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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001482-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES, DEPARTMENT FOR
COMMUNITY BASED SERVICES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00268

MARY BELL, THOMAS E. BELL,
AS NEXT OF FRIEND, AND
HON. RICHARD DAWAHARE

APPELLEES

OPINION REVERSING

** ** * * * * *

BEFORE: COMBS, DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, the Commonwealth of Kentucky, Cabinet for Health and Family Services, Department for Community Based Services (“DCBS”), appeals from an order of the Franklin Circuit Court granting Appellees’ motion for

attorney fees and for the production of DCBS's records pertaining to particular Medicaid patients involved in its program.

Appellee, Mary Bell, is a thirty-five-year-old adult who is totally and permanently disabled as a result of contracting Reye's Syndrome when she was five years old. Bell resides with her father, Appellee Thomas Bell, who has pursued this action as Bell's next friend. As a result of her disability, Bell has received Supplemental Security Income ("SSI") and is eligible for benefits under Kentucky's Medicaid program. In addition, Bell qualified for participation in DCBS's Home and Community Based Waiver Program ("HCBW"), which provides certain services to the elderly or those with disabilities to help them remain in their homes. The HCBW program requires a comparison between the participant's personal needs allowance and income to determine whether the participant is responsible for a patient liability,¹ or co-pay. Consistent with Bell's SSI income, Medicaid fully covered Bell's attendance at Redwood School and Rehab Center with no out-of-pocket cost to Bell.

In 2006, however, Thomas Bell retired and began receiving social security retirement benefits. As a result of being a disabled adult child of Thomas, Bell became eligible for social security benefits via RSDI (a/k/a old age, survivor, and disability insurance). For several months following Thomas's retirement, there was some confusion as to the effect his retirement had on Bell's eligibility under

¹ The patient liability is the difference between a Medicaid recipient's allowable income and the Agency's Personal Needs Allowance. The Allowance is derived from the standard SSI income so that a patient whose only income is SSI would never be charged a patient liability.

SSI and Medicaid. Eventually, however, it was established that Bell was entitled to her full Medicaid benefits as well as the RSDI benefits. Because the RSDI benefits were more than what Bell had previously received in SSI payments, her monthly income effectively increased. As a result of such increase, DCBS imposed a patient liability of \$60 per month for Bell to attend Redwood under the HCBW program.

In December 2008, Thomas filed an administrative action challenging the patient liability. An Administrative Law Judge determined that Bell received a monthly income of \$754 and had a personal needs allowance of \$694, thus warranting the monthly patient liability of \$60. Thereafter, Bell appealed the determination to the Franklin Circuit Court. On December 16, 2010, the trial court entered an opinion and order reversing the ALJ's determination. The court determined that the Pickle Amendment,² 42 U.S.C. 1396a (note)(1988), applied equally to the Pass-Through program (under which individuals are institutionalized) and to programs such as the HCBW program. The result was that when Bell's RSDI income was computationally adjusted, her "Pickled" income was less than the SSI limit, thus making her exempt from the patient liability. The trial court's order contained the language, "This order is final and appealable and there being no just cause for delay."

² "[T]he Pickle Amendment can be reduced to a simple directive: In determining Medicaid eligibility under each state's plan, 'Pickle beneficiaries' (those who have lost SSI eligibility as a result of Social Security COLAS . . .) must be subject to the same terms and conditions as are applicable to the specified benchmark class (those who currently receive SSI benefits in the same state . . .)." *Noland v. Shalala*, 12 F.3d 258, 261 (D.C. Cir. 1994).

On December 29, 2010, DCBS filed a motion for reconsideration. However, by order entered on January 13, 2011, the trial court ruled that DCBS's motion was untimely under CR 59.05 since it was filed later than ten days after entry of the final judgment. At that point, DCBS made the decision not to appeal the trial court's ruling and restored Bell's full eligibility in the HBCS program.

On January 28, 2011, forty-three days after the final judgment, Bell filed a motion for attorney fees and for the disclosure of DCBS's records pertaining to all Medicaid patients participating in the HBCS program who were being charged a patient liability. DCBS responded that the trial court no longer had jurisdiction over the matter because Bell did not file her motion within the ten-day time period set forth in CR 59.05 to file a motion to alter, amend or vacate. Further, DCBS argued that even if the court did have jurisdiction, it was without the power to impose attorney fees against the Commonwealth or to order the production of the requested records in the absence of any statutory authorization.

On March 24, 2012, the trial court entered an opinion and order granting Bell's motion. The court first ruled that it retained jurisdiction over the matter because its December 16, 2011, opinion and order was not a final and appealable judgment. In so doing, the trial court relied upon the decision in *Francis v. Crouse Corp.*, 98 S.W.3d 62, 67 (Ky. App. 2002), wherein a panel of this Court held that "the determination of whether the judgment is final when the amount of the attorney fees has not been resolved should rest on whether attorney fees were part of the claim or whether they were collateral to the merits of the action"

The trial court herein concluded that because Bell's claim for attorney fees was pled prior to the December opinion and order, such was not final because it did not resolve all of the issues as required by CR 54.01. As a result, the trial court vacated its prior order denying DCBS's motion for reconsideration and ruled that Bell's motion was not barred by the ten-day time period for a motion to alter, amend or vacate under CR 59.05.

With respect to the merits of Bell's motion, the trial court noted that under *Batson v. Clark*, 980 S.W.2d 566 (Ky. App. 1998), a court has equitable powers to award attorney fees to a party even in the absence of express constitutional or statutory authority. Further, the court ordered that the identity and contact information of all individuals receiving RSDI that were enrolled in the HBCW program and paying a patient liability should be disclosed. Although the court recognized the significant privacy concerns, it nevertheless opined that "this expectation of privacy must be weighed against the cold hard truth that many of these patients will have no chance of redress of the Cabinet's arbitrary position if the Court does not order it to produce certain records." Following the denial of its motion to alter, amend or vacate, DCBS appealed to this Court as a matter of right.

DCBS first argues that the trial court erred in ruling that Bell's motion was timely and that it retained jurisdiction to rule in the matter. DCBS contends that the trial court lost jurisdiction ten days after entry of the final judgment and Bell's failure to file a CR 59.05 motion during that time period precluded the trial court from thereafter ruling on her January motion. We agree.

As a general rule under Kentucky law, a judgment becomes final ten days after it is entered by the trial court. *See* CR 52.02, 59.04, 59.05. As defined in CR 54.01, a final judgment is:

[A] written order of a court adjudicating a claim or claims in an action or proceeding. 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. Where the context requires, the term “judgment” as used in these rules shall be construed “final judgment” or “final order”.

Notably, however, although, “a court loses jurisdiction once its judgment is final[,]” *Mullins v. Hess*, 131 S.W.3d 769, 774 (Ky. App. 2004), “if an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final.” *Hubbard v. Hubbard*, 303 Ky. 411, 412, 197 S.W.2d 923, 924 (1946).

We find the trial court’s reliance on the *Francis* decision misplaced. Therein, the plaintiff sued his employer under the Kentucky Civil Rights Act. At trial, a jury awarded the plaintiff both compensatory and punitive damages. In the subsequent trial order, the court specifically recognized that the plaintiff was entitled to attorney fees under KRS 344.450, which provides, in pertinent part, that when a plaintiff prevails under the Act “[t]he court’s order or judgment shall include a reasonable fee for the plaintiff’s attorney of record[.]” Thus, the trial court’s order required the plaintiff to submit a fee statement within ten days. *Francis*, 98 S.W.3d at 64. Nevertheless, the court included the requisite finality language within the judgment.

On appeal, a panel of this Court *sua sponte* questioned whether the trial court's judgment was final and appealable in light of the fact that the attorney fees issue had been reserved for a ruling. The panel observed that "the claim for attorney fees was pursuant to statute" and "the statute required that the judgment include a reasonable attorney fee." *Francis*, 98 S.W.3d at 67. As such, because the attorney fees were part of the plaintiff's civil rights claim, the trial court's judgment was not final and appealable. *Id.*

We are of the opinion that the situation herein is more akin to that presented in *Harris v. Camp Taylor Fire Prot. Dist.*, 303 S.W.3d 479 (Ky. App. 2010). Therein, the plaintiff prevailed in a whistleblower action under KRS 61.102, *et seq.* The trial court's final judgment was entered on November 8, 2007. On December 14, 2007, the plaintiff filed a motion for attorney fees and costs. The trial court denied the motion, ruling that because the judgment was final and appealable without the reservation of any issue, the court no longer had jurisdiction of the matter and thus, the plaintiff's motion was untimely.

On appeal, a panel of this Court distinguished the *Francis* decision, wherein the claim for attorney fees was mandated by KRS 344.450. "By contrast, the claim for attorney fees in the instant case arises under KRS 61.990(4). As noted, an award for attorney fees is discretionary, rather than mandatory." *Harris*, 303 S.W.3d at 483, n.4. Because the judgment in *Harris* left nothing on its face to be determined, the panel concluded that it was, in fact, final and appealable. Accordingly, "[a]s *Harris* failed to file a motion to alter, amend or vacate the

November 8, 2007, judgment within ten days from entry of that judgment, the trial court properly determined that it lacked jurisdiction to award attorney's fees."

Harris, 303 S.W.3d at 483.

As in *Harris*, the trial court's December 16, 2010, opinion and order, on its face, left nothing to be resolved. Contrary to the trial court's reasoning, we believe that Bell's claim for fees was collateral to the merits of her case. Certainly, unlike *Francis*, fees herein were not mandated by statute and the court did not include language in the judgment specifically reserving the issue.

We must agree with DCBS that not only is the trial court's position contrary to Kentucky law, but it would create uncertainty in the judicial process. For practical purposes, there must be a point at which the parties to a legal action can definitively believe that the matter has concluded and that no further judgments or orders are forthcoming. To adopt the trial court's reasoning herein would effectively permit a prevailing party to file a motion for attorney fees at any time. Thus, we conclude that the trial court's December 16, 2010 opinion and order became final on December 27, 2010. As such, the court was without jurisdiction to consider Bell's motion.

Even if we were to hold that the trial court's opinion and order was not final and it retained jurisdiction, such a finding is essentially moot in this case because we agree with DCBS that the court was without the power to impose attorney fees on an agency of the Commonwealth. In deciding whether to award attorney fees to a prevailing party, Kentucky follows the "American Rule" that "in the absence of

contractual or statutory liability, attorneys' fees are not recoverable as an item of damages.” *Lyon v. Whitsell*, 245 S.W.2d 926 (Ky. 1951) (citing 15 Am.Jur., *Damages*, § 142). Nevertheless, as noted by the trial court, this long-standing rule does not abolish the principle that a trial court can rely upon its powers in equity to make an award of attorney fees. *Batson*, 980 S.W.2d at 577. Indeed, in limited circumstances, an award has been justified by the court’s exercise of its inherent power to “do that which is reasonably necessary for the administration of justice within the scope of [its] jurisdiction.” *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984).

Significantly, however, while a court may have the equitable power to award costs and attorney fees to a party, that power is not absolute and, in fact, is expressly limited by Kentucky’s constitutional and statutory law in situations where fees are sought to be imposed on the Commonwealth or one of its agencies. *See Commonwealth, Dep’t of Educ. v. Gravitt*, 673 S.W.2d 428 (Ky. App. 1984); *Dep’t of Revenue v. D & W Auto Supply, Inc.*, 614 S.W.2d 542 (Ky. App. 1981) (overruled on other grounds by *Commonwealth, Natural Res. & Env’tl. Prot. Cabinet v. Stearns Coal & Lumber Co.*, 678 S.W.2d 378 (Ky. 1984)). KRS 453.010 provides:

No judgment for costs shall be rendered against the Commonwealth in any action prosecuted by or against the Commonwealth in its own right, unless specifically provided by statute; provided, however, that in any civil action filed in any court of competent jurisdiction by or against the Commonwealth of Kentucky, the costs may be paid by the Commonwealth when such costs are

approved and allowed by the judge of the court in which the case was filed. Costs shall not exceed the fees allowed for similar services in other civil actions.

Similarly, CR 54.04(1) provides that:

Costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the Commonwealth, its officers and agencies shall be imposed only to the extent permitted by law.

In an unpublished opinion in *Cabinet for Health & Family Servs. v. Dornbusch*, 2008-CA-002385-MR (April 2, 2010),³ another panel of this Court reversed a lower court's decision to grant attorney fees to an individual who challenged the denial of her Medicaid eligibility application. Citing to the above provisions as well as §§ 27, 28, 230 of the Kentucky Constitution, the panel noted that "the expenditure of government resources is solely within the control of the Kentucky legislature and, absent statutory authority, the courts are without authority to impose costs or attorney fees against the Commonwealth." (Slip op. p. 2). Indeed, the intent of §230, the statutes, and CR 54.04 is "to prevent the expenditure of the State's money without the consent of the Legislature." *Ferguson v. Oates*, 314 S.W.2d 518, 521 (Ky. 1958) (citation and internal quotations omitted). Such a result is consistent with the governmental separation of powers and reinforces the proper role of the judiciary.

³ The trial court discussed *Dornbusch* at length and erroneously concluded that such was contradictory and "not particularly instructive." We disagree. The *Dornbusch* panel clearly and correctly held that while a trial court does possess equitable powers under some circumstances, as a matter of constitutional and statutory law, such powers do not give the court the authority to award attorney fees against the Commonwealth.

Bell has not cited to any statutory authority, and we find none, that would authorize an award of attorney fees against DCBS. While the trial court may have believed the award was justified, as a matter of constitutional and statutory law, it simply did not have authority to award fees against an agency of the Commonwealth.

We likewise agree with DCBS that the trial court was without any authority to order the disclosure of records relating to non-party Medicaid beneficiaries in the HCBW program receiving RSDI benefits and being charged a co-pay. As DCBS points out, federal law mandates that it “provide safeguards which restrict the use or disclosure of information concerning applicants and recipients[.]” 42 U.S.C. § 1396a(7); 42 C.F.R. § 431.300(a). Information which DCBS is required to safeguard includes the recipients’ names and addresses, medical services provided, social and economic circumstances, agency evaluation of personal information, medical data, including diagnosis and past history, any information received for verifying income eligibility, and the amount of medical assistance payments. *See* 42 C.F.R. § 431.305(b)(1)-(6).

In addition to federal law, Kentucky law places restrictions on DCBS’s ability to disclose protected information. KRS 205.175(1) requires that all records of Medicaid recipients be kept confidential. Subsection (2) explicitly states that such records “shall not be published or be open for public inspection,” and while certain “necessary information” may be furnished to specified entities or

individuals, a private attorney representing a private party is not among those listed. *See* KRS 205.175(2)(a)-(e).

The trial court's order herein purports to require DCBS to disclose the very information it is required to safeguard and without the permission of those recipients. Presumably, the information would be turned over to Bell's counsel, who is not subject to any sort of confidentiality requirements. Without question, the trial court's order is erroneous as it directly violates state and federal law. Finally, we find no merit in Bell's claim that the disclosure is warranted to prevent DCBS from continuing its egregious conduct. Not only does Bell fail to cite legal authority for such proposition, but we would observe that the trial court made no finding in its December 2010 opinion and order that DCBS acted in bad faith. Rather, the issue in the administrative proceedings was simply the correct application of the Pickle Amendment.

Based on the foregoing, the opinion and order of the Franklin Circuit Court awarding Bell attorney fees and ordering the disclosure of DCBS's records related to the HBCW program is reversed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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