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Obamacare Doesn't Limit Recovery in Med Mal Case, Judge Rules

Michael Booth, New Jersey Law Journal

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Defendants in a medical malpractice case may not rely on the Affordable Care Act to limit the claim for future medical expenses, a New Jersey judge has ruled.

Bergen County Superior Court Judge Robert Wilson, in an unpublished ruling issued Jan. 22, said possible contributions or reimbursements from the Patient Protection and Affordable Care Act cannot be taken into consideration when calculating future medical expenses since there is no guarantee that it will remain law into the future.

The case involves a 9-year-old girl, Ella Pannacciulli, who was born with cerebral palsy and who cannot walk and is completely dependent on others. She presently receives health benefits through her parents' employers' health care policies, according to the opinion.

Ella's current medical care liens total more than \$3.25 million, and it is expected that her future medical care costs will amount to another \$2.3 million to \$4.5 million, the opinion said.

The girl's parents, Sarah and Michael Pannacciulli, filed a medical malpractice suit against defendants Michelle Beloff, the Valley Hospital and other health care workers. The defendants argued that a jury should be told that the ACA will cover many of Ella's future expenses, according to the opinion.

But Wilson rejected that argument, saying the ACA is likely subject to policy changes.

"...Congress has sought to repeal and/or undermine the ACA over 50 times," Wilson said. "Additionally, longevity of the ACA is overwhelmingly called into question by the upcoming governmental elections."

The Pannacciullis' attorney, Daryl Zaslow, said defense attorneys in medical malpractice cases are now routinely seeking to introduce to juries the possibility that future health care costs could be covered by the ACA.

The ACA, enacted in 2010, is a hallmark of the administration of President Barack Obama, and mandates that everyone in the United States have health insurance. It provides avenues of coverage for those who do not have coverage on their own or through their employer.

Zaslow, of Edison's Eichen Crutchlow Zaslow & McElroy, said medical malpractice defense attorneys are attempting to avoid the "legal fiction" that defendants, rather than their carriers, will be held financially responsible for damages.

Defendants, he said, should be confined to making reimbursement arguments after the trial under New Jersey's collateral source rule, which says a defendant's insurer may seek reimbursement from a plaintiff's carrier.

"These things don't come before a jury," Zaslow said.

Wilson said the defendants' motion to limit future medical expenses "fails because the defendants have not shown that there is a reasonable certainty that Ella will be covered by the ACA or private health insurance."

Wilson, citing an unpublished 2006 New Jersey trial court ruling in *Puzio v. Mimms*, said future benefits that are contingent, speculative or subject to change or modification cannot be deducted from a claim for future medical expenses.

"The argument postured by the defendants that Ella will receive benefits under the ACA does not demonstrate that Ella will in fact receive these benefits with any reasonable certainty," Wilson said.

"Furthermore, even if...the ACA remains in effect for 30 [+] years, Ella's entitlement to receive such benefits and the amount that she may be entitled to receive is merely speculative," he said. "[T]his court is not convinced the negligent professional should be exculpated by coverage afforded from the subsidized coverage of the ACA."

The suit alleges Ella Pannacciulli's condition was caused by a failure to promptly perform a Caesarean section, according to the opinion.

The hospital's attorney, Charles Murray of Florham Park's Farkas & Donohue, did not return a call seeking comment on the ruling.

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