No. 101537 - *In Re: E.B., a minor*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Justice, concurring:

The majority opinion in this case is a thorough, well-reasoned, and comprehensive compendium of this Court's jurisprudence regarding DHHR's statutory right, afforded by W. Va. Code § 9-5-11 (2009) (Supp. 2011),[1] to recover monies it has paid for a Medicaid recipient's medical expenses. I write separately to reiterate my agreement with

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[1]The text of W. Va. Code § 9-5-11 (2009) (Supp. 2011) begins, in subsection (a), with

> [*s*]*ubmission of an application to the Department of Health and Human Resources for medical assistance is*, as a matter of law, *an assignment of the right* of the applicant or legal representative thereof *to recovery* from personal insurance or other sources, including, but not limited to, liable third parties, to the extent of *the cost of medical services paid for by the Medicaid program*.

(Emphasis added). From this language, it is apparent that the DHHR's recovery rights arise upon a potential Medicaid recipient's application for benefits. As such, the version of this statute that governs the claims in the case *sub judice* is the version that was in effect at the time that Holly G. applied for benefits on behalf of E.B. on February 5, 2007, which would be the 1995 version of this statute. *See* W. Va. Code § 9-5-11 (1995) (Repl. Vol. 2007). Nevertheless, the majority opinion in this case cites to the current version of this statute. *See* W. Va. Code § 9-5-11 (2009) (Supp. 2011). Because the changes between these two statutory versions are primarily stylistic and do not affect the substance of those provisions upon which the Court's decision of this case is based, my separate opinion also will refer to the 2009 version of W. Va. Code § 9-5-11 to maintain consistency with the majority's citations to this statute.

the majority's recognition that DHHR's recovery pursuant to W. Va. Code § 9-5-11 is limited to that portion of a Medicaid recipient's damages award that is allocated to, or specified as payment for, his/her past medical expenses only. Unquestionably, the seminal case on this point, *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006), remains silent as to whether a recovery of previously paid Medicaid benefits attaches only to the recipient's damages award for past medical expenses or whether reimbursement also may be sought from the recipient's future medical damages award, referring only to "medical expenses," generally, without distinction between past and future medical expenses. *See Ahlborn*, 547 U.S. at 291, 126 S. Ct. at 1766, 164 L. Ed. 2d 459 (citation omitted). Whether the Supreme Court intentionally or astutely failed to resolve this quandary remains to be seen, although the most logical explanation is that the Court simply did not need to reach this issue insofar as the parties therein had agreed that the Medicaid payor's recovery would be limited to that portion of the Medicaid recipient's settlement proceeds that "constituted reimbursement for medical payments made." *See* 547 U.S. at 274, 126 S. Ct. at 1758, 164 L. Ed. 2d 459 (citation omitted).

Nevertheless, this absence of a definitive ruling inevitably has led to a difference of opinion regarding the source of a Medicaid payor's recovery: whether the recovery source is limited to *past* medical damages *only* or whether *both* past *and* future medical damages are available to satisfy the payor's previously paid expenses. The

dissenters favor attaching that portion of the recipient's damages award representing his/her future medical expenses that is intended to provide the recipient financial security and ensure that he/she will have sufficient resources to continue receiving necessary medical care. By contrast, the majority of the Court, as we consistently have done in our prior opinions, resolves this issue by consulting the other courts who have carefully considered and answered this question. The *majority* view in the country, with which the majority of this Court agrees, permits a Medicaid payor to recover benefits it previously has paid on behalf of a Medicaid recipient from that portion of the recipient's damages award representing his/her *past* medical expenses *only*. *See, e.g.*, *E.M.A. v. Cansler*, 674 F.3d 290 (4th Cir. 2012); *McKinney v. Philadelphia Hous. Auth.*, No. 07-4432, 2010 WL 3364400 (E.D. Pa. Aug. 24, 2010); *Price v. Wolford*, No. CIV-07-1076-M, 2008 WL 4722977 (W.D. Okla. Oct. 23, 2008); *Branson v. Sharp Healthcare, Inc.*, 193 Cal. App. 4th 1467, 123 Cal. Rptr. 3d 462 (2011); *Garcon v. Agency for Health Care Admin.*, No. 3D11-925, 2012 WL 2120870 (Fla. Dist. Ct. App. June 13, 2012); *Lugo v. Beth Israel Med. Ctr.*, 13 Misc. 3d 681, 819 N.Y.S.2d 892 (N.Y. Sup. Ct. 2006); *Doe v. Vermont Office of Health Access*, No. 2011-045, 2012 WL 752727 (Vt. Mar. 9, 2012). The view espoused by the dissenting members of this Court is the country's *minority* view, which permits the attachment of *both* past *and* future medical damages awarded to the Medicaid recipient. *See, e.g.*, *I.P. v. Henneberry*, 795 F. Supp. 2d 1189 (D. Colo. 2011); *Special Needs Trust for K.C.S. v. Folkemer*, No. 08:10-CV-1077-AW,

2011 WL 1231319 (D. Md. Mar. 28, 2011); *In the Matter of Matey v. Matey*, 147 Idaho 604, 213 P.3d 389 (2009).

I agree with the soundness of the legal reasoning supporting the decisions of a majority of the courts in the country, which this Court's majority has adopted in its decision of this case: the recovery of previously paid Medicaid expenses is limited to the recipient's damages award for his/her *past* medical expenses. Accordingly, I respectfully concur with the majority's opinion in this case.