

July 20, 2010

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

OKLAHOMA CHAPTER OF THE
AMERICAN ACADEMY OF
PEDIATRICS (OKAAP), et al.,

Plaintiffs-Appellants/Cross-
Appellees,

v.

Nos. 05-5100 & 05-5107

MICHAEL FOGARTY, Chief Executive
Officer of the Oklahoma Health Care
Authority (OHCA), et al.,

Defendants-Appellees/Cross-
Appellants.

AMERICAN ACADEMY OF
PEDIATRICS, et al.,

Amici Curiae.

ORDER

Before **BRISCOE**, Chief Judge, **TACHA**, and **HARTZ**, Circuit Judges.

Before the court is plaintiffs' motion seeking relief from our January 3, 2007 Judgment and Opinion, as well as our February 13, 2007 Mandate. We treat plaintiffs' motion as a motion to recall the mandate, 10th Cir. R. 41.2, and, for the reasons outlined below, deny the motion.

I

Plaintiffs originally filed this 42 U.S.C. § 1983 action in March of 2001 claiming that defendants, officials of the State of Oklahoma and the Oklahoma Health Care Authority, violated various provisions of the Medicaid Act by failing to provide Medicaid-eligible children in the State of Oklahoma with necessary health care services, including early and periodic screening, diagnosis, and treatment services. Although the district court found in favor of plaintiffs on some of their claims, we reversed the judgment of the district court and remanded with directions to enter judgment in favor of defendants. Okla. Chapter of Am. Acad. of Pediatrics v. Fogarty, 472 F.3d 1208 (10th Cir. 2007). In doing so, we concluded, in pertinent part, “that the term ‘medical assistance,’ as employed in [42 U.S.C.] § 1396a(a)(8)[and (a)(10)], refers to financial assistance rather than to actual medical services.” Id. at 1214 (internal quotation marks and citation omitted). Consequently, we held “that 42 U.S.C. § 1396a(a)(10) requires a state Medicaid plan to pay for, but not to directly provide, the specific medical services listed in the Medicaid Act.” Id. at 1209-10.

We entered judgment in the case on January 3, 2007. Plaintiffs unsuccessfully moved for rehearing en banc. Our mandate issued on February 13, 2007. On February 16, 2007, the district court, in accordance with our mandate, entered judgment in favor of defendants. The Supreme Court subsequently denied plaintiffs’ petition for writ of certiorari. Okla. Chapter of Am. Acad. of Pediatrics v. Fogarty, 552 U.S. 813 (2007).

Approximately three years later, on June 8, 2010, plaintiffs filed the instant motion

seeking relief from our January 3, 2007 judgment and our February 13, 2007 mandate. In support of their motion, plaintiffs note that Congress enacted the Patient Protection and Affordable Care Act (PPACA). See Pub. L. No. 111-145, 124 Stat. 119 (2010). Section 2304 of the PPACA, plaintiffs note, amended the definition of “medical assistance” set forth in the Medicaid Act, 42 U.S.C. § 1396d(a), to read as follows:

The term “medical assistance” means payment of part or all of the cost of the following care and services, **<or the care and services themselves, or both,>**

(amendment in bracketed bold text). This section, along with the balance of the PPACA, went into effect on March 23, 2010. Plaintiffs allege, citing comments from a House Energy and Commerce Committee report that preceded enactment of the PPACA, that this amendment was intended “[t]o correct any [judicial] misunderstandings as to the meaning of the term,” and “to conform th[e] definition to the longstanding administrative use and understanding of the term.” Mot. at 5 (quoting H.R. Rep. No. 111-299, at 694). In short, plaintiffs argue, “Congress . . . unmistakably clarified that [our] opinion in [this case] was based upon a ‘misunderstanding’ of the meaning of ‘medical assistance.’” *Id.* at 6.

II

Plaintiffs rely exclusively on Federal Rule of Civil Procedure 60(b)(6) as the basis for their motion. But neither plaintiffs nor defendants have addressed the threshold question of whether Rule 60(b)(6) can be invoked in this court. Because the standards for granting a Rule 60(b)(6) motion are substantially similar to the standards for granting a

motion to recall a mandate, and because those standards have not been met here, we will simply assume, without deciding, that Rule 60(b)(6) can be invoked here. See Calderon v. Thompson, 523 U.S. 538, 549-50 (1998) (recognizing the “inherent power” of courts to recall a mandate, but emphasizing it is “to be held in reserve against grave, unforeseen contingencies”); Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah, 114 F.3d 1513, 1522 (10th Cir. 1997) (emphasizing “the power to recall or modify a mandate is limited and should be exercised only in extraordinary circumstances.”).

“Rule 60(b) . . . provides an exception to finality that allows a party to seek relief from a final judgment, and request reopening of the case, under a limited set of circumstances.” United Student Aid Funds, Inc. v. Espinosa, – U.S. –, 130 S.Ct. 1367, 1376 (2010) (internal quotations and citations omitted). Generally speaking, “such relief is extraordinary and may only be granted in exceptional circumstances.” Servants of Paraclete v. Does, 204 F.3d 1005, 1009 (10th Cir. 2000) (internal quotations omitted).

The specific clause of Rule 60(b) relied on by plaintiffs, (b)(6), authorizes a court to relieve a party from a final judgment for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). “Courts have found few narrowly-defined situations that clearly present ‘other reasons justifying relief’” under Rule 60(b)(6). 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2864 at 351-52 (2d ed. 1995). And, of particular note here, “[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)” Agostini v. Felton, 521 U.S. 203, 239 (1997).

After reviewing the parties' briefs in this matter, we are not persuaded that Congress's recent amendment to the Medicaid Act's definition of the term "medical assistance" is the type of extraordinary circumstance that warrants relief under Rule 60(b)(6). Our January 3, 2007 published opinion and corresponding final judgment in this case was intended as our "final word," Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 n.14 (1983), on the then-existing definition of the term "medical assistance," as used in the Medicaid Act. The fact that Congress has now amended the statutory definition does nothing to call into question our interpretation of the prior definition, let alone justify the extraordinary relief sought by plaintiffs in their motion. Plaintiffs' suggestion, in reliance on the legislative history of the amendment, that Congress did not agree with our interpretation of the prior definition carries no weight. The actual text of the amendment contains no indication that it was intended to operate retroactively, let alone function as the basis for granting relief from long-final judicial decisions. And it is understandable why Congress chose not to include any such language in the actual text of the amendment: the Supreme Court has made clear that, "[h]aving achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995) (emphasis omitted). In other words, we presume that Congress was well aware, given the holding in Plaut, that the amendment could not operate to call into question the

finality of our judgment in this case.

Plaintiffs' Rule 60(b)(6) motion for relief from final judgment, which we treat as a motion to recall the mandate, is DENIED.

Entered for the Court,

Mary Beck Briscoe
Chief Judge