

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0111-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ST. ELIZABETH'S HOSPITAL, INC.,

PLAINTIFF,

V.

ESTATE OF FLORENCE A. LADUKE,

**DEFENDANT-THIRD-
PARTY PLAINTIFF,**

**DEANNA L. LEGAN, JOHN LEGAN, NORBERT J. KARNER,
MARCIA L. KARNER AND STEVEN LADUKE,**

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-APPELLANTS,**

BLOCK, SEYMOUR & SAMSON, S.C.,

**INVOLUNTARY-THIRD-
PARTY PLAINTIFF-RESPONDENT,**

**MEDICARE, AND PARKSIDE NURSING &
REHABILITATION CENTER, INC.,**

**INVOLUNTARY-THIRD-
PARTY PLAINTIFFS.**

ST. ELIZABETH'S HOSPITAL, INC.,

PLAINTIFF,

V.

**FLORENCE A. LADUKE, JOHN DOE, BETH A. GOCKER,
MARGARET GOCKER AND SECURA INSURANCE COMPANY,**

DEFENDANTS.

PARKSIDE NURSING & REHABILITATION CENTER, INC.,

PLAINTIFF,

V.

MARCIA KARNER,

DEFENDANT.

APPEAL from an order of the circuit court for Outagamie County:
DONALD R. ZUIDMULDER, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Several potential heirs to the Florence A. LaDuke Estate, (the heirs) appeal from an order awarding \$53,000 in attorney fees to LaDuke's attorneys, Block, Seymour & Samson, S.C., for representing her in a personal injury action. The issue is whether the trial court properly construed a contingency agreement between Block and LaDuke. We conclude that the trial

court erred in construing the agreement, and therefore reverse and remand for further proceedings.¹

LaDuke was injured in an automobile accident. She retained Block to represent her in a personal injury action and signed a contingency agreement providing that Block would receive one-third of any recovery after costs and “unreimbursed medical expenses” were deducted.

The expenses for LaDuke’s accident-related treatment included approximately \$135,000 paid by Medicare, \$33,000 charged to LaDuke personally by St. Elizabeth’s Hospital, Inc., and \$40,000 in other unreimbursed medical expenses. Under federal law, Medicare was entitled to reimbursement for its payments from LaDuke’s recovery under any automobile insurance policy. Block signed a reimbursement agreement with Medicare to that effect, with the agreement also providing “plaintiff’s attorney [Block], in compensation for the recovery of these amounts, will be paid such amounts as Federal statutes and regulations at the time of judgment or settlement may provide.”

The automobile insurers for LaDuke’s tort-feasor subsequently paid her \$200,000 in settlement of her claim. In May 1997 she died with the St. Elizabeth’s bill outstanding and the issue of Medicare reimbursement still pending. Applying its standard formula under federal law and the terms of the contingency agreement, Medicare set aside \$51,000 of its \$135,000 reimbursement claim to pay its share of litigation costs and attorney fees, and demanded payment of the remaining \$84,000. However, through subsequent negotiations, Block induced Medicare to accept one-third of the net settlement or

¹ This is an expedited appeal under RULE 809.17, STATS.

\$62,000 in satisfaction of its claim. Block then paid Medicare the \$62,000, and paid itself \$42,000 representing Medicare's share of its contingency fee. (The other \$9,000 of the amount set aside for Medicare went to costs.) Neither the estate nor the heirs participated in the negotiations or Block's decision to retain the \$42,000.

Meanwhile, St. Elizabeth's commenced an action on its unpaid \$33,000 bill. The heirs filed a third-party complaint in the action seeking a declaratory judgment on the distribution of the settlement proceeds. In the ensuing litigation, the heirs contended that the unreimbursed medical expenses to be deducted from the settlement before computing Block's one-third share included the \$33,000 owed to St. Elizabeth's and the \$62,000 paid to Medicare. After deducting those amounts, LaDuke's remaining undisputed expenses and the litigation expenses, the heirs computed a net settlement of \$63,000 with Block receiving \$21,000. Consequently the heirs sought refund of one-half the amount Block had already retained.

Block, in turn, contended that the St. Elizabeth's bill was not an unreimbursed expense under the contingency agreement because Medicare would have paid it had LaDuke requested it to do so. Block agreed, however, that "the Medicare payments were unreimbursed medical expenses, as that term is understood in the retainer contract." However, Block computed the net settlement by deducting not only the undisputed medical expenses, the \$62,000 Medicare accepted for its claim and the litigation expense, but also the \$42,000 that Block had already retained as Medicare's share of the contingency fee. Block then claimed one-third of the remaining \$56,000, in addition to an order allowing it to keep the \$42,000.

The trial court rejected both proffered formulas, and concluded that neither the St. Elizabeth's nor the Medicare payments were "unreimbursed medical expenses" under the contingency agreement. Consequently the court subtracted the litigation expenses and the \$40,000 in stipulated medical expenses from the gross settlement, and awarded Block one-third of the remaining amount or \$53,000. That determination is the subject of this appeal.

The trial court erred by excluding the Medicare payment from the "unreimbursed medical expenses." There were no facts in evidence to support the trial court's interpretation of the contract. All parties agreed that Medicare expenses were "unreimbursed medical expenses." The real, unresolved controversy was whether Block could keep the \$42,000 Medicare subtracted from its reimbursement claim as its share of the attorney fees, plus one-third of the amount remaining after it and all other expenses and costs were subtracted from the gross settlement. We therefore remand for a decision on that issue.

We also remand to determine what portion of the St. Elizabeth's bill should also be subtracted from the gross settlement as an unreimbursed medical expense. The parties stipulated that Medicare would have paid the bill had LaDuke submitted it. They also agreed that Medicare's reimbursement claim was an unreimbursed medical expense, and only disputed the computation of that expense. We therefore conclude that the trial court erred by excluding the St. Elizabeth bill from its calculation. On remand the trial court shall determine the amount Medicare would have claimed from the settlement had it paid the St. Elizabeth bill, either including or excluding Medicare's computed share of Block's contingency fee, as the court determines.

By the Court.—Order reversed and cause remanded.

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

