NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0530 c/w 2014 CA 0531 c/w 2014 CA 0532

MIDTOWN MEDICAL, LLC

VERSUS

THE DEPARTMENT OF HEALTH & HOSPITALS; BRUCE D. GREENSTEIN, INDIVIDUALLY & IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH & HOSPITALS; & JERRY PHILLIPS, INDIVIDUALLY & IN HIS OFFICIAL CAPACITY AS UNDERSECRETARY OF THE DEPARTMENT OF HEALTH & HOSPITALS

Judgment Rendered: DEC 29 2014

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C612718 c/w C617546 & C614798

Honorable Janice Clark, Judge Presiding

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BEFORE: GUIDRY, McCLENDON, AND HIGGINBOTHAM, JJ.

McCLENDON, J.

The Department of Health and Hospitals (DHH) seeks review of the trial court's judgment granting appellee's motion for summary judgment and issuing a permanent injunction in favor of appellee. For the following reasons, we reverse and deny the motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

Midtown Medical, LLC (Midtown) is a medical clinic located in New Orleans that sees between roughly 1000 and 1200 patients per month. The vast majority of Midtown's patients do not have private health insurance and are covered by Medicaid. DHH regulates Midtown's compliance with Medicaid's regulations.

By correspondence dated May 14, 2012, DHH notified Midtown that it was seeking monetary recoupment for alleged Medicaid overpayments and a monetary penalty. Further, it would seek to exclude Midtown from the Medicaid Program.[1] By separate correspondence, also dated May 14, 2012, DHH additionally notified Midtown of its intention to immediately terminate Midtown's Medicaid provider agreement.

On June 7, 2012, Midtown filed a Verified Petition for Injunctive Relief and Damages, naming DHH and DHH's secretary and undersecretary as defendants. Midtown requested the injunction to prevent DHH from terminating Midtown's Medicaid provider agreement, denying Medicaid remittances, and recouping Medicaid overpayments.

The trial court held an evidentiary hearing on Midtown's request for injunctive relief. At the hearing, Midtown presented documentary evidence, and the following individuals testified: Maria Couevas, Midtown's owner and administrator; Dr. Kiat Varnishung, a treating physician at Midtown; and Kimberly Sullivan, DHH's Program Integrity Section Chief, who signed the recoupment letter and who appeared pursuant to Midtown's subpoena request. Because Ms.

[1] Specifically, DHH indicated that Midtown billed for fifty-two intrauterine contraceptive devices (IUD) that could not be validated to meet Federal Drug Administration (FDA) regulations due to incomplete invoices lacking, among other things, lot numbers, national drug code numbers, and expiration dates. DHH also sought reimbursement due to Midtown billing for medically unnecessary services, billing for non-covered services, and billing evaluation and management codes without supporting documentation.

Sullivan did not have specifics regarding why DHH sought the recoupment or made the decision to terminate, the trial court ordered DHH to produce for deposition the witnesses identified by Ms. Sullivan as having the requisite knowledge.[2]

Midtown subsequently deposed the following individuals: Dr. Michael Bourgeois, the doctor who reviewed Midtown's medical records to determine medical necessity for the reimbursements Midtown had submitted to Medicaid, and Vanessa Rojas and Jeanne Rube, both of Molina Information Systems, LLC (Molina),[3] DHH's contracted agent that performs audits to ensure compliance with Medicaid regulations.

After the three referenced depositions were taken, the hearing on the preliminary injunction was reconvened on July 5, 2012, at which time the three referenced depositions were introduced into evidence, and additional testimony was given by Ms. Sullivan. At the close of the hearing, the trial court took the matter under advisement.[4]

On July 13, 2012, the trial court signed a judgment in favor of DHH denying Midtown's request for a preliminary injunction. Subsequently, the trial court signed two additional judgments—on July 26, 2012 and August 9, 2012—granting Midtown's request. Midtown initially sought review of the July 13, 2012 judgment, and DHH sought review of the two latter judgments. See **Midtown Medical, L.L.C. v. The Dep't Of Health and Hosp.**, 12-1597 (La.App. 1 Cir. 2/15/13), 113 So.3d 1094. However, Midtown, following the trial court's grant of the preliminary injunctive relief, dismissed its appeal seeking review of the July 13, 2012 judgment. **Midtown**, 113 So.3d at 1095 n.3. This court concluded that the only valid judgment rendered by the trial court was the first—the July

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[2] At the close of the hearing, the trial court also issued a stay requiring DHH to reinstate Midtown's Medicaid eligibility and Medicaid remittances in order for Midtown to continue treating its Medicaid patients.

[3] Molina is referenced in the record as "Molina Medicaid Solutions" and "Molina Information Systems, LLC."

[4] The trial court also ordered that its prior stay referenced in the preceding footnote would remain in effect.

13, 2012 judgment that denied Midtown's request for injunctive relief. **Midtown**, 113 So.3d at 1096. This court noted that the two latter judgments were without legal effect because they made substantive changes to the July 13, 2012 judgment.[5] Accordingly, this court concluded that it lacked jurisdiction to consider the merits of the two latter judgments and dismissed DHH's appeal. **Id.**

Midtown closed in January 2013.[6] Thereafter, on July 12, 2013, Midtown filed a "Motion for Partial Summary Judgment on Plaintiff's Claim for Permanent Injunction." In support, Midtown, introduced, among other things, the transcript from the prior hearing on the preliminary injunction, along with the depositions of Dr. Bourgeois, Ms. Rojas, and Ms. Rube.[7]

Following a hearing, the trial court granted Midtown's motion seeking a permanent injunction and enjoined DHH from: (1) terminating Midtown's Medicaid provider agreement without petitioning the court to lift the injunction, (2) excluding Midtown from the Medicaid program without petitioning the court to lift the injunction, and (3) denying Midtown all Medicaid claims properly payable that Midtown has submitted or will submit for dates occurring after May 14, 2012, when the immediate termination was originally instituted.

DHH has appealed, presenting the following issues for review:

1. Whether the [trial] court erred in granting a permanent injunction in the absence of a full evidentiary hearing/trial on the merits?

2. Whether the [trial] court erred in granting a permanent injunction when the *prima facie* right to its issuance was never proved?

3. Whether the [trial] court erred in granting a permanent injunction in a matter *entirely* involving pecuniary interest, specifically payment of Medicaid reimbursement funds (no irreparable injury)?

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[5] The substantive changes were not made pursuant to a contradictory motion for new trial filed by the parties or by the court on its own motion pursuant to LSA-C.C.P. art. 1971, by consent of the parties, or by a timely appeal. **Midtown**, 113 So.3d at 1096.

[6] Subsequently, Midtown, positing that the trial court's stay had never been lifted, filed a "Motion to Enforce Stay" on March 11, 2013.

[7] Midtown also introduced the deposition testimony of Bruce Greenstein, former Secretary of DHH, which had been taken on May 20, 2013.

4. Whether the [trial] court erred in granting a permanent injunction when the facts, allegations, and evidence failed [to] meet the "*three-prong test*" required by Louisiana law to obtain injunctive relief?

5. Whether the [trial] court erred in further considering/conducting proceedings in this matter after jurisdiction had been divested of it?

6. Whether the [trial] court erred in prematurely considering and granting a permanent injunction when the administrative appeal of the underlying action was never fully adjudicated?

DISCUSSION

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Berard v. L-3 Communications Vertex Aerospace, LLC**, 09-1202 (La.App. 1 Cir. 2/12/10), 35 So.3d 334, 339-40, writ denied, 10-0715 (La. 6/4/10), 38 So.3d 302. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits admitted for the purpose of summary judgment show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

On a motion for summary judgment, the initial burden of proof remains with the mover to show that no genuine issue of material fact exists. If the mover bears the burden of proof at trial and has made a *prima facie* showing that the motion should be granted, the burden shifts to the non-moving party to present evidence demonstrating that a material factual issue remains. The failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. See **Jones v. Estate of Santiago**, 03-1424 (La. 4/14/04), 870 So.2d 1002, 1006.

In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. **Hines v. Garrett**, 04-0806 (La. 6/25/04), 876 So.2d 764, 765. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material, for purposes of summary judgment, can be seen only in the light of

the substantive law applicable to the case. **Gaspard v. Graves**, 05-1042 (La.App. 1 Cir. 3/29/06), 934 So.2d 158, 160, writs denied, 06-0882 and 0958 (La. 6/16/06), 929 So.2d 1286 and 1289.

Injunction proceedings are governed by Louisiana Code of Civil Procedure articles 3601-3613. An injunction is an ordinary proceeding in which the plaintiff seeks a permanent injunction compelling the defendant to do an act or barring him from acting. **In re Interdiction of Wright**, 13-0862 (La.App. 1 Cir. 3/27/14), 144 So.3d 7, 11, writ denied, 14-0832 (La. 6/20/14) 141 So.3d 810. An injunction also includes summary proceedings—the temporary restraining order and the preliminary injunction—to compel or bar the disputed act, pending a determination on the merits of the ordinary proceeding. LSA-C.C.P. arts. 3601(C), 3602, and 3603(A); **In re Interdiction of Wright**, 144 So.3d at 11-12. Thus, the TRO and the preliminary injunction may only be obtained as adjuncts to a suit for permanent injunction. See LSA-C.C.P. art. 3601; **In re Interdiction of Wright**, 144 So.3d at 12. The issuance of a permanent injunction takes place only after a trial on the merits, in which the burden of proof must be founded on a preponderance of the evidence. **State Machinery & Equipment Sales, Inc. v. Iberville Parish Council**, 05-2240 (La.App. 1 Cir. 12/28/06), 952 So.2d 77, 81.

Injunctive relief may be granted in cases where irreparable injury, loss, or damage may otherwise result to the applicant, and in other cases specifically provided by law. LSA-C.C.P. art. 3601; **In re Interdiction of Wright**, 144 So.3d at 12. Irreparable injury is a loss that cannot be adequately compensated in money damages or is not susceptible of measurement by pecuniary standards. **Id.** Appellate courts review the issuance of a permanent injunction under the manifest error standard of review. **Louisiana State Bar Ass'n v. Carr and Associates, Inc.**, 08-2114 (La.App. 1 Cir. 5/8/09), 15 So.3d 158, 170, writ denied, 09-1627 (La. 10/30/09), 21 So.3d 292.

Assignments of Error Numbers Two and Five

In its second assignment of error, DHH avers that the trial court erred in granting a permanent injunction when the *prima facie* right to its issuance was never proved. In so arguing, DHH focuses on the preliminary injunction as opposed to the permanent injunction. Specifically, DHH notes that the party seeking the issuance of the preliminary injunction must show that it will suffer irreparable injury if the injunction does not issue and must show entitlement to the relief sought; this must be done by a *prima facie* showing that the party will prevail on the merits of the case. **Vartech Systems, Inc. v. Hayden**, 05-2499 (La.App. 1 Cir. 12/20/06), 951 So.2d 247, 255. DHH contends that Midtown failed to establish a *prima facie* showing altogether, but at a minimum, however, at least failed to establish such a showing prior to the issuance of the preliminary injunction because the preliminary injunction was never issued. Because the preliminary injunction was never properly issued, DHH concludes that it follows that the permanent injunction could not issue.

In its related fifth assignment of error, DHH contends that the trial court's jurisdiction over this matter ceased once Midtown perfected its prior appeal on the preliminary injunction issue.[8] DHH maintains that the trial court denied the preliminary injunction, which denial this court upheld on appeal. DHH avers that this court did not remand the matter back to the trial court following this court's decision in the prior appeal. Absent remand, an application for rehearing, or a writ to the Louisiana Supreme Court, DHH concludes that this court's prior judgment on the preliminary injunction was final and that Midtown could not seek any further remedy in the trial court.

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[8] Louisiana Code of Civil Procedure article 2088 addresses the trial court's divesture of jurisdiction. Louisiana Code of Civil Procedure article 2088(A) provides, in pertinent part:

> The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal or on the granting of the order of appeal, in the case of a devolutive appeal. Thereafter, the trial court has jurisdiction in the case only over those matters not reviewable under the appeal.

The article then lists ten non-exclusive circumstances where the trial court retains jurisdiction.

At the outset, we note that this court's prior ruling did not address the merits of the preliminary injunction; rather, this court dismissed the appeal for lack of jurisdiction. Also, we note that the relief sought through the preliminary injunction is a separate and distinct form of relief from a permanent injunction. A preliminary injunction is essentially an interlocutory order issued in summary proceedings incidental to the main demand for permanent injunctive relief. **Dalke v. Armantono**, 09-1954 (La.App. 1 Cir. 5/7/10), 40 So.3d 981, 987. The principal demand of the permanent injunction is generally determined only after a full trial under ordinary process, even though the summary proceedings for the preliminary injunction may touch upon or tentatively decide issues on the merits. **Dalke**, 40 So.3d at 987. A permanent injunction may issue only after a trial on the merits at which the burden of proof is by preponderance of the evidence, which is more than is required by the *prima facie* showing standard of proof to obtain a preliminary injunction. **Id.**

Moreover, it is well settled that a court cannot, absent a stipulation by the parties that the preliminary and permanent injunctions will be decided together, dismiss a suit on a permanent injunction prior to consideration on the merits for the permanent injunction based solely on the denial of a preliminary injunction. See **Olsen v. City of Baton Rouge**, 247 So.2d 889, 895 (La.App. 1 Cir.), writ denied, 259 La. 755, 252 So.2d 454 (La. 1971) and **Primeaux v. Hinds**, 350 So.2d 1310, 1313 (La.App. 3 Cir. 1977); see also **Dalke**, 40 So.3d at 987-88 ("Thus, although the trial court properly acted within its discretion to deny the preliminary injunction, it was without authority to deny [the] request for permanent injunction absent an evidentiary trial on the merits of that request."). Accordingly, irrespective of the procedural history of the preliminary injunction, the trial court nevertheless retained jurisdiction over the permanent injunction. Issues relative to the preliminary injunction are now immaterial in this appeal except to the extent they may have touched on issues relative to the permanent injunction. As such, assignment of error numbers two and five are without merit.

Assignment of Error Number Six

In its sixth assignment of error, DHH contends that the action is premature because Midtown failed to exhaust its administrative remedies prior to seeking injunctive relief. DHH avers that there still exists a pending 2012 administrative appeal before the Division of Administrative Law that has not been adjudicated. DHH contends that the administrative appeal could overturn the entire underlying basis for the relief sought by Midtown in these proceedings.

While we recognize that administrative remedies generally must be exhausted before a litigant is entitled to judicial review, the right to bring an administrative appeal does not preclude or negate the litigant's right to seek injunctive relief where irreparable injury might otherwise result. **Bally's Louisiana, Inc. v. Louisiana Gaming Control Bd.**, 99-2617 (La.App. 1 Cir. 1/31/01), 807 So.2d 257, 265, writ denied, 01-0510 (La. 1/11/02) 807 So.2d 225. Assignment of error number six is without merit.

Assignment of Error Number Three

In its third assignment of error, DHH contends that the trial court erred by granting a permanent injunction on a matter entirely involving payment of Medicaid reimbursement funds. DHH avers that Midtown has suffered no irreparable injury insofar as its interest is wholly pecuniary. DHH asserts that there exists an adequate remedy by law in the form of a suit for damages against it to recover Medicaid funds Midtown alleges DHH has wrongfully withheld.

In opposition, Midtown notes that even if its damages are wholly pecuniary, federal jurisprudence recognizes that irreparable harm may nevertheless result "where the potential economic loss is so great as to threaten the existence of movant's business." **Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.**, 875 F.2d 1174, 1179 (5 Cir. 1989), cert. denied, 493 U.S. 1075, 110 S.Ct. 1124, 107 L.Ed.2d 1030 (1999). Even if we were to recognize such an exception, which we do not address, Midtown has not been operating since January 2013, almost a year before the request for a permanent

injunction was considered by the trial court on summary judgment. Under these circumstances, we conclude that the exception would not apply.

Midtown also notes that the threat of irreparable injury need not be shown by a party seeking injunctive relief when the deprivation of a constitutional right is at issue. **Acadian Ambulance Service, Inc. v. Parish of East Baton Rouge**, 97-2119 (La.App. 1 Cir. 11/6/98), 722 So.2d 317, 322, writ denied, 98-2995 (La. 12/9/98), 729 So.2d 583. Midtown contends that the right to operate a lawful business, such as health care facility, is a constitutionally protected property right and DHH interfered with that right, without due process of law. See **Acadian Ambulance Service, Inc.**, 722 So.2d at 323. Even assuming that Midtown's right to operate its facility is a protected property right, DHH's actions did not preclude Midtown from operating its clinic. Rather, it only affected Midtown's participation in the Medicaid program. Although removal as a Medicaid provider may have effectively caused Midtown to cease operating, Midtown has cited no authority to support a proposition that the right to receive Medicaid funding is a protected property right. Cf. **Plaza Health Laboratories, Inc. v. Perales**, 878 F.2d 577, 581 ("it may well be that a person's interest in uninterrupted continuation as a Medicaid provider is not a property right that is protected by due process.").

Midtown also urges that its patients will continue to suffer irreparable harm absent issuance of the permanent injunction. Specifically, Maria Couevas, the owner/administrator of Midtown Medical whose prior testimony at the preliminary injunction hearing was offered into evidence, testified that other clinics will not take Midtown's patients who are in their last trimester. She explained that many of these patients will not receive care until they are ready to go into labor and show up at the emergency room to deliver. Ms. Couevas also indicated that many patients, who rely on public transportation, will have difficulty reaching other clinics since Midtown is "right there on the street corner."

We note that our courts, in very limited circumstances, appear to have recognized that when threatened irreparable injury will befall third parties or the public generally, an entity charged with their service may obtain injunctive relief. See **Greater New Orleans Expressway Commission v. Traver Oil Co.**, 494 So.2d 1204, 1217 (La.App. 5 Cir. 1986) (concurring opinion) (citing **South Central Bell Telephone Co. v. F. Miller & Sons, Inc.**, 382 So.2d 264, 265 (La.App. 3 Cir. 1980) and **State Bd. of Educ. v. Anthony**, 289 So.2d 279, 284 (La.App. 1 Cir. 1973), writs denied, 292 So.2d 246 (La. 1974).

At the time of the hearing on the motion for summary judgment, Midtown had not treated any patients for nearly a year. At the hearing on Midtown's motion for summary judgment, Midtown offered no new evidence to reflect that its former patients were being harmed following Midtown's closure. Even so, on cross examination at the prior preliminary injunction hearing, Ms. Couevas testified that Midtown had been able to contact all of its pregnant patients and tried to refer them to other health care providers. Although Ms. Couevas testified that some of Midtown's patients "didn't like the way they were treated" by other clinics, she did not indicate that any of these individuals had been denied care. Further, Ms. Couveas indicated that there was another walk-in clinic within a "mile or two" of Midtown. Cf. **Affiliated Professional Home Health Care Agency v. Shalala**, 164 F.3d 282, 286 (5 Cir. 1999), (in concluding that the health care agency failed to make the requisite showing of irreparable harm to entitle it to injunctive relief after its Medicare benefits were terminated, the federal court noted that "it seems highly unlikely that the termination of [the agency's Medicare] provider status would result in a measurable loss of home-based health care in three separate counties. Similarly, it seems unreasonable to conclude that [the agency's] patients will be deprived of adequate home-based health care if [the agency] is forced out of business.").

Because Midtown bears the burden of proof at trial, Midtown must make a *prima facie* showing that the motion for summary judgment should be granted before the burden shifts to DHH. LSA-C.C.P. art. 966. Considering the foregoing,

we cannot conclude that Midtown made a *prima facie* showing of irreparable harm. Accordingly, because Midtown failed to meet its requisite burden, the trial court erred in granting Midtown's motion for summary judgment.[9]

CONCLUSION

For the foregoing reasons, we reverse the trial court's judgment granting Midtown's motion for summary judgment. Costs of this appeal are assessed to Midtown.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT HEREWITH.

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[9] Because we conclude that assignment of error number three has merit, we pretermit discussion of assignments of error numbers one and four. We further note that although DHH contends that the trial court erred in granting a permanent injunction on summary judgment and that the injunction could only issue after a full evidentiary hearing, DHH did not object to the summary judgment procedure being utilized by the trial court.