STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HARRY SILNICKI, BY AND THROUGH
HIS GUARDIAN DEBRA SILNICKI, AND
DEBRA SILNICKI, INDIVIDUALLY,

Petitioners,

vs. Case No. 13-3852MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted on May 8, 2014, in Tallahassee, Florida, before Administrative Law Judge (ALJ) Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Adam James Stallard, Esquire
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STATEMENT OF THE ISSUE

The issue is the amount of money, if any, that must be paid to the Agency for Health Care Administration (AHCA) to satisfy its Medicaid lien under section 409.910, Florida Statutes (2013).

PRELIMINARY STATEMENT

On October 2, 2013, Petitioners filed their "Petition to Preclude, or, Alternatively, Determine the Amount of, Medicaid's Lien." The matter was referred to DOAH and assigned the case number reflected above. On January 7, 2014, Petitioners filed their "Amended Petition to Preclude, or, Alternatively, Determine the Amount of, Medicaid's Lien."

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation, which contained certain stipulated facts. Those stipulated facts have been incorporated into this Final Order to the extent they are deemed relevant.

At the final hearing conducted May 8, 2014, Petitioners called as their only witness attorney Scott Henratty, who represented the Petitioners in the personal injury proceeding discussed below. Petitioners offered seven pre-marked Exhibits, each of which was admitted into evidence. Respondent offered no witnesses and no exhibits.

The Transcript of the proceedings, consisting of one volume, was filed June 3, 2014.

At the request of the Respondent, the deadline for the filing of proposed final orders was extended. Thereafter, the parties timely filed their proposed orders, which have been duly-considered by the undersigned in the preparation of this Final Order.

At the request of both parties, official recognition was taken of pertinent legal authorities.

All statutory references are to Florida Statutes (2013).

FINDINGS OF FACT

1. Harry Silnicki, at age 52, suffered devastating brain injuries when a ladder on which he was standing collapsed. Mr. Silnicki, now age 59, has required, and will for the remainder of his life require, constant custodial care as a result of his injuries. He has been, and will be into the indefinite future, a resident of the Florida Institute of Neurological Rehabilitation (FINR) or a similar facility that provides full nursing care.

2. Debra Silnicki is the wife and guardian of Mr. Silnicki. Mr. Silnicki, through his guardian, brought a personal injury lawsuit in Broward County, Florida, against several defendants, including the manufacturer of the ladder, the seller of the ladder, and two insurance companies (Defendants), contending that Mr. Silnicki's injuries were caused by a defective design of the ladder. The lawsuit sought compensation

for all of Mr. Silnicki's damages as well as his wife's individual claim for damages associated with Mr. Silnicki's damages. When referring to the personal injury lawsuit, Mr. and Mrs. Silnicki will be referred to as Plaintiffs.

3. During the course of the trial, before the jury reached its verdict, the Plaintiffs entered into a High-Low Agreement (HLA) with the Defendants by which the parties agreed that, regardless of the jury verdict, the Defendants would pay to the Plaintiffs $3,000,000 if the Plaintiffs lost the case, but would pay at most $9,000,000 if the Plaintiffs won the case.

4. After a lengthy trial, on March 27, 2013, the jury returned a verdict finding no liability on the part of the manufacturer or any other defendants. Consequently, the jury awarded the Plaintiffs no damages.

5. The Defendants have paid to the Plaintiffs the sum of $3,000,000 pursuant to the HLA (the HLA funds). The HLA constitutes a settlement of the claims the Plaintiffs had against the Defendants.[1/]

6. As shown in their Closing Statement (Petitioners' Exhibit 7), dated September 23, 2013, the Silnickis' attorneys have disbursed $1,100,000 of the HLA funds as attorney's fees and $588,167.40 as costs. The sum of $1,011,832.60[2/] was paid under the heading "Medical Liens/Bills to be Paid/Waived/Reduced by Agreement Pending Court Approval." Included in that sum were

payments to Memorial Regional Hospital in the amount of $406,464.49 and a payment to FINR in the amount of $600,000.00. Also included was the sum of $245,648.57, which was to be deposited in an interest-bearing account. Subject to court approval, the Closing Statement earmarked, among other payments, $100,000 for a special needs trust for Mr. Silnicki and a $100,000 payment to Mrs. Silnicki for her loss of consortium claim.

7. AHCA has provided $245,648.57 in Medicaid benefits to Mr. Silnicki. AHCA has asserted a Medicaid lien against the HLA funds in the amount of $245,648.57. As required by section 409.910(17)(a), the amount of the Medicaid lien has been placed in an interest-bearing account. The Closing Statement reflects that should Petitioners prevail in this proceeding by reducing or precluding the Medicaid lien, any amounts returned to Petitioners will be split 50% to FINR, 25% to attorney's fees, and 25% to the Petitioners.

8. Section 409.910(11)(f) provides as follows:

> (f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:
>
> 1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil

> Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.
>
> 2. The remaining amount of the recovery shall be paid to the recipient.
>
> 3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.

9. The parties stipulated that the amount of Petitioners' "taxable costs as defined by the Florida Rules of Civil Procedure" is $347,747.05. The parties have also stipulated that if the section 409.910(11)(f) formula is applied to the $3,000,000 settlement funds received by Mr. and Mrs. Silnicki, the resulting product would be greater than the amount of AHCA's Medicaid lien of $245,648.57. That amount is calculated by deducting 25% of the $3,000,000 for attorneys' fees, which leaves $2,250,000. Deducting taxable costs in the amount of $347,747.05 from $2,250,000 leaves $1,902,352.95. Half of $1,902,352.95 equals $951,176.48 (the net amount). The net amount exceeds the amount of the Medicaid lien.

10. Section 409.910(17)(b) provides the method by which a recipient can challenge the amount of a Medicaid lien as follows:

> (b) A recipient may contest the amount designated as recovered medical expense damages payable to the agency pursuant to the

> formula specified in paragraph (11)(f) by filing a petition under chapter 120 within 21 days after the date of payment of funds to the agency or after the date of placing the full amount of the third-party benefits in the trust account for the benefit of the agency pursuant to paragraph (a). The petition shall be filed with the Division of Administrative Hearings. For purposes of chapter 120, the payment of funds to the agency or the placement of the full amount of the third-party benefits in the trust account for the benefit of the agency constitutes final agency action and notice thereof. Final order authority for the proceedings specified in this subsection rests with the Division of Administrative Hearings. This procedure is the exclusive method for challenging the amount of third-party benefits payable to the agency. In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

11. Scott Henratty and his firm represented the Plaintiffs in the underlying personal injury case. Mr. Henratty is an experienced personal injury attorney. Mr. Henratty testified that the Plaintiffs asked the jury for a verdict in the amount of $50,000,000 for Mr. Silnicki for his total damages, not including his wife's consortium claim. Mr. Henratty valued the claim at between $30,000,000 and $50,000,000. There was no clear and

convincing evidence that the total value of Mr. Silnicki's claim exceeded $30,000,000.

12. Mr. Henratty testified that Plaintiffs presented evidence to the jury that Mr. Silnicki's past medical expenses equaled $3,366,267, and his future medical expenses, reduced to present value, equaled $8,906,114, for a total of $12,272,381. Those two elements of damages equal approximately 40.9% of the total value of the claim if $30,000,000 is accepted as the total value of the claim.[3/]

13. The Closing Statement reflects that more than the amount of the claimed Medicaid lien was to be used to pay past medical expenses.

14. Petitioners assert in their Petition and Amended Petition three alternatives to determine what should be paid in satisfaction of the Medicaid lien in the event it is determined that the HLA funds are subject to the lien. All three alternatives are premised on the total value of Mr. Silnicki's recovery being $30,000,000 (total value) and compare that to the recovery under the HLA of $3,000,000, which is one-tenth of the total value. All three methods arrive at the figure of $24,564.86 as being the most that can be recovered by the Medicaid lien, which is one-tenth of the Medicaid lien. Future medical expenses is not a component in these calculations.

15. The portion of the HLA funds that should be allocated to past and future medical expenses is, at a minimum, 30% of the recovery.[4/]

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes.

17. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients (recipients) who later recover from third-party tortfeasors. See Ark. Dep't of Health and Hum. Srvs. v. Ahlborn, 547 U.S. 268 (2006).

18. Florida has enacted section 409.910, which is known as the "Medicaid Third-Party Liability Act." Section 409.910(1) expresses the following legislative intent:

> It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien,

> and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

19. Section 409.910(6)(c) affords AHCA with an automatic lien "for the full amount of medical assistance provided by Medicaid to or on behalf of the recipient for medical care furnished as a result of any covered injury or illness for which a third party is or may be liable, upon the collateral, as defined in s. 409.901."

20. Section 409.901(7) defines "collateral" as follows:

> (7) "Collateral" means:
>
> (a) Any and all causes of action, suits, claims, counterclaims, and demands that accrue to the recipient or to the recipient's legal representative, related to any covered injury, illness, or necessary medical care, goods, or services that necessitated that Medicaid provide medical assistance.
>
> (b) All judgments, settlements, and settlement agreements rendered or entered into and related to such causes of action, suits, claims, counterclaims, demands, or judgments.
>
> (c) Proceeds, as defined in this section.

21. In this proceeding, the application of the formula in section 409.910(11)(f) yields a result that exceeds the amount Medicaid has paid. Consequently, Petitioners are required to pay

to Medicaid the amount of its lien (the sum of $245,648.57) unless they can prove, pursuant to section 409.910(17)(b), that a lesser amount of the HLA funds should be allocated for the payment of medical expenses.

22. Section 409.910(17)(b) establishes the evidentiary burden that must be established by a challenger to the statutory formula:

> In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

23. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

24. As stated by the Florida Supreme Court, the standard:

> entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.
>
> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must

> be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

25. The federal anti-lien statute at 42 U.S.C. § 1396p(a)(1) states "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid," and the federal anti-recovery statute at § 1396p(b)(1) states "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made." Pursuant to these federal directives, Florida enacted the "Medicaid Third-Party Liability Act." See § 409.910, Fla. Stat.

26. In Wos v. E.M.A., 133 S. Ct. 1391, 1394 (2013), the Court observed as follows:

> A federal statute prohibits States from attaching a lien on the property of a Medicaid beneficiary to recover benefits paid by the State on the beneficiary's behalf. 42

> U.S.C. §1396(a)(1). The anti-lien provision pre-empts a State's effort to take any portion of a Medicaid beneficiary's tort judgment or settlement "not designated as payments for medical care." Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268, 284, 126 S. Ct. 1752, 164 L. Ed. 459 (2006).

27. For a settlement or jury verdict that does not distinguish between different categories of damages, Wos requires that an allocation be made of the portion of the settlement or verdict that is reasonably attributable to medical expenses.[5/]

28. Effective July 1, 2013, section 409.910(17)(b) was enacted to provide a recipient the right to rebut the presumptively valid allocation created by section 409.910(11)(f). That provision clearly contemplates the allocation of medical expenses required by Wos to include past and future medical expenses.

29. If the language of a statute "is clear and unambiguous and conveys a clear and definite meaning, the statute should be given its plain meaning." Fla. Hosp. v. Ag. for Health Care Admin., 823 So. 2d 844, 848 (Fla. 1st DCA 2002).

30. Here, a plain reading of "past and future medical expenses" cannot, as Petitioners argue, limit the term to "past medical expenses." See Savasuk v. Ag. for Health Care Admin., Case No. 13-4130MTR (Fla. DOAH Jan. 29, 2014) and Holland v. Ag. For Health Care Admin., Case No. 13-4951MTR (Fla. DOAH May 2,

2014). Petitioners' strained construction of the applicable statutes is rejected.

31. There has been no ruling by a court of competent jurisdiction that the provision in section 409.910(17)(b) that includes future medical expenses in the calculation of medical expenses violates the anti-lien provision found at 42 U.S.C. § 1396p(a)(1).[6/] A determination that a provision in a statute is void or unenforceable should be left to a court of competent jurisdiction. "The Administrative Procedure Act does not purport to confer authority on administrative law judges or other executive branch officers to invalidate statutes on constitutional or any other grounds." Commc'n Workers v. Gainesville, 697 So. 2d 167, 170 (Fla. 1st DCA 1997).

32. The statutory scheme requires that Petitioners prove, by clear and convincing evidence, that an allocation of the amount of the HLA funds for past and future medical expenses results in an amount that is less than the Medicaid lien, which would dictate that the Medicaid lien be reduced.

33. The three alternative calculations argued by Petitioners do not factor in future medical expenses when allocating the portion of the HLA funds attributable to medical expenses. Consequently, those alternatives are rejected.

34. The portion of the HLA funds that should be allocated to past and future medical expenses is a minimum of 30% of the

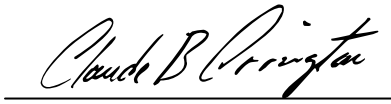
recovery. Applying 30% to the net amount of $951,176.48 produces a figure ($285,352.94) that exceeds the amount of the Medicaid lien ($245,648.57).

35. Petitioners failed to prove by clear and convincing evidence that the Medicaid lien should be reduced.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is DETERMINED that the amount of AHCA's Medicaid lien payable from Petitioners' High-Low Agreement funds is $245,648.57, as claimed by AHCA.

DONE AND ORDERED this 15th day of July, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 15th day of July, 2014.

ENDNOTES

[1/] Petitioners argue that the HLA funds are not subject to the Medicaid lien because the jury found the defendants not liable in

the underlying personal injury action. That argument is rejected. The defendants became liable parties by the HLA.

[2/] This amount is slightly more than 30% of the HLA fund.

[3/] In addition to arguing that the HLA funds are not subject to the Medicaid lien, Petitioners make three arguments as to the appropriate allocation of the HLA funds. All arguments are based on an assumed total value of the claim in the amount of $30,000,000.

[4/] This minimum percentage is based on the portion of the HLA funds paid for medical expenses (approximately 30%), the evidence of past and future medical expenses presented to the jury in the personal injury case brought by the Silnickis (approximately 40.9%), and on the evidence presented by Petitioners as to a plaintiff with damages similar to Mr. Silnicki's. Petitioners introduced as their exhibit 15 the verdict form from Milien v. Whitney, another personal injury case tried by Mr. Henratty. Mr. Henratty testified that the damages suffered by Mr. Milien and the damages suffered by Mr. Silnicki were similar. The jury awarded Mr. Milien a total verdict of $33,100,000. Of that award $1,200,000 was awarded for past medical expenses and $14,400,000 was awarded for future medical damages for a total medical expense award of $15,600,000. The percentage of past and future medical expenses in Milien approximated 47% of the total award.

[5/] In their proposed order, Petitioners argue that because the jury returned a verdict of no liability, "it is impossible and inappropriate to undertake an analysis of what a jury would have awarded 'had the matter proceeded to trial' as required by Wos. The undersigned disagrees. The HLA funds should not be treated as a windfall to Petitioners that is exempt from the Medicaid lien. The HLA funds are properly treated as the results of the settlement of an action in tort and should be treated as any other settlement.

[6/] The undersigned has not overlooked the final order in Gibbons v AHCA, Case No. 13-4720MTR (Fla. DOAH Mar. 5, 2014).

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.