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COURT OF APPEALS

STATE OF NEW YORK

AARON MANOR REHABILITATION,

Respondent,

-against-

NO. 31

ZUCKER,

Appellant.

20 Eagle Street
Albany, New York
March 12, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Next matter on the calendar
2 is Matter of Aaron Manor Rehabilitation v. Zucker.

3 MS. NEPVEU: Good afternoon, Your Honors. Kate
4 Nepveu for defendants. I'd like to reserve five minutes
5 for rebuttal, please?

6 CHIEF JUDGE WILSON: Yes.

7 MS. NEPVEU: Your Honors, the legislature
8 mandated removal of this payment factor as of April 1st,
9 2020, in an act that it didn't even vote on until April 2nd
10 of 2020, and with the full knowledge that it takes time for
11 reimbursement rates to be recalculated. It therefore must
12 have intended that the removal of this payment rate be
13 retroactive. There are three provisions of the act that
14 demonstrate the legislature's intent here. First, it used
15 a notwithstanding clause, which is a commonly used and well
16 understood provision that says that - - - that something
17 supersedes any inconsistent provision of - - -

18 JUDGE RIVERA: But we've said that's not enough
19 in the retroactivity context. Right?

20 MS. NEPVEU: Well, we're not asking you to find
21 that that alone is sufficient. There are two other aspects
22 of the act. The second is that the removal was mandated
23 for rate periods on and after April 1st of 2020. The only
24 way to give meaning to the on and after part of that
25 provision is to interpret it as authorizing the department

1 to reach back to April 1st, in order when it removes the
2 payment factor.

3 JUDGE RIVERA: Why aren't they right, though,
4 that given the way rates are actually determined, that that
5 could only mean rates at that future calendar date, the
6 next calendar year?

7 MS. NEPVEU: Rate periods are not calendar - - -
8 necessarily calendar years, Your Honor. If you look at - -
9 - throughout Public Health Law 2808, there are multiple
10 forms - - - multiple rate periods defined in the statute.
11 Not all of them are calendar years. Not even all of them
12 are even fiscal years. Some of them are a single month.
13 Some of them are a span of months. If - - - if that's not
14 sufficient as to what a rate period is, even plaintiffs
15 agree that it's a term of art, which means that the
16 department's definition of a term of art is entitled to
17 deference, and the Department defines it as a period for
18 which a rate applies.

19 JUDGE HALLIGAN: Is this really a question of
20 statutory retroactivity? I mean, I understand that the
21 letter is in August and it apparently has effect reaching
22 back, as I think you just said. But why is the question
23 whether that is retroactive, as opposed to whether the
24 statute has retroactive application? And - - - and perhaps
25 it doesn't, because it's effective as of a date specified

1 in the statute itself.

2 MS. NEPVEU: Well, the statutory retroactivity is
3 because it was passed on April 3rd.

4 JUDGE HALLIGAN: Yes.

5 MS. NEPVEU: And it says - - - you know, that
6 both the rate that the removal - - -

7 JUDGE HALLIGAN: For that day or two?

8 MS. NEPVEU: Right.

9 JUDGE HALLIGAN: Right.

10 MS. NEPVEU: Yes.

11 JUDGE HALLIGAN: But if we set that aside.

12 MS. NEPVEU: Yes.

13 JUDGE HALLIGAN: Well, let me ask you first.

14 Would - - - if - - - if given that day or two, would that
15 be enough to mean that the statute lacked valid application
16 from April 3rd, the day of enactment, going forward? Or is
17 it simply a question if - - - if we're going to look at the
18 retroactivity - - - core retroactivity of what happens with
19 the first and the second, which I think are the day or two
20 before - - - between the date specified in the statute and
21 the date in which it's enacted? If that makes sense.

22 MS. NEPVEU: Yes. It's kind of the same
23 analysis, Your Honor, because the legislative intent is
24 clear on both grounds. First, that the statute enacted on
25 April 3rd takes effect - - - shall be deemed, in fact, to

1 have been in full force and effect on an - - - on and after
2 April 1st, which the effective date language, the third
3 part of the Act's provisions says. And also that the
4 intent is clear that the legislature's waiving the sixty-
5 day advance notice requirement, which it created, and which
6 it creates exceptions to all the time. It's important to
7 realize here that the legislature knows how Medicaid works.
8 The legislature created the advance notice requirement, and
9 then it created a bunch of exceptions.

10 JUDGE CANNATARO: Counsel, I don't find the
11 statutory language so crystal clear as you do. And let me
12 explain to you why and you can tell me where I go wrong.
13 You know, presumably the legislature knew when it enacted
14 this statute that there had been a determination - - - you
15 know, these - - - these things are set up annually to run
16 from a period, I think, that begins April 1st and goes
17 through for a year following that; is that right?

18 MS. NEPVEU: The rates here, they're usually done
19 on a calendar year.

20 JUDGE CANNATARO: Yeah.

21 MS. NEPVEU: In this case, the legislature
22 directed that they be changed to run with the fiscal year.

23 JUDGE CANNATARO: Right.

24 MS. NEPVEU: Yes. Go ahead.

25 JUDGE CANNATARO: So previously it had been set

1 up at the - - - at the beginning - - -

2 MS. NEPVEU: Yeah.

3 JUDGE CANNATARO: - - - of the calendar year and
4 they were aware that reimbursements were being made under
5 that regime. And they enact a statute that says that there
6 shall no longer be a payment factor for residual equity
7 reimbursements, meaning, you know, we're not going to do
8 that going forward. But they don't specifically mention a
9 stop to reimbursements that had been set up under the
10 previous implementation of the act. So my feeling is the
11 legislative language could have been clearer as to
12 retroactive intent if the legislature said stop reimbursing
13 now.

14 MS. NEPVEU: Well, Your Honor, the legislature
15 said for rate periods on and after April 1st, there shall
16 be no payment factor. So that indicates that as of April
17 1st, you have to take the payment factor out of their
18 rates. And that makes sense with what was going on in the
19 world at the time, as - - - as the court may remember in
20 April 2020, the state was facing an enormous fiscal crisis.
21 Even before COVID hit, the state budget needed to close a
22 \$3 billion gap. So there's no way that the legislature
23 could have intended to wait on these savings until the next
24 year.

25 CHIEF JUDGE WILSON: But let me try to - - -



1 JUDGE HALLIGAN: Does the record tell us why
2 there's such a - - - there's a gap of about four months
3 between the statute being enacted and the "Dear
4 administrator" letter?

5 MS. NEPVEU: Yes. The state had to recalculate
6 the rates. It has to give the - - - send them to the
7 director of the budget to be approved - - -

8 JUDGE HALLIGAN: So just normal course of
9 business and everything?

10 MS. NEPVEU: Yes. Just the normal course of
11 events.

12 CHIEF JUDGE WILSON: So I'm not sure why this is
13 being described - - - other than the two days which we can
14 set aside for the moment - - - as a - - - as applying our
15 retroactivity analysis to it at all? It seems to me that
16 what I'm hearing is it's a question of when the legislature
17 enacted the statute, did it intend for there to be a period
18 to allow the regulators to set new rates, or did it intend
19 to disable the regulators at that moment? But that doesn't
20 seem to be a question of retroactivity at all. That's just
21 a pure question of legislative intent.

22 MS. NEPVEU: Yeah. And the legislative intent
23 here is itself clear that under the circumstances, these -
24 - - this removal of the payment factor was a recommendation
25 of the Medicaid redesign team, which had been constituted

1 that year or reconstituted, rather, in order to find \$2.5
2 billion in savings because of the budget gap that the State
3 had already been facing. It had recommended both the
4 removal of this and the five percent cut across the board
5 to capital rates.

6 JUDGE RIVERA: Let - - - let me - - -

7 MS. NEPVEU: Yes.

8 JUDGE RIVERA: If I'm understanding the Chief
9 Judge's question to you, I'm not sure you're directly
10 responding to it. I - - - I thought the question is, why
11 is it about retroactivity moving forward? Because I
12 thought - - - excuse me. Why is it about retroactivity?
13 And - - - and is it because rates had already been set, and
14 as you were responding to Judge Halligan, those had to be
15 recalculated?

16 MS. NEPVEU: Yes.

17 JUDGE RIVERA: Otherwise you were bound to those
18 rates?

19 MS. NEPVEU: Yes. They had to be recalculated.
20 And ordinarily the legislature has required a sixty-day
21 advance notice for that. But the - - - this was passed
22 notwithstanding any contrary provision of law, as you know,
23 on and after April 1st, which means that the sixty-day
24 notice requirement didn't apply. And the legislature was
25 directing the department, when you recalculate these rates,

1 recalculate them back to April 1st.

2 JUDGE HALLIGAN: Were the new rates ever put into
3 effect?

4 MS. NEPVEU: No. Because of a preliminary
5 injunction, and then - - -

6 JUDGE HALLIGAN: And that's still in effect?

7 MS. NEPVEU: That's still in effect, Your Honor.
8 Which is why the approximately \$374 million has been paid
9 to plaintiffs through the end of this calendar year under
10 that injunction. As I just want to emphasize that the - -
11 - given the fiscal crisis at the time, given the three
12 aspects of the statutory language, it's clear that the
13 legislature intended that these rate changes be made
14 effective as of April 1st. The Appellate Division erred
15 when it said it couldn't find any clear expression of that
16 legislative intent here. And that change is not meant as -
17 - - as plaintiffs suggest, it's to - - - to - - - excuse me
18 - - - to crash the - - - the nursing home industry. Nobody
19 wants the nursing home industry to fail. I see that my
20 time is up.

21 JUDGE RIVERA: Your red light is on. Can I just
22 ask you - - -

23 MS. NEPVEU: Yes.

24 JUDGE RIVERA: - - - if - - - if the Chief Judge
25 allows, just take perhaps a very brief opportunity to

1 address the 7807 argument? The 2807 argument, excuse me.

2 MS. NEPVEU: Yes.

3 JUDGE RIVERA: I inverted the numbers. Sorry.

4 MS. NEPVEU: No. That's fine. Your Honor, the
5 department was not required to recalculate plaintiff's
6 rates to see if they met the statutory standard in 2807(3)
7 before they removed the payment factor from their rates.
8 That's because the legislature said you must remove this
9 payment factor, notwithstanding any contrary provision of
10 law. And so that prohibits -- -- that forecloses
11 plaintiffs from saying just because you took away this
12 payment factor, my rates don't meet the standard.
13 Certainly, plaintiffs can challenge their rates overall on
14 other grounds, but they would have had to do so by showing
15 their individual costs and how the new rates didn't meet
16 those individual costs. And that would be particularly
17 important here, because - - -

18 JUDGE RIVERA: So if I'm understanding you, the -
19 - - the - - - the flaw from your perspective in - - - in
20 their challenge is that they're challenging the rates writ
21 large? Although, they always retain - - - I hear you
22 saying, and I thought that's how I read the briefing - - -
23 the opportunity to challenge the reimbursement to - - - to
24 an individual facility?

25 MS. NEPVEU: Absolutely.



1 JUDGE RIVERA: To say it's not reasonable in
2 light of our costs and our expenditures?

3 MS. NEPVEU: That's exactly correct, Your Honor.
4 Yes. I see that my light is on, and I will reserve my time
5 for rebuttal. Thank you, Your Honors.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. GREENE: Good afternoon. F. Paul Greene, on
8 behalf of cross-appellants. May it please the court. I'd
9 like to reserve three minutes for rebuttal, if I may?

10 CHIEF JUDGE WILSON: Yes.

11 MR. GREENE: I wanted to address this issue of
12 statutory retroactivity in the first instance. There was
13 statutory retroactivity here because we need to understand
14 how capital works. And capital is set on an annual basis.
15 And that's very important. Because capital is one of the
16 four necessary components of the rate, it is perhaps one of
17 the most important components of the rate paying for the
18 home in which these residents reside. And think about it.
19 You need to know, at least running any business you need to
20 know for a certain amount of time how much money you're
21 going to have to pay for that facility. Imagine going to a
22 mortgage lender and saying, my income for this mortgage may
23 change on a daily basis. We have two protections in that
24 regard. The department has built this yearly structure.
25 It's their own structure. Their own documents prove this

1 structure. This is record at 352. That's one of their
2 documents. I believe it's actually the rate sheet.

3 CHIEF JUDGE WILSON: Right. But are you - - -
4 but are you saying that the legislature is disabled from
5 removing that structure?

6 MR. GREENE: No, not at all. But it certainly,
7 as - - - as - - -

8 CHIEF JUDGE WILSON: Well, if it removed it, it
9 might disrupt everything in the way you were just alluding
10 to?

11 MR. GREENE: Exactly. What I'm - - - what I'm
12 getting at here and discussing is - - - are the rights
13 involved. And those rights were set as of November 1,
14 2019, for all of calendar year - - -

15 CHIEF JUDGE WILSON: Yeah. But the legislature
16 is not, I think you just told me, disabled from changing
17 that like this?

18 MR. GREENE: Correct. And the - - - what the
19 legislature - - -

20 JUDGE GARCIA: Is your point that it would be a
21 retroactive application? By changing it in April you have
22 a retroactive effect on the rates that have already been
23 set?

24 MR. GREENE: On the rate period. Exactly.

25 JUDGE HALLIGAN: What does that mean, "on the

1 rate period"?

2 MR. GREENE: So that was a specific term that the
3 legislature chose. A specific term of art and that go in
4 relation to - - -

5 JUDGE HALLIGAN: The - - - the rate period?

6 MR. GREENE: Rate period. It's in the - - -

7 JUDGE HALLIGAN: Oh, the rate period. I thought
8 you meant rate comma period. I understand. Thank you.

9 MR. GREENE: Pardon me.

10 JUDGE CANNATARO: So you had a - - - you had a 1
11 - - - from November 1st of the previous year, you had a
12 one-year expectation that your rates were set?

13 MR. GREENE: They were set. Not just an
14 expectation. It's a certification by the Department of
15 Health.

16 JUDGE HALLIGAN: But I thought - - - do you
17 disagree with your adversary's comment that that is
18 something that can be changed if - - - if - - - if that's
19 something that the administrator wants to do? Or is it
20 your position that the administrator is statutorily
21 disabled from changing it?

22 MR. GREENE: I thought the question was going to
23 be, can the legislature change it?

24 JUDGE HALLIGAN: No.

25 JUDGE CANNATARO: I think you answered that the

1 legislature can change it.

2 JUDGE HALLIGAN: Yes.

3 MR. GREENE: And here they chose not to. They
4 used the term rate period. They said with the next rate
5 period, remove residual equity.

6 JUDGE HALLIGAN: But is - - - it your view that
7 the administrator cannot - - - lacks statutory authority to
8 vary the rate period? And - - - and if so, where do we
9 look for that?

10 MR. GREENE: No, I don't think that - - - the - -
11 - that the commissioner lacks statutory authority. But
12 that brings us to 2807(7), the - - - the sixty-day notice
13 provision.

14 JUDGE HALLIGAN: But that's something that - - -
15 I take it, given your answer to the Chief Judge, you - - -
16 you would say the legislature can change or - - - or no?

17 MR. GREENE: Certainly, they can create an
18 exception to 2807(7). And the - - - the statement from my
19 adversary was the legislature does this all the time. Not
20 true. They did it once. That was in 2808(11). It was a
21 number of years ago and this court found in Jewish Home
22 that that was an exclusive list of the exceptions to
23 2807(7).

24 JUDGE HALLIGAN: So your - - - your position is
25 that the legislature could not or did not? I'm not sure

1 which one.

2 MR. GREENE: Did not. Absolutely did not.

3 JUDGE HALLIGAN: Did not - - -

4 JUDGE CANNATARO: They could have but they
5 didn't.

6 MR. GREENE: Correct.

7 JUDGE HALLIGAN: - - - didn't waive the sixty-day
8 period?

9 MR. GREENE: Right.

10 JUDGE RIVERA: So if we disagree with you on both
11 those points, do you lose? Do they win?

12 MR. GREENE: If they - - - the two points being
13 that they - - -

14 JUDGE RIVERA: You - - - you - - - you've just
15 said the legislature could have done these things - - -

16 MR. GREENE: Correct.

17 JUDGE RIVERA: But your argument is that's not
18 what they did.

19 MR. GREENE: They did not.

20 JUDGE RIVERA: Her argument, of course, is that
21 is what they did. So if we agree with her, is that part of
22 the case done?

23 MR. GREENE: Certainly. If you find that the
24 legislature expressly - - - expressly said this shall be a
25 new exception to 2807(7), then we lose. But the

1 legislature did not do that, and that's clear in a number
2 of places.

3 CHIEF JUDGE WILSON: But that really has nothing
4 to do with retroactivity. No? That's just pure statute,
5 what did the legislature intend?

6 MR. GREENE: There - - - this gets back to my
7 first point; there's statutory retroactivity. And I
8 believe there is statutory retroactivity in the fact that
9 they are changing rights that accrued as of January 1.
10 That rate period is one year. They knew that. They - - -
11 and according to the reading of respondents - - - not
12 according to the - - - the clear text of the statute - - -
13 but according to the - - - the reading of appellant's - - -
14 pardon me.

15 JUDGE GARCIA: Then what does the April 1 do in
16 the statute? Why is it there?

17 MR. GREENE: The April 1 is there to give the
18 Department of Health enough time to do all of those things
19 to get this change in the books. The appellants admit that
20 they needed to change the regulations. The regulation for
21 residual reimbursement is still on the books 86-2.21. That
22 takes time under SAPA, State Amended Procedure - - -
23 Administrative Procedure Act takes at least sixty days of
24 notice. They needed to recalculate the rates. They needed
25 to do all of those things, submit a state plan amendment.



1 What the legislature was telling the - - - the commissioner
2 at the time was get a move on - - -

3 JUDGE CANNATARO: So the legislature - - -

4 MR. GREENE: - - - remove this factor.

5 JUDGE CANNATARO: - - - is telling them they have
6 seven months - - -

7 MR. GREENE: Yes.

8 JUDGE CANNATARO: - - - to change the - - - the -
9 - - the - - - the reimbursement scheme for November 1st of
10 the coming year?

11 MR. GREENE: For the next applicable rate period,
12 correct.

13 JUDGE CANNATARO: Whenever the next rate period
14 calculation takes place.

15 MR. GREENE: Correct.

16 JUDGE RIVERA: But it seems the legislature would
17 have said effective of the next rate period?

18 MR. GREENE: They did. For rate periods on and
19 after. And - - -

20 JUDGE HALLIGAN: But they said - - -

21 MR. GREENE: - - - and the on and after - - - if
22 - - - if I'm - - - oh, go ahead.

23 JUDGE HALLIGAN: Go ahead.

24 MR. GREENE: The on and after is - - -

25 JUDGE RIVERA: Your - - - your - - - it's very

1 nice rhetoric, but it's not helping me. Okay. On or after
2 means moving forward, but if they really meant not as of
3 today - - - or whatever day they chose - - - but rather at
4 the next cycle, would they not have said that very clearly?

5 MR. GREENE: They - - - I think they did.

6 JUDGE RIVERA: Especially since - - - well, I
7 know you think they did. But I'm asking you, if I
8 disagreed with you - - - let's - - - how would you persuade
9 me of that? That's my point - - -

10 MR. GREENE: There are two phrases - - -

11 JUDGE RIVERA: - - - behind it. Because
12 remember, she's also arguing that the state is in a major
13 fiscal crisis. If you take that in context - - - in
14 addition to the plain language, take that in context,
15 there's only one reading of that language.

16 MR. GREENE: There is only one reading of that
17 language, and it's according to its plain terms. The state
18 - - - the legislature uses two phrases when it talks about
19 commencement date in Public Health Law 2808. It either
20 says "commencing on" or it says, "rate periods on and
21 after". That - - - those are the two choices. Commencing
22 on means commencing on, and that is shown by this very
23 bill. Appellants reference this change. They say change
24 to the - - - changes to the rate happened all the time. In
25 this same bill, there was a five percent reduction to

1 capital overall to address the potential - - -

2 JUDGE HALLIGAN: So where in the statute do we
3 know that rate periods on and after April 1st, 2020, does
4 not give any room or does not, in fact, instruct that the
5 rate period without this reimbursement will commence on
6 that date and run forward?

7 MR. GREENE: It is not a defined term in the
8 statute, and so it is a factual issue as to what that
9 means. In practice, it is - - -

10 JUDGE HALLIGAN: Well - - -

11 MR. GREENE: - - - rate year. And they've
12 admitted - - -

13 JUDGE HALLIGAN: - - - I don't know what it means
14 for - - - for a question of statutory interpretation to be
15 a factual issue. Generally, I think we look to understand
16 the legislature's intent when we're reading a statute. So
17 what are the interpretive guideposts that you would point
18 us to, to read it in the way that you're proposing, as
19 opposed to the way your adversary proposes?

20 MR. GREENE: As appellants state, we need to
21 expect that the legislature knows how the system works, and
22 we need to assume that the legislature knows that a rate
23 period for - - - for capital is one year - - - one calendar
24 year, and one calendar year only.

25 JUDGE HALLIGAN: And is there anything in the



1 legislative history which confirms that?

2 MR. GREENE: There is no legislative history one
3 way or the other.

4 JUDGE HALLIGAN: Right. Yeah.

5 JUDGE RIVERA: What if it also knows, as - - - as
6 she has argued, that there are these other provisions that
7 do allow for rate changes during other times of the
8 calendar year, why wouldn't the legislature think I can
9 change it from now forward?

10 MR. GREENE: They use different language. And
11 that was in this budget bill that I was addressing. The
12 five percent reduction - - -

13 JUDGE RIVERA: The one you're not challenging?

14 MR. GREENE: Pardon me?

15 JUDGE RIVERA: The one you're not challenging?

16 MR. GREENE: Correct. We're not challenging
17 that. And that began commencing April 1. Same bill, two
18 different phrases; "commencing" as opposed to "for rate
19 periods on and after". If they meant commencing for
20 capital, they would have said commencing, period.

21 JUDGE CANNATARO: So if they had simply replaced
22 commence - - - "on or after" with "commencing", that would
23 have signaled a - - - an unambiguous intent to stop the
24 reimbursements effective April 1st?

25 MR. GREENE: The clear expression. If I may - -



1 -

2 JUDGE GARCIA: Isn't that the requirement? I
3 mean, it's a retroactivity analysis. So the presumption is
4 it's not. So it seems to me you don't have to prove that
5 they - - - you know, they intended it to be prospective
6 only. You just have to show they didn't clearly indicate
7 it was retroactive.

8 MR. GREENE: That's exactly it. The presumption
9 that they change - - - that they could change those rights
10 midstream, is that they could not. They could not do that
11 retroactively, and they need to show the clear expression.

12 JUDGE HALLIGAN: But doesn't that - - - let's set
13 to the side, if we can, the - - - the question of April 1st
14 and 2nd, okay. Other than that, doesn't the question of
15 whether it's retroactive - - - as I think the Chief Judge's
16 question previously indicated - - - turn on whether or not
17 there is no authority to vary a rate period? I mean,
18 otherwise, how is it retroactive in any sense?

19 MR. GREENE: That's 2807(7). And that's kind of
20 the lower case retroactivity here. That's the
21 administrative action. The as-applied action that ended up
22 being retroactive.

23 JUDGE HALLIGAN: You mean the - - - the - - - the
24 letter on the 4th?

25 MR. GREENE: Correct.



1 JUDGE HALLIGAN: But the - - - the letter on the
2 4th - - -

3 MR. GREENE: The - - - the letter in August.

4 JUDGE HALLIGAN: I'm sorry. In August, yes. The
5 letter in August - - - I - - - I mean your - - - your
6 argument is that that has impermissible retroactive
7 activity, separate and apart from whatever the legislature
8 set forth in the statute?

9 MR. GREENE: This court is bound to read those
10 two statutes together, 2808 - - -

11 JUDGE HALLIGAN: What - - - what - - - the - - -
12 the "Dear Administrator" letter is not a statute. That's
13 what I'm referring to.

14 MR. GREENE: I'm referring to the intent of the
15 legislature as expressed in 2808(20)(d). And we need to
16 read (20)(d) together with 2807(7) - - - (20)(d) says take
17 the factor away with the next rate period. 2807(7) says
18 give sixty-days' notice. Those are entirely congruent.
19 Entirely congruent. Telling the - - - the commissioner go
20 give notice, do all of that work, give your notice, and
21 then start it with the next rate period. We believe the
22 letter was improper because it did not give that notice
23 under 2807(7), period.

24 JUDGE CANNATARO: So - - - but you would agree,
25 would - - - would you not, that if the legislature had

1 intended to change the rates effective April 1st of that
2 year, 2807 wouldn't have been an impediment to the
3 legislature doing that?

4 MR. GREENE: Correct. It would - - - it would
5 have had to create an - - - an exception. It would have
6 had to say, this is - - - that 2807 does not apply - - -
7 2807(7) does not apply.

8 JUDGE CANNATARO: And the "notwithstanding"
9 language of the - - - of the enactment doesn't take care of
10 that problem?

11 MR. GREENE: It does not. It says,
12 "notwithstanding any contrary provision of law", and it was
13 adopted in 2011. I question whether, as a matter of
14 English grammar, the notwithstanding applies to the
15 subordinate clause that's about thirty-five words away.
16 But in 2001 they adopted that notwithstanding clause, and
17 the laws in 2001 said, "This Act shall not be construed to
18 alter, change, affect, impair, or defeat any rights,
19 obligations, duties, or interests accrued, incurred, or
20 conferred prior to the effective date of the statute." So
21 by definition, that notwithstanding clause is not
22 retroactive. If I may brief you on my cross-appeal on the
23 two extra - - -

24 JUDGE RIVERA: Before you go to that - - - I'm
25 sorry. I'm going to have you step back, because I'm - - -

1 I'm - - - I'm having difficulty understanding your argument
2 about the use of the word "commencing". If - - - if we
3 swap "on or after" for "commencing", why do you have a
4 date? And why wouldn't the date be what you say is the
5 understood commencement date of rate periods historically?

6 MR. GREENE: I think you need a - - - a date in
7 both situations to be commencing April 1.

8 JUDGE RIVERA: Yeah. But why is the date April
9 then? Why isn't it the date that you say everyone
10 understands that's when the rate period commences?

11 MR. GREENE: As we show - - - for the "on and
12 after" language?

13 JUDGE RIVERA: Yes.

14 MR. GREENE: As we - - -

15 JUDGE RIVERA: I thought that's what you said?

16 MR. GREENE: As we showed in our papers - - -

17 JUDGE RIVERA: That's the difference. One
18 section had - - - the five percent - - -

19 MR. GREENE: Correct.

20 JUDGE RIVERA: - - - had commencing and this has
21 something else. So they must have meant something else
22 here?

23 MR. GREENE: Yes.

24 JUDGE RIVERA: Yes.

25 MR. GREENE: As we showed in our papers in



1 relation to the - - - the capital rate, sometimes - - -
2 very rarely - - - sometimes a capital rate can begin mid-
3 year. If you go out and get a new mortgage, you have a
4 capital rate beginning with that mortgage. So the
5 legislature, we need to assume they knew that this was part
6 of the program, part of the plan. They said, okay, well,
7 if you have any new rate - - - any new rate periods
8 starting after April 1, that's where you start any new rate
9 periods.

10 JUDGE RIVERA: But I'm saying, why would you pick
11 - - - My point is why are you picking - - - for this
12 provision we're talking about. The one you are
13 challenging. Why would you pick April if you know that
14 it's - - - the - - - there rate period itself - - -

15 MR. GREENE: They were trying to - - -

16 JUDGE RIVERA: - - - is months away?

17 MR. GREENE: - - - they were trying to capture
18 every single rate period in between. There are rate
19 periods with nursing homes between - - - in 2020, between
20 April and January the next year, just not for any of the
21 plaintiffs, period. And so the legislature was clearly
22 saying, if there's a new rate period - - -

23 JUDGE RIVERA: Why - - - why are they not for the
24 plaintiffs? I'm sorry that I did not understand.

25 MR. GREENE: Oh, it's only when you go out and

1 get new financing or have - - -

2 JUDGE RIVERA: I see.

3 MR. GREENE: - - - build a new building, for
4 example - - -

5 JUDGE RIVERA: I see.

6 MR. GREENE: - - - very rare circumstances. With
7 600 nursing homes, there's always a rate period that falls
8 mid-year. The next year, by the way, it goes back on an
9 annual basis. So it's not true that the rate year has been
10 changed to a fiscal year.

11 JUDGE RIVERA: I understand that.

12 MR. GREENE: Yeah. But they set out, "on and
13 after April 1", to capture any new rate period after that
14 date.

15 JUDGE SINGAS: But they didn't say any new rate
16 periods. They said any period.

17 MR. GREENE: But I think that's the only way one
18 could - - - pardon me. That's the only way one can read
19 "for rate periods on and after", because rate periods
20 always begin anew. It's a rate period set for a year, and
21 the next rate period is a new rate period.

22 I see my time is up.

23 CHIEF JUDGE WILSON: Thank you.

24 JUDGE RIVERA: Okay. Just to finish this off.

25 What's your response to his argument about the use of the

1 word "commencement" or "commencing" in a different
2 provision, and how it perhaps suggests what the legislature
3 intended with this provision?

4 MS. NEPVEU: Your Honor, the legislature uses
5 five different ways in 2808 to say that a rate change is
6 going to start on a particular date and go forward after
7 that. So there's no - - - there's no code, there's no
8 significance; it's just different ways of getting across
9 the same concept. I'm happy to lift - - - list those if
10 the court would like, but they all mean the same thing.
11 And you can't make any meaning out of "on April 1st" if it
12 doesn't - - - the removal doesn't happen as of April 1st
13 when it's eventually calculated.

14 CHIEF JUDGE WILSON: I guess the question is why
15 add the word rate period there?

16 MS. NEPVEU: Again, it's - - - I mean, a rate
17 period is simply - - - it's the period for which a
18 particular rate is paid. The - - - the legislature - - -

19 CHIEF JUDGE WILSON: You're giving those words no
20 meaning. I guess, if you just struck them would mean the
21 same thing?

22 MS. NEPVEU: I mean, it's the same way as - - -
23 as saying commencing on date for rates of payment. It's
24 the same as saying effective date and thereafter. They're
25 just different ways of referring - - - a different drafting

1 approach - - - approach to referring to the same period.
2 And it can't be that a rate period on April 1st means that
3 it really somehow only applies to January of 2021,
4 especially under the circumstances.

5 JUDGE CANNATARO: But what it could mean is that
6 the rate period that had been established on November 1st,
7 2019, is in place and it's - - - and now April 1st is
8 certainly after that.

9 MS. NEPVEU: On April 1st, you're within a
10 previously existing rate period, but you're still in a rate
11 period. And in order to give effect to the removal that
12 there shall be no payment factor on April 1st, then the
13 legislature has created a new rate period.

14 CHIEF JUDGE WILSON: So let me ask you this. If
15 I - - -

16 MS. NEPVEU: Which the legislature does - - -

17 CHIEF JUDGE WILSON: - - - if on May 1st, a
18 nursing home goes out and does the sort of thing that
19 counsel described, that it gets large new refinancing for
20 its home, when would that new rate period start?

21 MS. NEPVEU: If it starts after April 1st, it's
22 still on and after, so the removal would still apply there.
23 I don't - - -

24 CHIEF JUDGE WILSON: No. I'm - - - I'm - - -

25 MS. NEPVEU: I'm sorry. I don't think I



1 understood your question properly.

2 CHIEF JUDGE WILSON: Yeah. Sure. If I
3 understood Counsel correctly, he said that although rate
4 periods are annual, and they sort of are for everybody,
5 there are certain events that can happen in the middle of a
6 year that cause that particular nursing home to have a new
7 rate period for the stub end of the year. Is that - - -
8 comport with your understanding?

9 MS. NEPVEU: Yes, Your Honor.

10 CHIEF JUDGE WILSON: Okay. And one of those
11 things, just as an example, might be you went out and got a
12 complete new refinancing.

13 MS. NEPVEU: Sure.

14 CHIEF JUDGE WILSON: And so then my question is,
15 suppose that happened May 1st, would that new period start
16 May 1st or would it start sixty days after May? When would
17 that start?

18 MS. NEPVEU: It's my understanding that it would
19 - - - and - - - you know, I'm happy to check on this, Your
20 Honor. But suppose it starts May 1st, even if the - - -

21 CHIEF JUDGE WILSON: Well, I don't want to
22 suppose. I'm - - - I'm looking for a factual answer.

23 MS. NEPVEU: Okay.

24 CHIEF JUDGE WILSON: If you don't know, it's
25 okay.

1 MS. NEPVEU: Yeah. I'm not sure.

2 CHIEF JUDGE WILSON: Okay.

3 MS. NEPVEU: But if it starts May 1st, even if
4 the - - - even if the department has to calculate it later
5 - - - doesn't calculate it until June or whatever, it's
6 still effective as of May 1st. And that is a change that's
7 reaching back - - -

8 CHIEF JUDGE WILSON: So that the nursing home
9 would get the benefit of that, presumably, if the - - - if
10 that refinancing caused them to get a greater
11 reimbursement?

12 MS. NEPVEU: Yes.

13 JUDGE HALLIGAN: And is that - - -

14 MS. NEPVEU: And it's the same - - - yes, Your
15 Honor.

16 JUDGE HALLIGAN: - - - is that retroactive or is
17 that something that is in effect but not yet implemented?

18 MS. NEPVEU: It's - - -

19 JUDGE HALLIGAN: In other words - - -

20 MS. NEPVEU: Yes. I understand what you're - - -
21 you're - - - you're asking, Your Honor. They tend to use
22 it the same - - - the terms interchangeably, which I
23 understand - - -

24 JUDGE HALLIGAN: The "they" being?

25 MS. NEPVEU: The Department.

1 JUDGE HALLIGAN: Um-hum.

2 MS. NEPVEU: Which I understand is confusing when
3 we're talking about statutory retroactivity as well. But
4 this idea of nonstatutory retroactivity is basically
5 without the prospective notice in 2807(7), which, as the
6 court has mentioned - - - you know, this change was made
7 notwithstanding any contrary provision of law, and that
8 includes the sixty-day advance notice.

9 JUDGE GARCIA: Counsel, we've said repeatedly
10 that the best way to do this is to really make your
11 intention clear. This was a change that affected a rate
12 that had been set for all of 2020, and it had pretty big
13 financial impact. There's agreement, it seems, that the
14 state could do this. Legislature could do this. Why not
15 make it clear? Why are we here debating on whether the
16 notwithstanding clause, with an April 1st date with a - - -
17 with a time period that could run a full year or not run a
18 full year? Wouldn't it be easier and wouldn't it be a
19 better message to say, if you want to do that, do it. But
20 do it in a way so we don't have to do this again?

21 MS. NEPVEU: Well, I certainly would hope that -
22 - - you know, the legislature is taking note of this. But
23 as it is - - -

24 JUDGE GARCIA: In the other cases that we've had,
25 some fairly recently, where we've made this same point.

1 MS. NEPVEU: But as it is, it doesn't - - -
2 there's nothing - - - the legislature directed, as it does
3 often in the budget, that this change shall be deemed to
4 have been in force and - - - full force and effect on and
5 after April 1st. What could possibly that provision mean,
6 if not - - -

7 JUDGE GARCIA: What if it means a partial new
8 payment that we've been talking about? A reset on a rate
9 that - - - a reset that starts a new rate period running on
10 May 1st? It could mean that.

11 MS. NEPVEU: It - - - what plaintiffs are
12 principally arguing is, oh, it means that they need to
13 start working on the rates. It's not as though the
14 department's going to time travel back to April 1st and
15 start working on the rates before the act is even passed.
16 Remove, "There shall be no payment" - - - "there shall be
17 no payment factor on and after April 1st," that shall be
18 deemed to have been in effect. Those are pretty clear.
19 And that it's more than sufficiently clear that the
20 Appellate Division erred in finding that it wasn't clear
21 enough for these purposes, particularly when, as stated
22 here, it's fully within the power of the legislature.

23 JUDGE GARCIA: The Supreme Court - - - what did -
24 - - what did the Supreme Court rule here? I'm sorry. I
25 really can't remember for a moment. Did they rule it was

1 retroactive or not effect? Did they agree with the
2 Appellate Division? Did the Appellate Division agree with
3 the Supreme Court? I'm sorry.

4 MS. NEPVEU: Yes. The Appellate Division
5 affirmed.

6 JUDGE GARCIA: So six judges have found it's not
7 that clear so far, right?

8 MS. NEPVEU: I - - - respectfully, Your Honor,
9 sometimes six judges are wrong. Not these judges, of
10 course. Thank you, Your Honors.

11 JUDGE GARCIA: We're seven and never wrong.
12 Thank you.

13 MR. GREENE: I'd like to move on to our cross-
14 appeal, and that concerns sufficiency of the rate and equal
15 protection. It is not the case that the legislature can
16 create a rate that says there'll be no payment for the
17 nursing home care that we're providing through private
18 providers such as appellants. Pardon me. Such as
19 plaintiffs. In addition, there are limits to how low they
20 can go in relation to reimbursement. And that limit is set
21 in Public Health Law 2807(3). 2807(3) says that
22 reimbursement shall be reasonable and adequate to meet the
23 costs which must be incurred by economically and
24 efficiently operated facilities. That is an inherently
25 factual question. The word reasonable is in there. The

1 word adequate is in there. There was zero proof on summary
2 judgment from the other side that the resulting rate would
3 be reasonable and adequate, period. So this was a summary
4 judgment motion. They did not shift their burden. We
5 showed quite clearly how removal of residual equity would
6 prevent our facilities and prevent these operators for
7 paying for things like a new roof, social distancing.

8 JUDGE RIVERA: But - - - but isn't that an
9 individual - - - isn't she right about that? That that's
10 each individual facility would, of course, have the
11 opportunity to present that - - - your evidence as to why
12 the rate is not reasonable in your case, as opposed to what
13 you're doing here. And you can correct me if I've
14 misunderstood you. What you're doing here is across the
15 board saying, obviously, if you've taken out this factor,
16 you started out in your argument saying this is, if not the
17 most crucial - - - an exceptionally crucial factor because
18 of the capital, the money involved. And if that's removed,
19 then it must be unreasonable? That - - - I take that to be
20 your argument. If it's removed, it is automatically
21 unreasonable?

22 MR. GREENE: No. We're arguing each
23 individually. That by failing to pay us capital, our rate
24 is insufficient. And we put in individualized proof for a
25 number of homes - - - several dozen homes. And again, the

1 burden was not ours. The burden was on defendants here to
2 show that our rates were, in the first instance, adequate
3 to move the burden to us. Keep in mind, the - - - the
4 first cause of action is an Article 78 cause of action.
5 There was no record on return here. They could have easily
6 put in all of the rate sheets for a hundred homes and said,
7 look, here's the rate and we think that rate is adequate.
8 They did not. Their summary judgment motion is five pages
9 of text, if you look at the motion itself; nineteen if you
10 look at the other documents that they put together. In
11 those nineteen pages, there is nothing said about it's
12 reasonable and adequate. The Appellate Division said,
13 well, because they had no discretion - - - because the
14 legislature mandated it, and because the - - - the goal was
15 to save money, then they showed it's reasonable and
16 adequate. Non sequitur. Non-discretion has nothing to do
17 with the factual question of what's reasonable and
18 adequate. Cost savings has nothing to do, whether it's
19 factually reasonable and adequate. Equal protection. Bay
20 Park does not say that in all cases and for all times, for-
21 profits and not-for-profits are never similarly situated.
22 That's what they're arguing here. Bay Park does not say
23 that.

24 JUDGE RIVERA: But did - - - did you sue the
25 right entity or individual?

1 MR. GREENE: Yes. Yes, we did. The - - - the -
2 - - both the Director of Budget and the Department of
3 Health are responsible for setting rates, period. And
4 they're responsible. Keep in mind - - -

5 JUDGE RIVERA: That's, again, the statutory
6 choice of the legislature?

7 MR. GREENE: No. They - - - they are statutorily
8 mandated by the legislature to make sure that our rates are
9 reasonable and adequate. And capital reimbursement is a
10 pure function of regulation. This goes back to the very -
11 - -

12 JUDGE RIVERA: Well, how - - - how - - -

13 MR. GREENE: - - - beginning.

14 JUDGE RIVERA: - - - aren't they - - - how isn't
15 she correct, though, when she says yes, but if they did
16 exactly what you're requesting that circumvents the
17 amendment?

18 MR. GREENE: It doesn't. Because - - -

19 JUDGE RIVERA: The point of the amendment was to
20 save money and your argument is no, the rates are
21 unreasonable across the board and therefore the money's got
22 to be put back in?

23 MR. GREENE: We're not saying that no money could
24 be saved. We're saying that there needs to be a balancing.
25 Because the - - - the legislature's mandate in 2807(3) is

1 sacrosanct. This court has repeatedly said that that is an
2 important aspect of the prospective reimbursement regime.
3 And keep in mind, we need to understand how capital works.
4 Just briefly, I see my time is up. The first substantive
5 section of Public Health Law 2808, which is 2-A(a), says,
6 "There shall be capital".

7 JUDGE RIVERA: Didn't you have to - - -

8 MR. GREENE: It says, commissioner, go and create
9 regulations.

10 JUDGE RIVERA: - - - did you have to start an
11 individual process for your - - - for each individual
12 entity, didn't you have to start an individual process,
13 where you would have an administrative determination of
14 that individual entity's rates?

15 MR. GREENE: And - - -

16 JUDGE RIVERA: But then, if you lost, you could
17 appeal?

18 MR. GREENE: And that's what we challenged here,
19 both individually Article 78 and declaratory judgment. We
20 sought both forms of relief, saying that our individual
21 rates after removal were inadequate. And there was zero
22 proof, zero proof on summary judgment put in by defendants
23 in this regard. They just said we had to do it. This was
24 to save money. So it's okay. That's not what 2807(3)
25 says.

1 JUDGE RIVERA: Because that's my confusion. I
2 just may miss - - - miss - - - may be misunderstanding the
3 process. It would strike me you would need an
4 administrative process where all of that is fleshed out.
5 And then again, if - - - if they don't find in your favor,
6 you can appeal that?

7 MR. GREENE: Oh, it's a - - -

8 JUDGE RIVERA: As opposed to just the amendment?

9 MR. GREENE: - - - that - - - that's a very
10 important point, and one brought up by the amicus here.
11 That 2807(3) prescribes eight specific factual
12 determinations to be made by the department. The
13 department has now said we don't have to write any of that
14 down. We don't have to do any of that. If we think it's
15 reasonable, that's enough. But no, for each one of our
16 homes, 2807(3) says for every single rate schedule
17 submitted to the Division of Budget, you have to go through
18 these eight specific factual determinations and determine
19 that the resulting rates are reasonable.

20 JUDGE RIVERA: But they were actually saying the
21 legislature thinks it's reasonable? I thought that's what
22 they were saying, I may have misunderstood.

23 MR. GREENE: But the legislature did not repeal
24 2807(3). That - - - that is still there. It's been there
25 for over fifty years.

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JUDGE RIVERA: No. Agreed.

MR. GREENE: I see my time is up.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Aaron Manor Rehabilitation v. Zucker, No. 31 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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