IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MICHAEL A. PIVONKA, *et al.*	)	**CASE NO. CV 13 804235**
	)	
	)	**JUDGE JOHN P. O'DONNELL**
Plaintiffs,	)	
	)	**JOURNAL ENTRY DENYING**
	)	**THE DEFENDANT'S MOTIONS FOR**
vs.	)	**SUMMARY JUDGMENT AND FOR**
	)	**JUDGMENT ON THE PLEADINGS**
JOHN B. McCARTHY, DIRECTOR	)	
OF THE OHIO DEPT. OF MEDICAID	)	
	)	
Defendant.	)	

John P. O'Donnell, J.:

This is a class action lawsuit by Michael Pivonka and Lisa Rijos for themselves and all similarly situated people. The plaintiffs recovered money on injury claims against third parties and allege that they were forced to forfeit a portion of their recovery to the Ohio Department of Medicaid under an illegal subrogation statute. The complaint asserts a cause of action for unjust enrichment seeking the remedy of restitution of the funds unjustly retained by the defendant.

The Ohio Department of Medicaid has now moved 1) for summary judgment on the bases that: subrogation recovery from both named plaintiffs was allowed by federal law, not just the disputed state statute; Pivonka settled his claim against the department, barring his suit; and Rios's payments were properly paid to the department from an award of her medical expenses, and 2) for judgment on the pleadings on the basis that the offending statutory provisions have been amended to to divest this court of subject matter jurisdiction. This entry follows.

The subrogation statute

Medicaid is a state-administered program of federal and state government health insurance created by Title 42, section 1396, of the United States Code. The law authorizes payments from the federal government to states to enable them to furnish medical assistance to people "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. §1396-1. In Ohio, the Medicaid program was overseen by the department of job and family services but is now administered by the Ohio Department of Medicaid.

The Medicaid statute requires states to enact laws permitting them to seek reimbursement from third-party tortfeasors for Medicaid recipients who received treatment because of another's negligence. 42 U.S.C. §1396a(a)(25). To enforce that obligation to subrogate, Ohio enacted section 5101.58 of the Ohio Revised Code. The law gives the department an "automatic right of recovery . . . against the liability of a third party for the cost of medical assistance paid on behalf of" a Medicaid participant. R.C. 5101.58(A). The statute mandates that "any payment, settlement or compromise" of a Medicaid recipient's claim against a third party is subject to the department's right of recovery. *Id.* The department's right to recovery exists even where the settlement "excludes the cost of medical assistance paid." *Id.* Where a Medicaid participant pursues a third party for damages, either informally or through a lawsuit, the law requires that the participant or his attorney give the department details of the claim, and no settlement of the claim is final without the department being given "a reasonable opportunity to perfect [its] rights of recovery." R.C. 5101.58(E). The participant and his attorney must reimburse the department if the required notice is not given. *Id.* A participant's acceptance of benefits creates an automatic assignment of that person's right to payment by a liable third party for the "cost of medical assistance paid" by Medicaid. R.C. 5101.59(B). Additionally, the law permits a maximum of

one-third of a settlement to be exempt from the lien to cover attorneys' fees and other costs of recovery, but gives the department the right to receive no less than one-half of the rest of the settlement without regard to the components of that settlement, e.g. lost wage, future expense, pain and suffering, etc.

The complaint

Pivonka was injured by the negligence of the Cleveland Metropolitan School District on September 27, 2005, and Rijos was injured in a car accident by the negligence of Jeffrey Ruiz on August 25, 2011. Both of the plaintiffs received medical treatment for their injuries, and some of the bills for their treatment were paid by the Ohio Department of Medicaid.

Pivonka eventually filed a lawsuit as case number 761496 in the Cuyahoga County Court of Common Pleas but settled his claim before trial. From that settlement, he paid the department $7,108.74 based upon a subrogation lien asserted against his settlement proceeds. Rijos also filed a lawsuit (case number 780111 in this court) that ended in a jury verdict in her favor for $9,038.00. The department was given $703.16 of that judgment amount to satisfy its subrogation lien.

The plaintiffs claim that the department was unjustly enriched by those subrogation payments because R.C. 5101.58 is unconstitutional, invalid and unenforceable. Plaintiffs' complaint, ¶¶1, 2, 3, 11, 17, 21, 26, 29-31.

The plaintiffs' legal argument

The federal Medicaid law prohibits the imposition of a lien against the property of a benefit recipient "on account of medical assistance paid." 42 U.S.C. 1396p(a)(1). This is known as the Medicaid anti-lien provision. In *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), the United States Supreme Court considered the question of whether the

federal Medicaid statute's anti-lien provision preempted an Arkansas law that imposed a lien on a Medicaid recipient's tort settlement in an amount equal to Medicaid's costs without regard to the total amount of the settlement or the allocation of the settlement to particular categories of damage.

The court unanimously held that the Arkansas statute's third-party liability provisions were unenforceable insofar as they imposed a lien on the entire settlement amount instead of that part of the settlement representing only damages for medical expenses incurred.

The interplay between the federal anti-lien provision and state subrogation statutes came before the United States Supreme Court again in *Wos v. E.M.A.*, 568 U.S. ___ (2013). E.M.A. was born with multiple serious birth injuries for which she required almost full-time skilled nursing care and which prevented her from ever living independently or providing for her basic needs. The cost of her ongoing care was paid in part by North Carolina's Medicaid program.

Her parents filed a medical malpractice suit against the doctor who delivered her and the hospital where she was born. The parents' expert witnesses estimated the lifetime cost of skilled nursing care alone at $37 million. The case was settled for $2.8 million, and that amount was not allocated among the various components of alleged damages. The North Carolina equivalent of R.C. 5101.58 gave the state a lien on up to one-third of the tort settlement, so the trial court ordered one-third of the settlement to be placed into escrow until the amount of the state's Medicaid lien was conclusively determined.

E.M.A. and her parents then filed a lawsuit claiming that the North Carolina law violated the federal statute's anti-lien provision and was thus unenforceable. While that lawsuit was pending, the North Carolina Supreme Court decided in an earlier case that the irrebuttable statutory presumption that one-third of a Medicaid beneficiary's tort recovery is attributable to

medical expenses was a reasonable method for determining the state's medical reimbursements. The district court in E.M.A.'s case followed that holding, but the federal court of appeals reversed, finding that the North Carolina law violated *Ahlborn*'s holding that a state could not recover any portion of a settlement not attributable to medical expenses. The supreme court accepted North Carolina's appeal to resolve the conflict.

The opinion in *Wos* began by acknowledging *Ahlborn*'s conclusion that "the Medicaid statute sets both a floor and a ceiling on a state's potential share of a beneficiary's tort recovery." The floor is the portion of a settlement representing payments for medical care and the ceiling is the remainder of the settlement. But *Ahlborn* did not decide how to determine what portion of a settlement represented payment for medical care, and North Carolina's disputed law was that state's attempt to answer that question by determining, in advance, that the portion of a settlement representing medical expenses is deemed to be the lesser of the amount of Medicaid benefits paid or one-third of a beneficiary's total tort recovery.

The supreme court held that North Carolina gave the wrong answer. Because its statute operated to allow the state to make a claim to part of a Medicaid beneficiary's tort recovery that was not designated as payments for medical care, the law conflicted with the federal anti-lien provision and was preempted by the federal statute. Germane to the plaintiffs' claims about R.C. 5101.58(G)(2) in this case, the court said:

> An irrebuttable, one-size-fits-all statutory presumption is incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses.

The defendant's motion for summary judgment

The Ohio Department of Medicaid filed its motion for summary judgment prior to any discovery in the case, offering three arguments in support. First, the department asserts that the

plaintiffs are claiming that because R.C. 5101.58(G)(2) is invalid the state is entitled to *no* reimbursement from their tort recoveries. This "all or nothing" approach by both plaintiffs, according to the department, "cannot succeed" because there is no question that both federal and state law permit the state to get paid *some* reimbursement from the tort recovery attributable to medical expense. Defendant's motion for summary judgment, page 3. Second, the department argues that Pivonka's claim is barred by virtue of his settlement of the subrogation claim. Third, the defendant contends that the $703.16 paid by Rijos was lawfully collected from a part of her judgment attributable to medical expenses.

All or nothing

The North Carolina law invalidated by *Wos* because it was preempted by the federal anti-lien statute gave the state a lien on a beneficiary's tort recovery – by settlement, judgment or otherwise – not to "exceed one-third of the gross amount obtained or recovered." R.C. 5101.58(G)(2) gives Ohio a lien on a beneficiary's tort recovery, after deducting the costs of recovery, equal to "no less than one-half of the remaining amount" or the total assistance paid, whichever is less. The department does not argue that there is any difference in Ohio's law that saves it from the same fate as North Carolina's. To the contrary, the department "recognizes that *Wos* means that it is not proper to use R.C. 5101.58(G)(2) to impose a one-size-fits all formula." Mtn. for summary judgment, p. 13.

Instead, the department notes that the plaintiffs' complaint seeks the restitution of "all amounts collected" (complaint, p. 6) under R.C. 5101.58 and points out the impossibility of such relief since even *Ahlborn* and *Wos* acknowledged that the state may recover some portion of a settlement as long as that money comes from the part of the settlement attributable to medical expense. As the department puts it:

> Because Plaintiffs' theory is that ODM has no legal authority to collect *any* amounts attributable to medical expenses, and that theory is wrong, ODM is entitled to judgment as a matter of law. Mtn. for summary judgment, p. 13.

In *Wos* the United States Supreme Court's affirmed the appellate court's remand to the district court for an evidentiary hearing to determine the proper amount of North Carolina's Medicaid lien. That order implicitly acknowledged the state's right to recover some amount even in the face of the invalid section of the law, lending support to the department's argument. But the plaintiffs contend that R.C. 5101.58 provides the state with its only means of executing its right to recover benefits paid where a third party is liable, and since the statute is invalid the state is left with no ability to recover anything.

Deciding who has the better of this argument necessitates a declaration of the rights and obligations of the parties under the interrelated federal and state statutes. Neither side here has asserted an explicit cause of action for declaratory judgment (although the plaintiffs do ask, at page six of the complaint, for a declaration that R.C. 5101.58 is invalid), and the pending summary judgment motion can be decided on the record evidence without a final declaration of the statutory rights and obligations of the parties. I therefore decline, at this point, to address whether the *Wos* decision did or did not leave the department with the ability to dun any part of a medical assistance recipient's tort recovery, but I acknowledge that question will have to be decided in this case. For the purposes of the summary judgment motion, however, I will assume that even after *Wos* the department is entitled to some recovery.

The amount, if any, that the department was properly entitled to collect from the plaintiffs depends on the amounts of Pivonka's settlement and Rijos's judgment that were attributable to medical expenses, and those amounts, in turn, depend on the evidence in each case. It is possible that none of the money recovered by Pivonka was attributable to medical expenses or that all of

it was, or, more likely, somewhere in between.[1] Since the defendant's motion is made pursuant to Rule 56 of the Ohio Rules of Civil Procedure, that genuine issue of material fact prevents a summary judgment.

Nor is the defendant entitled to summary judgment simply because the complaint alleges that the plaintiffs are entitled to restitution of *all* amounts paid. A demand for relief is just that: a demand. The fact that a complaint contains a demand for relief that might be impermissible under the law does not require a summary judgment for the defendant when the complaint has otherwise stated the elements of a cause of action. The complaint here alleges the elements of unjust enrichment: that a benefit was conferred on the defendant, with its knowledge, under circumstances where it would be unjust for the defendant to retain the benefit. There is no question that each plaintiff conferred a benefit – the subrogation payment – on the defendant, and *Wos* makes clear that the benefits were conferred under the authority of an invalid statute, creating the circumstance under which a finder of fact may conclude that it would be unjust for the department to retain the benefit. But how much of the benefit should be disgorged to do equity is left to the finder of fact, and the plaintiffs aren't precluded from seeking restitution of *some* of the benefit just because they pled an entitlement to the return of *all* of it.

Pivonka's payment of the department's claim for reimbursement

As an alternative basis for summary judgment on Pivonka's claim the department argues that his payment of $7,108.74 in settlement of its claim for reimbursement is an accord and satisfaction that bars his complaint in this case.

Accord and satisfaction is an affirmative defense for which the defendant bears the burden of proof. *Hudak v. Nationwide Mut. Ins. Co*., 112 Ohio App 306, 308 (1960). An accord

[1] As for Rijos, it is quite likely that her payment came out of an award for medical expense. See the discussion of her claim at page 10 of this opinion.

is a contract between a debtor and a creditor in which the creditor's claim is settled in exchange for a sum of money other than that which is allegedly due. *Allen v. R.G. Indus. Supply*, 66 Ohio St. 3d 229, 231 (1993). Satisfaction is the performance of that contract. *Id*. An accord and satisfaction must be supported by consideration. *Id*.

An accord and satisfaction most often arises in cases involving a contract between the parties where they agree that a contract exists but disagree on whether any money is owed at all or how much is owed. To supplant the original contract, the parties enter into a new one – the accord – and then complete it by performance, usually payment. In that context it is clearly a defense to a claim for money damages, in other words a legal claim. But the claim in this case is an equitable one that arose *because* of the alleged accord and satisfaction. In other words, if the purported accord and satisfaction didn't happen – if Pivonka never paid the money – the claim of unjust enrichment wouldn't exist. It was only after he paid the money that he learned the state took it from him under color of an illegal law. It is difficult for me to see how a claim that arises because of a payment can be said to be barred by that very payment.

Moreover, a purported accord and satisfaction may be taken into account when deciding whether an unjust enrichment defendant's retention of a benefit is "unjust" under the circumstances, but a finding that the accord and satisfaction serves as a complete bar to Pivonka's claim ignores the obligation to take all of the equities into account when deciding a claim of unjust enrichment. I cannot say on the record evidence in this case, construed most strongly in Pivonka's favor, that his payment – perhaps coerced, in some measure, by the existence of an unenforceable statute – defeats the possibility that the department's receipt and retention of the payment is unjust under the circumstances. In fact, the opposite is true: there could be no unjust enrichment if the payment wasn't made in the first place.

The same reasoning applies to the affirmative defense of settlement, which is essentially indistinguishable from accord and satisfaction because it requires a meeting of the minds on the terms of the compromise. Construing the evidence most strongly in his favor, Pivonka never knew the department's claim was founded on an unenforceable statute, leaving genuine questions of material fact about the exact terms of the settlement and its voluntariness.

Rijos's payment of the department's claim from an award of medical expenses

The department's motion for summary judgment includes exhibits showing that Rijos entered evidence at the trial of her tort case that she incurred $5,334.50 in medical bills and that the defendant offered evidence and argument that only $2,288.50 should be awarded. The jury returned a verdict in the total amount of $9,038 and the jury's interrogatory answers attributed $2,288 of that amount to economic loss. Since Rijos's trial exhibit 5 – her "audit of specials" – shows only medical expense as components of her economic loss it is clear that the jury's award of economic loss included only medical expense. There is also no doubt that the department was paid out of that award exactly what it had paid for Rijos's medical bills: $703.16.

If the department is entitled to a recovery even in the face of an invalid statute, then the amount it should get is $703.16 out of Rijos's total award of $2,288 for medical expense. But if the plaintiffs are correct and the absence of a valid subrogation statute leaves the department entitled to recover nothing, then it has been unjustly enriched and Rijos's claim has merit. As noted above, it is premature under the current procedural posture of the case to make a declaration of the rights and obligations of the parties under 42 U.S.C. 1396 and R.C. 5101.58 *et seq*. Without that declaration there is a genuine issue of material fact precluding summary judgment in the defendant's favor on the basis that Rijos was only made to pay back the department from an award received on account of her medical expenses.

The department's motion for judgment on the pleadings

The decision in *Wos* was released on March 20, 2013. Six months later – and in reaction to *Wos* – R.C. 5101.58 was amended (and renumbered as 5160.37) to provide for an administrative evidentiary hearing where the Medicaid beneficiary may rebut the statutory presumption that the department is entitled to recover one-half of any tort recovery (after costs of recovery) or the full amount of benefits paid by the department, whichever is less.

The new statute also provides, at R.C. 5160.37(L)(2), that a medical assistance recipient who paid a subrogated amount after September 29, 2007 – a category that includes Pivonka and Rijos – "may request a hearing" under the new procedures within 180 days of the law's enactment.

The department has filed a motion for judgment on the pleadings on the basis that the new law divests the common pleas court of jurisdiction to hear the plaintiffs' lawsuit. In particular, the department points to new R.C. 5160.37(P). That section makes explicit that the new parts of the statute conferring the right to a hearing to contest the amount of recovery sought by the department

> are remedial in nature and shall be liberally construed by the courts of this state in accordance with section 1.11 of the Revised Code. Those divisions specify the sole remedy available to a party who claims the department or a county department has received or is to receive more money than entitled to receive under this section, section 5160.38 of the Revised Code, or former section 5101.58 or 5101.59 of the Revised Code.

The plaintiffs oppose judgment on the pleadings on the grounds that the department, an executive branch agency, cannot strip the judiciary of jurisdiction, and that the legislation amending R.C. 5101.58 was passed in violation of the Ohio Constitution's single subject rule. Additionally, the plaintiffs assert that the new law doesn't apply to them since the state did not have a right to any money under R.C. 5101.58. This is what the department refers to as the "all

or nothing" position, and as noted above a determination on that issue will only be made after discovery and briefing specific to that question.

Prudence dictates the same course on a decision on the effect the new statute has on the rights and obligations of the parties because the issues raised in the motion for judgment on the pleadings and the brief in opposition cannot be thoughtfully decided on the pleadings alone.

Conclusion

For the reasons given in this opinion, the defendant's motion for summary judgment and motion for judgment on the pleadings are denied.

IT IS SO ORDERED:

_____ January 3, 2016

Judge John P O'Donnell Date

SERVICE

A copy of this journal entry was sent by email on January 3, 2016, to the following:

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