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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2023-000654

Alexis Jones ....Respondent – Appellant,

v.

Progressive Northern Insurance Company..................................Appellant – Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Appellant-Respondent Progressive Northern Insurance Company ("Progressive"), by and through its undersigned counsel, hereby respectfully submits this Petition for Rehearing.

ARGUMENT

This appeal concerns what "expenses incurred" means in the context of medical payments coverage for a Medicaid recipient. The Progressive policy only provides Medical Payments coverage for certain medical "expenses incurred" by an insured as a result of an accident. The Court's February 24, 2025 Opinion held that Ms. Jones incurred $27,786.17 in medical expenses even though she readily admits that she never became obligated to pay this amount. Progressive respectfully asserts that the Court's decision warrants reconsideration because it fails to take into account the realities of how Medicaid works and makes no

meaningful distinction between this case and the Supreme Court's prior Opinion in *Gordon v. Fid. & Cas. Co. of N. Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961). As Medicaid providers, Ms. Jones' providers entered into provider contracts with the South Carolina Department of Health and Human Services before ever rendering any treatment to Medicaid beneficiaries. Under those provider agreements, they agreed to accept set fees as payment-in-full for services rendered. In this case, those previously-agreed-to set fees totaled $1,323.60. As a result, there was never any obligation on the part of Ms. Jones to pay $27,786.17 for her medical treatment. Consequently, this amount cannot be an expense she "incurred."

I. The Court's Opinion fails to take into account the realities of how Medicaid works.

The Court's Opinion states: "[W]hile we acknowledge that her costs ***were eventually adjusted and paid by Medicaid***, Jones still incurred the full amount charged...." (February 24, 2025 Opinion, p. 3) (emphasis added). This statement demonstrates a fundamental misunderstanding of how Medicaid works.

"A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency...." 42 C.F.R. § 447.15.[1] Before rendering treatment to Medicaid recipients, "healthcare providers must first enter into a contract with the South Carolina Department of Health and Human Services ("SCDHHS"), the state agency responsible for the administration of the Medicaid program in South Carolina." *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 206 (4th Cir. 2007). "Healthcare providers in South Carolina are not required to accept Medicaid

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[1] In this case, it is undisputed that Ms. Jones was not responsible for "any deductible, coinsurance, or copayment" under Medicaid. *See* 42 C.F.R. § 447.15. Thus, the amount paid by the Medicaid agency was the amount the Medicaid providers had agreed to accept "as payment in full." *Id.*

patients. However, if a healthcare provider elects to treat Medicaid patients…, it does so by entering into a contract ("provider contract" or "contract") with SCDHHS." *Id.* at 207. "The contract provides for the method and amounts of payment." *Id.; see also Anco, Inc. v. State Health & Hum. Servs. Fin. Comm'n*, 300 S.C. 432, 436, 388 S.E.2d 780, 783 (1989) ("The Finance Commission implements the Medicaid program by contracting with qualified providers."). Pursuant to the South Carolina Medicaid provider contract, the provider agrees before rendering treatment "that Medicaid reimbursement is payment in full…for care or services to a recipient/patient" and "***that the provider shall not bill, request, demand, solicit, or in any manner receive or accept payment from the recipient….***" Medicaid Participation and Payment Agreement, Form (07/17), available at https://www.scdhhs.gov/sites/default/files/Participation%20%26%20Payment%20Agreement%20July%202017.pdf (emphasis added). Thus, a Medicaid patient never incurs costs beyond the Medicaid-adjusted rates. His or her providers have already agreed before treatment to accept those rates as "payment in full." *See id.*

As Justice Burnett succinctly explained:

> The Medicaid program provides individuals with medical treatment by doctors who agree to accept such patients in exchange for payment at a predetermined rate schedule. The patient not only receives medical care, but also incurs no liability for the cost of the care once the doctor accepts payment. ***The difference between the amount billed and the amount paid, the amount in issue in this case, is "phantom" money in that no one has paid the amount and no one will incur a debt for the amount.***

Haselden v. Davis, 353 S.C. 481, 487, 579 S.E.2d 293, 296 (2003) (J. Burnett dissenting and J. Pleicones concurring in dissent) (emphasis added).[2] "[T]he plaintiff has never paid nor will ever

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[2] *See also McAmis v. Wallace*, 980 F. Supp. 181, 184 (W.D. Va. 1997) (recognizing that in a Medicaid situation no one pays the written-off amount and the patient "has not incurred this fee"); *Sheeks v. Farmers Ins. Exch.*, 146 Mich. App. 361, 365, 379 N.W.2d 493, 495 (Mich. Ct.

be liable for the written-off difference between the billed and paid amount…" *Id.* Consequently, "it is unconscionable to permit the taxpayers to bear the expense of providing free medical care to a person" and then allow that person to pocket an insurance windfall, raising future insurance rates for all South Carolinians. *See id.*

II. The South Carolina Supreme Court's decision in *Gordon v. Fid. & Cas. Co. of N. Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961) requires this Court to find that Ms. Jones did not "incur" the "phantom" expenses billed by her medical providers in violation of their provider contracts with Medicaid.

As this Court's Opinion correctly recognizes, the phrase "expenses incurred" is not ambiguous, and the South Carolina Supreme Court has already defined it in this context. (February 24, 2025 Opinion, p. 2). In *Gordon*, the insurer "agreed 'to pay all reasonable expense incurred' for necessary medical and surgical service." 238 S.C. at 444, 120 S.E.2d at 512. The South Carolina Supreme Court stated: "There is no uncertainty or ambiguity in the language of the policy. It is too plain to call for judicial construction." *Id.*

However, this Court's Opinion fails to take into account the entirety of the definition the South Carolina Supreme Court gave to the phrase "expense incurred" in this context. This Court's Opinion states:

> [O]ur supreme court in *Gordon* stated, "South Carolina law defines 'expense incurred' for insurance purposes as 'a thing for which there exists [an] obligation to pay, either express or implied.'" *See Gordon*, 238 S.C. at 445, 120 S.E.2d at 512.

App. 1985) ("[I]n the instant case, plaintiff's health care providers must accept as payment in full the Medicaid payments from the state. M.C.L. § 400.111b(11); M.S.A. § 16.490(21b)(11). Accordingly, the amount charged to and reimbursed by Medicaid is the reasonable charge incurred by plaintiff…."); *Grimes v. Gov't Employees Ins. Co.*, No. 1:18-CV-798, 2019 WL 3425227, at *9 (M.D.N.C. July 30, 2019); *Metz v. U.S. Life Ins. Co. in City of New York*, 662 F.3d 600, 602 (2d Cir. 2011); *State Farm Mut. Auto. Ins. Co. v. Bowers*, 500 S.E.2d 212, 214 (Va.1998); *Evans v. Liberty Nat. Life Ins. Co.*, No. 13-CV-0390-CVE-PJC, 2015 WL 1650192, at *5 (N.D. Okla. Apr. 14, 2015).

(February 24, 2025 Opinion, p. 2). With respect to the language in the above parentheticals, there is no such quote in *Gordon*.

What the South Carolina Supreme Court in *Gordon* actually said was:

> "Incur emphasizes the idea of liability * * *'. Webster's New International Dictionary. 1. Bouv. Law Dict., Rawle's Third Revision, p. 1531 similarly points to this inherency in its definition of the term incur: 'To have liabilities thrust upon one by act or operation of law * * *'. Also, there are examples in specific legal situations, where it has been held that ***a thing for which there exists no obligation to pay, either express or implied, cannot in law be claimed to constitute an 'expense incurred'***. *See e. g. Stern-Slegman-Prins Co. v. Commissioner*, 8 Cir., 79 F.(2d) 289; *Bauer Bros. Co. v. Commissioner*, 6 Cir., 46 F.(2d) 874.'
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> There being no obligation on the part of the respondent to pay for the hospitalization he received at Fort Jackson hospital, he 'incurred' no expense within the meaning of the provision of the policy of insurance issued by the appellant.

Gordon, 238 S.C. at 444, 120 S.E.2d at 512 (emphasis added). In its Opinion, the Court states that the distinguishing factor between the South Carolina Supreme Court's case of *Gordon v. Fid. & Cas. Co. of N. Y.*, 238 S.C. 438, 120 S.E.2d 509 (1961) and this case is that Gordon "received *free* medical care from a military hospital." (February 24, 2025 Opinion, p. 3) (emphasis in orig.). However, Gordon did not receive free medical care at a military hospital. His medical care was paid for by taxpayers. He just received free-to-him medical care. Likewise, Ms. Jones' medical care was paid for by taxpayers. She also received free-to-her medical care. Thus, the difference between medical expenses being paid by a taxpayer-funded Veterans' Administration or a taxpayer-funded Medicaid program is not a meaningful distinction.

As the South Carolina Supreme Court stated: "[A] thing for which there exists no obligation to pay, either express or implied, cannot in law be claimed to constitute an 'expense incurred'." *Gordon*, 238 S.C. at 445, 120 S.E.2d at 512. Based on the way Medicaid works, those "phantom" charges from Ms. Jones' medical providers – which they issued in violation of their

provider agreements – were "a thing for which there exists no obligation to pay." *See id.* Consequently, those "phantom" charges cannot be an "expense incurred." *See id.* at 446, 120 S.E.2d at 513 ("There being no obligation on the part of the respondent to pay for the hospitalization he received at Fort Jackson hospital, he 'incurred' no expense within the meaning of the provision of the policy of insurance issued by the appellant."). Like the claimant in *Gordon*, Ms. Jones stipulated that she is not legally obligated to pay any money to any of her medical providers for the medical treatment she received. (R. p. 123, lines 4-24); (Stipulation of Fact, R. p. 140 ¶ 17). Thus, the *Gordon* decision requires this Court to find that Ms. Jones has "incurred" no expense within the meaning of the policy provision.[3]

Additionally, the insured being sent a bill for "phantom" charges she was never required to pay is also not a meaningful distinction from the *Gordon* case. The South Carolina Supreme Court in *Gordon* specifically referenced and relied upon a case where an insured had been billed

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[3] The Court's Opinion also purports to distinguish the *Barker* case based on policy language:

> Progressive relies heavily on an unpublished order from *Barker v. Washington National Insurance Company*, No. 9:12-CV-1901-PMD, 2013 WL 1767620, at *5 (D.S.C. Apr. 24, 2013). However, the insurance contract in Barker contained a provision which provided the insurer would only pay the Medicare adjusted amount. We do not have such a provision in this case.

(February 24, 2025 Opinion, p. 3 n.1). However, the fight in Barker was over the "expenses incurred" language in the policy. *Id.* at *4 ("Barker emphasizes the '100% in full' language, while WNIC emphasizes 'expenses incurred.'"). The *Barker* court did not address the Medicare limitation until after determining that the insured never "incurred" expenses above the Medicare-adjusted rates. *Id.* at *6 ("The Second Circuit Court of Appeals affirmed, concluding that under New York law, the Medicare recipient 'did not incur more than the amounts that her physicians had agreed ahead of time they would seek from her.' *Metz v. U.S. Life Ins. Co.*, 662 F.3d 600, 602 (2d Cir.2011). Similarly, this Court concludes that under South Carolina law, Barker was never obligated to pay more than the amount that the hospital had agreed to accept as full payment under Medicare, which amount appears to be about $15,929.29."). The District Court based its opinion on the "expenses incurred" policy language and the way Medicare works, which is identical to Medicaid in that physicians contract ahead of time with a government agency to accept set fees for a given service. *Id.* at *4-6.

for an amount he was never required to pay, and that court held there were no expenses incurred. *See Gordon*, 238 S.C. at 444-45, 120 S.E.2d at 512 ("In the case of *Drearr v. Connecticut General Life Ins. Co.*, La.App., 119 So.2d 149, 151, the plaintiff was a war veteran and was confined in a government hospital for treatment of and surgery for a duodenal ulcer. He had an insurance policy which contracted to pay him for the expense incurred for hospital charges and services. He brought an action to recover the amount of an alleged bill rendered by the Veterans' Administration for his hospital charges and services."). Thus, the Court made no meaningful distinction between this case and the *Gordon* case, which requires a finding that Ms. Jones never incurred expenses beyond the Medicaid-adjusted rates.

CONCLUSION

For the above-stated reasons, Progressive respectfully requests that the Court reconsider its February 24, 2025 Opinion. The Opinion fails to take into account the realities of how Medicaid works. Specifically, the providers have previously entered into contracts wherein they agreed to accept set amounts as payment in full and to not bill patients for any additional amounts. Furthermore, the Opinion fails to make any meaningful distinctions between this case and the *Gordon* case. Therefore, Progressive respectfully requests that the Court grant it summary judgment on Jones' breach of contract claim.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of Appellant-Respondent on Alexis Jones by depositing a copy of it in the United States Mail, postage prepaid, on March 11, 2025, addressed to her attorneys of record, J. Logan Cannon, Esquire, P.O. Drawer 36250, Rock Hill, South Carolina 29732 and by electronic mail at cannon@shawcannon.com and John S. Nichols, Esquire, Bluestein Thompson Sullivan, LLC, PO Box 7965, Columbia, SC 29202, and by electronic mail at john@bluesteinattorneys.com.

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March 11, 2025

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Re: <u>Alexis Jones vs. Progressive Northern Insurance Company</u>

Civil Action No.:	2020-CP-12-00207
Appeal No.:	2023-000654
Claim No.:	19-4070335
Insured:	Willie Brown
Date of Loss:	10-8-2019
Our File No.:	1115-3581

Dear Ms. Kitching:

Enclosed for filing Appellant-Respondent's Petition for Rehearing. Please return a clocked copy to me via email.

By copy of this email, I am advising opposing counsel of my communication with the court and providing a copy of same.

My firm's check in the amount of $50.00 for the filing of the Petition for Rehearing will be sent to the court via U.S. Mail today.

With warm personal regards, I am

Sincerely yours,

s/J. R. Murphy

J. R. Murphy

JRM/sb
Enclosures

cc: J. Logan Cannon, Esquire (via email)
John S. Nichols, Esquire (via email)