COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP751

Cir. Ct. Nos. 2014CV168, 2014CV169, 2014CV170, 2015CV77, 2015CV91, 2015CV92

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MILE BLUFF MEDICAL CENTER, INC.,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF NECEDAH, CITY OF NEW LISBON AND CITY OF ELROY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Juneau County: PAUL S. CURRAN, Judge. *Affirmed.*

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

¶1 LUNDSTEN, P.J. Mile Bluff Medical Center, Inc., is a non-profit entity that owns and operates a hospital in Mauston. Mile Bluff challenges the taxation of separate properties: three health clinics that Mile Bluff purchased in

2013. Mile Bluff seeks an exemption for these three clinics under WIS. STAT. § 70.11(4m)(a).[1] One of the § 70.11(4m)(a) exemption requirements is that the property not be used as a "doctor's office." We agree with the circuit court that Mile Bluff fails to show that the clinics are not "doctor[s'] office[s]" within the meaning of the exemption statute. Accordingly, we affirm.

Background

¶2 The health clinics are located in the municipalities of Necedah, New Lisbon, and Elroy (collectively, the "municipalities"). Before Mile Bluff purchased the clinics in 2013, the clinics were owned by a partnership of physicians.

¶3 Mile Bluff concedes that, prior to Mile Bluff's 2013 purchase of the clinics, the clinics were "doctors' offices." That is, Mile Bluff in effect concedes that, prior to Mile Bluff's purchase, the clinics were not exempt under WIS. STAT. § 70.11(4m)(a).

¶4 When Mile Bluff purchased the clinics, the clinic physicians became Mile Bluff employees and no longer owned the clinic facilities or equipment. In addition, Mile Bluff asserts, and we take as true, that Mile Bluff applied for and obtained "rural health clinic" status for the clinics from the federal Centers for Medicare and Medicaid Services and the State of Wisconsin. As we shall see, this

[1] All references to the Wisconsin Statutes are to the 2015-16 version. We cite the most current version for ease of reference. The statutory language that we apply here has not changed during the relevant times.

status entails a considerable amount of integration between the clinics and the Mauston hospital that is owned and operated by Mile Bluff.[2]

¶5 With a minor exception that we will address below, Mile Bluff sought a property tax exemption for the clinic properties under WIS. STAT. § 70.11(4m)(a). On a motion for summary judgment, the circuit court concluded that the clinics did not qualify for the exemption. Mile Bluff appeals.

¶6 We reference additional facts in the discussion below.

Discussion

¶7 This court reviews summary judgment de novo, applying the same standards as the circuit court. ***Saint Joseph's Hosp. of Marshfield, Inc. v. City of Marshfield***, 2004 WI App 187, ¶9, 276 Wis. 2d 574, 688 N.W.2d 658. Summary judgment is proper when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* WIS. STAT. § 802.08(2). We view the evidence, and reasonable inferences from the evidence, in the light most favorable to the party, here Mile Bluff, against whom summary judgment is sought. *See* ***Saint Joseph's***, 276 Wis. 2d 574, ¶9. For the reasons that follow, we conclude that the circuit court properly granted summary judgment against Mile Bluff.

[2] The municipalities do not affirmatively concede that Mile Bluff obtained "rural health clinic" status for the clinics. At the same time, the municipalities do not appear to seriously dispute that the clinics have this status or that this status entails a considerable amount of integration between the clinics and the Mauston hospital.

¶8 The exemption statute provides, in relevant part:

> Property exempted from general property taxes is:
>
> ….
>
> **(4m)** NONPROFIT HOSPITALS. (a) Real property owned and used and personal property used exclusively for the purposes of any hospital of 10 beds or more devoted primarily to the diagnosis, treatment or care of the sick, injured, or disabled …. *This exemption does not apply to property used … as a doctor's office.*

WIS. STAT. § 70.11 (emphasis added).

¶9 The parties dispute both whether Mile Bluff's clinics are "used exclusively" for hospital purposes and whether the clinics are used as "doctor[s'] office[s]." As explained below, we agree with the circuit court that the clinics are used as "doctor[s'] office[s]" within the meaning of the exemption statute and, on that basis, we also agree with the circuit court that the clinics are not exempt from taxation. We need not address whether the clinics are used exclusively for hospital purposes.

¶10 Courts construe tax exemption statutes reasonably but "strictly" against granting an exemption. ***Covenant Healthcare Sys., Inc. v. City of Wauwatosa***, 2011 WI 80, ¶22, 336 Wis. 2d 522, 800 N.W.2d 906. "[D]oubts are to be resolved in favor of taxability." ***St. Elizabeth Hosp., Inc. v. City of Appleton***, 141 Wis. 2d 787, 791, 416 N.W.2d 620 (Ct. App. 1987).

¶11 The term "doctor's office" lacks a particularized definition in the statute. *See* ***St. Clare Hosp. of Monroe, Wis., Inc. v. City of Monroe***, 209 Wis. 2d 364, 372, 563 N.W.2d 170 (Ct. App. 1997). "'[W]hether a building is used as a doctor's office depends on the nature of services provided and the manner in which these services are delivered to the patient.'" ***Covenant***, 336 Wis. 2d 522,

¶31 (quoting ***St. Clare***, 209 Wis. 2d at 373). "The determination of whether property is used as a doctor's office ultimately turns on the facts of each case." ***Id.***

¶12 The supreme court in ***Covenant*** identified seven non-exclusive factors that courts look at to determine whether a facility is used as a "doctor's office." *See* ***id.***, ¶¶33-36 & n.13. These factors are whether:

1. physicians own or lease the facility or equipment;
2. physicians at the facility receive "variable compensation," that is, compensation based on their "productivity";
3. physicians at the facility employ or supervise non-physician staff, or receive extra compensation for such duties;
4. the facility and hospital generate separate billing statements or use separate billing software;
5. the physicians in the facility have office space in the facility;
6. the facility provides care on an outpatient, as opposed to inpatient, basis; and
7. the facility is open during regular business hours during which time the physicians generally see patients by appointment.

See ***id.*** (identifying seven factors from ***St. Clare*** and four factors from ***St. Elizabeth*** that are the same as four of the seven ***St. Clare*** factors).

¶13 We now apply these seven factors, as well as other relevant factors, to conclude that the Mile Bluff clinics are used as "doctor[s'] office[s]" within the meaning of the exemption statute. In the course of our discussion, we address Mile Bluff's arguments to the contrary.

¶14 **One: Own or Lease.** It is undisputed that the clinic physicians do not own or lease the clinics or equipment. This factor favors Mile Bluff.

¶15 **Two: Variable Compensation.** As to whether the clinic physicians receive "variable compensation," the parties appear to agree that the physicians' compensation is determined by a Medicare-based multi-factor formula, but they disagree as to whether this formula is "variable compensation" based on physician "productivity" as those terms are used in the case law. We are uncertain whether the parties' disagreement on this topic involves underlying factual disputes or instead presents a purely legal issue as to what case law means when referring to the terms "variable compensation" and physician "productivity." We will assume, without deciding, that the Mile Bluff clinic physicians' compensation is not "variable compensation" based on their "productivity." Thus, we further assume that this second factor favors Mile Bluff.

¶16 **Three: Supervision and Compensation Relating to Non-Physician Staff.** Turning to the third factor, Mile Bluff concedes that clinic physicians supervise non-physician staff, namely, physician assistants (PAs) and nurse practitioners (NPs), and that these physicians receive compensation for their supervisory activities. Mile Bluff argues, however, that this paid supervision is not relevant because applicable law requires physician supervision of PAs and NPs. Mile Bluff argues that this type of legally required supervision is not supervision "in an employment sense." As support for this argument, Mile Bluff cites the unpublished decision of ***SSM Health Care of Wisconsin, Inc. v. City of Fitchburg***, No. 2015AP429, unpublished slip op. (WI App Sept. 24, 2015). We are not persuaded by Mile Bluff's reliance on ***SSM***.

¶17 It is true that in ***SSM*** we appeared to conclude that the legally required "presence" of a physician in a clinic was not enough to constitute supervision. *See* ***id.***, ¶33 & n.3. We did not, however, make any clear conclusion in ***SSM*** as to whether legally required supervision is irrelevant, nor did we adopt

the proposition that, to be relevant, supervision must be, as Mile Bluff asserts, "in an employment sense." *See* ***id.*** Thus, ***SSM*** provides no clear support for Mile Bluff's argument.

¶18 More helpful here is our ***St. Clare*** decision, which makes clear that the compensation of clinic physicians for supervising PAs and NPs at a clinic *is* a relevant factor that favors treating the clinic as a "doctor's office." *See* ***St. Clare***, 209 Wis. 2d at 366, 371. The physicians here are compensated for such supervisory activities and, therefore, we conclude that the supervision factor weighs against Mile Bluff.

¶19 **Four: Separate Billing Statements or Separate Billing Software.** We turn to the fourth factor, whether the clinics and hospital generate separate billing statements or use separate billing software. Mile Bluff points to a variety of evidence that, taken together, paints a confusing picture as to how Mile Bluff's billing system works. This evidence includes the following deposition testimony: that Mile Bluff has two billing systems, one of which is "mainly used in the clinic … and that is built for your visit with your provider"; that the system the hospital primarily uses "did not accommodate the needs of the clinics"; that "[t]he clinics primarily bill for all professional services," whether performed at the clinics *or* at the hospital; that, when a patient receives both professional services and other services, such as lab work, the patient receives two separate bills based on the two different billing systems; and that both bills are "billed through Mile Bluff Medical Center." Viewing the evidence in a light most favorable to Mile Bluff, we conclude that Mile Bluff has at most shown separate billing systems with significant overlap. And, viewed this way, we are unable to say that this factor weighs in favor of either Mile Bluff or the municipalities.

¶20 **Five: Physician Office Space.** As to the fifth factor, Mile Bluff concedes that the clinic physicians have office space at the clinics. Mile Bluff argues, however, that this factor should be disregarded because Mile Bluff has not sought an exemption for the relatively small amount of space in the clinics devoted to physician office space.

¶21 The sole authority that Mile Bluff cites as support for this argument is ***Covenant***, but ***Covenant*** is off topic. In ***Covenant***, a hospital owner sought an exemption for three of five floors of a property occupied by a health facility but did not seek an exemption for the two additional floors, which were leased to others. *See* ***Covenant***, 336 Wis. 2d 522, ¶¶6, 44 n.15. The court in ***Covenant*** disregarded the two leased floors for purposes of determining whether the three floors used by the health facility were a doctor's office. *See* ***id.***, ¶44 n.15. The court in ***Covenant*** did not address the quite different question of whether a health facility could strengthen its case for an exemption by carving out office space that was *within the health facility* and used by that facility's physicians. In the absence of authority on this topic, we see no basis to disregard the clinic physicians' office space as a factor here. This factor weighs against Mile Bluff.

¶22 **Six: Outpatient/Inpatient Care.** Mile Bluff concedes that the clinics provide only outpatient care. Mile Bluff, however, contends that this concession is unimportant because of the changing nature of outpatient care. Specifically, Mile Bluff cites ***Covenant*** for the proposition that changes in the types of procedures that used to be done only in hospitals but are now done on an outpatient basis in clinics weigh in favor of Mile Bluff. *See* ***id.***, ¶¶38-39 (noting as relevant that technological advances allow for more complex procedures to be performed on an outpatient basis). The problem with this argument is that Mile Bluff fails to point to facts in the record showing that Mile Bluff's clinics perform

procedures that used to be performed at hospitals. Thus, Mile Bluff fails to persuade us that this sixth factor should not weigh against Mile Bluff.

¶23 **Seven: Business Hours and Patients Seen by Appointment.** Mile Bluff concedes that the clinics provide services only during regular business hours, and Mile Bluff does not dispute that the clinics see most patients by appointment. Additionally, Mile Bluff does not dispute that the clinics provide primary care. Instead, Mile Bluff affirmatively asserts that the purpose of the clinics is to provide primary care. Primary care is the type of care most commonly associated with an ordinary doctor's office. This final factor of the seven factors weighs strongly against Mile Bluff.

¶24 To sum up so far, the majority of the seven factors weigh against Mile Bluff and, while application of the factors is not a rote formula, we conclude that, on balance, these factors support a conclusion that the clinics are used as "doctor[s'] office[s]" within the meaning of the exemption statute.

¶25 As to other factors, Mile Bluff relies on the "rural health clinic" status of the clinics under federal and state law and, more specifically, on the required integration between the clinics and Mauston hospital that Mile Bluff tells us this legal status entails. For example, according to Mile Bluff, this status requires that the hospital and clinics share the same governing body; that the hospital and clinics are financially integrated; that the hospital oversees the clinics as it would any other hospital department; that clinic patients have full access to hospital services; and that clinic professional staff have clinical privileges at the hospital. Mile Bluff complains that the circuit court failed to consider these and other similar factors.

¶26 We agree with Mile Bluff that, to the extent these factors go to the nature or manner of services delivered to patients, they are relevant. We disagree, however, that they tip the balance in favor of Mile Bluff. Mile Bluff identifies a number of ways that rural health clinic status has affected the internal administration of the clinics, but Mile Bluff does not explain how this status has resulted in any significant change in the nature or manner of *patient services*. *See* ***Covenant***, 336 Wis. 2d 522, ¶31 ("'[W]hether a building is used as a doctor's office depends on the *nature of services provided* and the *manner in which these services are delivered to the patient*.'" (emphasis added; quoted source omitted)).

¶27 Our conclusion that these additional considerations do not tip the scales in favor of Mile Bluff is supported by our ***St. Clare*** decision. Regardless whether integration is required or a choice, it does not weigh heavily in favor of Mile Bluff.

¶28 In ***St. Clare***, we expressly rejected the proposition that the integration of clinic and hospital services is a sufficient reason to conclude that a clinic is no longer a "doctor's office." We reasoned:

> We acknowledge that competitive pressures lead health care providers to consolidate and integrate their services. However, if the property tax exemption were extended to clinics owned and operated by nonprofit hospitals, similar privately-operated facilities would be put at a competitive disadvantage. The question of whether to extend the § 70.11(4m)(a), STATS., exemption to outpatient clinics owned and operated by nonprofit hospitals is a public policy question for the legislature, not us, to decide. We are not to extend property tax exemptions by implication. Following a "strict but reasonable" construction of the statute, we conclude that the clinic building is not exempt from property taxation.

St. Clare, 209 Wis. 2d at 375-76 (footnote and citations omitted). Rather, in ***St. Clare*** we relied on factors which we have already concluded favor the municipalities here: clinic physicians had office space at the clinic; the clinic building lacked any inpatient facilities; and the clinic was open only during regular business hours, with most patients seen by appointment. *See* ***id.*** at 366-67, 370-76.

¶29 Moving on, Mile Bluff asks us to consider that the integration between its clinics and its hospital promotes the provision of primary health care to patients in rural areas suffering a shortage of such services. We acknowledge that Mile Bluff makes an argument here that was not considered in ***St. Clare***, namely, that tax policy should take into account the financial difficulty of providing health care services in rural areas. There is no indication in ***St. Clare*** that the clinic there qualified for any special status based on the provision of services in a rural area. However, even assuming that this difference is a valid policy concern, Mile Bluff does not attempt to tie this consideration either to the pertinent statutory language that excludes from exemption property that is used as a "doctor's office" or to case law interpreting that language. Thus, Mile Bluff fails to persuade us that rural health clinic status matters for purposes of this statutory requirement. Whether rural health clinic status might matter for purposes of the separate statutory requirement of exclusive use is a question that we need not address.

¶30 Finally, we consider Mile Bluff's apparent assertion that Mile Bluff's clinics are like the health facility deemed *not* to be a doctor's office in ***Covenant***. Mile Bluff's attempt to portray its clinics as more like the facility in ***Covenant*** than the clinic in ***St. Clare*** lacks merit. Although the facility in ***Covenant*** was referred to as an "Outpatient Clinic," the facts of ***Covenant*** show

that that facility was substantially different from the clinics here or in ***St. Clare***, and not like an ordinary doctor's office. The ***Covenant*** facility included an urgent care center that was designed to operate much like an emergency room, to accept emergency ambulances, and to "treat all levels of emergency care." ***Covenant***, 336 Wis. 2d 522, ¶40. Further, the facility included hospital-like amenities that are not typically present in a "doctor's office," such as a gift shop and cafeteria. *See* ***id.*** The court in ***Covenant*** viewed as particularly significant the fact that the facility's patient services were previously provided at a hospital, a fact that, as we have noted, is not present here. *See* ***id.***, ¶42; *see also* ***St. Elizabeth***, 141 Wis. 2d at 788-90, 793-94 (a "First Care unit" that was integrated into a hospital emergency room was not a "doctor's office" within the meaning of the exemption statute).

¶31 In sum, construing the facts and reasonable inferences in favor of Mile Bluff, we conclude that Mile Bluff's clinics are used as "doctor[s'] office[s]" within the meaning of WIS. STAT. § 70.11(4m)(a). Accordingly, we further conclude that Mile Bluff is not entitled to an exemption under this statute and that the circuit court properly granted summary judgment in favor of the municipalities.

Conclusion

¶32 For the reasons stated above, we affirm the circuit court's grant of summary judgment against Mile Bluff and in favor of the municipalities.

By the Court.—Judgment affirmed.

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