HAMILTON v. HILLCREST HEALTHCARE SYSTEM, 2013 OK CIV APP 92

BAMBI HAMILTON, individually and as Guardian of the Person and Estate of M.H., a minor, and MATTHEW HAMILTON, Plaintiffs/Appellants, v. HILLCREST HEALTHCARE SYSTEM, an Oklahoma Corporation d/b/a Hillcrest Medical Center; CHRISTINE BLAKE, M.D.; JENNIFER CRAIG, M.D.; JAMES FERGUSON, M.D.; FRED FUMIA, M.D.; DEREK HOLMES, D.O.; TAMMIE KOEHLER, D.O.; JOHN NETTLES, M.D.; JON PLACIDE, M.D.; and PAUL PLOWMAN, M.D., Defendants/Appellees.

No. 110254

Court of Civil Appeals of Oklahoma, Division 2.

Decided: September 24, 2013 Mandate Issued: October 23, 2013

Appeal from the District Court of Tulsa County, Oklahoma, Honorable Carlos Chappelle, Trial Judge, **Petition for Rehearing Granted, Prior Opinion Withdrawn, Order of the District Court Vacated and Case Remanded for Further Proceedings.**

Richard A. Shallcross, RICHARD A. SHALLCROSS & ASSOCIATES, P.L.L.C., Tulsa, Oklahoma, for Plaintiffs/Appellants.

Howard Pallotta, Sloan Wood, OKLAHOMA HEALTH CARE AUTHORITY, Oklahoma City, Oklahoma, for Defendant/Appellee Oklahoma Healthcare Authority.

JOHN F. FISCHER, Presiding Judge:

¶ 1 This appeal was filed by Plaintiffs/Appellants, Bambi Hamilton, individually and as Guardian of the person and the Estate of M.H., a minor, and Matthew Hamilton to challenge the amount of the lien owed to the Appellee Oklahoma Health Care Authority. On May 31, 2013, this Court issued its Opinion reversing the Order of the district court denying the Hamiltons' request to reduce the amount of the lien owed to OHCA and directed the district court to reduce OHCA's lien pursuant Title 12 O.S.Supp.2009 § 994.1. On June 4, 2013, the Oklahoma Supreme Court declared H.B. 1603 unconstitutional: "We hold that H.B. 1603, commonly known as the Comprehensive Lawsuit Reform Act of 2009, violates the single-subject rule of Article 5, § 57 of the Oklahoma Constitution. The bill is unconstitutional and void in its entirety." *Douglas v. Cox Ret. Prop., Inc.*, 2013 OK 37, ¶ 12, 302 P.3d 789, 794. Section 994.1 was enacted as a part of the Comprehensive Lawsuit Reform Act of 2009, and as such was declared void by *Douglas.* In reliance on *Douglas*, OHCA filed a petition for rehearing. OHCA's petition for rehearing is granted, this Court's May 31, 2013 Opinion is withdrawn, the Order of the district court is vacated and this case is remanded for further proceedings.

BACKGROUND

¶ 2 The Hamiltons filed a medical malpractice action against multiple medical providers for birth injuries sustained by M.H. The medical malpractice claims filed by the Hamiltons were settled with the medical providers. The settlement required that all of the net settlement proceeds be placed in a special needs trust for the benefit of M.H., that the parents of M.H. receive no funds from the settlement, and that OHCA's lien be satisfied. The Hamiltons filed a motion for an order determining the correct amount of the OHCA lien. The Hamiltons requested that the district court reduce the amount of the OHCA lien in accordance with Title 12 O.S.Supp.2009 § 994.1(A):

Recovery against the party that received payment.

1. General rule. Medicaid reduces its recovery to take account of the cost of procuring the judgment or settlement, as provided in this section, if:

a. procurement costs are incurred because the claim is disputed, and

b. those costs are borne by the party against which the Oklahoma Health Care Authority seeks to recover.

¶ 3 OHCA objected to the reduction of its lien based on Title 63 O.S.Supp.2007 § 5051.1(G)'s requirement concerning a special needs trust: "A Medicaid special needs trust for the purposes of establishing or maintaining Medicaid eligibility shall not be approved until such time as the Authority has been made whole and paid in full for all paid medical claims which are associated with the action." OHCA argued section 994.1 was inapplicable to its lien in this case because of the existence of the special needs trust established for M.H. pursuant to section 5051.1(G).

¶ 4 The Hamiltons filed a reply to OHCA's objection in which they argued that OHCA's interpretation of the "made whole and paid in full" provision of Section 5051.1(G) made the statute inherently inconsistent with the lien reduction provision set forth in Section 5051.1(D)(1)(d). That section provides that OHCA's lien shall: "be applied and considered valid as to the entire settlement, after the claim of the attorney or attorneys for fees and costs, unless a more limited allocation of damages to medical expenses is shown by clear and convincing evidence." The Hamiltons contend that in order to harmonize the two provisions recipients of a special needs trust should also be entitled to establish entitlement to a reduction in the OHCA lien by proving "a more limited allocation of damages to medical expenses . . . by clear and convincing evidence." *Id.*

¶ 5 The Hamiltons also argued in their reply that OHCA's interpretation of section 5051.1(G) would render the statute unconstitutional citing various State and federal constitutional provisions. These arguments were based on the Hamiltons' contention that disabled Medicaid beneficiaries who place tort proceeds in a special needs trust were treated differently and disparately from Medicaid beneficiaries who receive tort proceeds directly. Finally, the Hamiltons argued section 5051.1(G) violated the anti-lien provision of federal Medicaid law set forth in **42 U.S.C. § 1396p**(a) and described in *Arkansas Dept. of Health & Human Serv. v. Ahlborn*, **547 U.S. 268**, **126 S.Ct. 1752** (2006). OHCA was not afforded the opportunity to respond to the additional issues raised by the Hamiltons in their reply to OHCA's objection.

¶ 6 The district court found that Section 994.1 was inapplicable to the OHCA lien. The court determined that Section 5051.1(G) controlled and ordered that OHCA be reimbursed the full amount of its lien. The district court did not address or make any findings regarding the constitutionality of Section 5051.1(G) or the Hamiltons' Medicaid anti-lien argument. It was from this Order that the Hamiltons filed this appeal. In this Court's initial Opinion, we held that the district court incorrectly concluded Section 994.1 was inapplicable to OHCA's lien and reversed that decision. As a result, we did not consider the Hamiltons' constitutional and anti-lien arguments.

¶ 7 In their petition for rehearing, OHCA argues the district court's application of Section 5051.1(G) should be affirmed, because Section 994.1 has now been declared unconstitutional and, therefore, cannot be the basis for reducing their lien. The Hamiltons' response argues despite the unconstitutionality of Section 994.1, the resolution of the present appeal requires determination of the constitutionality of section 5051.1(G) and whether section 5051.1(G) violates the anti-lien provisions of federal Medicaid law as set forth in **42 U.S.C. § 1396p**(a) and described in *Arkansas Dept. of Health & Human Serv. v. Ahlborn*, **547 U.S. 268**, **126 S.Ct. 1752** (2006).

¶ 8 On September 10, 2013, Governor Mary Fallin signed into law Senate Bill 4X (SB 4X), which repealed and reenacted Title 12 O.S.2011 § 994.1 in its entirety, to be codified as Title 12 O.S. Supp.2013 § 994.2. 2013 Okla. Sess. Laws 1st Ex. Sess. Ch. 14.

Senate Bill 4X was one of 19 bills that passed during a special session of the Oklahoma Legislature and in which an emergency was declared, making the bills effective immediately. In substance, these bills sought to reenact provisions of the Comprehensive Lawsuit Reform Act of 2009 declared unconstitutional in *Douglas*. We have not asked the parties to address the impact of SB 4X, 2013 Okla. Sess. Laws 1st Ex. Sess. Ch. 14, on this litigation because we conclude that further proceedings are required in the district court.

STANDARD OF REVIEW

¶ 9 "An appellate court will not make first-instance determinations of disputed law or fact issues. That is the trial court's function in every case — whether in law, equity or on appeal from an administrative body." *Bivins v. State of Oklahoma, ex rel. Oklahoma Memorial Hosp.*, 1996 OK 5, ¶ 19, 917 P.2d 456, 464.

ANALYSIS

Applicability of 2013 Okla. Sess. Laws 1st Ex. Sess. Ch. 14

¶ 10 As set forth above, Title 12 O.S.Supp.2009 § 994.1 was declared unconstitutional by the Supreme Court in *Douglas*. The basis of the Court's rulings did not address the constitutional merits of the statute but rested on the State's single-subject rule and the inclusion of Section 994.1 within HB 1603 which the Court found violated that rule. Title 75 O.S.2011 § 11a(1) provides that:

> For any act enacted on or after July 1, 1989, unless there is a provision in the act that the act or any portion thereof or the application of the act shall not be severable, the provisions of every act or application of the act shall be severable. If any provision or application of the act is found to be unconstitutional and void, the remaining provisions or applications of the act shall remain valid, unless the court finds:
>
> a. the valid provisions or application of the act are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or
>
> b. the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

The *Douglas* Court considered whether severance of the offending provisions of HB 1603 would be possible and concluded:

> Unlike in *Thomas* [*v. Henry*, 2011 OK 53, 260 P.3d 1251], where the Court severed the offending provision of the Oklahoma Taxpayer and Citizens Protection Act of 2007, H.B. 1603 encompasses so many different subjects that severance is not an option. It would be both dangerous and difficult for this Court to engage in the exercise of severance in this case. By picking and choosing which provisions relate to lawsuit reform and which do not, this Court would essentially become the policy-maker. Policy-making is the job of the Legislature.

Id. ¶ 11, 302 P.3d at 793-794.

¶ 11 SB 4X, identical to its unconstitutional predecessor, passed both the House and the Senate without a single negative vote. Oklahoma law has

not addressed the effect of such Legislative action and whether the new legislation would be applied retroactively in light of the fact that the substantive provisions of § 994.1 were not found to be unconstitutional.

¶ 12 The appellate courts in Florida have addressed this precise situation numerous times in both criminal and civil cases. The Florida District Court of Appeal has held:

> It is well-settled that a single subject violation is cured upon readoption of the Florida Statutes. *See Salters v. State*, **758 So.2d 667**, **670** (Fla.2000). If a challenge to a permit is filed between the effective date of the amendment and the subsequent reenactment, as here, then the court must determine whether the statute in question should be applied retroactively or prospectively only. In order for a law to apply retroactively, the court must determine (1) if there is evidence that the legislature clearly intended for the law to be applied retroactively, and (2) if so, whether the retrospective application of that law is constitutionally permissible. *See Pondella Hall for Hire v. Lamar*, **866 So.2d 719**, **722** (Fla. 5th DCA 2004). In the absence of clear legislative intent that a law apply retroactively, the general rule is that procedural statutes apply retroactively and substantive statutes apply prospectively. *Id.*

Environmental Confederation of Southwest Florida, Inc. v. State, **886 So.2d 1013**, **1017** (Fla. Dist. Ct. App. 2004).

¶ 13 Illinois has also considered the issue of curative legislation, and has concluded:

> As the State correctly asserts, the Illinois legislature has the power to enact curative legislation. *See Johnson* [*v. Edgar*], **176 Ill.2d [499]** at **518**, 224 Ill.Dec. 1, **680 N.E.2d 1372**; *Bates v. Board of Education, Allendale Community Consolidated School District No. 17*, **136 Ill.2d 260**, **268**, 144 Ill.Dec. 104, **555 N.E.2d 1** (1990). We note, however, that such legislation must exhibit on its face evidence that it is intended to cure or validate defective legislation. In *Johnson*, for instance, an act held to be unconstitutional for violating the single subject rule was validated in part by amendatory legislation that completely recodified a statutory provision within the invalidated act and that provided a clause expressly validating all actions taken in reliance on the defective statute. *Johnson*, **176 Ill.2d at 521**, 224 Ill.Dec. 1, **680 N.E.2d 1372**.

People v. Reedy, **708 N.E.2d 1114**, **1120** (Ill. 1999). The State of Washington has also declared:

> Washington case law is clear that an article II, section 19 violation can be remedied by subsequent legislation.**[fn1]** In *Morin v. Harrell*, a statute violating the constitution was amended several times after its enactment in 1988.**[fn2]** The *Morin* court found those amendments cured any constitutional defect. Moreover, in *Matteson*, the principle is clearly enunciated that subsequent legislation may cure a constitutional defect.**[fn3]** It is well established that the legislature can enact a curative statute while there is pending litigation on that issue.

Fossos v. Matheson, **149 Wash. App. 1062**, 2009 WL 1110889, *2 (2009).

¶ 14 This Court and the Hamiltons relied on Section 994.1 to determine the proper amount owed to OHCA. Neither the district court nor the parties have had an opportunity to consider the applicability of SB 4X, 2013 Okla. Sess. Laws 1st Ex. Sess. Ch. **14**, in determining the amount of OHCA's lien. As such, the Hamiltons and OHCA should be afforded the opportunity to brief the issue of whether SB 4X, 2013 Okla. Sess. Laws 1st Ex. Sess. Ch. **14**, represents curative legislation that may be applied retroactively. Similarly, the district court must make a first instance determination

regarding the same before appellate consideration is appropriate. *Bivins*, 1996 OK 5, ¶ 19, 917 P.2d at 464.

The Hamiltons' Arguments on Rehearing

¶ 15 As previously discussed, the Hamiltons also raised on rehearing and before the district court the constitutionality of 63 O.S.Supp.2007 § 5051.1(G), and the anti-lien provisions of Federal Medicaid Law. The district court has not addressed those issues. Nothing in this Opinion shall preclude the Hamiltons from raising these issues again or any other issues that may be appropriate. Likewise, OHCA should be provided an opportunity to address any such issues raised by the Hamiltons. Any such issues must be resolved by the district court in the first instance before appellate consideration is appropriate. *Bivins*, 1996 OK 5, ¶ 19, 917 P.2d at 464.

COCLUSION

¶ 16 This Court will not make first instance determinations of law or fact. Because SB 4X, 2013 Okla. Sess. Laws 1st Ex. Sess. Ch. 14, was enacted after the district court's decision in this case, that court has not had the opportunity to address the applicability of that statute to the Hamiltons' request to reduce OHCA's lien. Further, because the district court ruled that Title 12 O.S.Supp.2009 § 994.1 was not applicable, it did not address the constitutionality of Title 63 O.S.Supp.2007 § 5051.1(G) or the Hamiltons' anti-lien argument. OHCA's petition for rehearing is granted. This Court's Opinion issued May 31, 2013 is withdrawn. The district court's order awarding OHCA the full amount of its lien is vacated. This case is remanded to the district court for further proceedings

¶ 17**PETITION FOR REHEARING GRANTED, PRIOR OPINION WITHDRAWN, ORDER OF THE DISTRICT COURT VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS.**

BARNES, V.C.J., and WISEMAN, J., concur.

[fn1] "No bill shall embrace more than one subject, and that shall be expressed in the title." Wash. Const. art. II, ¶ 19.

[fn2] 161 Wash.2d 226, 164 P.3d 495 (2007).

[fn3] *In Re Matteson*, 142 Wash.2d 298, 12 P.3d 585 (2000).