[Cite as *Encompass Indemn. Co. v. Bates*, 2012-Ohio-4503.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Encompass Indemnity Company,	:	
Plaintiff-Appellee,	:	
		No. 11AP-1010
v.	:	(C.P.C. No. 10CVH-05-7470)
Brian K. Bates,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
Ohio Department of Job and Family Services,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 28, 2012

Michael DeWine, Attorney General, and *Robert J. Byrne*, for appellee.

Law Offices of Paul Scott, and *Paul Scott*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Brian K. Bates, appeals from a judgment of the Franklin County Court of Common Pleas granting judgment in favor of defendant-appellee, Ohio Department of Job and Family Services, Tort Recovery Unit ("ODJFS"). For the following reasons, we affirm.

I. Factual and Procedural Background

{¶ 2} On January 12, 2008, Bates was seriously injured as a result of an automobile accident involving another vehicle driven by Tim D'Angelo. Bates required medical care as a result of those injuries. His medical care was paid in part by ODJFS through the Medicaid program. Mr. D'Angelo had a personal automobile policy issued by Encompass Insurance ("Encompass") that provided bodily injury liability insurance coverage in the amount of $100,000 per person and $300,000 per accident. Liability for the accident was disputed. Encompass and Bates ultimately agreed to settle Bates's claim for $100,000—Emcompass's policy limit.

{¶ 3} Bates's medical bills totaled over $185,000. (Serrott affidavit, ¶ 5.) It is undisputed that ODJFS paid about $67,245.37 of Bates's medical bills. (Serrott affidavit, ¶ 11.) After attorney's fees, expenses and costs were deducted, approximately $62,000 of the $100,000 settlement remained.

{¶ 4} Pursuant to R.C. 5101.58(A) and 5101.58(G)(2), ODJFS asserted it had a right to be reimbursed either the full amount of medical expenses it paid on Bates's behalf, or one-half of the settlement after the deduction of attorney's fees, expenses and costs, whichever is less. Because one-half of the settlement funds remaining after deducting attorney's fees, expenses and costs ($31,000) was less than the full amount ODJFS paid towards Bates's medical expenses ($67,245.37), ODJFS contended it had a right to reimbursement of $31,000. Bates argued that ODJFS was not entitled to any reimbursement, or in the alternative, it was only entitled to an amount substantially less than $31,000. Because Bates and ODJFS did not agree on the amount of ODJFS's reimbursement right, Encompass filed a complaint for interpleader and deposited the disputed $31,000 with the trial court. Encompass requested that the trial court determine the respective rights of Bates and ODJFS to the disputed funds. Thereafter, by agreement of the parties, the trial court dismissed Encompass from the case, leaving Bates and ODJFS to litigate their respective rights to these funds.

{¶ 5} Ultimately, the trial court issued a "scheduling notice" indicating that "[b]ased upon the representations of the parties that the sole remaining issue is division of funds placed in escrow * * * the issue [could] be resolved by motions." Thereafter, ODJFS filed a pleading entitled "memorandum in support of its position." Bates filed a

pleading entitled "motion in support of defendant, Brian Bates, request for summary judgment or disposition of this matter." Both parties then filed responses.

{¶ 6} In a decision and entry entered October 21, 2011, the trial court ruled in favor of ODJFS and ordered its clerk of courts to pay $30,503.07 (out of the $31,000 held) to ODJFS.

{¶ 7} Bates appeals, assigning the following errors:

> ASSIGNMENT OF ERROR NO. I
>
> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE WHEN APPELLEE FAILED TO SUBMIT AN AFFIDAVIT, OR ANY FORM OF PROOF, THAT THE MEDICAL EXPENSES WERE PAID BY APPELLEE OR THAT THE EXPENSES WERE REASONABLE, NECESSARY, AND RELATED TO THE AUTOMOBILE CRASH AT ISSUE.
>
> ASSIGNMENT OF ERROR NO. II
>
> THE TRIAL COURT ERRED IN REFUSING TO APPLY A PRO-RATA FORMULA IN ORDERING DISTRIBUTION OF THE PROCEEDS OF THE SETTLEMENT REPRESENTING MEDICAL EXSPENSES.
>
> ASSIGNMENT OF ERROR NO. III
>
> THE TRIAL COURT ERRED IN PERMITTING A SUBROGATION RECOVERY ON BEHALF OF APPELLEE WHEN O.R.C. § 5105.58 ONLY GIVES APPELLEE THE RIGHT OF RECOVERY AGAINST THIRD PARTIES AND THE STATUTE OF LIMITATION HAD EXPIRED WITH RESPECT TO APPELLEE'S SUBROGATION CLAIM AGAINST THE TORTFEASOR.

II. Analysis

{¶ 8} Because the issue decided by the trial court raises a question of law, our standard of review is de novo. *Maga v. Ohio State Med. Bd.*, 10th Dist. No. 11AP-862, 2012-Ohio-1764, ¶ 29.

{¶ 9} In his first assignment of error, Bates argues that the trial court erred when it entered judgment for ODJFS because there are genuine issues of material fact regarding

the amount of medical expenses and whether those medical expenses are related to the accident. We disagree.

{¶ 10} In the affidavit of Mark Serrott that is attached to Bates's motion for summary judgment or disposition of this matter, Mr. Serrott states that "Medicaid paid about $67,245.37 in medical bills on behalf of Bates." (Serrott affidavit, ¶ 11.) This is the same figure noted in ODJFS's memorandum in support of its position. The record reflects that this figure was not disputed in the trial court by either party. In addition, Bates did not argue in the trial court that the medical expenses paid by ODJFS were not reasonable, necessary, and related to the accident. Therefore, Bates has waived this argument on appeal. *Camp v. Star Leasing Co.*, 10th Dist. No. 11AP-977, 2012-Ohio-3650, ¶ 66 (generally, argument not raised in trial court is waived on appeal).

{¶ 11} Bates's argument is also based on the assumption that the trial court used Civ.R. 56 as the procedural vehicle for its decision. That assumption is incorrect. The trial court's decision and entry makes no reference to Civ.R. 56 or the summary judgment standard. In fact, in their written submissions to the trial court, neither party cited Civ.R. 56 or the Civ.R. 56 standard. Nor did either party indicate there were any disputed facts relevant to the legal question presented. Rather, based upon representations of the parties, the trial court agreed to decide on "motions" what was essentially a question of law on undisputed facts. (*See* July 13, 2011 scheduling notice.) Although the trial court's use of the word "motions" may have created some confusion, it is clear that the parties represented to the court that the issue presented was one of law and that the issue could be decided by written submissions. For these reasons, we overrule Bates's first assignment of error.

{¶ 12} In his second assignment of error, Bates argues that the trial court erred in failing to apply a pro rata formula in calculating the reimbursement amount to which ODJFS is entitled. Based upon the opinion of his former lawyer, Bates argues that although he settled his case for $100,000, his case actually had a value of at least $500,000, if there had been sufficient insurance coverage. According to Bates, the $100,000 settlement represented only about 20 percent of the true value of his case. Therefore, Bates contends that ODJFS may not be reimbursed more than 20 percent of the amount it paid towards Bates's medical bills (20 percent of $67,245.37 equals

$13,449.07). Bates argues that to the extent Ohio law permits ODJFS to recover more than this amount, it conflicts with federal law and is unenforceable. Bates relies principally upon *Arkansas Dept. of Health and Human Sers. v. Ahlborn*, 547 U.S. 268 (2006), to support his argument.

{¶ 13} Before addressing the *Ahlborn* decision, it is necessary to generally describe the Medicaid program and the obligations it places on participating states to seek reimbursement for medical benefits paid on behalf of a recipient if a third-party tortfeasor is responsible for the recipient's injuries.

{¶ 14} The Medicaid program provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs. Although federal law does not compel states to participate in Medicaid, all states have chosen to join the program. Participating in Medicaid subjects the states to certain statutory requirements. Among those requirements is that the state agency charged with managing Medicaid must take reasonable measures to determine the liability of third parties to pay for medical services and, if such liability is determined after the state has made payments for medical services, the agency must seek reimbursement for those payments to the extent of such liability. *Ahlborn* at 275-76, citing 42 U.S.C. 1396(a)(25)(A) and (B); *Mulk v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-211, 2011-Ohio-5850, ¶ 8. Moreover, states are required to enact laws providing that, where a third party has legal liability to make payments for medical expenses, the state will be considered to have acquired the rights of the injured party to seek payments to the extent that the state provided assistance with medical expenses. *Ahlborn* at 276; 42 U.S.C. 1396(a)(25)(H); *Mulk* at ¶ 8.

{¶ 15} In Ohio, that obligation is addressed by R.C. 5101.58 which provides in relevant part that "when an action or claim is brought against a third party by a public assistance recipient or participant, any payment, settlement or compromise of the action or claim, or any court award or judgment, is subject to the recovery right of the department of job and family services or appropriate county department of job and family services." R.C. 5101.58(A). The law stipulates that acceptance of public assistance gives ODJFS or the applicable county department of job and family services an "automatic right of recovery."

{¶ 16} Relying principally upon the *Ahlborn* decision, Bates contends that federal law limits ODJFS's right of reimbursement to a pro rata share of the settlement proceeds. In *Ahlborn*, the plaintiff was injured in an automobile accident. The Arkansas Department of Health and Human Services ("ADHS") paid $215,645.30 in medical expenses on her behalf. *Ahlborn* at 272-73. Ahlborn then filed suit against the alleged tortfeasors. Ultimately, the case settled for $550,000. ADHS asserted a lien against the settlement for the total amount of medical expenses paid on Ahlborn's behalf. Ahlborn filed suit arguing that the state's lien violated federal law because it would "require depletion of compensation for injuries other than past medical expenses." *Id.* at 274. Ahlborn and ADHS stipulated that the plaintiff's total claim was worth more than $3 million and that the settlement amount constituted approximately one-sixth of the total claim value. The parties also stipulated that $35,581.47, or 16.5 percent of the settlement, constituted "a fair representation of the percentage of the settlement constituting payment by the tortfeasor for past medical care." The United States Supreme Court upheld the Eighth Circuit's ruling, holding that federal law "does not sanction an assignment of rights to payment for anything other than medical expenses—not lost wages, not pain and suffering, not an inheritance." *Id.* at 281. Therefore, ADHS was prohibited from asserting a lien on any portion of the settlement beyond the amounts representing payments for medical care. *Id.* at 292.

{¶ 17} In response to the *Ahlborn* decision, the Ohio legislature amended R.C. 5101.58 to add division (G)(2), which provided for the deduction of attorney's fees and costs before allocating the state's recovery. *Mulk* at ¶ 19. That provision provides:

> Reasonable attorneys' fees, not to exceed one-third of the total judgment, award, settlement, or compromise, plus costs and other expenses incurred by the recipient or participant in securing the judgment, award, settlement, or compromise, shall first be deducted from the total judgment, award, settlement, or compromise. After fees, costs, and other expenses are deducted from the total judgment, award, settlement, or compromise, the department of job and family services or appropriate county department of job and family services shall receive no less than one-half of the remaining amount, or the actual amount of medical assistance paid, whichever is less.

{¶ 18} Thus, under Ohio law, attorney's fees, expenses and costs are first deducted from the judgment or settlement before the statutory formula is applied. Under the formula, ODJFS can be reimbursed no more than one-half of the remaining recovery, thereby ensuring that the injured party will retain a significant portion of the judgment or settlement for categories of damages other than medical expenses. *Id*. at ¶ 13.

{¶ 19} In *Mulk*, we rejected an argument very similar to that presented by Bates here. The plaintiffs in *Mulk* required medical care as a result of injuries sustained due to the tortuous conduct of third parties. The plaintiff's medical care was paid for in part by ODJFS through the Medicaid program. The plaintiffs filed tort claims against the third parties allegedly responsible for their injuries. They retained attorneys to pursue these tort claims on a contingent fee basis. Ultimately, the plaintiffs settled their claims and they received a substantial settlement from the tortfeasors. The plaintiffs paid their attorney according to the contingent fee agreements. Because the total medical expenses paid by ODJFS for plaintiffs' benefit were less than one-half of the settlement monies remaining after attorney's fees, costs and expenses were deducted, ODJFS asserted a right to recover all of those medical expenses. Several of the plaintiffs filed suit seeking declaratory judgment that they are only obligated to reimburse ODJFS on a pro rata basis. Plaintiffs argued that because they had to pay attorney's fees, costs and expenses out of the settlement proceeds, ODJFS's reimbursement should also be reduced by a similar percentage (the percentage of the total settlement consumed by attorney's fees, costs and expenses). The plaintiffs principally relied upon *Ahlborn* to support their argument. The trial court granted judgment in favor of ODJFS as a matter of law and we affirmed.

{¶ 20} We expressly rejected in *Mulk* the application of a pro rata reduction in the amount ODJFS was entitled to recover for reimbursement of medical expenses paid on behalf of the plaintiffs. We noted that R.C. 5101.58(G)(2) already required the deduction of attorney's fees, costs and expenses before the statutory formula applied. Moreover, by limiting ODJFS to one-half of the settlement amount remaining after deducting attorney's fees, costs and expenses, or the full amount of the medical expenses paid by ODJFS, whichever is less, the Ohio statute addressed the concern raised in *Ahlborn*—that reimbursement not go beyond an amount representing payments for medical care. We stated "[t]he General Assembly has created a valid method to fulfill its obligations under

federal law and to preserve an injured party's recovery of other categories of damages." *Mulk* at ¶ 30. In addition, we stated:

> Thus, existing Ohio law provides for the payment of attorney fees and costs *before* calculating appellee's recovery for medical expenses. Moreover, the law is structured to ensure that appellee will take no more than half of the remaining recovery, thereby ensuring that the injured party will retain a portion of the judgment or settlement to compensate for other categories of damages. State and federal courts have found that Medicaid recovery systems in other states that are similar to Ohio's system are permissible under *Ahlborn*.

Id. at ¶ 13.

{¶ 21} Based upon our reasoning in *Mulk*, we reject Bates's contention that ODJFS' reimbursement right is subject to a pro rata reduction. Ohio law preserves an injured Medicaid recipient's recovery for categories of damages other than medical expenses. In addition, unlike *Ahlborn*, here there is no stipulation regarding what percentage of the settlement constituted payment for Bates's medical expenses.

{¶ 22} Bates also argues that a pro rata reduction in ODJFS's right of reimbursement is required because a subrogation claim is subject to equitable principles including the "made-whole doctrine." Pursuant to the made-whole doctrine, if a plaintiff is not made whole and the case is settled for less than its full value, the subrogee's interest must be reduced by the same pro rata amount. For the reasons more fully discussed in connection with Bates's third assignment of error, this argument is flawed because ODJFS is asserting a statutory right of recovery, not a right based upon subrogation. Therefore, the made-whole doctrine is inapplicable.

{¶ 23} For the foregoing reasons, we overrule Bates's second assignment of error.

{¶ 24} In his third assignment of error, Bates contends that ODJFS is not entitled to any reimbursement because its subrogation claim is barred by the two-year statute of limitations, and R.C. 5101.58 does permit an action against a recipient. We find this argument unpersuasive.

{¶ 25} R.C. 5101.58(A) states in relevant part: "The acceptance of public assistance gives an automatic right of recovery to the department of job and family services * * * against the liability of a third party for the cost of medical assistance paid on behalf of the public assistance recipient or participant." The statute further mandates that a public

assistance recipient's settlement is subject to the department of job and family services automatic recovery right. Therefore, the statute expressly creates an independent right of recovery against the settlement proceeds—not a subrogation interest. We noted the nature of this statutory right in *Mulk* wherein we stated that ODJFS's "ability to recover payments for medical expenses from a liable third party was not limited by the general law of subrogation." *Mulk* at ¶ 22. Because the right at issue is created by statute, and is not based on subrogation, the two-year statute of limitations identified by Bates is inapplicable. Nor does this case involve a claim against Bates. Rather, this is an interpleader action that seeks to resolve competing claims against a portion of the settlement proceeds. For these reasons, we overrule Bates's third assignment of error.

{¶ 26} Having overruled Bates's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and CONNOR, J., concur.