in fact, a "statute of limitations," but a regulatory limitations period. Regardless, we have not changed the language used by the parties and the circuit court in this regard, when we have quoted them.

Cabinet to restore funds it had previously seized by withholding payments to Edgemont, but to which it was not entitled, pursuant to the court's ruling.

The Cabinet now appeals, contending that: (a) this action did not accrue until October 2003, when Medicaid completed its finding concerning the rate of reimbursement and notified Edgemont that Medicaid had overpaid the nursing facility; and (b) the *EPI* case is inapplicable because the present cause of action did not accrue until 2003, and if any limitations period applies in this case, it is the fifteen-year statute of limitations pertaining to actions based upon a contract.

II. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id*. at 482. Whether an action is time-barred pursuant to a statutory or regulatory period of limitations is a question of

law that we review *de novo*. *See Lipsteuer v. CSX Transportation, Inc.*, 37 S.W.3d 732, 737 (Ky. 2000).

III. ANALYSIS

A. WHEN CAUSE OF ACTION ACCRUED

The Cabinet[7] first alleges that this action did not accrue until October 2003, when Medicaid completed its finding concerning the rate of reimbursement and notified Edgemont that Medicaid had overpaid the nursing facility. The administrative regulation primarily involved in this case was 907 KAR 1:110, which was titled "Recoupment of overpayments." The Supreme Court in *EPI* noted that 907 KAR 1:110 provided in pertinent part as follows during the years 1988 – 1995:

> Section 1. Scope. This administrative regulation applies to all providers of medical assistance services where payments are made from Medicaid Program funds.
>
> Section 2. Recoupment of Overpayments. When it is determined that a provider has been overpaid, a letter shall be mailed to the provider requesting payment in full within thirty (30) days. If a provider demonstrates to the program within the thirty (30) day time limit that full payment would create an undue hardship, a payment plan not to exceed six (6) months from the notification date shall be established. If the full payment or payment plan request is not received within thirty (30) days of notification, the amount due shall be deducted from current payments until the full amount is recouped. Once the payment plan has been established and a payment is not received by the agreed to date, the amount shall be deducted from current payments.

[7] In our analysis, we will collectively refer to the Appellants as "the Cabinet."

> Section 3. Exceptional Hardship Circumstances. When it is determined that a recoupment of an overpayment in accordance with Section 2 of this administrative regulation would result in an exceptional hardship for the provider and have the direct or indirect effect of reducing the availability of services to program recipients (e.g., by resulting in the bankruptcy and subsequent dissolution of the provider entity), the program may provide for a reasonable extension of the time period for recoupment. The time period for recoupment shall not exceed twelve (12) months from the date the overpayment is established, and shall be accomplished within twenty-one (21) months from the end of the provider's cost reporting period or the receipt by the program of the billing invoice, request for payment or similar document for providers not reimbursed on the basis of cost reports.

EPI, No. 2006-SC-000348-DG, 2008 WL 5274857, at *2 (Ky. Dec. 18, 2008) (unpublished).

Further, in *EPI*, No. 2006-SC-000348-DG, 2008 WL 5274857, at *3 (Ky. Dec. 18, 2008) (unpublished),[8] the Supreme Court held that the 21-month limitation period in 907 KAR 1:110, Section 3, applied as a "general limitation period for all recoupments of overpaid Medicaid benefits by the Cabinet" from 1988 – 1995, not just to recoupments in exceptional hardship circumstances. The Court also noted that "[a]n agency's regulations have the force and effect of law, and the agency is bound by the language of it[s] own regulations." *EPI*, No. 2006-SC-000348-DG, 2008 WL 5274857, at *3 (Ky. Dec. 18, 2008) (unpublished). Therefore, because 907 KAR 1:110, Section 3 provided that the recoupment "shall

[8] Although the *EPI* case is an unpublished decision by the Kentucky Supreme Court, we may consider it in the analysis of this appeal pursuant to Kentucky Rule of Civil Procedure 76.28(4)(c), as we found no other published cases on point.

be accomplished within twenty-one (21) months from the end of the provider's cost reporting period,"[9] the Cabinet's argument that the limitations period did not commence until the cause of action accrued in October 2003, after Medicaid determined that it had overpaid Edgemont, lacks merit.

B. APPLICABLE LIMITATIONS PERIOD

The Cabinet next argues that the *EPI* case is inapplicable because the present cause of action did not accrue until 2003, and if any limitations period applies in this case, it is the fifteen-year statute of limitations pertaining to actions based upon a contract, pursuant to KRS 413.090(2). However, as we noted, *supra*, the Cabinet's claim that the cause of action did not accrue until 2003 lacks merit.

Additionally, the *EPI* case is persuasive. Like the present case, *EPI* concerned the Cabinet's intent to recoup an alleged overpayment of Medicaid benefits paid to a provider for services provided to Medicaid beneficiaries during the years that 907 KAR 1:110, Section 3, was in effect, *i.e.*, 1988 – 1995. Thus, we follow the instruction in the *EPI* case.

As for the Cabinet's argument that the only limitations period applicable in this case, pursuant to KRS 413.090(2), is the fifteen-year statute of limitations pertaining to actions based upon a contract, this claim lacks merit. The

[9] As noted by the circuit court, the regulation was amended in 1996, and the provision concerning the 21-month limitation period was removed from the regulation. Further, the Supreme Court noted in *EPI*: "The current recoupment regulation, 907 KAR 1:671, contains no time frame within which recoupment must be accomplished." *EPI*, No. 2006-SC-000348-DG, 2008 WL 5274857, at *4 n.1 (Ky. Dec. 18, 2008) (unpublished).

Supreme Court in the *EPI* case noted that the only issue involved in that appeal was

> whether recoupment of overpaid Medicaid benefits by the Cabinet for Health and Family Services ("Cabinet") from 1988-1995 is barred by 907 KAR 1:110, Section 3 (21 months for recoupment to be accomplished) or KRS 413.120(2) (5-year statute of limitations for liability created by statute when no time limit fixed by statute), *or whether recoupment is allowed under KRS 413.090(2) (15-year statute of limitations for actions based on contract)*.

EPI, No. 2006-SC-000348-DG, 2008 WL 5274857, at *1 (Ky. Dec. 18, 2008) (unpublished) (emphasis added). However, as previously discussed, the Supreme Court held in *EPI* that the 21-month limitations period set forth in 907 KAR 1:110, Section 3 was applicable, rather than the 5-year or 15-year statutes of limitations. Therefore, the Cabinet's claim in the present appeal that we should apply the fifteen-year statute of limitations is not well-taken.

Accordingly, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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