

Short Form Order-no numbering

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **PETER J. O'DONOGHUE** IAS PART 13
Justice

GREGORY WRIGHT, As Guardian *ad Litem*
of MARCIA KELLY, an adult incapable of
adequately prosecuting her rights,

Index No: 17444/01

Plaintiff,

-against-

NEW YORK HOSPITAL MEDICAL CENTER OF
QUEENS, et. al.

Defendants.

The within matter, which was previously scheduled for trial on October 5, 2006 settled for the sum of \$5,250,000.00. Subsequently, plaintiff's counsel submitted a Proposed Compromise Order with supporting papers for the Court's review. Opposition papers were submitted by the Department of Social Services with respect to the issue of compromising the medicaid lien. The Court held a hearing with respect to this issue and decides as follows:

Medicaid is a jointly funded federal and state program that pays for medical expenses for qualifying indigent recipients. 42 U.S.C. § 1396 et seq; Social Services Law § 363 et seq. Congress intended that Medicaid be a "payer of last resort." Arkansas Dept. Of Health & Human Servs. v. Ahlborn, 126 S. Ct. 1752, 1767 (2006).

In Ahlborn, the United States Supreme Court addressed the issue of whether the State is entitled to recoup only the portion of the settlement proceeds allocated to past medical expenses. The "anti-lien" provision in 42 U.S.C. § 1396p bars States from placing liens against the property of Medicaid recipients prior to their deaths. In Ahlborn, the parties agreed that the State can demand as a condition of Medicaid eligibility that the

recipient "assigns" in advance any payments that may constitute reimbursement for medical costs. This forced assignment is an exception to the anti-lien provision but is only limited to payments for medical care, not rights to payment for, for example, lost wages. Ahlborn, 126 S.Ct. at 1761-3; §§ 1396a(a)(25) and 1396k(a). Thus, the Court held that the State agency's recovery of a Medicaid lien from a Medicaid recipient's settlements, judgments, or awards of monies is limited to the third-party tortfeasor's particular liability for medical expenses.

The parties stipulated that Ahlborn's damages amounted to \$3,040,708.12, but because of her contributory negligence, she could only recover one-sixth of those damages. The Arkansas Department of Human Services stipulated that only \$35,581 of that sum represented compensation for medical expenses, even though the full Medicaid lien was in the amount of \$215,645.30. The Court held that "under the circumstances, the relevant 'liability' extends no further than" \$35,581. Ahlborn, 126 S. Ct. at 1761.

Subsequently, New York courts have addressed the meaning of Ahlborn. In Lugo v. Beth Israel Med. Ctr., 819 N.Y.S.2d 892 (2006), the court held that pursuant to Ahlborn, the court has the power to limit the State's recoupment to the amount of the settlement proceeds allocated to past medical expenses, to hold a hearing to allocate the medical costs in the settlement, and to hold no more than the disputed amounts in escrow until a final determination is reached concerning the amount to be reimbursed to Department of Social Services (DSS), which conflicted with the two leading cases which governed New York law before Ahlborn, Gold v. United Health Services Hospitals, Inc., et al., 95 N.Y.2d 683 (2001) (holding that the social services agencies have broad authority to satisfy the lien from the entire amount of the personal injury judgment or settlement) and Cricchio v. Pennisi, et al., 90 N.Y.2d 296 (1997) (holding that the DSS is entitled to first satisfy the lien from those personal injury settlement funds, leaving the remainder available for transfer to a supplemental needs trust for the benefit of the Medicaid recipient plaintiff). "To the extent the Cricchio or Gold decisions suggest otherwise, Ahlborn implicitly overrules them." Lugo, 819 N.Y.S.2d at 896.

As to how to determine the allocation, the Lugo court acknowledged that it was not required to use the Ahlborn formula, which is, first find the ratio of the settlement amount and the actual value of the case and then apply the same ratio to the Medicaid lien amount. However, it is rational to use it because the "Court appears to sanction the formula by equating the stipulation to a judicial determination allocating the award."

Lugo, 819 N.Y.S.2d at 897. To determine the true value of the case, the Lugo court looked at the following factors: (1) the extent of plaintiff's injuries; (2) whether the plaintiff needs supervision, future care and/or therapy; (3) the duration of that care or supervision; (4) documents that were used to establish plaintiff's injuries; and (5) decisions involving jury awards for similar plaintiffs with similar injuries.

In Chambers v. Jain, 15 Misc.3d 1120(A) (2007), 2007 WL 1118383 (N.Y.Sup.), 2007 N.Y.Slip op. 50776(U), the court held DSS is limited to the amount of plaintiff's settlement allocated to past medical expenses because Ahlborn is the controlling case on this issue. In Chambers, the corporate counsel for the City of New York wrote in a supplemental brief that "as a result of Ahlborn, the HRA [Human Resources Administration] will no longer attempt to collect funds expended for Medicaid benefits on plaintiff's behalf against the entire proceeds of plaintiff's underlying tort settlement. Instead HRA will collect the funds only against the portion of the settlement amount that represents past medical costs. (Letter, Office of the City of New York Law Department, dated May 25, 2006, to Judge John G. Koeltl, U.S. District Court for the Southern District of New York in the case of Sanchez v. City of New York.)"

Like the Lugo court, the Chambers court also used the Ahlborn formula to determine how much money the DSS is entitled to. In addition to the Lugo factors used to determine the true value of the case, the Chambers court looked also at plaintiff's ability to be employed in the competitive job market.

In Harris v. The City of New York, 16 Misc. 3d 674, 2007 WL 1674337 (N.Y.Sup.), 2007 N.Y.Slip op. 27239, the court ordered a hearing to determine the percentage of the settlement that should be allocated for pain and suffering and what amount is to be paid for DSS to reimburse it for medical expenses paid, regardless of plaintiff's allegation that the entire settlement award was based on pain and suffering.

In the case at bar, the parties do not stipulate to the total value of the case. The parties were given the opportunity to submit evidence to establish the true value of the case at trial. In determining the true value of the case, the court first looks at the injuries to the plaintiff. The plaintiff, Marcia Kelly, who was forty-four years old at the time of the incident, was an intelligent woman who cared for her two teenage children. Dr. Angela M. Hegarty, a neurologist, examined Marcia Kelly, and in a report dated June 26, 2006, stated that she "has been totally dependent on staff for care. She is incontinent of urine and feces, she is bed-ridden, she is being fed parenterally through a jejuostomy [sic; jejunostomy] tube, she requires

constant care and supervision for bathing, feeding and requires special care to prevent pressure sores and contractures." Her mental status is listed as unconscious and persistive vegetative state with some response to verbal stimuli. She "has endured severe and ongoing conscious pain and suffering and will continue to do so going forward." In terms of her future care, Dr. Joseph Carfi, an Assistant Clinical Professor at the Department of Rehabilitation Medicine at Mount Sinai Medical Center, examined Kelly on April 4, 2004, opines that Kelly will continue to "depend upon others for her care and sustenance. She is not employable. With optimum care, she faces a loss of life expectancy of approximately 25%."

After reviewing the medical evidence presented in the papers and at trial, as well as the deposition testimony, the court determines that the true value of the plaintiff's case is \$12,872,821 for the facilities care option. The plaintiff's medical malpractice case was settled for the sum of \$5,250,000. Applying the Ahlborn formula, which was adopted in Lugo and Chambers, the court finds that the ratio between the settlement and the true value of the case is 40.8% for the facilities care option. When this ratio is applied to the lien amount of \$636,149, the amount of the Medicaid lien is reduced to \$259,548.79.

Accordingly, the proposed Compromise order shall be amended to the extent set forth herein.

Dated: October 19, 2007

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J.S.C.