IN THE SUPREME COURT
STATE OF GEORGIA

MCG HEALTH, INC.,	)	
	)	
Appellant,	)	Case No. S10G1142
	)	
v.	)	
	)	
OWNERS INSURANCE COMPANY	)	
	)	
	)	
Appellee,	)	
	)	
BRAXTON V. MORGAN and KYLIE MORGAN,	)	
	)	
	)	
Appellees.	)	

BRIEF OF AMICUS CURIAE, GEORGIA TRIAL LAWYERS ASSOCIATION, IN SUPPORT OF APPELLEES

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I. Statement of Interest

The Georgia Trial Lawyers Association ("GTLA") is a membership association comprising lawyers committed to preserving the jury system and representing those injured by the wrongdoing of others. The issue under review in the above-captioned case potentially affects numerous Georgia residents who are injured due to the negligent or willful acts of others and receive medical treatment that is partially or fully covered by medical insurance or a governmental medical coverage program, such as TRICARE, Medicare, or Medicaid.

II. Summary of Argument

A. MCG Health, Inc. ("MCG") is attempting to indirectly collect from an injured military service member through a lien against his property, even though it is prohibited from doing so directly. Moreover, MCG's actions raise Constitutional Due Process concerns, since its lawsuit seeks, under state law, to take the protected property interest of the service member despite the service member owing no debt.

B. The primary case on which MCG relies is distinguishable from this case in that there, the injured party accrued an obligation to pay for services provided, which claim was the obligation of her husband only by virtue of a statute

shifting that obligation to him. Here there was no underlying obligation to pay the debt by the service member or anyone in privity with him.

C. The public policy concerns raised by MCG are an attempt to obscure the fact that MCG negotiated for certain fee schedules and had every opportunity to pursue reimbursement for Morgan's treatment under those agreed-to rates, but declined to do so. It should not now be entitled to shift the burden of paying for healthcare onto Morgan, who received guaranteed healthcare by virtue of his voluntary military service.

D. MCG's attempts to enforce the lien under state law are preempted by the federal TRICARE program. The express preemption granted to TRICARE covers, *inter alia*, financing of medical treatment, which extends to state lien laws.

III. Argument and Citation of Authority

The question posed by this Court is whether "the Court of Appeals correctly interpret[ed] O.C.G.A. § 44-14-470 to require an underlying debt that is the obligation of the patient[.]" This amicus firmly agrees with the lower appellate court's decision. In order to fully examine the issue presented and answer this question, it is necessary to closely review the nature of MCG's actions and the

implications thereof. For purposes of this brief, GTLA accepts the statement of facts as set forth by the parties.

A. MCG is attempting to collect payment from the property of appellee Morgan,[1] which is prohibited.

It has long been held that "[o]ne cannot do indirectly what the law says may not be done directly."[2] This principle has been sustained in well over 100 published opinions of this Court and the court of appeals, collectively, in a wide range of matters dating back to at least 1855.[3] Nevertheless, MCG seeks to do precisely that through this lawsuit.

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1 In this brief, "Morgan" refers to Braxton Morgan, who was the patient at MCG and, thus, was the individual in whose name the lien was filed. His wife, a co-defendant, is involved only by virtue of an indemnity agreement with the tortfeasor's insurer.

2 *Thackston v. State*, 303 Ga. App. 718, 722 (2010).

3 *See, e.g., id.* (use of suppressed testimony); *Burns v. Hill*, 19 Ga. 22 (1855) (liability of minors *ex contractu*); *Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc.*, 297 Ga. App. 28, 32-33 (2009) (administrative insurance remedies); *Grand v. Hope,* 274 Ga. App. 626, 630 (2005) (recoupment of child-support payments); *Haddon v. Shaheen & Co.*, 231 Ga. App. 596, 600 (1998) (setting aside of arbitration decision); *Independent Bankers Ass'n of Georgia, Inc. v. Dunn*, 230 Ga. 345, 363 (1973) (ownership interest in bank).

Per federal regulations, any TRICARE-participating hospital "must accept the DRG-based payment system amount determined pursuant to §199.14 as payment in full for the hospital services covered by the system."[4] Additionally, those participating hospitals are prohibited from undertaking any action that would result in *any recourse against* the patient covered by TRICARE, which specifically includes a prohibition against the hospital seeking "compensation, remuneration, or reimbursement against" a covered person.[5] MCG's actions directly violate this regulation by seeking recovery from appellant Morgan's property.

Simply put, the cause of action to which MCG's lien purportedly attaches is Morgan's property. A person's legal claim is a property interest, no less tangible or less protected, from a legal standpoint, than that person's interest in real or personal property.[6] MCG certainly could not place a lien on the personal or real property of Morgan because the TRICARE program prohibits it. Yet MCG's action does, in

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[4] 32 C.F.R. § 199.16 (b)(1). DRG means "Diagnosis Related Group," which is essentially a fee schedule promulgated by the government for treatment based on diagnosis, age, and certain other factors. 32 C.F.R. § 199.14.

[5] MCG contract with Humana Military Services, Inc., § 17. *See also* 10 U.S.C. § 1079 (j).

[6] *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (cause of action is property interest subject to due process protections).

fact, seek recovery directly from Morgan's property, in the form of the cause of action and debt owed from the tortfeasor to Morgan.

As such, GTLA does not disagree with the statement of the Georgia Hospital Association ("GHA") in its amicus curiae brief that a medical lien, when properly applied, attaches to the tortfeasor's debt.[7] But the *tortfeasor's debt* is the debt owed to the *patient*, *not* to the hospital, and, therefore, this amicus disagrees strongly with GHA's unsupported claim that this debt is one between the tortfeasor and the hospital. It is reasonable that a lien should attach to the legal claim of a party receiving treatment and owing money to the hospital for that treatment. It is another matter altogether to make that same claim when the applicable statutes and regulations foreclose *any* liability of the patient to the provider. There is *no* law in Georgia suggesting that a medical provider has a claim directly against a tortfeasor, except as a derivative action where a *patient's debt* to the provider is not satisfied.[8] Morgan had no such debt.

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[7] Brief of Georgia Hospital Association, p. 4.

[8] In fact, Georgia law is just the opposite. A tort victim cannot lawfully assign his personal injury claim for medical expenses to a third-party, such as a hospital or other medical provider, even if he wished to do so. *See* O.C.G.A. § 44-12-24 (right of action based on personal injury not assignable). Since any lien under O.C.G.A. § 44-14-470(b) "is only a lien against such [personal injury] cause of action," the lien logically can only be against the only person who may lawfully possess that cause of action, the patient/tort victim, not a third-party.

Furthermore, GTLA believes that allowing a medical provider to engage in the practices at the heart of this lawsuit introduces state and federal Due Process issues. Allowing the hospital to take Morgan's property, by virtue of a state law that, MCG argues, does not require Morgan to actually owe the hospital anything, amounts to a seizure of his property without due process of law. The United States Supreme Court has ruled that a cause of action constitutes a property interest that is entitled to due process protections.[9] Even if this Court were to accept MCG's arguments, therefore, it would still need to resolve the constitutional implications of enforcing the lien. In this light, it makes no difference that the lien statute specifies that the filing of a lien is not against the person individually, since the person's property interest is still at issue.

GTLA recognizes that the TRICARE manual, at § 5.5.2, appears to give the hospital the option to pursue a lien. A federal government field manual, however, cannot reasonably be interpreted to supersede Georgia law. If the law does not provide for a valid lien in this circumstance, it is illogical that this manual could override that law to create a new substantive right for the hospital. And as appellees point out in their supplemental brief, the Eleventh Circuit has recently

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[9] *Logan, supra.*, at 428.

held that a field manual is afforded no deference where it conflicts with the law.[10] Therefore, to the extent that the manual conflicts with federal or state laws or regulations, the laws and regulations should control.

B. The *Dawson* decision required an underlying obligation to the hospital, which is absent here.

MCG heavily relies on the case of *Dawson v. Hospital Authority of Augusta* for the proposition that a hospital lien does not require an underlying debt that is the obligation of the patient.[11] *Dawson* was decided at a time when a married woman was not legally liable for medical expenses she incurred. MCG thus argues that this case stands for the proposition that there need be no underlying obligation on the part of the patient in order to support a lien. This expansive reading of Dawson, however, is erroneous and is not applicable to this case. In *Dawson*, there was, in fact, an underlying debt, which, even if not enforceable against the patient personally, was enforceable against her husband, who stood in privity with her by statute. The injured party in that case (and in *Dawson*), Dora Boyd, received

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[10] *Bradley v. Sebelius*, No. 09-13765, 2010 WL 3769132, slip op. at 15-16 (11th Cir. Sept. 29, 2010).

[11] 98 Ga. App. 792 (1958).

treatment, and the hospital was entitled to recover for the costs of her treatment, whether through filing a lien, as it did, or by filing against Boyd or her husband.

In fact, this is precisely what the court of appeals held a year earlier in a previous case arising from the same lawsuit as *Dawson*. In *Hospital Authority of City of Augusta v. Boyd*, the court of appeals held that the lien statute and the resulting right of action against a tortfeasor/liability insurer is analogous to a garnishment action, and further held that the hospital could have pursued a *quantum meruit* claim against Boyd herself, just as a judgment creditor can seek to collect directly or can seek to garnish the debtor's property held by another party.[12] The court dismissed the claim against Boyd *not* because there was no underlying debt owed by her or her husband for the treatment but because of a technical defect in the pleading, as the plaintiff had alleged that Boyd was liable directly because of the lien.[13]

Such is not the case here. In this case, neither the patient nor anyone in privity with him owed anything to MCG, *nor could they* by virtue of the TRICARE system. Unlike the plaintiff in *Dawson* and *Boyd*, there is no claim, either on open account or quantum meruit, against Morgan for the treatment he received. And as the court of appeals suggested in *Boyd*, the direct cause of action against the

[12] 96 Ga. App. 705, 708-09 (1957).

[13] *Id.*

tortfeasor was analogous to a garnishment: in that scenario, without a valid debt on the part of a defendant, a creditor has no direct action against a garnishee. The same is necessarily true here.

C. MCG's public policy arguments are misplaced and irrelevant in this context.

MCG argues that its recovery against Morgan's property can be minimized or eliminated by the doctrine established by the court of appeals in *Adams v. State Farm Mutual Automobile Insurance Company,* whereby an injured party can recover from his own uninsured/underinsured motorist carrier if the damage award is diminished as a result of the existence of a lien under 44-14-470.[14] This argument, while perhaps true, is entirely irrelevant – any party could hypothetically have purchased additional insurance to protect against a loss, but this has no bearing on whether MCG has improperly attempted to seek payments from Morgan, indirectly, through a lien on his property.

MCG also attempts to place into issue the state's "crisis in funding for trauma care." GTLA does not deny that this is an important issue. At the same time, however, MCG negotiated at arms-length with TRICARE's regional

[14] 298 Ga. App. 249 (2009) *cert. granted*, No. S09G1710 (January 11, 2010) (applying doctrine established in *Thurman v. State Farm Mut. Auto. Ins. Co.*, 278 Ga. 162 (2004) to such liens).

administrator, Humana Military Services, Inc., to accept certain rates for treating military service members such as Morgan. Rather than accept those rates, however, under the program guaranteed to Morgan by virtue of his military service, MCG now seeks to recover from Morgan's cause of action, perhaps for a significantly higher sum than its negotiated contract would have provided. MCG should not be permitted, under the guise of public policy, to shift the burden and cost of medical treatment onto service members by recovering against those members' property, nor should it simply impose this burden on service members by arguing they had the opportunity to purchase additional insurance, particularly where medical coverage was to be provided and expected as a part of compensation for military service. The policy concerns of appellants are well taken, but a solution that involves taking the property of Morgan and others similarly situated is simply not a solution at all, particularly since MCG could have simply billed TRICARE and been compensated for the services provided.

D. Federal Law preempts application of Georgia law.

TRICARE regulations expressly preempt state law "relating to health insurance, prepaid health plans, or other health care delivery or financing methods."[15] As stated in the Code of Federal Regulations, "[t]he TRICARE

[15] 32 C.F.R. § 199.17 (a)(7); 10 U.S.C. § 1103.

program is established for the purpose of implementing a comprehensive managed health care program for the delivery and financing of health care services in the Military Health System."[16] By providing an alternate means for financing medical treatment for service members such as Morgan, O.C.G.A. § 44-14-470 is in conflict with the federal interest and as such the federal law controls.[17] Additionally, federal law also directly addresses situations in which third-party liability is involved and specifies the method of recovery of medical expenses from those third-parties by the government, therefore preempting MCG's (or anyone's) attempts to do so under state law.[18]

Because the Georgia medical lien statute is preempted by federal law as manifested in the TRICARE regulations, and because the TRICARE manual does not supersede the no-liability provisions of federal law with respect to medical

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16 32 C.F.R. § 199.17 (a)

17 *See, e.g., Geier v. American Honda Motor Company*, 529 U.S. 861, 881-84 (2000) (federal law preempted state tort claims since state claims "presented an obstacle" to federal regulation and the "accomplishment and execution" of federal objectives, even though law did not expressly preempt specific state law claims).

18 10 U.S.C. § 1095 (i)(2) ("[i]n cases in which a tort liability is created upon some third person, collection from a third-party payer that is an automobile liability insurance carrier shall be governed by the provisions of Public Law 87–693 (42 U.S.C. 2651 et seq.)."

treatment for military service members, any lien filed by MCG in this case or in any case involving service members like Morgan is improper.

III. Conclusion

The Georgia medical lien statute has never created or allowed a direct cause of action for medical expenses against a tortfeasor (or its insurer) for medical expenses resulting from a tort. Rather, the statute creates only an inchoate and purely derivative cause of action if the patient's bill is not otherwise satisfied. Thus, if the patient never pursues the cause of action, either in court or through settlement, the provider has no right to foreclose on the lien and has no recourse for its bill except against the patient. Conversely, where there is no bill or obligation on the part of the patient, the derivative action simply cannot exist. MCG was prohibited from billing the patient directly, and as a result it cannot bill the patient indirectly through the patient's interest in a cause of action. Therefore the medical lien is improper.

Moreover, MCG's public policy concerns, though not insignificant, simply do not and should not come into play in this case. MCG engaged in arms-length negotiations that resulted in its agreement to accept certain rates for particular procedures. To now award more money to MCG (at the direct expense of Morgan)

would work a severe injustice against him and other military service members similarly situated.

Finally, aside from all of the arguments raised by the parties and amici, GTLA believes that the express preemption clause in the TRICARE regulations, which applies to financing of medical treatment and recovery from a third-party for costs of medical treatment, prohibits the application of any state law, including O.C.G.A. § 44-14-470 *et seq.*, in this case.

For these and for all other reasons presented to the Court, amicus curiae Georgia Trial Lawyers Association respectfully requests that the decision of the court of appeals be affirmed.

Signatures on following page

Respectfully submitted this 4th day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of November, 2010, served a copy of the within and foregoing AMICUS CURIAE BRIEF OF THE GEORGIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper posted prepaid, addressed as follows:

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