STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR10864

PARKER HOME CARE LLC Petitioner v. NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE Respondent	**FINAL DECISION**

THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on July 30, 2014 in Raleigh, North Carolina, together with a companion case with the same parties denominated 14DHR00752, after due notice given July 14, 2014. Upon resolution of the parties' dispositive motions, a Final Decision was entered.

APPEARANCES

For Petitioner: Mathew W. Wolfe
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For Respondent: Brenda Eaddy
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ISSUES

Whether Respondent Division of Medical Assistance ("DMA") substantially prejudiced Petitioner's rights contrary to law, as set forth in N.C. Gen. Stat. §150 B-23, by its October 22, 2012 decision not to allow Petitioner's Request for Reconsideration of an undated decision to withhold Medicaid payments to Petitioner in the amount $594,741.00, as proposed in the Tentative Notice Of Overpayment dated December 15, 2011, issued by Respondent's contractor, Public Consulting Group.

APPLICABLE LAW

N.C. Gen. Stat. §§150B-23, 150 B-23(f), 150B-33(b)(3a), 108C-12(d), 108C-2(1), 108C-5, 150B-34, 150B-45, 1A-1 Article 2, 150B-46, and 150B-47; N.C. Rules of Civil Procedure 12(h)(3); Rule 56; Rule 50(a); and, Rule 41(b); and 26 NCAC 03 .0101 (b), 26 NCAC 03 .0127(c), and 26 NCAC 03 .0102.

EXHIBITS

The following Exhibits were admitted into evidence:

Petitioner's Exhibits:
(Petition and its attachments)

Exhibit No.	Description
1.	Verified Petition for Contested Case Hearing, Parker Home Care, LLC v. NC DHHS, DMA, 12DHR10864
2.	Notice of Dismissal dated October 17, 2012 in re Parker Home Care, LLC, PI Case #2011-1474 (sic)
3.	Notice of Dismissal (Corrected Copy) dated October 22, 2012 in re Parker Home Care, LLC, PI Case #2010-1474
4.	Notice of Reconsideration Review Decision (Corrected) dated June 13, 2012 by DMA Hearing Office in re Interim Health Care – Morris Group, P.I. Case # 2011-0413

Respondent's Exhibits: Respondent did not offer any exhibits for admission.

WITNESSES

Petitioner did not present the testimony of any witnesses.

Respondent did not present the testimony of any witnesses.

MEMORANDUM of DECISION

[26 NCAC 03 .0127(c)(7)]

In open Court on July 30, 2014, and in its Prehearing Statement, Respondent made clear that its sole objective was to obtain an Order dismissing the Petition "due to lack of subject matter jurisdiction because Petitioner failed to timely file its Petition for a Contested Case Hearing," or failing that, to preserve that issue for review; and consequently, that Respondent would not offer any testimony of any witnesses, nor introduce any other evidence concerning the

validity of its underlying claim for recoupment, as set out in the December 15, 2011 *Tentative Notice of Overpayment* prepared by its contractor, Public Consulting Group ("PCG").[1] As discussed in the hearing, Respondent filed its *Renewed Motion to Dismiss Petition for Contested Case Hearing, or in the alternative, Motion for Summary Judgment* on August 7, 2014.

At the July 30, 2014 hearing, Petitioner moved for directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure, and presented Petitioner's *Brief on Directed Verdict*. The undersigned declined to rule until Respondent's jurisdictional motion was resolved.

In addition, the parties filed briefs addressing whether the repeal of N.C. Gen. Stat. §150B-36 and amendment of §150B-34 to give the Office of Administrative Hearings ("OAH") final decision authority in cases of this nature -- made effective at the time of a federal waiver -- was effective on the *date of the letter* granting the waiver, December 27, 2012, or the effective date *stated* in the letter, July 1, 2012. Upon consideration of the arguments of counsel, and it appearing that the latter date best reflects the intent of the legislature, as well as the stated intent of the grantor of the waiver, the undersigned proceeds herein on the assumption that OAH is responsible for making a Final Decision in this matter pursuant to §150B-34.

Upon due consideration of the submissions of the parties, and all the contents of the record, the undersigned determined the Motions and entered a Final Decision as follows:

MOTIONS

RESPONDENT'S *RENEWED MOTION TO DISMISS PETITION FOR CONTESTED CASE HEARING, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT*

Respondent's *Motions* each argue that the Office of Administrative Hearings ("OAH") lacks of subject matter jurisdiction, based on the undisputed fact that Petitioner did not react to a letter from Respondent's contractor. The parties agree that these Motions are grounded in the same undisputed facts and legal arguments that were addressed to the Hon. Beecher R. Gray, Administrative Law Judge (now a Special Superior Court Judge) prior to his Orders entered on December 14, 2012, denying similarly-styled motions offered by Respondent, and granting Petitioner's *Motion for Stay of Contested Actions*, allowing relief in the nature of a Preliminary Injunction barring Respondent from withholding funds due Petitioner as a means of recouping alleged overpayments.

Briefly, the legal issues revolve around a certified letter to Petitioner, dated December 15, 2011, and titled "Tentative Notice of Overpayment," from Public Consulting Group ("PCG"), an auditing contractor for Respondent. The letter proposed recoupment of nearly $600,000 paid to Petitioner for the provision of "personal care services" and other in-home services provided to

[1] Respondent assumed the same posture in another, legally similar matter involving PCG. See *Caring Hands Home Health, Inc. v. N.C. Department of Health and Human Services*, 13 DHR 09727, 2013 WL 7118820 (NC OAH, 5 December 2013); *aff'd*, 14 CVS 2549 (Supr. Ct., Guilford Co., 10 July 2014).

Medicaid patients. Whatever its legal import, the parties agree that this letter was mishandled at Petitioner's office, and there was no reaction to it until the following October, when Petitioner was put on inquiry by Respondent withholding funds from payments contemporaneously due Petitioner. It is Respondent's position that, since Petitioner failed to file a Petition for a contested case hearing within 60 days of receipt the December 15, 2011 letter per §150B-23(f), Petitioner is now barred from contesting the proposed recoupment at the Office of Administrative Hearings ("OAH"). Judge Gray concluded that the contractor's "Tentative Notice of Overpayment" did not constitute "notice … of the agency decision," within the meaning of §150 B-23(f), "because it was issued by a private contractor and not the agency" and consequently, did not start the 60 day period for appeal to OAH. Order of December 14, 2012, Conclusion of Law ¶ 9.

The threshold issue presented is whether the undersigned can or should reconsider Judge Gray's decision in this case. The long-standing rule to the contrary applied in the General Court of Justice was observed in the case of *Wall v. England*, 243 N.C. 36, 89 S.E.2d 785 (1955), wherein the judgment of the second judge in the case to enforcing the decision of his predecessor was upheld:

> If the ruling of … Judge [Rudisill] of Superior Court were erroneous, the remedy of defendant was to except thereto and appeal to Supreme Court. And upon failure of defendant to except and appeal[,] the judgment becomes, not so much *res judicata*, as the law of the case. Hence the judgment of Judge Rudisill was not before Judge McSwain for review. He, Judge McSwain, could not question its correctness but was bound by its terms. Indeed no appeal lies from one Superior Court judge to another. (Cites omitted.) The power of one judge of the Superior Court is equal to and co-ordinate with that of another. A judge holding a succeeding term of a superior court has no power to review a judgment rendered at a former term, upon the ground that such judgment is erroneous.

Wall, 243 N.C. at 39, 89 S.E.2d at 787. This "rule does not apply to *interlocutory* orders … during the progress of an action which affect the procedure and conduct of the trial," which are "subject to change during … the action to meet the exigencies of the case." But to "permit one superior court judge to overrule the final order or judgment of another would result in the disruption of the orderly process of a trial and the usurpation of the reviewing function of appellate courts." *State v. Stokes*, 308 N.C. 634, 642, 304 S.E.2d 184, 189-90 (1983).

It in this instance, Respondent has the opportunity, and the expressed intention (see *infra*), of appealing Judge Gray's rulings, and this decision. But if the undersigned were to consider the same issues and arguments presented to Judge Gray, and reach a different result, it would offend the rule discussed in *Wall*. In upholding a decision reversing a county board of commissioners' issue of a conditional use permit, under circumstances substantially similar to when it was formerly denied, "on the basis that the … [permit] application was barred by the doctrines of *res judicata* and collateral estoppel," the Court of Appeals has recently held that

> [A] material change which precludes the use of the defense of *res judicata* occurs when the specific facts or circumstances which led to the prior … decision have

> changed to the extent that they 'vitiate ... the reasons which produced and supported' the prior decision such that the application 'can no longer can be characterized as the same claim.'

Mount Ulla Historical Pres. Soc., Inc. v. Rowan Cnty., 754 S.E.2d 237, 239, 242 (N.C. Ct. App. 2014), *citing* 83 Am.Jur.2d Zoning and Planning § 700. Collateral estoppel can be raised to "preclude[] relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding." *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995), cited with approval in *Rymer v. Estate of Sorrells by & through Sorrells*, 127 N.C. App. 266, 268, 488 S.E.2d 838, 840 (1997). The doctrine of collateral estoppel applies when the following requirements are met:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Beckwith v. Llewellyn, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990) (quoting *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)). Rulings on summary judgment may be given preclusive effect, *Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55, *aff'd per curiam*, 352 N.C. 666, 535 S.E.2d 356 (2000), as well as dismissals under rule 12(b), *Hill v. West*, 189 N.C. App. 194, 198, 657 S.E.2d 698, 700 (2008). Each of the above prerequisites for the application of collateral estoppel is present in this case.

Respondent argues, correctly, that it is entitled to be heard to argue, at any stage of the litigation, that the court lacks jurisdiction. N.C. Rules of Civil Procedure 12(h)(3); 26 NCAC 03 .0101 (b). However, "the law of the case" or *res judicata*-of-the-forum, as well as collateral estoppel, preclude a different finding for the same parties when the material facts and the applicable law are the same. These doctrines are not grounded in the idea they will necessarily preserve a superior result. Instead, the manifest purpose is simply to prevent re-litigation of the *same issue, on the same facts, between the same parties*. Thus in *Beckwith*, our Supreme Court held that collateral estoppel did not apply to bar a client from suing her former attorneys based on allegations of breach of fiduciary obligation and negligence during litigation, even though she consented to the settlement that concluded the case, because the parties were not adversaries in that proceeding. *Beckwith*, 326 N.C. at 571, 391 S.E.2d at 189.

Based on the uncontested facts and whole record in this matter, the issues raised by Respondent's Motions are precluded as a matter of law.

Consequently, Respondent's Motions to dismiss and for summary judgment must be, and hereby are, DENIED.

PETITIONER'S *MOTION FOR DIRECTED VERDICT*

At the July 30, 2014 hearing, Petitioner moved for directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure, and presented Petitioner's *Brief on Directed Verdict* in support of the Motion. The undersigned deferred ruling until the jurisdictional issue raised by Respondent was resolved.

Considering this Motion as a finder of fact without a jury, it is treated as a Motion to Dismiss pursuant to Rule 41(b), as made applicable in OAH cases by N.C. Gen. Stat. § 150B-33(b)(3a), and 26 NCAC 03 .0101(b). See 1969 official *Comment* to Rule 41, ¶ 4; *Goodrich v. Rice*, 75 N.C. App. 530, 535, 331 S.E.2d 195, 198 (1985).

As noted above, the Respondent voluntarily declined to make an evidentiary showing in support of the merits of its claim at the hearing.

As it acknowledged at the hearing, Respondent had the burden of proof in this case as to any "adverse determination." N.C. Gen. Stat. § 108C-12(d). The definition of "adverse determination" includes the decision to recoup funds from the Petitioner. *See* N.C. Gen. Stat. § 108C-2(1).

"Even after entry of a default judgment in civil court, 'for damages to be certain, more evidence is needed 'than simply the plaintiff['s] bare assertion of the amount owed.' *[Grant v.] Cox,* 106 N.C.App. [122,] at 127–28, 415 S.E.2d [378] at 381–82 [(1992)]." *Basnight Const. Co. v. Peters & White Const. Co.*, 169 N.C. App. 619, 623, 610 S.E.2d 469, 472 (2005). In this instance, statutes and regulations require that the agency demonstrate that it followed specific procedures when it seeks to utilize extrapolation to calculate a recoupment claim. N.C. Gen. Stat. § 108C-5.

Consequently, due to Respondent's failure to prosecute its claim, Petitioner is entitled to judgment as a matter of law.

FINAL DECISION

NOW, THEREFORE, based on the foregoing, the Respondent's decision to withhold funds alleged to be due in the "Tentative Notice of Overpayment" dated December 15, 2011, prepared by Respondent's contractor Public Consulting Group, and the agency's PI Case No. 2010-1474, must be REVERSED.

Consequently, it is **ORDERED**:

That Respondent is permanently enjoined from withholding any of the referenced funds;

That Respondent shall remit the funds heretofore withheld, totaling $79,046.00, together with interest as provided by law, within 30 days of the date of this Final Decision.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 6th day of October, 2014.

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J. Randolph Ward
Administrative Law Judge