COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2795 **Cir. Ct. No. 2009CV1608**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JAYMIE A. GISTER, ETHAN A. GISTER, A MINOR BY HIS GUARDIAN AD LITEM, DAVID E. SUNBY, AND JARED L. ELLIS, A MINOR BY HIS GUARDIAN AD LITEM, DAVID E. SUNBY,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT,

SAINT JOSEPH'S HOSPITAL OF MARSHFIELD, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Order reversed and cause remanded with directions.*

Before Lundsten, Higginbotham, and Sherman, JJ.

¶1 PER CURIAM. Several former medical patients appeal an order denying their claim that hospital liens filed against them are invalid. We reverse and remand with directions.

¶2 This action was commenced by Jaymie Gister, Ethan Gister, and Jared Ellis (collectively, "the Gisters"). They sought a judgment declaring that liens filed by Saint Joseph's Hospital were invalid. The complaint alleged that the Gisters were injured in an automobile accident caused by an insured of American Family Insurance; that they were treated at Saint Joseph's; and that they were covered by "BadgerCare" (medical assistance). The Gisters further alleged that Saint Joseph's did not submit the medical bills to medical assistance, but instead filed a hospital lien against each of them for recovery of the medical bills; that the insurance policy limits are insufficient to cover their damages; and that American Family is now prepared to settle their injury claims, but any such payments to the Gisters would be reduced or eliminated to pay the hospital, if the liens are valid.

¶3 The above factual allegations do not appear to have been disputed for purposes of this appeal, and no evidentiary hearing was held. The circuit court ruled in favor of Saint Joseph's and held the liens valid.

¶4 Saint Joseph's filed the liens under WIS. STAT. § 779.80 (2007-08).[1] In short, that statute gives charitable hospitals "a lien for services rendered … to any person who has sustained personal injuries as a result of … any tort of any other person." § 779.80(1). The lien attaches to any judgment or settlement the injured person might obtain against the tortfeasor. § 779.80(2).

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 One focus of the parties' arguments is our decision in ***Dorr v. Sacred Heart Hospital***, 228 Wis. 2d 425, 597 N.W.2d 462 (Ct. App. 1999). We conclude, for the reasons that follow, that if no other law permits a hospital lien against medical assistance patients, ***Dorr*** bars such a lien.

¶6 In ***Dorr***, the injured patient was insured by a health maintenance organization (HMO) that had a contract with the treating charitable hospital. ***Id***. at 432-33. That contract included a "hold harmless" provision that barred the hospital from seeking payment from the patient directly. ***Id***. at 433-34. The hospital did not submit the patient's bill to the HMO, but instead it filed a hospital lien on any tortfeasor payment to the patient. ***Id***. at 434. The patient obtained a tortfeasor payment but, as required by the lien, some of that money was sent to the hospital. ***Id***.

¶7 The patient then sued the hospital for its return, claiming that the hospital had no right to impose the lien in the first place. ***Id***. at 431. The hospital argued that it could file a lien regardless of the fact that it could not bill the patient. ***Id.*** We held that "when a contract between an HMO and hospital contains a hold harmless provision, no hospital lien can be filed against an HMO patient's property because the HMO patient is not indebted to the hospital for the medical services provided." ***Id***. at 435.

¶8 Several holdings in ***Dorr*** relate to the present case. The first is that the function of a hospital lien is debt collection, not the creation of a substantive claim benefiting the hospital. Responding to the hospital's argument that it could use the lien statute even though it was forbidden from billing the patient, we wrote that "the essence of any lien statute, including § 779.80, STATS., requires the existence of an obligation due the lienholder from the person whose property to

which the lien attaches." ***Id.*** at 438. We concluded: "To suggest that a lien can exist independent of a debt turns the purpose and provisions of a lien statute on its head. Lien statutes are designed to facilitate debt collection, not to encumber property when the property holder owes no obligation to the lienholder." ***Id***.

¶9 We further held that the debt owed to the hospital must be owed *by the patient*. ***Id***. at 438-39 ("the plain language of § 779.80, STATS., contemplates that the underlying debt to which the lien attaches is an obligation owed by the person receiving medical services from the hospital"). In other words, the fact that the hospital was potentially owed money by the HMO did not support the filing of a lien against the patient's tort payment. Thus, it is clear from ***Dorr*** that the function of the hospital lien statute is to help hospitals collect debt from patients that personally owe a debt to the hospital.

¶10 We also discussed a statute that we said immunizes an HMO enrollee from personal liability for the costs of covered health care received. ***Id***. at 440. The hospital conceded that because of that statute, the patient owed no debt to the hospital. ***Id.*** at 441. We then concluded that the hospital was precluded from filing a lien under WIS. STAT. § 779.80 because there was no underlying patient debt. ***Id.*** at 441-42.

¶11 The hospital in ***Dorr*** next argued that its lien did not violate that HMO statute because the hospital was not seeking payment from the patient, but was instead seeking recourse against the tortfeasor. We rejected that argument: "The plain language of § 779.80, STATS., however, does not authorize the hospital to pursue collection from the tortfeasor; it only authorizes the hospital to attach a lien on insurance proceeds due to the injured party from the tortfeasor's insurer." ***Id***. at 442.

¶12 Finally, we reviewed the hospital's contract with the HMO, under which the hospital had agreed to hold patients harmless. We said that the hospital's use of the lien violates that provision: "Pursuing the [tort] insurance proceeds is an attempt to seek recourse against the Dorrs because the claim to the proceeds belongs to the Dorrs." ***Id.*** at 444.

¶13 To summarize ***Dorr***, it holds that: (1) a hospital cannot file a lien under WIS. STAT. § 779.80 unless it is owed money by the patient; (2) § 779.80 does not give the hospital a direct claim against the tortfeasor; and (3) filing a hospital lien is a form of recourse *against the patient* because the tort claim belongs to the patient.

¶14 The Gisters argue, and Saint Joseph's does not appear to dispute, that when a hospital treats a medical assistance patient, the patient cannot be charged for the services. The hospital is forbidden from direct billing the patient. *See* WIS. STAT. § 49.49(3m). A medical assistance patient thus appears closely analogous to the HMO patient in ***Dorr***. In both cases, the hospital is forbidden from billing the patient, and thus the patient does not owe it a debt. And, in both cases, the hospital can normally obtain payment from a source other than the patient, either from the HMO or medical assistance.

¶15 Saint Joseph's attempt to distinguish ***Dorr*** is unconvincing. It asserts that ***Dorr*** is inapplicable because here "a debt does exist." But the hospital fails to acknowledge that the debt is not owed to it *by the Gisters*. Therefore, if the only applicable law is ***Dorr*** and the hospital lien statute, ***Dorr*** controls here. ***Dorr*** would require us to hold that the Gisters cannot be billed and therefore do not owe the hospital a debt; that the hospital lien statute does not give Saint Joseph's a claim against the tortfeasor; and, therefore, Saint Joseph's had no legal

basis to file liens against the Gisters' tort recoveries and doing so was an improper attempt at recourse against the patients.

¶16 That conclusion brings us to the question of whether some other law makes the medical assistance context here different from ***Dorr***. Saint Joseph's asserts that such law exists. It argues that Wisconsin laws "expressly grant health care providers the right to elect to seek payment from third-party liability settlement proceeds." In support it cites one statute and one rule. However, as we will discuss, the statute and rule do not, on their face, lead to the conclusion Saint Joseph's advocates.

¶17 The statute cited by Saint Joseph's is WIS. STAT. § 49.46(2)(d). WISCONSIN STAT. § 49.46(2) defines medical assistance benefits, that is, charges that may be paid to medical assistance providers. WIS. STAT. § 49.46(2)(a). The provision the hospital relies on limits benefits otherwise authorized under the benefits subsection. The part the hospital relies on provides: "Benefits authorized under this subsection may not include payment for that part of any service payable through 3rd-party liability or any federal, state, county, municipal or private benefit system to which the beneficiary is entitled." § 49.46(2)(d). If, for purposes of this appeal, we assume Saint Joseph's is correct that tort liability is a form of "3rd-party liability," the result is that the provision appears to bar St. Joseph's from seeking medical assistance payment as to injuries caused by tortfeasors. In any event, contrary to Saint Joseph's assertion, this statute does not "expressly" grant health care providers the right to seek payment from third-party liability settlement proceeds. This statute is only a prohibition. It says nothing affirmative about how a hospital might go about obtaining payment for treating tort-caused injuries.

¶18 Saint Joseph's also relies on WIS. ADMIN. CODE § DHS 106.03(8) (Mar. 1993).[2] We will assume Saint Joseph's is correct that the rule relates to treatment for injuries caused by torts, and allows a hospital to bill medical assistance for such treatment, despite the above statute. The rule then offers an alternative to billing medical assistance: "The provider may alternatively elect to seek payment by joining in the recipient's personal injury claim …."

¶19 Again contrary to Saint Joseph's assertion, this rule does not "expressly" grant it the right to seek payment from third-party liability settlement proceeds. It says only that the hospital can "join[] in the recipient's personal injury claim." The rule does not explain what the hospital's legal theory would be, what the procedure would be, or against whom the hospital would have a claim. Was the rule intended to create a new legal claim for hospitals, such as a subrogation interest or a direct claim against the tortfeasor? Or, was it intended only to permit a hospital to "join in the claim" to facilitate the vindication of some separately identified legal right, such as a contractual subrogation right with the patient?

[2] WISCONSIN ADMIN. CODE § DHS 106.03(8) (Mar. 1993) provides:

> If a provider treats a recipient for injuries or illness sustained in an event for which liability may be contested or during the course of employment, the provider may elect to bill MA for services provided without regard to the possible liability of another party or the employer. The provider may alternatively elect to seek payment by joining in the recipient's personal injury claim or workers compensation claim, but in no event may the provider seek payment from both MA and a personal injury or workers compensation claim. Once a provider accepts the MA payment for services provided to the recipient, the provider shall not seek or accept payment from the recipient's personal injury or workers compensation claim.

¶20 The rule does not expressly say that the patient owes a debt to the hospital; or that the hospital is authorized to file a lien under WIS. STAT. § 779.80; or that the hospital has priority to recover its bill before the patient receives damages; or that the hospital has a direct claim against the tortfeasor. The text of this cursory and vague rule does not, by itself, lead to the conclusion that a hospital may file a lien against a medical assistance patient.

¶21 Saint Joseph's does not develop an argument in this appeal that answers these questions about the rule or explains how the rule necessarily leads to a conclusion that a hospital may file a lien. To the extent Saint Joseph's relies on public policy arguments, those arguments are not sufficient to support such a specific conclusion. Nor are they sufficient to overcome ***Dorr***'s clear and thorough analysis of the lien statute. Because Saint Joseph's has not developed an argument showing that the statute and rule authorize a hospital lien, we decline to explore these questions further and attempt answers on our own. Perhaps such an argument can be developed, but it has not been in this appeal.

¶22 Accordingly, we conclude that, because Saint Joseph's has not persuaded us that any law requires a different result in a medical assistance case, ***Dorr*** bars a hospital from filing a lien against a medical assistance patient. Therefore, we reverse the order holding the lien valid and remand with directions to issue an order holding the lien invalid and ordering such other relief as may be necessary to relieve the Gisters and American Family from complying with the lien.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.