

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1470

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NORTHWOODS CARE VANS, INC.,

Petitioner-Appellant,

v.

**STATE OF WISCONSIN DEPARTMENT
OF HEALTH AND SOCIAL SERVICES,**

Respondent-Respondent.

APPEAL from judgment of the circuit court for Langlade County:
ROBERT A. KENNEDY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Northwoods Care Vans, Inc., appeals a decision of the Wisconsin Department of Health and Social Services ordering Northwoods to repay \$63,618.17 the State overpaid to it and the circuit court judgment affirming that decision. Northwoods contends that the circuit court erred by concluding that neither the hearing examiner nor the circuit court had the equitable power to reduce or eliminate the debt on an equity theory. Because we conclude that Northwoods failed to demonstrate a basis for relief in equity and Northwoods did not take reasonable steps to protect its interests, we

affirm. We therefore do not reach the question whether the circuit court or hearing examiner had the equitable power to reduce or eliminate the recoupment.

Northwoods provides specialized medical vehicle transportation services to the elderly and handicapped. The Wisconsin Medical Assistance Program (WMAP) has certified Northwoods to provide these services. In order to become certified, Northwoods had to sign an agreement to comply with all the rules and regulations of the department. WMAP has contracted with Electronic Data Systems to provide administrative and supervisory services as well as regulate the reimbursement for all specialized medical vehicle providers.

Northwoods clients include WMAP recipients and non-WMAP recipients. WMAP reimburses Northwoods for services provided to its recipients, the other clients are on a self-pay basis. Northwoods' business was composed of almost only WMAP recipients. In January 1992, Northwoods was seeking to expand its self-pay client base. To that end, one of Northwoods' employees, Kay Chapman, telephoned the EDS helpline to inquire whether there was a set rate they could charge self-pay clients. According to Chapman, the EDS employee stated that Northwoods could set its own rate but that all self-pay clients had to be charged the same rate. Northwoods took this to mean it could charge self-pay clients less than it charged WMAP clients.

Northwoods set its self-pay rate at slightly less than the rate charged to WMAP clients and printed brochures to advertise this fact to the general public. Northwoods included one of these brochures in its 1993 renewal application to EDS. EDS renewed Northwoods as a specialized medical vehicle transport provider and did not object to Northwoods' rates.

In response to a letter complaining that Northwoods was charging WMAP clients more than self-pay clients, EDS started an audit. The audit found that WMAP had overpaid Northwoods by \$63,618.87 based on the difference between the rates for the audit period. During the seventeen-month audit period, Northwoods had 1,919 WMAP clients and 116 self-pay clients. Northwoods appealed this to a Department of Health and Human Services

hearing examiner who affirmed the recoupment and then to the trial court who affirmed the hearing examiner.

Northwoods argues that the trial court erred by deciding it did not have the equitable power to alter or nullify the amount due to WMAP. We do not reach the question whether the trial court had this equitable power because we conclude that Northwoods failed to meet the required elements of its equitable estoppel claim.

The doctrine of equitable estoppel is not to be as freely applied against government agencies as it is against private citizens. *Sanfelippo v. DOR*, 170 Wis.2d 381, 391, 490 N.W.2d 530, 534 (Ct. App. 1992). "Estoppel may be applied against the state when the elements of estoppel are clearly present and it would be unconscionable to allow the state to revise an earlier position." *Id.* at 390-91, 490 N.W.2d at 534. The elements of equitable estoppel are: "(1) action or nonaction by the person against whom estoppel is asserted (2) upon which the person asserting estoppel reasonably relies (3) to that person's detriment." *St. Paul Ramsey Med. Ctr. v. DHSS*, 186 Wis.2d 37, 47, 519 N.W.2d 681, 685 (Ct. App. 1994). The burden is on the party asserting estoppel to prove each element by clear and convincing evidence. *Id.*

Northwoods asserts that the EDS employee's statement that Northwoods was free to charge self-pay clients whatever it desires as long as it charged all self-pay clients the same misled it to believing it could charge self-pay clients less than it charged WMAP clients. The threshold issue is whether this conversation with the EDS employee fulfills the elements of an equitable estoppel claim. We conclude that it does not.

Northwoods never expressly asked EDS if it could charge self-pay clients less than WMAP client rates. It only asked whether there were limitations on what it could charge self-pay clients. Northwoods cannot invoke equitable estoppel because it did not receive the answer to a question it never asked. Further, we agree with the hearing examiner's conclusion that "reliance on the telephone conversation was not reasonable, in fact, it was precisely the opposite." When making a decision as important as establishing the billing rates, Northwoods could not have reasonably relied on this conversation to provide support for two separate billing schedules. A written confirmation of

Northwoods' understanding is the minimum step a prudent person would undertake in making so important a decision. An equity action will not lie when the party seeking to invoke equity has failed to take reasonable steps to protect his interests. *Rascar, Inc. v. Bank of Oregon*, 87 Wis.2d 446, 453, 275 N.W.2d 108, 112 (Ct. App. 1978).

The agreement Northwoods entered into with WMAP incorporated the "Specialized Medical Vehicle Terms of Reimbursement." This document specifically provides: "Providers are required to bill their usual and customary charges for services provided. The usual and customary charge is the amount charged by the provider for the same service when provided to non-Medical Assistance patients" Northwoods had this document and agreed to follow its terms. Any question over this section should have been more specifically addressed on the helpline than with the open ended question Northwoods asked. The ambiguous nature of the question permitted a reasonable person to respond as though the inquiry concerned a maximum that could be charged to self-pay clients. It could also be reasonably construed to inquire as to whether self-pay clients could utilize Northwoods' services without jeopardizing Northwoods' contract with the State. Only if Northwoods specifically queried as to the relationship between the rates for self-pay and medical assistance clients could Northwoods make a claim for equitable relief.

Because we conclude that Northwoods failed to meet the elements of an equitable estoppel claim, we affirm.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.