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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000246-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT H. HENDRICKSON, JUDGE
ACTION NO. 14-CI-00542

LETTIE SEXTON, BY AND THROUGH HER AUTHORIZED REPRESENTATIVE, APPALACHIAN REGIONAL HEALTHCARE, INC.; AND COVENTRY HEALTH AND LIFE INSURANCE d/b/a COVENTRYCARES, INC. — APPELLEES

OPINION AND ORDER
VACATING AND REMANDING
AND DENYING MOTION TO DISMISS

** ** ** ** **

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

CLAYTON, JUDGE: The Cabinet for Health and Family Services ("Cabinet") brings this interlocutory appeal from the January 26, 2015 Order of the Harlan

Circuit Court denying its motion to dismiss the Petition for Review of an administrative decision by the Secretary of the Cabinet, which was submitted by Lettie Sexton, by and through her authorized representative, Appalachian Regional Healthcare, Inc., ("ARH"). The Secretary's final order adopts the recommended order of the hearing officer, which proposes that Sexton's appeal be dismissed for lack of standing, which effectively denies Sexton an administrative hearing on the denial of a Medicaid reimbursement by Coventry Healthcare and Life Insurance d/b/a CoventryCares, Inc. ("Coventry") for a portion of her hospital treatment at ARH.

In addition, Sexton, by and through her representative, ARH, has filed a motion to dismiss the current appeal as interlocutory and not final. This motion was passed to our panel. After careful review, we deny Sexton's motion to dismiss the appeal. And having considered the record and the arguments before us, noting that venue is improper, we vacate the decision of the trial court and remand the matter for actions consistent with this opinion.

BACKGROUND

Sexton was admitted to ARH in Harlan, Kentucky, on April 7, 2014, complaining of chest pain. The ARH sent a request for preauthorization of medical services to Coventry, which Coventry approved for a 23-hour observation stay. However, Sexton, through ARH, requested that the observation be extended 15 hours to allow for a cardiology consultation. Coventry declined to approve the additional coverage.

Coventry is a managed care organization ("MCO"), which has contracted with the Cabinet to provide covered services to Medicaid beneficiaries. The Cabinet administers the Kentucky Medical Assistance Program (KMAP), which provides for implementation of the Federal Medicaid Program in Kentucky. Sexton is a Medicaid beneficiary who authorized ARH to represent her interests on any disputed claims. Sexton, on April 7, 2014, executed an "Appointment of Authorized Representative for Disputed Claims, Administrative Hearings and Court Appeals," designating "Phyllis Wilson" and/or "Tommy Scott Huff" as her authorized representative to request administrative hearings, file court appeals, and to represent her at administrative hearings and court appeals. Wilson and Huff are employees of ARH.

Wilson, as Sexton's authorized representative, requested on April 15, 2014, an internal review by Coventry of its preauthorization denial of the last 15 hours of Sexton's hospital stay. Coventry upheld its original denial on May 16, 2014, and thereafter, on June 12, 2014, Wilson, as Sexton's representative, requested a state fair hearing to challenge Coventry's decision denying the payment of medical services to ARH.

A hearing officer for the administrative services branch of the Cabinet issued a recommended Order on August 26, 2014, dismissing the administrative appeal for lack of standing. The hearing officer held that Sexton lacked standing because she had no financial stake in the matter since Medicaid, rather than Sexton, paid for medical services to ARH. The Secretary for the Cabinet adopted

the recommended Order on October 23, 2014. Next, ARH, through Sexton's authorized representative, filed a Petition for review in Harlan Circuit Court on November 25, 2014.

The Cabinet filed a motion in the trial court to dismiss the Petition alleging the following:

1. ARH was not an authorized representative.
2. Venue was inappropriate.
3. The petition was barred by sovereign immunity because it did not strictly comply with the requirements of Kentucky Revised Statutes (KRS) 13B.140.

Coventry also filed a motion to dismiss the Petition proffering arguments similar to the Cabinet:

1. ARH is not the authorized representative for Sexton, and lacks the capacity to bring suit on petitioner's behalf.
2. The petition fails to strictly comply with KRS 13B.140 and must therefore be dismissed due to lack of jurisdiction and lack of venue by the Harlan Circuit Court.

After conducting a hearing on January 8, 2015, the trial court entered an Order denying the Respondents' motion to dismiss Sexton's Petition for review of the Cabinet's final Order of October 23, 2014.

First, the trial court addressed the Cabinet's and Coventry's arguments that ARH lacked standing because Sexton only gave "written consent" authorizing ARH employees to represent her and neither party was named in the action, and thus, the consent was insufficient. ARH responded that these two individuals are

the hospital's employees, and thus, its agents, which allows ARH, through them, to represent Sexton in the appellate process. In its Order, the trial court agreed with ARH and clarified that the exhibits attached to the Petition provided enough information to establish that the authorized representatives were proceeding on behalf of ARH.

The trial court then considered the Cabinet's and Coventry's arguments that the trial court lacked subject matter jurisdiction and venue since ARH had not explicitly followed the directives of KRS 13B.140(1). Supporting this argument, the Cabinet and Coventry observed that the Petition failed to list the addresses of all the parties. In fact, the only absent address in the style of the Petition was ARH's address. However, as pointed out by the trial court, exhibits A and D, attached to the petition, were letters on ARH letterhead, and contained the address of Harlan ARH. The trial court then held that this listing was sufficient to meet both the requirement of KRS 13B.140, and because Sexton was treated at the Harlan ARH, venue was proper.

Lastly, the trial court determined that the Cabinet and Coventry's sovereign immunity argument failed because it hinged on the proposition that failure to strictly comply with KRS 13B.140 eliminates the waiver of sovereign immunity. The trial court concluded that because the Petition was facially sufficient, the limited waiver of sovereign immunity remained. For these reasons, the trial court denied the Cabinet and Coventry's motion to dismiss.

The Cabinet now appeals from this Order. Coventry, inexplicably acting in the capacity of an appellee, also argues that the Order was improper. Moreover, during the pendency of the appeal, ARH filed a motion to dismiss the appeal arguing that the Order of the trial court was not final and appealable. This motion has been passed to this merit panel.

STANDARD OF REVIEW

When a trial court rules on a motion to dismiss, it should liberally construe the pleadings in the light most favorable to the plaintiff and all allegations should be taken as true. *Mims v. Western–Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. App. 2007). Therefore, in the case at bar, the trial court is to construe the pleadings in a light most favorable to Sexton, through her authorized representative, ARH. Moreover, in ruling on a motion to dismiss, the trial court is not required to make any factual findings. *Benningfield v. Pettit Environmental, Inc.*, 183 S.W.3d 567, 570 (Ky. App. 2005). Thus, the issue in a motion to dismiss, "is purely a matter of law." *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Accordingly, we review the trial court's decision *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000). Indeed, we review all legal issues *de novo*. *Kindred Nursing Centers Ltd. Partnership v. Brown*, 411 S.W.3d 242, 246 (Ky. App. 2011).

ANALYSIS

Motion to Dismiss Appeal

We begin by addressing the Appellees' motion to dismiss the appeal as interlocutory, and therefore, not ready for appellate review. Noting that Kentucky Rules of Civil Procedure (CR) 54.01 declares that "[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02," Sexton believes that the order is interlocutory and not ready for appeal.

Sexton claims that the actual issue, whether she had standing, was not addressed by the trial court. A review of the Order has the following language:

> Respondents argue vigorously that ARH lacks standing because Lettie Sexton never gave ARH "written consent" to be her representative . . . The Court notes that the exhibits to the Petition contain enough information regarding the prosecution of the administrative action below to assume the two (certainly Ms. Wilson) were proceeding on behalf of ARH – not much information, but enough to avoid dismissal.

So, the trial court held that ARH had authority to represent Sexton because she consented to this representation in her written authorization, but the trial court did not specifically address the Cabinet's holding that Sexton lacked standing to pursue an appeal before the Cabinet. Consequently, this issue has not yet been decided by the trial court.

Final judgments must adjudicate an entire claim, not just part of a claim. *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 102 (Ky. App. 2011). Further, the order must adjudicate "all of the rights of all of the parties[,]" to be a final and appealable order. *Wright v. Ecolab, Inc.*, 461 S.W.3d 753, 757

(Ky. 2015). Thus, Sexton believes that because the trial court entered an order that only adjudicated part of the claim, did not determine all of the rights of all of the parties, and did not recite that it was "final and appealable," the order was interlocutory, and our Court does not have jurisdiction to hear it.

The Cabinet responds to Sexton's motion to dismiss the appeal by noting that in the Cabinet and Coventry's motion to dismiss the Petition was based on Appellees' failure to invoke the waiver of sovereign immunity since they did not strictly comply with the requirements of KRS 13B.140. Therefore, the Cabinet maintains that this appeal is properly before the Court since it is premised on their claim of sovereign immunity.

Sexton, apparently anticipating this argument, suggests that the trial court's Order denying the Cabinet and Coventry's motion to dismiss the Petition did not mention sovereign immunity. But a review of the Order establishes that the trial court articulated in the Order that "Respondents' sovereign immunity argument necessarily fails. . . ." Thus, the trial court did indicate that sovereign immunity was implicated.

Sovereign immunity entitles its possessor to be free from the burdens of not only liability, but also of defending the action. *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). Moreover, our Court has stated that "an order denying a claim of sovereign immunity is immediately appealable." *Commonwealth v. Samaritan All., LLC*, 439 S.W.3d 757, 760 (Ky. App. 2014)(*citing Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky. 2009)).

Indeed, as discussed by the Kentucky Supreme Court in *Wright*, a few exceptions exist to the rule that an appeal may not be taken from an interlocutory order. *Wright*, 461 S.W.3d at 758. It highlighted that a claim of sovereign immunity is such an exception. *Id*. Accordingly, trial court's rulings on sovereign immunity are immediately appealable even in the absence of a final judgment. Consequently, while this appeal is interlocutory, it is properly before our Court.

KRS 13B.140 and sovereign immunity

According to the Cabinet, KRS 13B requires strict compliance to invoke a limited waiver of sovereign immunity and confer jurisdiction on the trial court. The trial court disagreed with the contention that Sexton's compliance was insufficient under KRS 13B.140, and as a result, held that the limited waiver of sovereign immunity still existed. In doing so, the trial court agreed, or at least appears to agree, with the Cabinet's legal assessment that KRS 13B.140 acts as a limited waiver of sovereign immunity.

In its discussion of sovereign immunity, the Cabinet proffers that because judicial review of an administrative agency's final order is only available through legislative grace, it requires strict compliance with statutes to permit judicial review of an administrative agency's final decision. *Board of Adjustments of the City of Richmond v. Flood*, 581 S.W.2d 1 (Ky. 1978).

In making this argument, the Cabinet relies specifically on KRS 13B.140 as the statute requiring strict compliance in order to maintain a limited waiver of sovereign immunity. Our perusal of KRS 13B.140 suggests that it only provides the procedure for judicial review of a final order of an administrative agency but does so without any reference to sovereign immunity. In fact, the statutory language itself never uses the terms "sovereign immunity" or "waiver," nor does the Cabinet provide any case law supporting this exact legal requirement.

An examination of *Flood*, the primary case relied on by the Cabinet, shows that while it does discuss the necessity for strict compliance with a statute, it refers to the authorizing statute of an individual administrative agency. This authorizing statute outlines the requirements to authorize judicial review of a planning commission's decision. In *Flood*, the Kentucky Supreme Court held that for the trial court to have jurisdiction to hear the appeal of an administrative decision by the Board of Adjustment or Planning Commission, the appeal must strictly comply with KRS 100.347. In particular, the statute requires the planning commission to be served, and the appellants did not serve the planning commission until 68 days after the action was commenced. Hence, the Court held that appellants failed to strictly comply with the authorizing statute's requirements for judicial review, and hence, no judicial review was available. *Id*. at 2. Furthermore, at no point does *Flood* mention KRS 13B.140 or sovereign immunity or the necessity for strict compliance with KRS 13B.140.

The remaining cases cited by the Cabinet regarding strict statutory compliance do not indicate that the failure to strictly comply with KRS 13B.140 eliminates a limited waiver of sovereign immunity. Rather, these cases provide examples, similar to *Flood*, of extreme noncompliance with an authorizing administrative statute.

In *Rock Island, A. & L.R. Co. v. U.S.*, 41 S.Ct 55, 56 (1920), the complainant failed to exhaust administrative remedies. In *Grimes v. Unemployment Insurance Commission*, 340 S.W.3d 104 (Ky. App. 2011), the petitioner failed to file the appeal of the Commission's decision until twenty days after the decision was final. In *Taylor v. Kentucky Unemployment Insurance Commission*, 382 S.W.3d 826 (Ky. 2012), the complainant did not verify his complaint as required under the authorizing statute KRS 341.450(1). Interestingly, in *Taylor*, the appellant argued that KRS 13B.140 superseded the authorizing statute, and hence, its requirement for verification was unnecessary. Nevertheless, because the issue was not preserved, the Court did not consider the impact of this argument. Lastly, in *Harrison v. Park Hills Board of Adjustment*, 330 S.W.3d 89 (Ky. App. 2011), the Court held that the trial court's jurisdiction was negated because an indispensable party was not named as an appellee.

In sum, each case discusses a particular agency's authorizing statute for judicial review of an administrative agency decision. No case states that KRS 13B.140 must be strictly followed nor considers any interface of KRS 13B.140 with a waiver of sovereign immunity. Instead, the cases discuss the concept of a

trial court's jurisdiction to hear such appeals based on individual authorizing statutes. Moreover, the errors preventing judicial review in all these cases were much more significant than the discrepancies in Sexton's Petition. Consequently, the Cabinet provides no legal support for its assertion that failure to strictly comply with KRS 13B.140 procedural directives abrogates a party's limited waiver of sovereign immunity.

Clearly, we do not dispute the necessity for following authorizing and procedural statutes in administrative appeals, but we believe that the Cabinet's argument that KRS 13B.140 must be strictly complied with in order to avoid abrogating a limited waiver of sovereign immunity is a red herring. There is no legal support for the conclusion that a party seeking to appeal a final order of an administrative agency must strictly comply with KRS 13B.140 or lose the agency's waiver of sovereign immunity.

Having determined that the Cabinet's (and Coventry's) suggestions regarding sovereign immunity are incorrect, we now explore the tenets of sovereign immunity in this case.

Sovereign Immunity

Sovereign immunity is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity. *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). Section 231 of the Kentucky Constitution explains that the General Assembly "may, by law, direct in what manner and in what courts suits may be

brought against the Commonwealth." Accordingly, it is uncontested that claims are barred against the Commonwealth because of sovereign immunity unless expressly waived by the General Assembly. *See Withers v. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997). Furthermore, the Cabinet is immune from suit under the doctrine of sovereign immunity. *Commonwealth v. Samaritan Alliance, LLC*, 439 S.W.3d 757, 761 (Ky. App. 2014).

But, under the reasoning of *Samaritan Alliance*, in the cases of appeals by MCO's, where the Cabinet has entered into a Medicaid Service Provider Agreement with the MCO, for purposes of a contract claim, the legislature has waived the Cabinet's immunity by operation of KRS 45A.245. *Id.* at 759.

In the case at bar, we observe that the Cabinet entered into a Medical Service Provider Agreement with Coventry since, as noted above, the Cabinet administers the Kentucky Medical Assistance Program. Coventry is one of several entities that entered into a Medicaid Provider Agreement with the Cabinet. The Agreement provided that the Cabinet would reimburse the MCO's for Medicaid services provided at rates governed by state and federal statutes and regulations.

Although *Samaritan Alliance* concerns a waiver of sovereign immunity so that a MCO may seek judicial review in a contract dispute, these same Medicaid Provider Agreements also support the conclusion that the Cabinet has waived its sovereign immunity in cases where Medicaid enrollees and hospitals seek appeal and review of disputed decisions rendered by MCO's. Furthermore,

specific administrative regulations are provided to allow and guide the appeals process for several levels of review regarding such decisions by MCO's for both enrollees and hospitals. *See* 907 Kentucky Administrative Regulations (KAR) 17:010. Section 4 of the regulation explains the internal appeals process for an MCO, and Section 5 of the regulation discusses a state fair hearing with the Cabinet. And to clarify the issue of whether an authorized representative may participate in the process, 907 KAR 17.010 Section 5(3)(a) says "[a]n enrollee **or** authorized representative may request a state fair hearing by filing a written request with the department." (Emphasis added.)

Samaritan Alliance explains the influence of KRS 45A.245 on contracts between the Commonwealth and Medicaid Providers:

> However, the Cabinet has entered into a Medicaid Provider Service Contract with Samaritan. KRS 45A.245 expressly waives sovereign immunity for actions arising under contracts with the Commonwealth. In relying upon KRS 45A.245, the Supreme Court applied the statute as a waiver of sovereign immunity in all contract actions against the Commonwealth and not only those subject to the Model Procurement Code.

Samaritan Alliance, LLCI, 439 S.W.3d 757, 762.

Bolstering this reasoning is the Kentucky Supreme Court case, *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013). In this case, a group of county employees who were members of the County Employees Retirement Systems (CERS) brought a declaratory judgment action challenging the constitutionality of KRS 61.637(1). The Commonwealth, through

the Kentucky Employees Retirement Systems (KERS), responded by moving for dismissal on the basis of sovereign immunity, maintaining that its immunity cannot be waived in declaratory judgment actions.

In its analysis of the case, the Supreme Court thoroughly addressed the application of the doctrine of sovereign immunity. Observing that KERS is a statutorily created agency which performs an integral function of state government, the Court held that KERS is entitled to the protection of sovereign immunity. *Id*. at 837. But the Court explained that sovereign immunity can be waived either expressly or by overwhelming implication of statute. *Id*. at 838. *See also* Kentucky Constitution Section 231. Since sovereign immunity may be waived in certain situations, the Court determined that the statutory and contractual relationship between KERS and its members, read in conjunction with the Declaratory Judgment Act, KRS 418.075, creates an overwhelming indication that the sovereign immunity of the Commonwealth was waived. *Id*.

Even though the Court's decision was primarily based upon the specific statutory scheme relating to the KERS, the Court continued with its reasoning and addressed the application of these principles to contractual actions against the Commonwealth. The Court pointed out that KRS 45A.245 provides that any person, firm or corporation who has a written contract with the Commonwealth entered into after 1974 may bring an action against the Commonwealth for breach or enforcement. *Id*. The Court then held that KRS

45A.245 specifically waives governmental or sovereign immunity for contract actions against the Commonwealth.

We believe that the Court's reasoning in *Commonwealth v. Kentucky Retirement Systems* is relevant to the claims brought by Sexton and ARH. It is clear that the genesis of this case is the relationship between the Cabinet and Coventry. The Commonwealth has entered into a contract with Coventry so that Coventry functions as one of its MCO contract providers to administer Medicaid services in southeastern Kentucky. Coventry, in turn, entered into a temporary agreement with Appalachian Regional Healthcare, the dominant hospital care provider in that area, to provide its members in-network hospital care and other services in Appalachian's facilities. *Appalachian Regional Healthcare, Inc. v. Coventry Health and Life Ins. Co.*, 714 F.3d 424, 425 (6th Cir. 2013).

In the case at hand, we hold that in Medicaid reimbursement cases, sovereign immunity has been waived by the overwhelming implication of statutory language. Besides the aforementioned administrative regulations guiding such appeals, KRS 205.510 – KRS 205.645 provide the statutory directives for the State Medicaid Program. In particular, KRS 205.531 discusses administrative hearings and declares that "[a]ll administrative hearings conducted under KRS 205.510 to 205.645 shall be conducted in accordance with KRS Chapter 13B." As an aside, nowhere in the statutes does it suggest that the waiver of sovereign immunity necessitates strict compliance with KRS 13B.140.

Accordingly, as authorized by KRS 45A.245, the Cabinet has waived sovereign immunity in such disputes and Medicaid recipients have authority to appeal adverse decisions rendered by MCO's.

Venue

Although we have determined that sovereign immunity has been waived in cases appealing decisions by MCO's, another issue herein is the propriety of venue in Harlan Circuit Court. The trial court held that venue was appropriate. Venue, however, as provided in KRS 45A.245, mandates that an aggrieved person, firm, or corporation who has a valid written contract must bring an action for its enforcement in Franklin Circuit Court. Therefore, Sexton, with ARH as an authorized representative, in contravention of KRS 45A.245's directives, improperly filed the action in Harlan Circuit Court, and the trial court's decision must be vacated.

CONCLUSION

Under KRS 45A.245, sovereign immunity has been waived by the Cabinet in cases involving appeals of disputes regarding Medicaid reimbursements between MCO's and enrollees, who may be represented by an authorized representative. However, because the statute requires that such actions be filed in Franklin Circuit Court, the decision to deny the motion to dismiss is vacated. The parties may make a motion to transfer the matter to Franklin Circuit Court or file another Petition for Review in that court on whether Sexton has standing to bring the appeal.

The decision of the Harlan Circuit Court is vacated and remanded for actions consistent with this opinion.

ALL CONCUR.

ENTERED: _____

_____
JUDGE, COURT OF APPEALS

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