

**ILSE THERESA JACKSON, Plaintiff-Appellant,**  
**v.**  
**HUDSON COURT, LLC, BOROUGH OF CLIFFSIDE PARK, COUNTY OF**  
**BERGEN, STATE OF NEW JERSEY, AT&T INC., Defendants, and**  
**TIME WARNER, PUBLIC SERVICE ELECTRIC & GAS (PSE&G),**  
**VERIZON COMPANY, VERIZON COMMUNICATIONS, INC., NUNZIO P.**  
**SCALO and CAROL J. SCALO, Defendants-Respondents.**

No. A-4755-08T1.

**Superior Court of New Jersey, Appellate Division.**

Argued March 15, 2010.

Decided May 24, 2010.

Franklin P. Solomon argued the cause for appellant (Weitz & Luxenberg and Law Offices of Rosemarie Arnold, attorneys; Mr. Solomon and Natalie A. Zammitti Shaw, on the brief).

Charles D. Cole, Jr., argued the cause for respondent TWFanch-One Co. d/b/a Time Warner Cable of New Jersey (Newman Myers Kreines Gross Harris, attorneys; Mr. Cole, on the brief).

Respondents Public Service Electric & Gas, Verizon Company, Verizon Communications, Inc., Nunzio P. Scalo and Carol J. Scalo have not filed briefs.

Before Judges Lisa and Alvarez.

PER CURIAM

Plaintiff Ilse Theresa Jackson appeals from an April 17, 2009 Law Division order refusing to allocate settlement proceeds in conjunction with the discharge of a Medicare lien. Plaintiff also sought to have the motion judge find that no portion of her personal injury settlement was attributable to her medical expenses. This relief was denied as well. For the reasons set forth below, we affirm.

Plaintiff sued the numerous defendants as a result of a trip and fall on September 21, 2005, in Cliffside Park. Plaintiff, who was seventy-nine years old at the time the accident occurred, filed a complaint on January 17, 2007, seeking damages for permanent bodily injury and disability, pain and suffering, emotional distress, and economic losses, including medical expenses paid for by Medicare. The only defendants remaining, not dismissed either through summary judgment or by stipulation, are Nunzio P. Scalo and Carol J. Scalo, Verizon New Jersey, Inc. (improperly pled as Verizon Company, Verizon Communications, Inc.), Time Warner, and PSE&G.

On August 27, 2008, plaintiff was notified in writing by the Centers for Medicare and Medicaid Services (CMS) that payments made by Medicare for the cost of medical treatment necessary due to injuries sustained from the fall were "subject to reimbursement" from any recovery.

Plaintiff not only demanded reimbursement for the Medicare lien in her complaint, she included the expenses as an element of her damages in answers to interrogatories.

The case was referred to nonbinding arbitration, and on November 5, 2008, the arbitrator awarded plaintiff \$85,000. \$30,000 of the award was earmarked as funds in satisfaction of plaintiff's Medicare lien. The case eventually settled for the same amount as the arbitration award - \$85,000.

To reiterate, plaintiff's motion sought a court ordered allocation of the settlement proceeds in order to avoid payment of the Medicare lien. Her medical expenses were satisfied under the Medicare Secondary Payer Statute (MSPS), 42 U.S.C.A. § 1395y(b)(2). The only defendant participating in the appeal is TWFanch-One Co. d/b/a Time Warner Cable of New Jersey.

## **i.**

Medicare's right of reimbursement arises when a third party has or had a responsibility "to make payments with respect to [a Medicare-covered] item or service." 42 U.S.C.A. § 1395y(b)(2)(B)(ii). Once a beneficiary receives a payment from Medicare, he or she is obligated to submit reimbursement within sixty days. Insurance Coverage That Limits Medicare Payment: General Provisions, 42 C.F.R. § 411.24(h). In fact, if Medicare is not reimbursed by the beneficiary, "the primary payer must reimburse Medicare even though it has already reimbursed the beneficiary. . . ." Ibid. This obligation means that if plaintiff does not satisfy the lien, the settling defendants in this case could be compelled to pay twice, once to plaintiff, and a second time to Medicare, in satisfaction of the lien.

According to the Medicare Secondary Payer Manual, Medicare policy requires the recovery of "payments from liability awards or settlements . . . without regard to how the settlement agreement stipulates disbursement should be made." Medicare Secondary Payer Manual ch. 7, ¶ 50.4.4. Because "liability payments are usually based on the injured or deceased person's medical expenses, liability payments are considered to have been made `with respect to' medical services related to the injury even when the settlement does not expressly include an amount for medical expenses." Ibid. Medicare does, however, recognize "allocations of liability payments to nonmedical losses . . . when payment is based on a court order on the merits of the case." Ibid. This exception applies "[i]f the . . . adjudicator of the merits specifically designate[s] amounts that are for payment of pain and suffering or other amounts not related to medical services." Ibid. It is this allocation that plaintiff sought from the motion court.

## **ii.**

Plaintiff contends that N.J.S.A. 2A:15-97, the collateral source rule, bars recovery by Medicare beneficiaries of medical expenses. We do not agree.

The relevant statute reads as follows:

In any civil action brought for personal injury or death, . . . if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff . . . [N.J.S.A. 2A:15-97.]

Plaintiff reads the statute to prohibit recovery of any benefits paid by a "source other than a joint tortfeasor," including medical expenses paid by Medicaid. Thus, she asserts that since the collateral source rule flatly prohibits recovery of these expenses, no plaintiff should be obligated to reimburse Medicare-covered expenses from money recovered as a result of a personal injury claim because otherwise Medicare beneficiaries would have to satisfy Medicare liens using funds awarded for pain and suffering, or for lost wages. Plaintiff suggests that this unjust result can be avoided by providing for post-settlement hearings during which the proceeds of a settlement can be specifically allocated.

Plaintiff cites [Arkansas Department of Health & Human Services v. Ahlborn, 547 U.S. 268, 288, 126 S. Ct. 1752, 1765, 164 L. Ed. 2d 459, 476 \(2006\)](#), in support of the principle that our courts have the authority to enter such orders. There, the Court stated that "in the absence of . . . a postsettlement agreement, . . . the risk that parties to a tort suit will allocate away the State's interest can be avoided . . ., if necessary, by submitting the matter to a court for decision." In that case, due to comparative negligence, a Medicaid recipient's recovery against third-party tortfeasors was reduced from a stipulated value of \$3,040,708.12 to \$550,000. Id. at 274, 126 S. Ct. at 1757, [164 L. Ed. 2d at 468](#).

The Medicaid recipient had received \$215,645.30 in medical benefits, which the State claimed in full as a lien against her recovery of the \$550,000. Ibid. It was her position that because her recovery was reduced due to her comparative negligence, the amount of the Medicaid lien should also be reduced proportionately - to \$35,581.47. Id. at 274, 126 S. Ct. at 1757-58, [164 L. Ed. 2d at 468](#). Otherwise, the lien would be satisfied from non-medical-payment recovery of damages attributable to pain and suffering and lost wages. Id. at 280, 126 S. Ct. at 1760-61, [164 L. Ed. 2d at 471](#). The Court agreed that payment of the lesser amount was equitable. Ibid.

In this instance, however, plaintiff's settlement appeared to include a specific amount attributable for medical expenses, at least as allocated in the \$85,000 awarded by the arbitrator. We consider this to have been appropriate, because we disagree with plaintiff's reading of the collateral source statute.

In [Lusby ex rel. Nichols v. Hitchner, 273 N.J. Super. 578, 590 \(App. Div. 1994\)](#), we found that the collateral source statute "does not apply to reimbursable benefits paid by Medicaid." The legislative intent of the statute was "not only to prevent plaintiffs from obtaining a double recovery but also. . . to shift the burden, at least to some extent, from the liability and casualty insurance industry to health and disability third-party payers." Id. at 591. We reasoned that neither of these purposes would be furthered by an application of the statute in cases "where . . . a plaintiff could not . . . pocket a double recovery for medical expenses for the reason that his entire recovery is subject to Medicaid's reimbursement rights," and where "the ultimate burden is

shifted from the tortfeasor's liability carrier to a governmentally-funded secondary payer." *Ibid.* Certainly, as plaintiff points out, *Lusby* involves Medicaid and not Medicare, and the Medicaid law at issue involved state statutes rather than the federal Medicare program under consideration here. *Id.* at 585-86.

The distinction does not, however, defeat the logic behind *Lusby*. As we said in *Lusby*, the double recovery prohibited by the statute is not possible because of Medicaid's reimbursement liens, which are virtually identical to Medicare liens. See N.J.S.A. 30:4D-7.1; 42 U.S.C.A. § 1395y(b)(2)(B)(i). Just as with Medicaid, because the secondary payer, Medicare, has a nearly unqualified right to reimbursement, the outcome is the same. Even if a claimant was able to recover medical expenses, he could not pocket them and hence cannot obtain the "double recovery" that the collateral source statute is designed to avoid. A Medicare recipient cannot have his medical expenses paid for and then retain that exact amount in a personal injury recovery any more than can a Medicaid recipient. Therefore, we conclude the collateral source rule does allow a personal injury settlement to include recovery of medical expenses paid for by Medicare.

### **iii.**

Plaintiff also contends that New Jersey's tort recovery rules are not preempted by the MSPS. Because we do not read the collateral source rule as precluding plaintiffs in our jurisdiction from explicitly recovering paid Medicare benefits, as such a recovery would not amount to the double-dipping proscribed by the statute, the preemption arguments are made moot by our decision; we address them briefly.

This is an area of preemption where state law is considered to be a nullity "to the extent that it directly conflicts with federal law." [Cox v. Shalala, 112 F.3d 151, 154 \(4th Cir. 1997\)](#). On this point, we again agree with the trial judge: "where a state collateral source rule frustrates the purpose of the [MSPS's] provisions, that state law is pre-empted by the [MSPS] statutory scheme." Indeed, several federal cases have held that state collateral source statutes and other similar statutory schemes that interfere with Medicare's right to reimbursement are preempted. See *id.* at 154-55; [United States v. R.I. Insurers' Insolvency Fund, 80 F.3d 616, 622-23 \(1st Cir. 1996\)](#); [Smith v. Travelers Indem. Co., 763 F. Supp. 554, 556-58 \(M.D. Fla. 1989\)](#).

Plaintiff's argument that the 2003 amendments made to the MSPS drastically altered Medicare's right to reimbursement by making it dependent on state law is contradicted by evidence of congressional intent. The 2003 amendments are effective as if they were included in the original statute. Pub. L. No. 108-173, § 301(d), 117 Stat. 2066. No substantive change was made that supports plaintiff's arguments. The 2003 amendments were merely clarifications of the original legislative intent. *Id.* at § 301(b). These amendments cannot be reasonably interpreted to include deference to state law, such as the collateral source statute in this instance, which may prevent satisfaction of the lien. *Ibid.* Congress's purpose in making the amendments was to ensure greater, not lesser, recovery of funds expended by the federal government. See 71 Fed. Reg. 9466, 9467 (Feb. 24, 2006).

Lastly, plaintiff contends that her request for an allocation order was not a request for an adjudication of Medicare's rights or a usurpation of agency function. This argument is also made moot by our decision that the collateral source rule does not preclude similarly situated plaintiffs from recovering the amount paid in their behalf by Medicare. We choose not to address it further.

Affirmed.