No. 101537 – In Re: E. B., a minor

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

Workman, Justice, concurring, in part, and dissenting, in part:

I concur with the majority's conclusion that W. Va. Code § 9-5-11 (2009) is preempted to the extent that it conflicts with *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006), and further that our holding in *Grayam v. Department of Health and Human Resources*, 201 W. Va. 444, 498 S.E.2d 12 (1997), granting the Department of Health and Human Resources (hereinafter "DHHR") a "priority right to recover full reimbursement" must be overruled. Moreover, I agree that, to comply with the United States Supreme Court's holdings in *Ahlborn* and the anti-lien provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(18) and 1396p, a settlement or judgment must be allocated among the various categories of damages to ensure that DHHR's reimbursement does not encroach upon any aspects of the settlement or judgment which constitute the "property" of a Medicaid recipient. However, I disagree with the majority's determination that *Ahlborn* precludes recovery of a Medicaid subrogation lien from that portion of the settlement or judgment which constitutes future medical expenses. Additionally, I believe that the means and methods established by the majority to effectuate settlement and allocation in cases involving Medicaid liens are under-developed and impracticable. Finally, I believe that our Legislature should consider this issue and establish fair, efficient, and

workable procedures to ensure that *Ahlborn* is being effectuated in a manner which is equitable and balances the rights and needs of the Medicaid recipient, DHHR, and ultimately the taxpayers.

A.

Reimbursement from Future Medical Expenses

Inasmuch as the majority opinion sets forth an exhaustive examination of the Medicaid Act, *Ahlborn*, and our applicable statutes, further discussion of the general principles contained therein is unnecessary. However, further examination of *Ahlborn* and the Fourth Circuit's treatment thereof in *E.M.A. ex rel. Plyler v. Cansler*, 674 F.3d 290 (2012), demonstrates the overly restrictive reading the majority undertakes to preclude DHHR from obtaining reimbursement from amounts allocated to future medical expenses. As the majority implicitly acknowledges, the language in *Ahlborn* in no way limits Medicaid's recovery to amounts allocated to *past* medical expenses. In fact, the language utilized by the Supreme Court appears very intentionally broad: "[W]hat § 1396k(b) requires is that the State be paid first out of *any damages representing payments for medical care* before the recipient can recover any of her own costs for medical care." *Ahlborn*, 547 U. S. at 282 (emphasis added). "[T]he federal third-party liability provisions *require* an assignment of no more than the right to recover that portion of a settlement that represents

payments for *medical care*." *Id.* (second emphasis added). "Ahlborn retained the right to sue for *medical care payments*, and the State asserted a right to the fruits of that suit once they materialized." *Id.* at 286 (emphasis added). "[§ 1396k(b)] gives the State a priority disbursement from the *medical expenses* portion alone." *Id.* at 291 (emphasis added). Had the Supreme Court intended to restrict recovery to amounts allocated to past medical expenses it easily could have done so. Other courts take a similar view. *See In re Matey*, 213 P.3d 389 (Idaho 2009); *Special Needs Trust for K.C.S. v. Folkemer*, 2011 WL 1231319 (D. Md. Mar. 28, 2011); *Perez ex rel. Cardenas v. Henneberry*, 2011 WL 1584105 (D. Colo. Apr. 26, 2011).

Recognizing the dearth of guidance on this issue in *Ahlborn*, the majority looks to the Fourth Circuit case of *E.M.A. ex rel. Plyler v. Cansler, supra*, for persuasive authority. In *Cansler*, the Fourth Circuit found that North Carolina's third-party liability statutes, which allowed recovery of the lesser of actual Medicaid subrogation lien or one-third of the total recovery, failed to comply with *Ahlborn*. In its summary paragraph, the Fourth Circuit states that "federal Medicaid law limits a state's recovery to settlement proceeds that are shown to be properly allocable to *past* medical expenses." *Id.* at 312 (emphasis added). This statement notwithstanding, at no point in the Fourth Circuit's opinion does it analyze or even cursorily address the issue of whether reimbursement of past medical expenses may be made from that portion of the settlement representing future expenses. The majority further cites

to the only other vague reference to past medical expenses contained in *Cansler*: "*Ahlborn* is properly understood to prohibit recovery by the state of more than the amount of settlement proceeds representing payment for medical care *already received*." *Id.* at 307 (emphasis added). Again, however, the majority cherry-picks this statement out of a discussion having nothing whatsoever to do with the issue for which it is cited. This statement from *Cansler* is contained within a discussion finding that the North Carolina Supreme Court's conclusion that *Ahlborn* did not apply to non-allocated, lump-sum settlements was erroneous. Again, at no point is the instant issue directly discussed or analyzed.

In fairness to the majority, it notes that this issue will undoubtedly spawn further litigation and requests further guidance from the United States Supreme Court. However, I believe that not only is this Court not constrained by the Fourth Circuit's dicta which only tangentially makes reference to past medical expenses, but that the broad language of *Ahlborn*, which contains no such easily designated restriction to *past* medical expenses, permits this Court to allow such a recovery.

Being of the opinion that *Ahlborn* does not preclude the DHHR from recovering its subrogation lien for past medical expenses from the future expenses portion of a settlement or judgment, I do not believe, however, that such recovery should be permitted in every instance. Rather, I believe the policy reasons behind permitting such a

recovery dictate that it should be permitted only in cases where a Special Needs Trust is established for the benefit of the Medicaid recipient. Special Needs Trusts were created by Congress in 1993 in an amendment to the statute governing federal Medicaid grants to states. *See* 42 U.S.C. § 1396p(d)(4)(A). The statute generally provides that assets in a trust are to be considered in determining an individual's eligibility for, or amount of, benefits under a state Medicaid plan. 42 U.S.C. § 1396p(d)(1). However, certain types of trusts are exempted. Subsection (4) provides:

> (A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

Id. at § 1396p(d)(4)(A). As explained by the 8th Circuit Court of Appeals:

> [42 U.S.C.A. 1396p(d)(4)(A)] provides that disabled persons under the age of 65 remain eligible for ongoing Medicaid assistance (MA) in spite of funds or other property held in an SNT ["Special Needs Trust"], and can use SNT funds as a supplement to enhance the quality of their lives. The disabled person remains eligible for MA so long as the SNT contains a pay-back trust provision, *i.e.* a provision specifying that the total MA provided on or after October 1, 1993, will be paid back to the state after the beneficiaries' death from any funds remaining in the trust.

Norwest Bank of North Dakota, N. A. v. Doth, 159 F.3d 328, 330 (1998). As the 8th Circuit noted, however, "[n]othing in the statute requires the trustee to preserve the State's interest

in the trust corpus." *Id.* at 332. As such, despite the condition that the trust residual be utilized to reimburse Medicaid upon death of the beneficiary, there is no guarantee that there will be funds remaining in the trust with which to reimburse Medicaid.

Given that the purpose of establishing a Special Needs Trust is to preserve the Medicaid recipient's ability to continue to be eligible for Medicaid–which will then pay the recipient's future medical bills–the recovery of future medical expenses in a settlement or judgment creates a double recovery for the Medicaid recipient. The recipient may recover future expenses, pocket them in a Special Needs Trust, and still receive payment for the bulk of any future medical expenses from Medicaid. The reality is that DHHR will never be fully reimbursed for all that it will ultimately expend during the lifetime of an injured recipient as a proximate result of that injury. Allowing DHHR to recoup as much of the past expenses it has incurred on behalf of an injured recipient as possible, at a time when reimbursement is the most likely to occur–upon settlement of an injury claim or lawsuit–appears equitable in situations where a Special Needs Trust is established. Further, any severely injured individual would also qualify for Social Security income and benefits.

B.

Settlement and Allocation of Cases Involving Medicaid Liens

After determining that W. Va. Code § 9-5-11 and *Grayam* run afoul of *Ahlborn*, the majority proceeds to establish a post-settlement exchange between the parties and DHHR designed to facilitate allocation by agreement and the framework of a generic judicial allocation procedure to be utilized when an agreement cannot be reached. While I am cognizant of the difficult task of fashioning procedures to be utilized to give effect to the Supreme Court's holding in *Ahlborn*, I respectfully suggest that those established by the majority are more likely to frustrate settlement efforts and create a nearly-impossible burden for the DHHR to meaningfully fulfill its statutory obligation to pursue recovery of its subrogation lien.

First, the majority establishes a post-settlement requirement for the parties and DHHR to engage in a dialogue, making "all reasonable efforts" to reach an agreement on allocation. The clear implication of the syllabus point encompassing this dialogue is that the parties are to resolve the case without active involvement of DHHR as pertains to recovery of its lien and then attempt to create a *post-hoc* allocation that satisfies the DHHR while preserving inviolate the competing interests and concerns of the parties which must be

accommodated in reaching the settlement. Rather than facilitating settlement, I believe this will potentially frustrate settlement efforts.

While the majority half-heartedly notes that the parties are not precluded from inviting DHHR to participate in settlement negotiations if "necessary," I believe that its active involvement can only better enable both the parties and DHHR to reach a compromise which is fair and satisfactory to all. As most practitioners can attest, considerations in reaching a final settlement necessarily include determining what amounts will be deducted from any gross settlement for attorney fees, costs, and liens. The injured party is less interested in the gross settlement amount than the net settlement which they will have at their disposal; without having any information about the range in which the ultimate lien pay-out will lie, it will be difficult to convey to the injured party any sense of a "guaranteed" range of net recovery. If the parties and DHHR cannot agree on an allocation, obviously the net recovery will still be unknown, but with an exchange of proposed allocations during the settlement process, the injured party can at least know a range within which his net settlement will fall.

Moreover, engaging in this negotiation regarding the allocation while settlement discussions are occurring will allow an opportunity for a greater overall compromise and a more equitable, cost-effective result. For example, if all that stands in the

way of reaching a final settlement amount is the DHHR lien, knowing precisely the difference in the amount DHHR and the parties propose for allocation will allow for compromise of this amount by all participants in the negotiation and aid in reaching settlement. It will also necessarily allow the parties to determine if a refusal to agree to an allocation is in their best interest and whether proceeding to judicial allocation will be cost effective. Only if both of these negotiations–both settlement amount between plaintiff and defendant(s) and lien amount between plaintiff and DHHR–are contemporaneous can a true compromise occur. Relegating lien negotiations to a post-settlement phase, as the majority suggests, could create unequal bargaining positions. Settlement negotiations are fluid and without the presence of all of the "moving parts" at mediation or during negotiations, resolution efforts are frequently frustrated.

If DHHR were permitted at its discretion to participate in settlement negotiations or a mediation, the exchange of information about the strengths and weaknesses of the case which necessarily shape and mold the ultimate settlement could obviously be fully considered by DHHR and the parties, jointly, in development of an allocation. However, this right to participate triggers a commensurate obligation of DHHR to provide prompt information regarding lien amounts and, during the course of settlement negotiations, its proposed allocation, for use by the parties in crafting a settlement. To effect this joint resolution effort, DHHR should be given ample notice of and the right to participate in

settlement negotiations or mediation, and DHHR must provide full information on its expenditures.

These considerations are inextricably intertwined with my concerns regarding the majority's holding that DHHR is to bear the burden of proof in any judicial allocation procedure. Under Syllabus Point 8, the majority sets the stage for judicial allocation proceedings where an agreement cannot be reached between the parties and DHHR. In so doing, the majority creates a presumption that where agreement cannot be reached, DHHR is cast as the "challenger" to the allocation and bears the commensurate burden of proof. I believe this creates an unfair burden on DHHR and increases the potential for allocation manipulation by the parties, all at the expense of DHHR and ultimately the taxpayers.

The Tenth Circuit, in describing the issues of proof which are central to an adversarial allocation proceeding, highlights the practical impossibility of the majority's burden of proof. In *Price v. Wolford*, 608 F.3d 698 (10th Cir. 2010), the court considered the propriety of a judicial allocation pursuant to Oklahoma's amended Medicaid recovery statute, Okla. Stat. tit. 63, § 5051.1(D). Oklahoma's statute, which was amended post-*Ahlborn*, establishes that the Oklahoma Health Care Authority shall have a lien in the amount paid under Medicaid "up to the amount of the damages for the total medical expenses" and that such lien shall be considered valid "unless a more limited allocation of damages to medical

expenses is shown by clear and convincing evidence." Okla. Stat. tit. 63, § 5051.1(D)(1)(d). The Health Care Authority argued that the parties did not meet their burden of establishing a more limited allocation by clear and convincing evidence because they quite simply offered no evidence to justify the allocation. *Price*, 608 F.3d at 707. In discussing the sufficiency of the evidence presented to justify the allocation, the court explained that

> Aside from a reduction necessary to compensate counsel, a reduction in a Medicaid lien can be justified only by showing a reason why the plaintiff would agree to allow the defendant to pay less than the full amount of the Medicaid lien. The usual reasons would be that the liability of the settling defendant is uncertain or that the defendant lacks the money to pay for his full liability (or both); so the plaintiff would be willing to take a proportionate reduction in each component of the damages that she would expect the jury to award if the defendant were found liable. For example, if the settlement is for 50% of what the jury is likely to award because there is only a 50% chance that the jury will find liability, the Medicaid lien could properly be cut in half. Or if liability is clear and the expected verdict would be $2 million, but the defendant can pay only $1 million, a 50% reduction would also be in order. A further reduction might also be appropriate if there are doubts about whether the jury would award as damages all the medical expenses paid by Medicaid-because, for example, one could question whether the expenses were caused by the negligent acts of the defendant–although generally one can be more confident of recovering those expenses in full than in recovering, say, the full claim for pain and suffering.

Id. at 707-08. The Tenth Circuit appropriately recognized what are surely the most common reasons a compromised settlement occurs: unclear liability, insufficient assets, and damages issues, including questions of causation. In addition, unsupported or over-inflated future damages may unfairly skew a proportionate approach to allocation, i.e., over-inflated future

damages exaggerate the "full value" of the case, making it appear that the injured party settled for a smaller fraction of its value than is accurate, thereby driving down the proportionate share of the Medicaid lien. While Oklahoma's statute puts the burden on the Medicaid recipient as opposed to the State, whether a reduced lien amount is "challenged" by the State or "justified" by the injured party, the potential reasons for reduction of the Medicaid lien are the same. Identifying the issues which will be the subject of the adversarial judicial allocation hearing merely underscores the inequity of placing the burden of proof on DHHR.

Inasmuch as DHHR is a stranger to the claim or litigation being compromised in settlement, it is unclear how the majority anticipates DHHR having sufficient information to meet its burden at a judicial allocation hearing. As a non-party, the parties have no obligation to provide discovery materials to DHHR which would illuminate liability or damages issues affecting settlement value. Moreover, as a non-party, DHHR has no opportunity to develop evidence of its own to support its position regarding allocation. Simply summarily providing DHHR with the *opportunity* to "present the necessary evidence, including fact witness and expert witness testimony," as the majority states, does not enable DHHR to have the practical *ability* to proffer evidence in support of its burden of proof or to challenge evidence with which it disagrees. Although ostensibly DHHR could hire an expert witness to opine on certain matters–most likely damages-related–without complete

information including testimony of treating physicians, medical records, or other expert reports, such expert may be susceptible to serious attack on cross-examination. As the Tenth Circuit astutely noted: "An opposing party can hardly challenge evidence without knowing what the evidence is." *Price*, 608 F.3d at 708. In addition, the majority's opinion sets the DHHR with astronomical costs of litigating such issues.

Even more to the point, it is inequitable that DHHR should have the burden of proof to justify allocation in the event that an injured party settles for a compromised amount *in absence* of any of the above-stated reasons. Settlements are driven by many intangible and unascertainable factors–frequently having nothing to do with the merits of the underlying litigation. DHHR should not have the burden to prove its proposed allocation in the event of an injured party who simply becomes beleaguered by or disinterested with the litigation, or a lawyer who needs to close out the case quickly for financial reasons, and settles for pennies on the dollar irrespective of the strength of his case. If an injured party settles for reasons having nothing to do with the strength of his case, doesn't he do so at the peril of his own recoupment rather than that of the DHHR and, ultimately, the taxpayers? Under the majority's scheme, DHHR would have the burden, armed with nothing but a print-out of the medical expenses paid, to prove that it is entitled to its proposed allocation amount.

C.

Legislative Action

Although the majority has established a general construct to guide the lower courts in their application of the principles in *Ahlborn*, I believe it is incumbent upon our Legislature to develop fair and efficient procedures that do not further strain the State's resources, effectively aid in facilitating fair reimbursement of taxpayer dollars, yet properly preserve the injured Medicaid recipient's settlement property. I would urge the Legislature to examine this issue further and develop a statutory scheme which ensures compliance with federal law, while giving the fullest effect to DHHR's mandatory recovery efforts.

Therefore, for the reasons stated above, I concur, in part, and dissent, in part.