MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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NICHOLAS CHAMBERS, an infant, by his mother, and Natural Guardian, KEISHA REEVES,

Plaintiff,

-against-

AJEY JAIN, M.D., YVON P. DAMOUR, M.D., KATHY L. BLAIZE, R.N. and JAMAICA HOSPITAL, INC. d/b/a THE JAMAICA HOSPITAL MEDICAL CENTER,

Defendants.

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Index No.: 1240/03

Motion Dated: January 9, 2007
Hearing held February 2, 2007

Cal. No. 7

This is an application by the Department of Social Services of the City of New York to vacate and set aside the Infant's Compromise Order dated October 31, 2006. Plaintiff cross moves for an award of damages pursuant to CPLR 6315 by reason of the Temporary Restraining Order imposed by this court in the Order to Show Cause dated November 28, 2006. The main issue in this application is the right of the Department of Social Services to recover its Medicaid lien from the proceeds of the infant's settlement herein.

Plaintiff commenced a medical malpractice action against defendants in January 2003 alleging that the infant, Nicholas Chambers, who was born on June 29, 1995, suffered severe and

permanent injuries as a result of defendants' negligence during the labor and delivery of the infant and during his subsequent neonatal care. The infant and his mother currently live in Florida.

On October 31, 2006, this court signed an Infant's Compromise Order, which settled plaintiff's medical malpractice case for the sum of $1,700,000. The Department of Social Services of the City of New York asserted a Medicaid lien in the amount of $141,638.00 against the settlement proceeds. The lien covers services from June 29, 2005 through May 6, 1996. The Infant's Compromise Order provided that the amount of $141,638.00 would be paid to the Hudson Valley Bank to be held in escrow pending a final determination by the court of the correct amount of the Medicaid lien claimed by the New York City Department of Social Services against the infant plaintiff's recovery. The order also provided that $67,386.06 would be paid to the Hudson Valley Bank to be held in escrow pending a final determination by the court of the correct amount of the Medicaid lien claimed by the State of Florida Agency for Health Care Administration.

Thereafter, The Department of Social Services, by Order to Show Cause, moved to vacate the Infant's Compromise Order. Pending the determination of the motion, the court enjoined defendants from making any payments under the Compromise Order. By order dated January 9, 2007, the court extended the Temporary

Restraining Order. The court subsequently set the matter down for a hearing, which was held on February 2, 2007. By order dated February 2, 2007, this court vacated the Temporary Restraining Order but held that the Medicaid lien in the amount of $141,638.00 shall continue to be held in escrow pending a decision by this court as to the correct amount of the lien. Subsequently, the parties entered into an agreement in which plaintiff would pay $20,000.00 in full satisfaction of the Florida Medicaid lien.

In support of its application that the Infant's Compromise Order should be vacated, the Department of Social Services argues, inter alia, that plaintiff's attorney's failed to provide it with the appropriate notice of the original application to compromise the infant's claim. In opposition, plaintiff asserts that the Department of Social Services received adequate notice of the application. Plaintiff also relies on the United States Supreme Court decision of Arkansas Dept. Of Health and Human Servs. v Ahlborn, (547 US 268 [2006]) to determine how much of the settlement proceeds can be used to satisfy a Medicaid lien.

The court first finds that, contrary to the movant's contention, the Department of Social Services was timely served with the application for the Infant's Compromise Order. Indeed, the Department of Social Services acknowledges that it received the petition for an Infant's Compromise Order by mail. The

Department responded to the proposed order, and there is no basis to its position that it lacked notice of the petition for an Infant's Compromise Order.

Medicaid is a jointly funded Federal and State medical assistance program that pays for medical expenses for qualifying individuals. (see 42 USC § 1396 *et seq*; Social Services Law § 363 *et seq*.) A Medicaid recipient is required to assign to the State the right to seek reimbursement from any third party up to the amount of medical assistance paid. (Social Services Law § 366[4][h][1].) The underlying policy is that Medicaid be the "payer of last resort." (Arkansas Dept. Of Health and Human Servs. v Ahlborn, 547 US 268.

In Arkansas Dept. Of Health and Human Servs. v Ahlborn, (547 US 268 [2006]), the United States Supreme Court addressed the issue of what amount of the proceeds of a settlement can be used to satisfy a Medicaid lien. In Ahlborn, the Supreme Court held that the anti-lien provision contained in 42 USC § 1396(p)a bars states from imposing liens against the property of Medicaid recipients prior to their deaths, and that the statutory exception to that provision, which permits states to enforce statutory liens on settlements, judgments or awards of monies to Medicaid recipients, applies only to the portion of the settlement, judgment or award allocated to past medical expenses. (42 USC §§ 1396[a][a][25] and 1396k[a].) In Ahlborn, plaintiff

suffered brain damage as the result of a car accident. The case was settled for $550,000.00, which represented 1/6th of the full value of the case, which was estimated at $3,040,708.12. The Arkansas State Agency asserted a lien on the settlement proceeds for $215,000.00, which was the amount incurred for plaintiff's medical expenses. The Supreme Court agreed with the plaintiff that since her claim was settled for 1/6 of its value, Arkansas State Agency could only collect 1/6th of its claim for medical expenses, or $35, 581.47.

Prior to Ahlborn, under New York law, the entire amount of a settlement was available to satisfy a Medicaid lien. Ahlborn effectively overruled prior New York case law dealing with the settlement of Medicaid liens. (Fitzgerald and Daly, A Guide to Resolving Medicaid Liens in New York Post-'Ahlborn', NYLJ, Aug. 25, 2006, at 4, col 4.) In Gold v United Health Servs. Hosps., Inc. (95 NY2d 683 [2001]), Calvanese v Calvanese (93 NY2d 111 [1999]) and Cricchio v Pennisi (90 NY2d 296 [1997]), all pre-Ahlborn cases, the Court of Appeals held that a Medicaid lien can be satisfied from the entire amount of a personal injury settlement or judgment. In Calvanese, Chief Judge Kaye, writing for the Court of Appeals, ruled that "all settlement proceeds are available to satisfy a Medicaid lien, and the appellants could transfer settlement funds to a supplemental needs trust only after the liens were paid." (Calvanese v Calvanese, 93 NY2d at

116.) Chief Judge Kaye further stated in Calvanese that there is nothing in the relevant statutes that demonstrates that the right of the Department of Social Services to recover its Medicaid lien is in any way restricted. (Calvanese v Calvanese, 93 NY2d at 118.) Ahlborn, however, "has had a significant impact on New York law." (Lugo v Beth Israel Med. Ctr., 13 Misc 3d 681 [2006].) The City of New York has acknowledged the impact of Ahlborn. In a pending action involving a lien, the corporation counsel, wrote in a supplemental brief that "as a result of Ahlborn, the HRA [Human Resources Administration] will no longer attempt to collect funds expended fobr Medicaid benefits on plaintiff's behalf against the entire proceeds of Plaintiff's underlying tort settlement. Instead HRA will collect the funds only against that 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 case of Sanchez v City of New York.)

Ahlborn suggested a formula to determine what portion of a settlement represents past medical expenses. The court suggested that the ratio between the settlement amount and the actual value of the case should be determined and that ratio should be applied to medical expenses. In Ahlborn, the parties stipulated to the full value of the claim.

In a recent decision from the Supreme Court, New York County, Lugo v Beth Israel Med. Ctr., (13 Misc 3d 681 [2006]) Justice Alice Schlesinger analyzed the impact of Ahlborn on the recovery of Medicaid liens in New York. In Lugo, Justice Schlesinger held that "Ahlborn must be read to limit the DSS recoupment to the amount of the settlement proceeds allocated to past medical expenses. To the extent the Cricchio or Gold decisions suggest otherwise, Ahlborn implicitly overrules them." (Lugo v Beth Israel Med. Ctr., 13 Misc 3d at 686.) The court in Lugo acknowledged that the formula utilized in Ahlborn was based on a specific stipulation between the parties, but the court also found that such a formula is rational and noted that nothing in Ahlborn suggests that this formula is in any way improper.

Inasmuch as the parties herein, unlike Ahlborn, did not stipulate to the total value of this case, this court conducted a hearing and allowed the parties the opportunity to submit evidence. In determining the full value of this case, the court must first look at the injuries to the infant. Dr. Leon I. Charash, a pediatric neurologist, examined Nicholas, and in a report dated January 6, 2006, states that he "suffers from hydrocephalus controlled with a shunt. He has a right hemiparesis. He has an intractable seizure disorder. He is cognitively impaired." Dr. Charash also notes that Nicholas receives special education and that "Nicholas' academic work is

well below expectations for his age." In terms of his future care, Dr. Charash opines that Nicholas is destined to require assistance and supervision from others for an indefinite period of time. Dr. Charash states that Nicholas will require services from a variety of physicians, including a neurosurgeon and neurologist. Dr. Charash also notes that Nicholas "will require ongoing therapy services" and "will require ongoing help from therapists and special educators." Dr. Charash further states that "Nicholas' long-term prognosis is guarded in terms of his ability to function independently. Within reasonable certainty, he will not be commercially employable."

Dr. Joseph Carfi, an Assistant Clinical Professor at the Department of Rehabilitation Medicine at Mount Sinai Medical Center examined Nicholas on January 6, 2006 and made various findings. According to Dr. Carfi, Nicholas has a spastic right hemiplegia with a nonfunctional arm and partially functioning leg. He further notes that there is associated bowel and bladder incontinence, seizure disorder, self care deficits, and communication deficits. He has cognitive restrictions to at least a mild to moderate degree. He opines that "he will never be able to live alone but will always require a supported environment as he will remain dependent upon others for his care and sustenance. He will either need to remain at home with appropriate help or in an institutional setting due to his severe

seizure disorder. He will never be employable in the competitive job market although he may be able to manage a sheltered workshop setting." Thus, the medical evidence establishes that Nicholas will require extensive medical are for the rest of his life.

The court has reviewed various cases in which a child has sustained injuries comparable to the instant case following alleged medical malpractice. (see e.g. Andree v Winthrop Univ. Hosp., 277 AD2d 265 [2000]; Karney v Arnot-Ogden Mem. Hosp., 251 AD2d 780 [1998]; Nevarez v New York City Health and Hosps. Corp., 248 AD2d 307 [1998]; Bermeo v Atakent, 241 AD2d 235 [1998].) After such review, and in view of the medical evidence presented in the papers and at the trial of this matter before the case was settled, as well as the deposition testimony, the court determines that the full value of the infant's case is $6,000,000.00. Applying the formula set forth in Ahlborn and adopted in Lugo, the court finds that the ratio between the settlement and the full value of the case is 28.3%. When this ratio is applied to the lien amount of $141,638.00, the amount of the Medicaid lien is reduced to $40,083.55.

Turning to the cross motion, plaintiff seeks damages sustained by reason of the Temporary Restraining Order issued previously. The Temporary Restraining Order here did not require the posting of an undertaking. Absent an undertaking, a damaged party is without a remedy in the absence of a showing of

malicious prosecution. (Reingold v Bowins, 34 AD3d 667, 667 [2006]; RS Paralegal & Recovery Servs., Inc. v Poughkeepsie Sav. Bank FSB, 190 AD2d 660, 660-661 [1993].) Indeed, "the undertaking is the source of liability and, therefore, absent an undertaking there is no right, short of an action for malicious prosecution, to recover for damage resulting from the issuance of court process." (J.A. Preston Corp. v Fabrication Enters., Inc., 68 NY2d 397, 401 [1986].) The papers submitted herein do not indicate any malicious conduct allowing the recovery of damages.

Accordingly, the Order to Show Cause to vacate the Infant's Compromise Order is denied.

The Infant's Compromise Order dated October 31, 2006 shall be amended to the extent set forth herein.

The cross motion by plaintiff is denied.

Settle Amended Infant's Compromise Order as set forth herein.

Dated: April 13, 2007

AUGUSTUS C. AGATE, J.S.C.