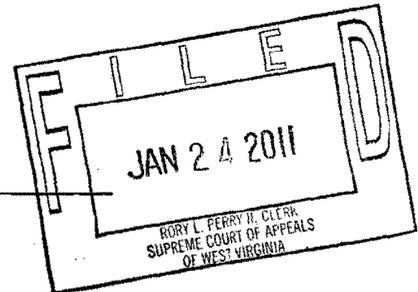

**BEFORE THE
WEST VIRGINIA SUPREME COURT OF APPEALS**

Circuit Court
Misc. Action No. 09-C-89

Appeal No. _____



In the Matter of:

V. P. H., a disabled adult, by P. D.,
her Mother and Guardian and Conservator,
as Petitioner.

PETITION FOR APPEAL

ON APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

In the Matter of:

V. P. H., a disabled adult, by P. D.,
her Mother and Guardian, and Conservator,
Petitioner,

vs.

Circuit Court
Misc. Action No. 09-C-89

Appeal No. _____

West Virginia Department of
Health and Human Resources,
Respondent.

PETITION FOR APPEAL

**STATEMENT OF PROCEEDING
AND RULING IN CIRCUIT COURT**

The petitioner seeks to appeal an order granting summary judgment to the West Virginia Department of Health and Human Resources on its demand for Medicaid subrogation in a catastrophic brain injury case.

The petitioner filed a settlement action in Monroe County Circuit Court for approval of settlements for her daughter's damages. She informed the Department of the proposed settlements and it interpleaded the lien.

Petitioner is the court-appointed guardian and conservator of her adult daughter, who has 2 children of her own and who suffered severe brain injuries in a motor vehicle crash in Monroe County in May 2009. She had surgeries and, for the 6 months from the motor vehicle crash until the time of hearing, she was not responsive to commands or otherwise able to communicate.

She here seeks an appeal to have the Department's lien set aside in its entirety, or at least to have an allocation of damages made between damages recovered for medical damages versus non medical damages, by negotiation with the Department over that

allocation or by judicial determination by the circuit court after evidentiary proceedings to allocate such damages.

The United States Supreme Court, by unanimous decision in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U. S. 268 (2006), ruled that a state's Medicaid subrogation lien in catastrophic cases can reach only the portion of a settlement which represents payment for medical expenses. Recoveries for other damages, for pain, suffering, lost wages, and permanent physical and mental impairment, are not subject to the Medicaid lien. Because the Department's lien statute requires the lien to reach all damages without allocation for non medical expense damages, the lien is invalid and should be set aside.

The circuit court upheld the Department's lien under *West Virginia Code* § 9-5-11. The court denied the cross motion of petitioner to set aside the lien as contrary to the rule of *Ahlborn*. Alternatively, petitioner moved for the court to narrowly construe the lien statute to mandate the Department to negotiate over the lien in light of a fair allocation of settlement proceeds for medical expenses versus other damages. Specifically, the petitioner moved for negotiations between the parties for such an allocation of damages, and for formal mediation on that point, if needed. If the parties could not agree on an allocation, the petitioner moved for evidentiary proceedings, all of which procedures are set out in *Ahlborn* as appropriate. That motion was denied.

The limits of 3 liability insurance policies were paid at the settlement hearing, and the Department interpleaded its subrogation lien in an amount it calculated automatically by reducing the amount of its Medicaid payments to account for usual legal fees and expenses and then applying an internal, incentive formula to further reduce the lien amount on account of a fee reduction which set the fee below the usual one third of recovery amount.

No allocation of damages to medical expenses was ever made by the Department, and none was required by the circuit court because *West Virginia Code* § 9-5-11 expressly forbids such a federally mandated allocation.

In an order entered on September 24, 2009, the Honorable Circuit Judge Robert A. Irons ruled on cross motions for summary judgment finding that the Department's lien could be enforced as provided for in *West Virginia Code* § 9-5-11. His order cited the application of 2 reductions as sufficient negotiation under *Ahlborn* for the final lien amount owed.

The order reviewed 3 prior decisions of this Court interpreting the lien statute, including, *Kittle v Icard*, 185 W. Va. 126, 405 S. E.2d 456 (1991); *Grayam v. Department of Health & Human Resources*, 201 W. Va. 444, 498 S.E.2d 12 (1997); *Anderson v. Wood*, 514 S. E.2d 408 (W.Va. 1999), and the circuit court held that the case was distinguishable from *Ahlborn*, because the Department negotiated here and reduced its lien twice, assuming that those automatic reductions were true negotiations in fact.

Further, the court, without evidentiary proceedings, found that the lien amount of \$76,741.00 was not excessive in light of the catastrophic injuries in the case, stating that the amount of the lien "does not exceed the amount of medical expenses for the injury and/or disability of Ms. H." (Order entered September 24, 2010 at page 7) No allocation of damages was made.

These findings of fact for a catastrophic brain injury case are not supported in the record. The reductions for fees and expenses are not allocations of damages. They are standard reductions the Department uses without regard to allocation of recovered damages.

This ruling is erroneous because *West Virginia Code* § 9-5-11 is contrary to federal law, because the lien amount under federal law must be determined by allocation of damages and not by standard reductions for costs of recovery.

This Court on appeal is confronted with plain statutory language it has interpreted before in a trilogy of Medicaid cases: *Kittle, Grayam, and Anderson*. This Court cannot rewrite the statute to make it comply with federal law as announced after the Court's controlling interpretation in *Grayam*. That is a legislative function.

When the lien is set aside, the Court's longstanding equitable rules should apply, as discussed in *Kittle and Grayam*.

Absent an overriding statutory lien to the contrary, the Department's Medicaid lien cannot reach a recovery which does not make the injured person whole for all damages suffered. This is the Made Whole Rule applied in *Kittle* but ruled inapplicable in *Grayam* solely because of the plain language of *West Virginia Code* § 9-5-11.

The petitioner here seeks to appeal this order and to reverse it with an order granting summary judgment to the petitioner, setting the lien aside and applying the Made Whole Rule to avoid the lien on the limited recoveries paid for the catastrophic injuries of petitioner's daughter.

In the alternative, if this Court should decide the lien of this statute is valid in accordance with its terms and can be narrowly enforced only as to recoveries allocated for the Department's payments for medical expenses, a remand is needed for evidentiary proceedings if no agreement of the parties can be reached over a fair allocation of damages in the case.

The petitioner here prays that her counsel be permitted to present the petition at oral argument, and for her petition for appeal be granted.

STATEMENT OF FACTS OF THE CASE

On May 26, 2009, petitioner's daughter, V. P. H., suffered horrific, catastrophic brain injuries in a motor vehicle crash. She had surgeries and, tragically, from the date of the crash until the hearing, on November 16, 2009, some 6 months later, she was non responsive to commands and questions and unable to communicate. She could not attend

the hearing. (Transcript of hearing on November 16, 2009 at page 4) There is no dispute that her damages are catastrophic and her general damages greatly exceed the amounts of her monetary recoveries.

On October 30, 2009, the petitioner agreed to settle her daughter's claims against the responsible driver for payment of the limit of primary liability coverage provided by State Farm Insurance Companies. There was no underinsurance coverage written on 2 household policies at issue, but on demand by counsel for the petitioner, Nationwide offered underinsurance coverages in the amounts of its primary liability limits under both policies, in the sum of \$100,000.00 each. The Nationwide offers were secured and agreed to just before hearing. Notice was provided to the Department of all settlements, and counsel for the Department formally appeared at hearing to assert its statutory lien against settlement proceeds.

In accordance with the plain language of the statute, the Department set its lien demand amount as the amount of the medical bill payments the Department had made as of the time the parties agreed to settle on October 30, 2009. The subrogation lien was for past payments and any future payments would create a lien on any future settlements. This is standard procedure for the calculation of subrogation liens and complies with the language in the Department's statute creating a lien for "the full amount of benefits paid on behalf of the recipient." *West Virginia Code* § 9-5-11 (a). It also follows language in the *Ahlborn* decision. See, *State Dept. of Health and Welf. v. Hudelson*, 196 P.3d 905, 912-913 (Idaho 2008).

At hearing, State Farm tendered its liability limit of \$100,000.00 for the driver and owner of the vehicle in which petitioner's daughter was a passenger. Nationwide tendered the sum of \$200,000.00, representing 2 underinsurance coverages which did not appear on either of its 2 household policies at issue. Medical payments insurance coverages in the

sums of \$5,000.00, \$500.00 and \$500.00 had already been paid by the insurance companies.

The Court approved the tendered payments and releases upon answer of the Court's appointed guardian ad litem, approving the proposed settlements as being in the best interest of petitioner's daughter. On motion of the Department, without objection, the full amount of the Department's lien demand of \$76,741.00 was deposited to the registry of the court held by the clerk of the court. The Department sought its usual full reimbursement after reduction for attorney fees and expenses, using a longstanding internal incentive formula applied to catastrophic cases.

At hearing, on inquiry by the court, counsel for the petitioner stated that petitioner had offered \$29,000.00 to settle the lien claim and asked for informal mediation after the hearing, between the parties. That was not successful and motions for summary judgment were filed.

At hearing and steadfastly thereafter, relying on its lien statute, the Department contended that it had a duty to seek a full and first dollar reimbursement on *any* settlement proceeds realized, whether for Medicaid payments or general damages. The Department had paid \$146,556.49 in medical benefits and reduced its lien amount for usual costs of recovery and then by an internal incentive formula which is applied in catastrophic cases if the attorney fees are reduced below 33.33%. Here they were 28%.

The Department made no separate calculation or accommodation of its lien amount based on the nature of the settlement recoveries or the catastrophic damages suffered by petitioner's daughter. It declined to negotiate outside its reductions for costs of recovery.

By order entered September 24, 2010, the circuit court upheld the Department's lien under *West Virginia Code §9-5-11*, and found that the Department in fact negotiated its lien by the 2 reductions it made for costs of recovery. The amount of the lien was found not to

be excessive and the Court denied the summary judgment motion of petitioner to set aside the lien as contrary to the rule of *Ahlborn*.

The petitioner here seeks to appeal the court's order granting the Department summary judgment.

ASSIGNMENT OF ERROR AND CIRCUIT COURT RULING

Assignment of Error:

In a catastrophic injury case, the Circuit Court of Monroe County erred in granting summary judgment to the West Virginia Department of Health and Human Services, upholding its Medicaid lien created by *West Virginia Code* § 9-5-11, on findings that the Medicaid lien, which attaches to recoveries for non medical damages, does not violate the federal Medicaid anti-lien statute as reviewed in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U. S. 268 (2006), and that the Department's lien is not excessive, and that the Department fairly negotiated over its lien by making reductions relating to the costs of recovery for compensation, all without full evidentiary proceedings.

Circuit Court Ruling:

In an order entered on September 24, 2009, the Honorable Circuit Judge Robert A. Irons ruled on cross motions for summary judgment finding that the Department's lien could be enforced as provided for in *West Virginia Code* § 9-5-11, with no allocation of damages for medical expenses versus other damages. He found the lien amount was not excessive and cited the application of 2 reductions as sufficient negotiation over the final lien amount owed.

POINTS AND AUTHORITIES

VALIDITY OF MEDICAID LIEN

Statutes

42 U.S.C. § 1396p

West Virginia Code § 9-5-11, which provides in pertinent part:

(a)...When an action or claim is brought by a medical assistance recipient or by someone on his or her behalf against a third party who may be liable for the injury, disease, disability or death of a medical assistance recipient, any settlement, judgment or award obtained is subject to the claim of the Department of Health and Human Resources for reimbursement of an amount sufficient to reimburse the department the full amount of benefits paid on behalf of the recipient under the medical assistance program for the injury, disease, disability or death of the medical assistance recipient....The right of subrogation created in this section includes all portions of the cause of action, by either settlement, compromise, judgment or award, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to the subrogation.....

(b) The trial judge shall, upon the entry of judgment on the verdict, direct that an amount equal to the amount of medical assistance given be withheld and paid over to the Department of Health and Human Resources....less the department's share of attorney's fees and costs expended in the matter. In the event of less than full recovery the recipient and the department shall agree as to the amount to be paid to the department for its claim....

(Emphasis added.)

Cases

Federal:

Arkansas Department of Health and Human Services v. Ahlborn,
547 U. S. 268 (2006)

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194 W.Va. 52, 459 S.E.2d 329 (1997)

Rules

Rule 56 *West Virginia Rules of Civil Procedure*

Summary judgment is controlled by Rule 56 of the *West Virginia Rules of Civil Procedure*. Rule 56 provides that summary judgment is appropriate when 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.”

The standard for granting a motion for summary judgment requires that “it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law,” *Williams v. Precision Coal , Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329 (1997), quoting Syl. Pt. 1, *Andrik v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1997).

The standard of review for this Court is *de novo*, when reviewing orders on motions for summary judgment. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Here, the circuit court decided the Department's lien was not excessive without an adequate factual basis, despite requests by the petitioner for evidentiary proceedings. The court assumed the basis of the Department's lien reductions were negotiations in fact. The court never made the necessary evidentiary findings to support the Department's lien as attaching only to recoveries for medical expenses, not other damages.

On the other hand, the motion of the petitioner for summary judgment to set aside the lien is based only in law, and it does not require a fact determination, if the statute at issue is found to be contrary to federal law under any interpretation made of it.

DISCUSSION OF LAW AND ARGUMENT

A. The Lien Is Invalid under Federal Law

The threshold issue in this appeal is the validity of the West Virginia Medicaid lien created by *West Virginia Code* § 9-5-11.

The statute creates a lien for Medicaid payments which broadly attaches to all damages compensated by any settlement, not just recoveries for medical expenses. As such it violates federal Medicaid law, as reviewed in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U. S. 268 (2006). That unanimous Supreme Court decision held that such state liens are invalid if they attach to non medical damage recoveries. The federal Medicaid anti-lien statute allows a narrow exception for liens that are limited to recoveries of medical expenses.

The Department's lien statute provides in pertinent part:

(a)....When an action or claim is brought by a medical assistance recipient or by someone on his or her behalf against a third party who may be liable for the injury, disease, disability or death of a medical assistance recipient, any settlement, judgment or award obtained is subject to the claim of the Department of Health and Human Resources for reimbursement of an amount sufficient to reimburse the department the full amount of benefits paid on behalf of the recipient under the medical assistance program for the

injury, disease, disability or death of the medical assistance recipient....(Emphasis added.)

West Virginia Code § 9-5-11(a)

Next, the statute makes clear that the Department's lien attaches to any and all damages recovered regardless of type or classification, not just to those that might be allocated to medical expenses. No such allocation is permitted. Any kind of recovery is subject to the lien, as the Department contends, on a full and first reimbursement basis. *Grayam v. Department of Health and Human Resources*, 201 W. Va. 444, 498 S.E.2d 12 (1997).

The statute provides “The right of subrogation created in this section includes all portions of the cause of action, by either settlement, compromise, judgment or award, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to the subrogation.....” (Emphasis added.) *Id.*

The statute imposes on the court a duty to order that the full amount of medical assistance be paid to the Department, less costs of recovery, including attorney fees and costs, which in *Anderson v. Wood*, 514 S. E.2d 408 (W. Va. 1999), was determined to include legal expenses as well as court costs. The trial judge has no discretion to allocate damages for medical expenses or to pay damages which have been allocated to medical expenses as part of the proceedings. The statute provides:

(b) The trial judge shall, upon the entry of judgment on the verdict, direct that an amount equal to the amount of medical assistance given be withheld and paid over to the Department of Health and Human Resources....less the department's share of attorney's fees and costs expended in the matter.

West Virginia Code § 9-5-11(b)

Finally, the statute allows the Department to negotiate with the recipient if the lien cannot be paid in full out of settlement proceeds. It states: “In the event of less than full recovery the recipient and the department shall agree as to the amount to be paid to the department for its claim....” *Id.*

This plain language creates a full and first dollar reimbursement lien on all damages recovered. This lien is over broad and contrary to the strict anti-lien provisions of the federal Medicaid law.

In the landmark case of *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U. S. 268 (2006), the United States Supreme Court held such a lien is unenforceable and settlement recoveries must be apportioned for all the damages to be compensated. Justice Stevens wrote for a unanimous Court that the federal Medicaid anti-lien statute invalidated Medicaid liens which reach beyond damages for medical expenses. 42 U.S.C. § 1396p. It can reach recoveries for medical expenses only, “not lost wages, not pain and suffering, not an inheritance.” *Ahlborn* at page 281.

An allocation of damages is always necessary when the compensation realized is not sufficient to pay for all of an injured person’s special and general damages. When the parties cannot agree on an allocation, a judicial determination of the apportionment is required. *Ahlborn*, 547 U. S. at page 288.

An Arkansas Medicaid lien, like the Department’s lien, required full and first dollar reimbursement to be paid out of the whole of every settlement recovery to the extent of Medicaid benefits paid, regardless of what damages were being compensated.

In a multi district mass tort case against a pharmaceutical company, the federal district court discussed the *Ahlborn* decision as it related to payments to be made in states across the country where state Medicaid liens applied to require reimbursement out of individual settlement proceeds. *In re Zyprexa Products Liability Litigation*, 451 F.Supp.2d 458, 469-70 (E. D. N. Y. 2006).

The *Zyprexa* court wrote that a number of states in 2006, including California, Texas, North Carolina, Alabama, Indiana, and New Mexico, generally allowed waivers or reductions of Medicaid liens for equitable consideration, where “a lien recovery would work a hardship or tend to defeat the purpose of the [Medicaid] program,” but the court stated

that a majority of states in 2006 had what it called “full reimbursement” statutes which required full and first dollar reimbursement of Medicaid payments out of any recovery received by a Medicaid recipient regardless of the classification of settlement proceeds. *Id.* at page 469. The court stated that after *Ahlborn* these “full reimbursement” statutes were not valid.

The *Zyprexa* court recognized that federal and state administrators supporting such a broad lien on all recoveries wanted to limit manipulation of allocations of damages by settling parties, but the court noted that this approach “deprives poor and injured individuals of needed compensation of their pain and suffering, lost wages, and other non-medical damages.” *Id.* at page 470. The court also stated that taking away all of a recipient’s incentive to bring third party claims would work to limit the recoveries of Medicaid payments made.

The *Zyprexa* court wrote that these policy arguments had been decided by the Supreme Court in *Ahlborn* just a few months before the district court’s opinion was issued.

In May 2006, the Supreme Court, in a unanimous decision, rejected the full reimbursement approach in the Medicaid program, holding that the federal Medicaid statute only permits a state to recover its Medicaid expenditures from the portion of a settlement attributable to medical costs. *Ahlborn*, 126 S.Ct. at 1767....[A]ny state statute providing for a greater assignment provisions would be inconsistent with the Medicaid “anti-lien” statute, 42 U.S.C § 1396p....According to the Court, while the assignment provisions create an exception to the anti-lien statute for recovery of payments that constitute reimbursement for medical costs paid by Medicaid, any recovery by the state of settlement funds intended to reimburse the Medicaid beneficiary for pain and suffering, lost wages, or other non-medical damages would constitute an impermissible lien on the beneficiary’s property. (Emphasis added.)

Zyprexa at page 470.

The West Virginia statute is one of these invalid “full reimbursement” statutes, stating that “no allocation or apportionment” of damages is allowed and its lien attaches to the whole settlement, from first dollar to last until the Department’s lien is satisfied in full, less costs of recovery. The Department adds an internal, incentive formula to the

calculation, as in this case, to reduce the lien when the costs are reduced below a usual one third fee.

The purpose of the Department's statute is to create an automatic and easily collected lien out of any and all settlement recoveries, even those which do not fully compensate an injured person or which are paid for damages other than Medicaid payments.

B. History of Lien Statute and Medicaid Trilogy of Cases: *Kittle, Grayam and Anderson*

The Department's Medicaid lien is a creature of statute. It was written before the federal anti-lien statute was determined to require an allocation of damages recovered.

This broad language has already been applied by this Court in the trilogy of Medicaid cases, *Kittle v Icard*, 185 W. Va. 126, 405 S. E.2d 456 (1991); *Grayam v. Department of Health & Human Resources*, 201 W. Va. 444, 498 S.E.2d 12 (1997); *Anderson v. Wood*, 514 S. E.2d 408 (W.Va. 1999), to give the Department a full and first dollar lien, less costs of recovery, on any type of damages recovered. The statute has been found to expressly bar any consideration of an allocation of recovered damages.

The Department's statute was amended on this point most recently in 1995. In 1997, this Court held in *Grayam*, with Justice Workman writing the opinion, that the Legislature intended to create a lien on all settlement proceeds "although it is unfortunate that there are inadequate insurance proceeds to fully compensate" an injured party for all losses suffered.

The Grayam Court decided that the plain language of the lien statute overrode the general "Made Whole" subrogation rule in equity, previously applied to the Department's lien in *Kittle*. The *Grayam* decision made it clear that the Department's lien was enforceable on any related settlement for any damages received. Of course, the *Grayam* Court did not have the benefit of a federal decision limiting Medicaid liens to damages

received for medical payments. The plain language of the statute barring allocation of damages was applied in *Grayam*, and equitable considerations were denied.

It should be noted that this same analysis for full and first dollar reimbursement was used by the Arkansas Supreme Court to support its statutory lien plan, and the *Ahlborn* Court set it aside. *Arkansas Dept. of Human Servs v. Ferrel*, 336 Ark. 297, 984 S. W.2d 807 (1999), as quoted in *Ahlborn* at page 279.

C. *Kittle Made Whole Rule Applies until Legislature Can Rewrite Statute*

This Court should not attempt to rewrite the statute. It is a complicated policy matter for the Legislature to decide. *Ahlborn* at page 287-88. No particular state lien plan was endorsed by the *Ahlborn* Court, but some plan is needed that provides for allocation of damages. See *Andrews ex rel. Andrews v. Haygood*, 362 N.C. 599, 669 S.E.2d 310 (2008). Other states have revised their statutes to comply with *Ahlborn*.

The Legislature amended the statute several times before *Grayam* was decided in 1997, to assure judicial interpretation would make the Department lien a full and first dollar lien which, by statute, would override the equitable principles applied to the Department's lien in *Kittle*. The Legislature amended the lien statute in 2010, without changing the provisions which are barred by *Ahlborn*. By direction of this Court, the Legislature should address the lien statute again in light of *Ahlborn*.

But the lien in this case on the settlement proceeds of the petitioner's daughter should be set aside in its entirety as a matter of law. The plain language of the statute requiring full and first dollar reimbursement on all damages makes it unenforceable. Also, on its face, the lien is excessive in light of the catastrophic injuries in this case given the inadequate recoveries received for such injuries.

To construe this language to allow a narrow negotiation on an allocation of damages is to rewrite the plain terms of the statute.

The *Ahlborn* parties, before appeal, negotiated the amount of the allocation for recovery of the Medicaid payments versus other damages. But here, the Department has declined to negotiate, insisting that it has a statutory right to full reimbursement of all of its payments even if the injured party's other damages are not paid. The statute allows the Department to negotiate if damages do not permit full payment of the lien, *West Virginia Code* § 9-5-11(b), but the statute forbids negotiations over an allocation of damages. The court below in applying the statute as written was forced to make no allocation of damages, nor could the court require the Department to negotiate over any allocation of damages. The statute says what it says, and either it is enforceable or not enforceable.

The Department's decision not to negotiate beyond the cost of recovery may in part rest on the happy circumstance of the petitioner's additional underinsurance recovery, when no such coverage was written in the household policies at issue. This allowed for an additional \$200,000.00 in compensation to be paid making the Medicaid lien less than the recovery amount. If those 2 extra coverage limits were not paid, as earlier thought, the Medicaid lien in this case would have swallowed up the net recovery of the petitioner for her daughter, or, under the clear terms of the statute, some negotiation might be permitted so long as no allocation of damages was considered.

Accordingly, this Court should rule as a matter of law that the Department's statute is not enforceable as written. It violates the federal Medicaid anti-lien statute. If the Department's statute is unenforceable, this would return the equitable "Made Whole" rule to catastrophic cases where damages greatly exceed recovery proceeds. *Kittle v Icard*, 185 W. Va. 126, 405 S. E.2d 456 (1991); *Grayam v. Department of Health & Human Resources*, 201 W. Va. 444, 498 S. E.2d 12 (1997). This is the equitable rule for other state liens on settlement proceeds. This equitable rule would lead the Court to grant the petitioner summary judgment setting aside the lien on her daughter's settlement proceeds.

Without a valid lien statute, the state's generally applicable equitable "Made Whole" rule in *Kittle* should be applied for catastrophic injury cases where a person is not fully compensated by the secured settlement recovery. That would follow logically from the reasoning of the *Grayam* Court, which upheld the lien solely on the basis of a then perceived valid lien statute. Absent such a statute, the *Kittle* analysis applies.

The *Grayam* Court gives good guidance here on application of the plain language of a statute. No interpretation or construction is needed for application of plain statutory language. Thus, this Court should not try to rewrite the statute, or develop a state plan to meet the requirements of *Ahlborn*. That is a purely legislative function. California and a number of other states have amended their lien statutes to accommodate the requirements in *Ahlborn*.

D. If Lien Is Valid,
Remand Is Needed for Evidentiary Proceeding

In the event that this Court were to determine that the statutory language can be read to limit the scope of the Department's lien, to a narrowly enforceable lien attaching only to medical expense damages, the Court should then remand this action for further proceedings, including negotiations by the parties for a lien amount based on allocation of damages. If no agreement can be reached, the circuit court should be ordered to schedule evidentiary proceedings and convene a hearing to allow the Court to determine a reasonable apportionment of settlement proceeds realized for medical expenses versus the recovery realized for other damages.

This is exactly the evidentiary procedure which this Court ordered in a private health insurance subrogation case, *Provident Life and Acc. Servs. v Bennett*, 483 S. E.2d 819, 825 (W. Va. 1997). With Justice Davis writing the opinion, the case was remanded to the trial court for evidentiary proceedings to determine the subrogation issue with an evidentiary record and hearing. That practice should be used for the Department's Medicaid lien in catastrophic cases.

CONCLUSION AND RELIEF PRAYED FOR

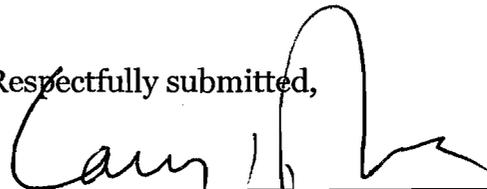
The Petitioner petitions the Court to grant an appeal of this important case involving the validity of the Department's Medicaid lien.

The lien statute at issue creates an invalid, over broad lien which cannot be enforced and the petitioner prays for this Court to set aside the Department's lien in its entirety under usual equitable principles, as set forth in the trilogy of Medicaid lien cases already decided by this Court in *Kittle, Grayam, and Anderson*. Only a valid lien statute can override those principles.

In the alternative, if the Court finds that it can apply the terms of the statute as written to have the lien reach only medical expense damages, petitioner prays that the Court will remand the action with an order for the parties to negotiate over an allocation of damages, with formal mediation, and, failing agreement, for the circuit court to conduct evidentiary proceedings to determine a fair allocation of recovered damages. See, *Provident Life and Acc. Servs. v Bennett*, 483 S. E.2d 819, 825 (W. Va. 1997).

The petitioner moves the Court to allow her counsel to present her petition for appeal at oral argument.

Respectfully submitted,



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Counsel for Petitioner

BEFORE THE SUPREME COURT OF WEST VIRGINIA

In the Matter of:

V. P. H., a disabled adult, by P. D.,
her Mother and Guardian, and Conservator,
Petitioner,

vs.

Circuit Court
Misc. Action No. 09-C-89

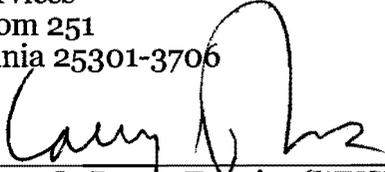
Appeal No. _____

West Virginia Department of
Health and Human Resources,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2011, 2 true and accurate copies of the foregoing **Petition for Appeal** were deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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