

[J-42-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

E.D.B., AN INCAPACITATED PERSON,	:	No. 78 MAP 2008
BY AND THROUGH D.B. AND J.R.B.,	:	
JR., COURT-APPOINTED GUARDIANS	:	Appeal from the Order of the Superior
OF THE ESTATE AND PERSON OF	:	Court at No. 2010 MDA 2006, dated
E.D.B.,	:	August 15, 2007, reconsideration denied
	:	October 25, 2007, reversing and
v.	:	remanding the Order of Centre County
	:	Court of Common Pleas, Civil Division,
GERALD CLAIR AND CENTRE	:	at No. 2003-2042, dated November 6,
COMMUNITY HOSPITAL, A	:	2006
CORPORATION	:	
	:	933 A.2d 86 (Pa.Super. 2007)
APPEAL OF: COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
PUBLIC WELFARE	:	

ARGUED: May 12, 2009

DISSENTING OPINION

MR. JUSTICE BAER

DECIDED: December 29, 2009

I respectfully dissent from the Majority Opinion based upon my conclusion that, under the applicable provisions of the Fraud and Abuse Control Act of 1980 (FACA),¹ Emily Bowmaster (Emily) was not the beneficiary of medical assistance payments from the Department of Public Welfare (DPW) during her minority years. Rather, these payments were made to her parents to assist them in meeting their obligation to support Emily during her years of minority. Accordingly, and as explained herein, I cannot agree that DPW can assert a lien against the settlement reached in this case to recover

¹ Act of 105 of 1980, P.L. 493, as amended, 62 P.S. §§ 1401-12.

monies paid to Emily's parents to assist them in meeting her substantial care obligations incurred during her minor years.

As noted by the Majority, this case is based upon medical malpractice that occurred during Emily's birth in 1985, at Centre Community Hospital. As a result of the malpractice, Emily was born with severe physical and mental disabilities, and over the many years since birth, DPW provided medical assistance for Emily's childhood care totaling approximately \$86,000. Despite the existence of the malpractice, neither Emily's parents nor DPW commenced any litigation against the hospital or physicians during Emily's years of minority.

Then, just prior to her eighteenth birthday, Emily's parents initiated a lawsuit on Emily's behalf as an "incapacitated person,"² against Gerald Clair, M.D. and Centre Community Hospital, alleging that the malpractice was the proximate cause of Emily's permanent and disabling injuries. The suit sought damages related to past and present pain and suffering, expenditures "of money for physicians, hospitals, paramedical personnel, home care attendance, medications and other items necessary for her proper care and treatment," as well as reduced earning capacity. Complaint at 8-9. The parties settled the litigation, and the trial court subsequently approved a petition for leave to settle an incapacitated person's estate. See Pa. R.C.P. No. 2064.³ The trial court further directed the creation of a trust for Emily's future needs and care. Id.

² As will be fully explained, infra, an "incapacitated person" is explicitly defined in the Pennsylvania Rules of Civil Procedure as being, first and foremost, "an adult." Pa. R.C.P. No. 2051.

³ I fully acknowledge that the complaint made claims for "past" damages without specifying whether these were limited to post-Emily's eighteenth birthday, or for damages suffered while she was a minor. This is of no concern as the statute of limitations is an affirmative defense see Romaine v. WCAB (Bryn Mawr Chateau Nursing Home), 901 A.2d 477 (Pa. 2006) (citing Pa. R.C.P. No. 1030), and, even (continued...)

As noted, during Emily's years as a minor, DPW provided approximately \$86,000 in medical assistance payments towards her care. Accordingly, upon commencement of the lawsuit against Dr. Clair and Centre Community Hospital, DPW asserted a lien against any award or settlement from the litigation in the amount of \$56,517.81.⁴ DPW did so under the auspices of the FACA, which permits DPW, upon application with the trial court, to assert "as a first lien against the amount of such judgment or award, the amount of the expenditures for the benefit of the beneficiary under the medical assistance program." 62 P.S. § 1409(b)(7)(i). The trial court granted the lien, and the Bowmasters appealed to the Superior Court. The Superior Court reversed and remanded, finding that DPW could only seek reimbursement for medical assistance payments paid to the Bowmasters after Emily reached the age of majority, because Emily's parents, and not Emily herself, were the beneficiaries of the medical assistance payments made before Emily's eighteenth birthday. Bowmaster v. Clair, 933 A.2d 86 (Pa. Super. 2007).

By way of background, and for ease of discussion, I first note the following. DPW is the agency responsible for administering medical assistance funds throughout the Commonwealth. When DPW provides such funds to a "beneficiary" because of an injury for which a third person (here, the doctor and hospital) is liable, DPW has the right to recover a reasonable value of funds paid to a "beneficiary." 62 P.S. § 1409(b)(1). DPW may do so either by initiating proceedings, through the Attorney General, against the third-party tortfeasors, id., or by asserting a first lien against the amount of any

(...continued)

assuming the doctor and hospital defendants waived the defense and paid too much in the settlement, these factors have no impact on this legal analysis.

⁴ This reduced amount reflects proportionate deductions for attorneys' fees and costs.

award or settlement received by the beneficiary. 62 P.S. § 1409(b)(7)(i). Thus, resolution of this appeal revolves around whether either Emily's parents or Emily herself were the "beneficiaries" of the medical assistance payments paid by DPW while Emily was a minor. For the reasons that follow, I would affirm the Superior Court's holding that Emily's parents, and not Emily herself, were the beneficiaries of medical assistance payments during Emily's minor years, and thus DPW cannot assert a lien against the settlement reached in this case.⁵

At the heart of this dispute is centuries' worth of Pennsylvania jurisprudence, which places the responsibility to raise a child upon her parents. While the Majority summarily dismisses such jurisprudence as a "common law anachronism," Maj. Slip Op. at 12 (quoting Shaffer-Doan v. Department of Public Welfare, 960 A.2d 500, 511 (Pa. Cmwlth. 2008)), both statutory and decisional law continue to place an almost absolute obligation upon parents to care for minor children: "Parents are liable for the support of their children who are unemancipated and eighteen years of age or younger." 23 Pa.C.S. § 4321(2) (emphasis added). Indeed, the Legislature has placed an additional burden on courts to ensure the health and well-being of our young members of society. See 23 Pa.C.S. § 4326(a) (providing that, in support orders, "the court shall ascertain the ability of each parent to provide medical support for the children of the parties, and the order shall include a requirement for medical support to be provided by either or

⁵ As noted by the Superior Court, an open question remains concerning whether Emily has received any medical assistance payments since she has turned eighteen. It is undisputed that, if she has, DPW can assert a lien against the settlement for recovery of that money. Thus, I would also agree with the Superior Court that a remand to the trial court is necessary to resolve this unanswered aspect of the litigation. Regardless, this appeal solely concerns medical assistance payments provided by DPW for medical care during Emily's minor years and, for a multitude of reasons, in my view, Emily's parents were the true beneficiaries of the payments made during that time period.

both parents, provided that such medical support is accessible to the children.”). This Court, on a number of occasions, has also placed the responsibility upon parents to provide for the welfare of their children during their minor years. See Conway v. Dana, 318 A.2d 324 (Pa. 1974) (the support of minors is the equal responsibility of both mother and father); In re McCready’s Trust, 126 A.2d 429 (Pa. 1956) (parents owe a duty of support to their children during the course of their minor years); see also Rich v. Rich, 967 A.2d 400 (Pa. Super. 2009) (the moral and legal duties of both parents to support their child is absolute); In Interest of Lilley, 719 A.2d 327 (Pa. Super. 1998) (parent’s basic constitutional right to custody and rearing of his or her child is converted, upon parent’s failure to fulfill parental duties, to child’s right to have proper parenting and fulfillment of her potential in permanent, healthy, safe environment).

In part, because parents are responsible for the well-being and protection of their children, Pennsylvania has traditionally segregated causes of action, and, consequently, the award of damages to minors, when a minor is injured by a third-party tortfeasor. “The measure of damages where a parent sues for a personal injury to a minor child . . . is hospital and medical bills and expenses incurred because of the injury” Discovich v. Chestnut Ridge Transp. Co., 85 A.2d 122, 124-25 (Pa. 1952); see also Meisel v. Little, 180 A.2d 772, 773 (Pa. 1962) (recognizing that minors may only recover reasonable compensation for pain and suffering and future loss of earning power when they are injured by third-party tortfeasors). In that same light, when a cause of action is brought on behalf of a minor against a tortfeasor, and the minor wins a verdict, the verdict in favor of the minor child shall not include “one cent for hospital expenses or doctor’s bills; that all such items would have to be included in the verdict, if any, for the father; and that [lienholders] would have to look to the father for payments.” In re Mikasinoich, 168 A. 506, 509 (Pa. Super. 1933) (citing e.g. Phila. Traction Co. v.

Orbann, 12 A. 816 (Pa. 1888)). The contrary, thus, is equally true: claims for losses suffered after an injured party reaches the age of majority, including medical expenses, belong to the injured alone, and not her parents. Brower v. City of Philadelphia, 557 A.2d 48, 50 (Pa. Cmwlth. 1989) (citing Quinn v. City of Pittsburgh, 90 A. 353 (Pa. 1914)). Despite the suggestions by the Majority to the contrary, this Court has never even questioned, let alone abrogated, this precedent.

To place this appeal into this framework, the aggrieved parties as concerns Emily's medical expenses during her minority years are her parents. Conversely, the damages sought for medical expenses in the suit instantly, brought on Emily's behalf as an incapacitated person, belong to Emily alone, and are solely for her care as an adult.⁶

As conceded by all parties, Emily's parents lost their claims for medical expenses they incurred during Emily's minor years over twenty years ago under the statute of limitations applicable to those claims. A statute of limitations "begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations. The statute of limitations requires aggrieved individuals to bring their claims within a certain time of the injury," otherwise, the aggrieved party generally loses all right to recovery for sustained injuries. Dalrymple v. Brown, 701 A.2d 164, 167 (Pa. 1997). Here, Emily's parents were required to bring any litigation in their own right for Emily's minor-year medical

⁶ To that end, it is worthy of note that the trial court instituted a trust fund and appointed a trustee for the disbursement of funds out of the settlement with Dr. Clair and Centre Community Hospital. In my view, the appointment of a trustee to oversee the settlement proceeds lends even more credence to the suggestion that Emily was the sole beneficiary of the action's proceeds. If these funds were to reimburse Emily's parents (or DPW) for monies spent on Emily's care during her childhood, the trust would have been unnecessary, and the proceeds could have been distributed directly to the parents (or DPW).

expenses and loss of services within two years of the alleged date of Emily's injury, i.e., by Emily's second birthday. See Fancsali v. Univ. Health Ctr. of Pgh., 761 A.2d 1159, 1164 (Pa. 2000) (holding that parents' causes of action arising out of injuries to their child at birth "accrued when [the child] was born, but the two-year limitation period for their claims began to run at that time."); see also 42 Pa.C.S. § 5524 (providing that an action to recover damages for injuries done unto a person must be commenced within two years of the date of the occurrence).

Conversely, the Legislature has specifically provided an exception to the statute of limitations for minors:

[...] the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action^[7] after attaining majority as is allowed to others by the provisions of this subchapter.

42 Pa.C.S. § 5533(b). Thus, while Emily's parents had until her second birthday to sue for medical expenses incurred on Emily's behalf during her minor years, Emily's cause of action in her own right for medical expenses incurred after her eighteenth birthday, as well as pain and suffering for her entire life, did not expire until her twentieth birthday.⁸ Thus, because (1) claims relating to Emily's minor years' care belonged exclusively to

⁷ Here, such time would be two years after Emily turned eighteen, i.e., her twentieth birthday. 42 Pa.C.S. § 5524.

⁸ This is not to say that Emily was forced to wait until her eighteenth birthday to seek those damages. See Fancsali, 761 A.2d at 1164 (recognizing that a child's claim, while brought at the same time as the parents', "does not alter the fact that [the child's] claim, when viewed in isolation, could have been filed at any time prior to [the child's twentieth birthday].")

her parents, and (2) those claims expired in 1987, the settlement instantly could only have included monies for medical expenses incurred during Emily's adult years.⁹

For these same reasons, I must also conclude that under the FACA, Emily's parents were the beneficiaries of the medical assistance payments provided by DPW during Emily's minor years, and, thus, DPW cannot recuperate those funds from this

⁹ Moreover, while, as mentioned in note 3, Emily's complaint is ambiguous, there is support therein for the proposition that her counsel recognized that the instant action could only recover medical expense damages related to Emily's adult years' care by explicitly listing Emily, the sole plaintiff in the action, as an "incapacitated person." The rules of civil procedure define an "incapacitated person" as

an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that the person is partially or totally unable to manage financial resources or to meet the essential requirements for physical health and safety.

Pa.R.C.P. No. 2051 (emphasis added). Furthermore, the comments to Rule 2051 specifically distinguish between incapacitated persons and minors:

Several rules of civil procedure have been amended to conform to the recent amendments to the Probate, Estates and Fiduciaries Code by Act No. 24 of 1992. The Act introduced a new nomenclature, replacing the term "incompetent" with the term "incapacitated person" throughout most of the Code and in a number of other statutes.

* * *

Former Rule 2052 provided that the rules governing incompetents applied to the exclusion of all other rules relating to disabilities. Thus, prior to the enactment of Act No. 24, if a party were both a minor and incompetent, the rules governing incompetents prevailed over the rules governing minors. However, Act No. 24 defines an "incapacitated person" as an adult so that an incapacitated person can no longer be subject to two chapters of rules. Since there are no other rules governing disabilities, Rule 2052 became obsolete and has been rescinded.

Id., comment (emphasis added). Based upon the relevant portions of the complaint's language, then, it appears reasonable to infer that the parties to the settlement, i.e., Emily, Dr. Clair, and Centre Community Hospital (and, notably, **not** DPW), contemplated only compensating Emily for medical expenses she has, and will, incur as an adult.

settlement. The Majority holds otherwise for two reasons. First, it looks to the statutory definition of “beneficiary” within the FACA:

“Beneficiary” means any person who has received benefits or will be provided benefits under this act because of an injury for which another person may be liable. It includes such beneficiary’s guardian, conservator, or other personal representative, his estate or survivors.

62 P.S. § 1409(b)(13). The Majority, in cursory fashion, reads the second sentence of this definition, which includes the phrase “beneficiary’s guardian,” as making “indisputably clear that the direct recipient of the medical benefits” is Emily. Maj. Slip Op. at 13. In light of the above discussion, however, concerning the responsibility of parents to care for their children, their legal standing to seek redress for their child’s medical expenses, and the passing of the statute of limitations for those claims in this case, I do not agree that Emily as a minor was a beneficiary of payments from DPW.

To the contrary, Pennsylvania law seems clear that the parent shall take charge of a child’s health and well-being, and, at least as this appeal is concerned, thus also solely retains standing to seek damages for a minor’s medical expenses. Therefore, DPW could only assert a lien against the parents for recuperation of the funds it expended on Emily’s minor years’ care on their behalf. See Mikasinovich, supra p.5.¹⁰ I cannot agree with the Majority that the General Assembly’s inclusion of “beneficiary’s guardian” within the statutory definition is proof positive that minor children are

¹⁰ Of course, as the Majority notes, there was a legislative response to the Superior Court opinion instantly, which now permits minors to pursue such actions, such that DPW may now also assert liens against awards or settlements. Act of July 4, 2008, P.L. 557, No. 44, effective Sept. 2, 2008, as codified, 62 P.S. § 1409(b)(4)(iii)(D). Such a response indicates to me that even the General Assembly understood that, without legislative action, minors simply possessed no legal right to pursue damages for their minor years’ medical expenses.

automatically beneficiaries of medical assistance payments received from DPW, merely because (generally) a minor's parent is also his or her guardian.

Second, the Majority draws support by claiming that the Legislature intended for courts to ignore common and statutory law when construing the FACA:

Except as otherwise provided in this act, notwithstanding any other provision of law, the entire amount of any settlement of the injured beneficiary's action or claim, with or without suit, is subject to [DPW's] claim for reimbursement of the benefits provided [...].

62 P.S. § 1409(b)(11), quoted in Maj. Slip Op. at 14 (emphasis added). In that light, the Majority holds that “notwithstanding any other provision of law would seem to preclude reliance on any common law rule that might bar a beneficiary from recovering from his or her tortfeasors the monies that DPW expended on his or her behalf during minority.” Maj. Slip Op. at 15. This statement, however, puts the proverbial cart before the horse, because, based upon the plain language of the above-quoted statute, the subject person must first be a beneficiary before “any other provision of law” precludes him or her from challenging DPW's lien against an award. As I cannot agree that Emily is a beneficiary, I do not believe that this generalized language should be employed to abrogate the long-standing principles concerning parents' responsibilities to care for their children.

Finally, the United States Supreme Court's recent holding in Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006), in my view, is the death knell for the Majority's analysis. In Ahlborn, the High Court considered a statutory scheme similar to that of Pennsylvania's, under which the Arkansas Department of Health and Human Services attempted to collect on a lien from the entirety of a damages award. The Supreme Court rejected such an approach, however,

finding that as a matter of federal Medicaid law, state agencies could only satisfy their asserted liens from portions of awards or settlements earmarked for medical care and expenses. Id. at 282.

As discussed at length, in my view, the settlement generated out of this litigation could only include a claim for medical expenses incurred by Emily during her majority years. For the reasons set forth herein, claims for minor-year medical expenses were Emily's parents' alone; and as the medical assistance payments relevant to this appeal relate only to Emily's minor years, DPW's redress was through the parents, as they were the true beneficiaries of the medical assistance payments made for Emily's care during that time. Notwithstanding that these claims have long since expired, DPW cannot now attack the settlement for Emily's adult-years' care to satisfy its lien, when she was not the beneficiary of the subject funds.¹¹ To be sure, the Majority's permitting of such a course of action allows DPW to recover funds it spent for Emily's care as a minor, from a settlement, which necessarily only includes monies for medical expenses incurred, and to be incurred, while Emily is an adult.

Moreover, even after Emily's parents' claims expired on her second birthday, DPW was still not without recourse to recover the medical assistance payments. Under the FACA, DPW specifically has the authority, through the Attorney General, to pursue third-party tortfeasors directly for reimbursement of medical assistance payments. 62 P.S. § 1409(b)(1). Such actions themselves, however, have five-year statutes of limitation, which has also expired. 62 P.S. § 1409(b)(4); Jordan v. Western

¹¹ Had Ahlborn never been decided, it would appear to me that DPW could have attacked the settlement, as it specifically included damages related to pain and suffering for Emily's entire life.

Pennsylvania Hosp., 961 A.2d 220 (Pa. Cmwlth. 2008).¹² While its common practice may be to sit back and await an initiation of proceedings by a private party, only now after DPW finds itself bound by hundreds of years of precedent and an expired statute of limitations does it advocate a radical interpretation of the law so that it may recover those funds from the injured party. Such an interpretation, however, simply does not survive in the face of longstanding Pennsylvania jurisprudence.

Accordingly, for the reasons articulated herein, I must respectfully dissent.

Madame Justice Greenspan joins this opinion.

¹² The amendments to the FACA enacted by the General Assembly in 2008, see supra note 10, increased this limitations period from five to seven years. As with the amendments mentioned above, however, such an increase is not applicable to the instant appeal.