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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DOCTOR'S MEDICAL LABORATORY, INC., Plaintiff and Appellant, v. DIRECTOR, STATE DEPARTMENT OF HEALTH SERVICES, Defendant and Respondent.	B161741 (Los Angeles County Super. Ct. No. BS060054)

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Hooper, Lundy & Bookman, Inc. and Patric Hooper for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Manuel M. Medeiros, Solicitor General, Andrea Lynn Hoch, Chief Assistant Attorney General, James M. Humes, Senior Assistant Attorney General, and Sandra L. Goldsmith, Deputy Attorney General, for Defendant and Respondent.

I. BACKGROUND

This is an appeal from a judgment denying a petition brought against defendant, the Director of the California Department of Health Services (the department). The department administers Medi-Cal, the federal Medicaid program in California. The action arose out of an audit of claims of Medi-Cal provider, plaintiff, Doctor's Medical Laboratory, Inc. (plaintiff). (42 C.F.R. §§ 447.45(f)(2), 456.3 (2003); Welf. & Inst. Code, § 14170, subd. (a)(1).) The audit was conducted by the State Controller's Office, on behalf of the department pursuant to a July 1, 1997 "interagency agreement." The July 1997 agreement allowed the Controller to perform audits and identify overpayments to Medi-Cal providers. The July 1997 agreement further provided that the department retained final authority to review all reports of overpayments identified by the Controller. (See *RCJ Medical Services., Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 999.)

In November 1997, plaintiff filed a mandate petition challenging the Controller's authority to conduct the audit under the "single state agency" requirement of the federal Medicaid statutes. (42 U.S.C. § 1396a(a)(5).) Plaintiff also sought an order directing the Controller to release funds that had been summarily withheld prior to and during the audit and appeal process. The trial court found that the Controller had authority to conduct the audit. But the trial court granted the petition because the Controller had improperly withheld funds from plaintiff. On February 1, 1999, in a published opinion, *Doctor's Medical Laboratory, Inc. v. Connell* (1999) 69 Cal.App.4th 891, 896-898, Division Seven of this appellate district held the Controller lacked the authority to conduct the audit and had improperly withheld the funds. The Controller was ordered to release the funds without prejudice to subsequent department audits and claims for overpayment. (*Ibid*.)

In August 1999, the department issued a final decision which granted in part plaintiff's appeal. The department did not conduct a new audit but adopted the Controller's original findings and determinations of overpayment except for specific

challenged items. The department determined that plaintiff obtained an overpayment of $1,004,904.78 from the Medi-Cal program for the period September 6, 1996, through November 20, 1997.

On October 28, 1999, plaintiff filed a California Code of Civil Procedure section 1094.5 petition seeking to set aside the department's decision. Plaintiff argued the Controller's audit findings violated the single state agency provisions of federal Medicaid law. (42 U.S.C. § 1396a(a)(5) and 42 C.F.R. § 431.10(e).) The mandate petition also alleged that the audit was invalid because the Controller imposed liability by using sampling and extrapolation methods which could only be used by the department in "postservice, postpayment audits."

On December 17, 1999, the federal Health Care Financing Administration approved, effective July 1, 1998, California State Plan Amendment No. 99-011. The amendment permitted the Controller to perform audits of Medi-Cal expenditures on behalf of the department.

On January 12, 2000, plaintiff filed its memorandum of points and authorities in support of its request for issuance of a writ of mandate. The only issue raised by the points and authorities challenged the Controller's authority to conduct the audit. Plaintiff attached a copy of the final decision which specifically addressed the sampling and extrapolation methods employed by the Controller in the audit. However, the methodology issue was not briefed. In addition, plaintiff argued that no administrative record was necessary to rule on the motion because only legal issues were raised and there were no challenges to the evidentiary sufficiency of the department's findings.

On April 28, 2000, the trial court filed a judgment granting a writ of mandate. The department was ordered to set aside its final decision and void the audit findings of the Controller based on the Division Seven decision of *Doctor's Medical Laboratory, Inc. v. Connell*, *supra*, 69 Cal.App.4th at pages 896-898. In response to the department's appeal from the judgment, plaintiff argued, among other things, that even if the federal Health Care Financing Administration approved a 1999 Plan Amendment, effective July 1,

1998, allowing the Controller to review Medi-Cal claims, the audit was nevertheless invalid. Plaintiff argued: "[The approval] may not be used as authority for permitting the Controller to audit [plaintiff], which audit occurred in late 1997 and early 1998. Because the audit predated the effective date of the State Plan Amendment, it is invalid under any circumstances."

On March 6, 2002, in an unpublished opinion, we reversed the trial court's order issuing the writ of mandate. (*Doctor's Medical Laboratory, Inc., v. The Director of the State Department of Health Services* (Mar. 6, 2002, B142529) [nonpub. opn.].) In our March 6, 2002, unpublished opinion, we incorporated by reference our analysis in *RCJ Medical Services., Inc. v. Bonta*, *supra*, 91 Cal.App.4th at pages 992-1015. In our unpublished opinion, we held, "All of the issues posited by the parties concerning the single state agency requirement are conclusively resolved by our opinion in *RCJ* . . . ."

On August 22, 2002, after the remittitur issued in this case, the trial court held a status conference. Plaintiff's counsel requested an opportunity to brief the issue of sampling and extrapolation. As noted previously, the issue was raised in the mandate petition. The trial court queried whether the issue had actually been briefed when the merits of the petition were tried. Plaintiff's counsel admitted that the sampling and extrapolation issues had not been briefed. The trial court then ruled that the failure to brief the issue when the petition was tried precluded consideration of the sampling and extrapolation issues on remand.[1] Plaintiff filed a timely appeal from the judgment entered in favor of the department.

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[1] On April 28, 2003, the department filed a motion for judicial notice of a number of documents including *RCJ Medical Services, Inc. v. Director of the State of Department of Health Services*, Los Angeles County Superior Court case No. BS060056. On April 30, 2003, we granted the judicial notice request in part (documents attached as exhibit A relating to the original trial in this case). We deferred ruling on the remaining documents. Because the superior court records from *RCJ Medical Services, Inc. v. Director of the State Department of Health Services*, Los Angeles County Superior Court case No. BS060056, attached as exhibit B are relevant to the issues raised by this appeal, the request is granted. The department has also requested judicial notice of the record on

II. DISCUSSION

Plaintiff argues the judgment must be reversed because: (1) our unpublished March 6, 2002, decision did not resolve all issues remaining in the case; (2) the department cannot rely on the audit findings of the Controller which predated the July 1, 1998, effective date of the State Plan Amendment; (3) plaintiff's sampling and extrapolation issues were not waived; and (4) the department's decision is arbitrary and capricious because the sampling and extrapolation procedures are not authorized under the facts of this case. We conclude that the trial court correctly entered judgment in favor of the department without conducting further proceedings.

First, there is no merit to plaintiff's argument the December 17, 1999, State Plan Amendment cannot be relied on for audit findings that predated the amendment's effective date. The issue of the effective date of the State Plan Amendment was raised by plaintiff and rejected by us in our prior unpublished opinion. As noted above, our unpublished opinion in this case concluded that our published *RCJ* decision conclusively disposed of all issues posited on the single state agency requirement issue. Contrary to plaintiff's argument, the issue of the effective date of the State Plan Amendment does not remain unresolved. The issue was resolved by our prior opinion in this case.

Second, plaintiff cannot litigate its sampling and extrapolation contention which it failed to raise during the trial on the petition. The general rule is that an unqualified reversal remands the case for a new trial. (*Erlin v. National Union Fire Ins. Co.* (1936) 7 Cal.2d 547, 549; *Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 743.) However, this

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appeal in *RCJ Medical Services, Inc. v. Director of the State Department of Health Services*, Court of Appeal case No. B143160, which documents were attached to the motion as exhibit C. Although we have referred to the published portions of this opinion, we deny the judicial notice request for the records attached to the motion as exhibit C. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6; *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064.)

general rule, like any other, is subject to limitations. (*Stromer v. Browning* (1968) 268 Cal.App.2d 513, 518-519; accord, *Moore v. City of Orange* (1985) 174 Cal.App.3d 31, 34-37.) Thus, retrial is unwarranted where: the appellate opinion as a whole establishes a contrary intent (*Stromer v. Browning*, *supra*, 268 Cal.App.2d at pp. 518-519; compare *Bank of America Nat'l Trust & Sav. Ass'n v. Superior Court* (1990) 220 Cal.App.3d 613, 623 [exception inapplicable with disputed facts and appellate opinion did not contain "patent" intent that judgment be entered without retrial]); a litigant had full and fair opportunity to present its case and the reversal is based on the insufficiency of evidence (*Cassita v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1066; *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1810; *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661-1662); or no factual issues remained to be determined. (*Snapp v. State Farm Fire & Cas. Co.* (1964) 60 Cal.2d 816, 820-821; *Moore v. City of Orange*, *supra*, 174 Cal.App.4th at pp. 34-35; see also *Griset v. Fair Political Practices Comm.* (2001) 25 Cal.4th 688, 698-700 [after appealable judgment entered that fully determined the parties' rights, trial court could not reopen or retry case].)

A similar argument to that raised in this case by plaintiff was rejected in *Moore v. City of Orange*, *supra*, 174 Cal.App.3d at pages 33-37. In *Moore*, a deputy city clerk was terminated without a hearing or written explanation as permitted by Government Code section 40812 which provides that deputy city clerks serve at the city clerk's pleasure. The trial court found that the former deputy city clerk was entitled to a writ of mandate. The trial court relied on a city resolution which, notwithstanding Government Code section 40812, prevented the former deputy city clerk's termination without providing due process protection. The Court of Appeal reversed the judgment without directions. After issuance of the remittitur, the city then obtained a summary judgment from which the former deputy city clerk appealed. In her appeal from the summary judgment, the plaintiff argued that the unqualified reversal effectively remanded the cause for trial de novo on all issues presented by her pleadings. The Court of Appeal held that the earlier

unqualified reversal did not entitle plaintiff to a trial on a theory not presented and "essentially conceded, in the original trial." (*Id*. at p. 33.)

Likewise, in this case, plaintiff's only contention at the first trial and on appeal was that the audit was unauthorized. Plaintiff specifically indicated that the sole issue it sought to have determined prior to the entry of the judgment was the question of the Controller's authority to conduct the audit. Moreover, although the sampling and extrapolation issue was raised in the petition, when plaintiff moved for issuance of a writ of mandate, it filed a memorandum of points and authorities which did not address the methodology question. This was in spite of the department's final administrative decision, which addressed a number of specific claims by plaintiff as to the propriety of the sampling methodology. Moreover, plaintiff chose not to include the administrative record in the superior court record. In that respect, plaintiff stated: "While this case involves judicial review of a final decision of the Director of [the department] following the holding of an administrative hearing, which ordinarily requires the Petitioner to obtain and present to the Court a record of the administrative proceedings, a record is not required in this case because of the purely legal nature of the issue to be resolved. [Citations.] [¶] In this case, Petitioner is not challenging the evidentiary sufficiency of the findings made by the Director of [the department]. Rather, Petitioner, [plaintiff] , is challenging the authority of the State Controller to conduct Medi-Cal audits, and specifically the Medi-Cal audit at issue. The Director of [the department] contends that federal law does not prohibit the State Controller from conducting Medi-Cal audits, especially the audit at issue. There is no need nor requirement for the preparation of an administrative record to resolve this issue, which has already been resolved fully by the courts." Thus, plaintiff's memorandum of points and authorities clearly indicated that the only issue to be resolved in the first trial was the Controller's authority to conduct the audit. As a result, no substantive issue remained for future determination. In addition, the sampling and extrapolation issue were never raised in the appeal from the trial court's judgment resolving the sole issue raised by plaintiff in the original trial. In short, the

judgment from the original trial disposed of all issues between the parties. Plaintiff chose to proceed in a manner that left no issues for the court to retry. (*Moore v. City of Orange*, *supra*, 174 Cal.App.3d at pp. 33-38.)

In *Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 622, the Court of Appeal for Division Two of the First Appellate District analyzed the *Moore* holding. The First Appellate District panel, after describing the factual and procedural scenarios in *Moore*, commented, "[I]t would have been senseless to follow the general rule that an unqualified reversal remands the case for a new trial." (*Ibid.*) We are in accord. Accordingly, the trial court correctly ruled that judgment should be entered in favor of the department.

III. DISPOSITION

The judgment is affirmed. Defendant, the Director of the California Department of Health Services, is entitled to recover his costs on appeal from plaintiff, Doctor's Medical Laboratory, Inc.

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TURNER, P.J.

We concur:

GRIGNON, J. ARMSTRONG, J.