

**E.F. v Durante**

2020 NY Slip Op 30642(U)

January 7, 2020

Supreme Court, Bronx County

Docket Number: 26689/15

Judge: Joseph E. Capella

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NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART 23

Case Disposed   
Settle Order   
Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

Index #: 26689/15  
DECISION/ORDER

-----X  
E.F., an infant by his mother and natural guardian,  
JASMIN RODRIGUEZ, and JASMIN RODRIGUEZ,  
individually,

Plaintiffs,

- against -

Present:  
Hon. Joseph E. Capella  
J.S.C.

MARGARET DURANTE, M.D., KATHRYN RUTENBER,  
M.D., and ROOSEVELT HOSPITAL also known  
as MT. SINAI WEST,

Defendants.

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The following papers numbered 1 to 3 read on this motion submitted on January 6, 2020.

<u>PAPERS</u>	<u>NUMBERED</u>
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	1
ANSWERING AFFIDAVIT AND EXHIBITS	2
REPLY AFFIDAVIT AND EXHIBITS	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS DENIED AS FOLLOWS:

Upon completion of their November 7, 2019-mediation, the parties agreed to a global settlement of plaintiff-infant's (infant) permanent neurological injury claims for a total cash sum of \$1,250,000, with the understanding that plaintiffs would also use a portion of said sum to satisfy the derivative claim of plaintiff-mother (mother). The parties also agreed that infant's settlement would be subject to the terms of the New York State Medical Indemnity Fund (MIF), and there would be a 50/50 MIF allocation. (Public Health Law § 2999.) On January 6, 2020, plaintiffs submitted via order to show cause a

proposed compromise order in which \$100,000 of the total settlement was allocated to mother's claim, with the remaining balance of \$1,150,000 allocated to infant's claims.

According to plaintiffs' counsel, it is important for them that the mother receive the entire \$100,000 "in order to plan for housing the family." Defendants do not oppose the \$100,000 allocation; however, the insurance coverage counsel for defendant, Roosevelt Hospital, takes issue with the calculations in the proposed compromise order.

There is no dispute that only the infant is the qualified plaintiff for MIF purposes, and MIF specifies that the "determination of the qualified plaintiff's attorney's fee shall be based upon . . . the full sum of the settlement" on behalf of the qualified plaintiff. (Public Health Law § 2999-j(14).) The plain language of the statute makes it clear that MIF only applies to settlement amounts paid on behalf of the infant. However, plaintiffs' proposed compromise order treats the entire \$1,250,000 cash settlement as the full settlement sum on behalf of the infant, and uses this figure to calculate the total settlement value. As submitted, the proposed compromise order's use of the \$1,250,000 amount results in a total settlement value of \$2,137,030.11, and attorney fees of \$362,969.89 (pursuant to Judiciary Law § 474-a). The disbursements are fixed at \$7,331.17, and using the aforementioned figures, the amount payable to the mother's claim is \$100,000.

Roosevelt Hospital's insurance counsel correctly points out that plaintiffs' calculation of the full settlement sum incorrectly treats the entire \$1,250,00 as being paid

on behalf of the infant, and thereby subject to the MIF statute. Contrary to plaintiffs' suggestion, the \$100,000 payment to satisfy the mother's claim is not equivalent to the payment of a Medicare or Medicaid lien, which is generally included in calculating the full settlement amount. Payments by Medicare or Medicaid for medical services rendered to the infant are done on behalf of and for the benefit of the infant. In addition, although the inclusion or exclusion of the \$100,000 to cover the mother's claim does not change the total amount of \$1,250,000 being paid by defendants, it does affect the calculations in other ways. For example, if the \$1,150,000 that is specifically allocated to the infant's claims is used in the calculations instead of \$1,250,000, then the total settlement value is actually \$2,061,793.44, and the resulting attorney fees total is slightly reduced to \$355,446.23. Applying these adjusted figures, including \$7,331.17 in fixed disbursements, leaves \$82,404.76 payable towards the mother's claim, summarized as follows:

Infant's settlement sum \$1,150,000 = Settlement Value \$2,061,793.44	
Defendants' total payment	\$1,250,000.00
Attorney Fees	(\$355,446.23) <sup>1</sup>
Disbursements	(\$7,331.17)
Infant's net amount	<u>(\$804,817.84)</u>
Balance for Mother's claim	\$82,404.76

Despite the well intended attempt by plaintiffs' counsel to preserve the entire \$100,000 paid towards the mother's claim, this Court is satisfied that their inclusion of

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<sup>1</sup> Attorney fees are calculated by applying the sliding scale of Judiciary Law § 474-a to the settlement value.

the \$100,000 in calculating the full sum of the settlement on behalf of the infant is inconsistent with the MIF statute. Therefore, the instant order to show cause is denied, and plaintiffs are directed to submit a new proposed compromise order consistent with this decision. Plaintiffs are directed to serve a copy of this decision/order with notice of entry by first class mail upon all sides within 30 days of receipt of copy of same. This constitutes the decision and order of this court.

1/7/20  
Dated

Hon.   
Joseph E. Capella, J.S.C.