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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SANDRA SHEWRY, as Director, etc., Plaintiff and Respondent, v. LYUDMILA PASTERNAK, Individually and as Successor in Interest, etc., et al., Defendants and Appellants.	A128484 (San Francisco City and County Super. Ct. No. CGC-09-484400)

Appellants protest the trial court's ruling that the Department of Health Care Services (Department) is entitled to recover $38,328.81 plus interest on a Medi-Cal lien in a third party tort action brought by Lyudmila Pasternak, the daughter of the deceased Medi-Cal beneficiary.[1] None of their arguments—that (1) Pasternak abandoned the claim that is subject to the Department's lien; (2) the Department released its lien claim, or is equitably estopped from asserting it; and (3) the trial court erroneously valued the underlying claim and erroneously allocated the settlement proceeds—are deserving. Thus, we affirm the judgment.

[1] Appellants are Lyudmila Pasternak, individually and as successor in interest to Nadezhda Sundukova, deceased; Albert G. Stoll, Jr. (Stoll); and the Law Office of Albert G. Stoll, Jr. Respondent is Sandra Shewry, as Director of the Department.

I. BACKGROUND

A. *Facts Giving Rise to Medi-Cal Lien*

On June 21, 2004, Nadezhda Sundukova, the deceased mother of appellant Pasternak, fell and broke her hip while under treatment at an ophthalmic center. She was treated at St. Rose Hospital in Hayward, and then transferred to Driftwood Health Care Center (Driftwood) where she developed an infection necessitating transfer back to the hospital. There a feeding tube was allegedly negligently inserted into her lung; she developed pneumonia and died on October 17, 2004. The Department, through its Medi-Cal program, paid $102,680.83 for Sundukova's treatment throughout this period.

B. *Law Governing Lien Rights*

California participates in the federal Medicaid program through its Medi-Cal program, which the Department administers in conformity with federal law. (*Lopez v. DaimlerChrysler Corp*. (2009) 179 Cal.App.4th 1373, 1379 (*Lopez*).) Federal law obliges state Medicaid agencies "to seek reimbursement from third parties legally liable for the medical expenses of individuals who receive benefits implicating Medicaid funds." (*McMillian v. Stroud* (2008) 166 Cal.App.4th 692, 697; see 42 U.S.C. § 1396a(a)(25).)

When benefits are provided to a Medi-Cal beneficiary[2] because of an injury for which another person or entity is civilly liable, the Department is entitled to recover from such third party the reasonable value of benefits so provided. (§ 14124.71, subd. (a).) In addition, the Department obtains lien rights in certain recoveries on behalf of a Medi-Cal beneficiary, as follows: "When an action or claim is brought by persons entitled to bring such actions or assert such claims against a third party who may be liable for causing the death of a beneficiary, any settlement, judgment or award obtained is subject to the director's right to recover from that party the reasonable value of the benefits provided to

[2] The term "beneficiary" includes the person who received benefits and includes his or her personal representative, estate or survivors. (Welf. & Inst. Code, § 14124.70, subd. (b).) Unless noted otherwise, all further statutory references are to the Welfare and Institutions Code.

the beneficiary under the Medi-Cal program . . . ." (§ 14124.72, subd. (c).) Further, the beneficiary must give formal written notice of the initiation of legal proceedings against such third parties within 30 days of filing the action. (§§ 14124.73, subd. (a), 14124.79.) As well, no judgment, award or settlement of a third party claim is deemed final or satisfied without giving the Department notice and a reasonable opportunity to perfect and satisfy the lien. (§ 14124.76, subd. (a).)

The Department's recovery on a lien is "limited to that portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided on behalf of a beneficiary." (§ 14124.76, subd. (a).) The statute also delineates procedures for ascertaining the portion of a recovery that is allocated to medical expenses or care, as follows: "All reasonable efforts shall be made to obtain the director's advance agreement to a determination as to what portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided [on] behalf [of] the beneficiary. Absent the director's advance agreement . . . , the matter shall be submitted to a court for decision." (*Ibid*.) Either party may move to resolve the dispute, in which case the court "shall be guided by the United States Supreme Court decision in Arkansas Department of Health and Human Services v. Ahlborn (2006) 547 U.S. 268[3] [*Ahlborn*] and other relevant statutory and case law." (§ 14124.76, subd. (a).)

When the Department imposes a lien on a beneficiary's own action against a third party tortfeasor, the lien will be reduced by (1) 25 percent for its reasonable share of attorney fees paid by the beneficiary, as well as (2) its proportionate share of litigation expenses. (§ 14124.72, subd. (d).)

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[3] In *Ahlborn*, the United States Supreme Court held that the Arkansas Department of Health and Human Services' recovery for benefits paid to a beneficiary could not exceed the portion of the settlement representing payments attributable to medical expenses. The high court employed a formula for determining the amount of the Medicaid lien recoverable from that settlement. (*Ahlborn*, *supra*, 547 U.S. at pp. 280-281.)

C. *Litigation*

In June 2005, Pasternak, individually and as successor in interest to her mother, sued all the health care providers who treated and purportedly caused her mother's injury and death. (*Pasternak v. Barez* (Super. Ct. Alameda County, 2007, No. RG05218786).) Nine of the 10 causes of action were brought either solely as successor in interest to Sundukova, or both individually and as successor in interest to the mother. Among other items, Pasternak pursued successor in interest damages under Code of Civil Procedure section 377.34, personal injury damages, and reimbursement for medical expenses. Neither Pasternak nor her attorneys notified the Department of this action. Appellants Stoll and the Law Office of Albert G. Stoll, Jr. substituted in as counsel of record on December 29, 2005.

In April 2006, Pasternak settled her claims against Driftwood for $52,500; no notice of settlement was given to the Department. A first amended complaint reflecting this settlement followed on May 31, 2006, with four of the five causes of action brought solely as successor in interest to Sundukova. As successor in interest, Pasternak prayed for "damages recoverable under C.C.P. section 377.34" including reimbursement for medical expenses.

The next week appellants notified the Department that a case had been filed concerning Pasternak's deceased mother, and indicated the Department might have a lien for medical payments. However, the notice did not specify the name of the court as required by section 14124.73, subdivision (a), nor did it reveal the $52,500 settlement with Driftwood. The Department furnished appellants with its preliminary itemization of medical expenses in the amount of $102,678.15 on July 6, 2006,[4] and at that time advised: "When this claim nears settlement, you are required by Welfare and Institutions Code, Sections 14124.76 and 14124.79, to notify us so that we may furnish you with an updated lien amount." The Department provided notice of the final lien amount of

[4] The Department's Estate Recovery Unit also opened a separate claim, with a separate case number, against Sundukova's estate, as required by section 14009.5, subdivision (a).

$102,680.83 on October 27, 2006, and indicated satisfaction of the lien must be sent to its Personal Injury Unit.

Meanwhile, Pasternak settled her case with the remaining defendants in March 2007, for $125,000. Appellants did not notify the Department of this settlement as required by statute, but Stoll did let the Department know, by letter dated April 2, 2007, that Sundukova "had no assets at the time of her death and only had $567.82 in her bank account." The Department's Estate Recovery Unit responded that in light of this information, the Department would "refrain from enforcing collection *against this estate*, at this time. [¶] This case is now closed." (Italics added.) The letter referenced the estate recovery case number and case amount of $158,461.05 and further stated: "Should additional assets become available in the future, please notify this office pursuant to [various Probate Code provisions]. We may exert our claim rights at that time."

Thereafter, on April 26, 2007, Stoll disbursed $22,000 to Pasternak which he had retained to pay the Medi-Cal lien, explaining to his client, "MediCal is no longer pursuing collections for their lien in the amount of $158,461.05."

In January 2009, the Department filed suit against appellants to recover the amount of $38,328.81 plus interest on its lien. The Department alleged it had made repeated demands on appellants for payment of its lien, but they refused to satisfy the obligation. Moreover, appellants failed to provide the Department notice and a reasonable opportunity to perfect and satisfy its lien, as required by law. Appellants moved to reduce and determine the lien amount. The trial court determined that appellants owed the full amount requested, and denied appellants' subsequent motions for reconsideration and a new trial. This appeal followed.

II. DISCUSSION

Appellants protest that the Department is entitled to nothing because Pasternak abandoned her successor-in-interest claims for medical expenses, and urge that the Department's recovery is barred by a purported release and principles of equitable estoppel. Alternatively, they maintain that the trial court erroneously valued the underlying claim and erroneously allocated the settlement proceeds.

A. *No Abandonment of Medical Reimbursement Claim*

Appellants assert that in settling the underlying action, the personal injury claims were abandoned and the full settlement amount of $177,500 was paid by the health care defendants to settle the wrongful death claims. As our Supreme Court has held, "a Medi-Cal lien may not be asserted in a wrongful death action when the damages recoverable by the plaintiff in that action do not and could not include compensation for medical services provided to the decedent by Medi-Cal." (*Fitch v. Select Products Co*. (2005) 36 Cal.4th 812, 822.) Here, the trial court found that the underlying settlement was *not* solely for the wrongful death action and rejected appellants' assertion of abandonment as not supported by the evidence.

Appellants argue nonetheless that statements in Stoll's declaration, as well as the mediation brief submitted in the underlying action, bolster their claim of abandonment.

There is no support. First, the statements in Stoll's declaration lodged with appellants' motion to reduce the lien are self-serving at best. Second, although appellants' mediation brief asserted "the statutory maximum of $250,000 in wrongful death medical negligence damages," it did not state that any other claims were being abandoned. Further, the settlement agreements themselves settled and released *all claims* asserted, not just the wrongful death claim, and did not indicate that they were based solely on the wrongful death claim or that any other claims had been abandoned. Indeed, the settlement with Driftwood expressly stated it was understood that "*Plaintiff agrees to pay . . . reimbursement of Medicaid and/or Medicare* and/or any other third-party payors, if any, *including any liens, out of the amounts paid in this Agreement*." (Italics added.) Moreover, the settlement with the other tortfeasors noted that Pasternak, individually and as successor in interest to her deceased mother, was releasing any and all claims "which are the subject of the Complaint . . . *including . . . any and all known and unknown claims for bodily injuries, personal injuries*, and wrongful death . . . ." (Italics added.) That agreement also provided that Pasternak acknowledged and agreed she was "*responsible for any and all liens . . . on any of the proceeds of the settlement including any Medi-Cal liens*." (Italics added.) Finally, as the trial court noted and contrary to appellants'

contention on appeal, Stoll initially had retained a portion of Pasternak's recovery for the express purpose of paying the Medi-Cal lien.

In addition, appellants are not on sound legal footing. They argue that "by utilizing the lien process" rather than bringing its own action or intervening in the beneficiary's action, "the Department essentially abdicate[d] its ability to control the settlement" and cannot now complain of potential settlement manipulation to deprive it of any recovery. In other words, the Department did not "exercise its rights" to participate in settlement discussions. Appellants fail to point out that they did not notify the Department of the initiation of legal proceedings within 30 days of filing the action, as required by section 14124.73, subdivision (a); nor did they adhere to section 14124.76, subdivision (a), which dictates that no settlement is satisfied without first giving the Department notice and a reasonable opportunity to perfect and satisfy its lien. Yet, the Department specifically alerted Stoll of his duty under this statute and section 14124.79 to notify the Department when the claim neared settlement.

Appellants also urge that the Department was required to present evidence to rebut Stoll's declaration to the effect that nothing was paid in settlement of the personal injury claims, but it did not, citing *Lopez*, *supra*, 179 Cal.App.4th at page 1387. In short, appellants contend there is a failure of proof that the settlement included some payment for those claims. *Lopez* is of no help. There, the beneficiary settled his tort suit for $2 million. In support of his motion to reduce the Medi-Cal lien, the beneficiary presented evidence of estimated future medical costs and future loss of earning capacity. The trial court requested that the department provide supplemental briefing explaining why it valued the lien at $350,000. The department provided no explanation, did not explain why the *Ahlborn* formula should not be used to calculate reimbursement of its lien, and did not refute the beneficiary's evidence. Held: The lower court did not erroneously place the burden of proof on the department to justify its valuation of the lien. (*Id*. at p. 1387.) Negotiations to decide what portion of the settlement would be allocated to medical expenses were not fruitful; therefore, the beneficiary moved to resolve the dispute and in the process provided evidence supporting his valuation. "The

trial court requested the Department to participate by submitting its reasons for valuing the lien. The Department failed to do so. The court acted within the statutory scheme and determined the Department's lien based on the evidence before it." (*Ibid.*)

In contrast, the Department, in its opposing brief as well as at the hearing on the tentative decision, provided ample reasoning and justification for its substantially reduced lien. That hearing was continued at the court's prompting, at which time the deputy attorney general asked if he should submit proposed calculations. The court queried if the parties agreed that if the *Ahlborn* formula were employed, the lien amount would be greater than what the Department was requesting. Counsel for appellants said no, at which point the court instructed the parties to talk among themselves. Prior to the final hearing, the Department submitted calculations of the precise amount of the lien recoverable under the *Ahlborn* formula: $51,728.34.

Substantial evidence supported the Department's right to recover $38,328.81 plus interest, but conversely did not support appellants' claim of abandonment.

B. *No Waiver of Release of Lien Claims*

Once the Department has notice of a lien under the Medi-Cal statutes, it can compromise, settle or release the claim, or waive it in whole or in part. (§ 14124.71, subd. (b)(1), (2).) Appellants now claim that the Department's letter of April 20, 2007, on its face closed the case and thereby released all lien claims.

The letter did not waive or release any claim. To sustain a defense of release, "the release must ' "be clear, unambiguous and explicit in expressing the intent of the parties." ' [Citations.]" (*Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 738.) The letter stated that the Department would refrain from collection against the estate at this time, but might exert its claim rights in the future should additional assets become available. This is not a clear and unambiguous release. True, the letter also said that the "case is now closed," perhaps inserting an element of ambiguity but not constituting a release.

As significant, this correspondence was initiated by the Estate Recovery Unit, indicated it concerned the estate of Sundukova, listed its own case number and identified

a *claim* amount of $158,461.05 (as opposed to the final personal injury *lien* of $102,680.83). The letter responded to Stoll's correspondence, which concerned only the financial circumstances of the decedent and made no mention of the underlying personal injury litigation or the settlement thereof. Contrary to appellants' lament that nothing in the letter would put anyone on notice that there was a distinction between the two departmental claims, it is clear that the April 2007 letter concerned only the Department's estate recovery collection claim, not its lien claim on the personal injury settlement.

Appellants also contend that because the beneficiary was deceased, only the beneficiary's estate could proceed in the litigation. Construing the letter as an outright release of all claims against the estate, appellants reason that it necessarily released all of the Department's claims. This argument was not raised below and hence is waived. But more to the point and without delving into the nuances of probate and estate law, the issue here concerns the Department's processing of claims and perfection of liens. Subject to exceptions, the Department is required to make a claim against the estate of a deceased beneficiary for reimbursement of Medi-Cal expenditures. (§ 14009.5.) This statute gives the Department a *direct right to claim reimbursement*, but does not afford the Department any *lien rights* stemming from a third party tort action resulting in a judgment, award or settlement, pursuant to section 14124.70 et seq. Two separate statutes, two separate processes, two separate case numbers, two separate amounts owned, two separate departmental units.

Echoing their claim below, appellants further contend that the above letter estopped the Department from pursuing any lien claim. The trial court concluded otherwise, holding that appellants did not establish the elements of an estoppel. This ruling was sound.

The elements of equitable estoppel are not in dispute: (1) the party to be estopped must be informed of the facts and (2) intend that his or her conduct be acted upon, or must act in such a way that the other party has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts and (4) must rely on the conduct to his or her injury. (*Honeywell v. Workers' Comp. Appeals Bd.* (2005)

35 Cal.4th 24, 37.) Further, a party's reliance must be reasonable under the circumstances. (*Mills v. Forestex Co*. (2003) 108 Cal.App.4th 625, 655.)

First, the Department was not apprised of the relevant facts, namely that at the time of sending the April 20, 2007 letter, Pasternak had settled third party tort claims for $177,500. Second, there is no evidence that the Department intended, by this letter, to induce Stoll into believing it was relinquishing its personal injury lien. Third, it is not credible that Stoll, an experienced attorney who by his own declaration admitted to handling cases and correspondence involving Department claims, as well as 16 years of personal injury practice, was not aware that the Department was pursuing two tracks with respect to reimbursement of Medi-Cal payments—the direct claim track against the decedent's estate, and the lien track against the third party tortfeasor settlement. Fourth, for the same reason, and given the content and wording of the letter, it would be unreasonable for him to believe the Department was relinquishing its personal injury lien.

C. *Allocation of Settlement Proceeds*

Appellants are adamant that the trial court erred in valuing the tort case at $250,000 rather than the $1,030,000 value Stoll advanced in his declaration. At the outset we clarify the basis for the valuation. Appellants contend the trial court's $250,000 value was tagged to the Medical Injury Compensation Reform Act (MICRA) cap of $250,000 for noneconomic losses. (See Civ. Code, § 3333.2.) This is not entirely accurate. The court chose $250,000 because "[d]efendants sought only $250,000 at the mediation in the underlying action."[5]

Appellants first maintain that they did not limit the demand in mediation to $250,000, but rather tendered "a Code of Civil Procedure section 998 offer" in that amount. However they want to characterize it, the mediation brief asked for $250,000 in damages.

Next, they assert the court failed to allocate any of the settlement to the wrongful death claim. The trial court appropriately used the *Ahlborn* formula to determine the

[5] Specifically, in the brief Pasternak claimed "the statutory maximum of $250,000" in damages.

recoverable amount on the lien. In essence appellants are suggesting that the trial court should have carved out wrongful death damages *prior to* applying the formula. This approach would result in double counting those damages, counter to the purpose of the *Ahlborn* formula, which is to allocate a settlement between recovery for past medical expenses and other damages. (See *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 752-755.)

Appellants also maintain the trial court should have accepted Stoll's $1 million-plus valuation of the underlying claim. Stoll based his "opinion" on his experience handling three other tort cases with greater recoveries than the instant matter. The court explained that those examples were insufficient as an evidentiary basis for valuing the claim. This conclusion was supported by the evidence. For example, the cases were factually very different and two of the three involved collisions; no details were given about the causes of action asserted; at least two of the cases were not subject to the MICRA cap; and there was no analysis drawing analogies from the prior cases. In any event, Stoll's valuation is not credible. Pasternak's noneconomic damages were subject to the $250,000 MICRA cap, there was no serious claim for punitive damages and the only economic damages apparent from the record were the $102,680.83 in Medi-Cal expenses. Adding those two factors together brings a maximum of slightly more than $350,000, far less than the $1,030,000 claimed by Stoll.

In their reply brief appellants posit a much higher minimum value of $821,000, adding in pain and suffering damages for Sundukova based on the elder abuse claim, higher medical expenses based on the Department's estate recovery claim, and attorney fees. These concepts and figures were not argued below and were not set forth in the mediation brief; indeed, to reiterate, what appellants sought was "the statutory maximum of $250,000 in *wrongful death* medical negligence damages." (Italics added.) Not a word about elder abuse or attorney fees. Moreover, the calculations which the court relied on *reduced* the lien recovery to account for the Department's share of attorney fees.

III. DISPOSITION

The judgment is affirmed.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.