STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELSA PARNAU HUNT AND ERIC HUNT, INDIVIDUALLY, AS PARENTS OF ETHAN HUNT, DECEASED, AND AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF ETHAN HUNT,

Petitioners,

vs. Case No. 13-4684MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER[1/]

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy, in Tallahassee, Florida, on May 13, 2014.

APPEARANCES

For Petitioners: Floyd B. Faglie, Esquire
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For Respondent: Adam James Stallard, Esquire
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(after mandate) Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

What is the amount to be reimbursed to Respondent, Agency for Health Care Administration (AHCA), for medical expenses paid on behalf of Ethan Hunt pursuant to section 409.910, Florida Statutes, from a wrongful death settlement received by Petitioners from a third party.

PRELIMINARY STATEMENT

On December 6, 2013, Petitioners filed a Petition to Determine Amount Payable to the Agency for Health Care Administration in Satisfaction of Medicaid Lien. The final hearing in this matter was originally scheduled for February 13, 2014. After a series of unopposed motions for continuance based upon Respondent's delay in timely responding to discovery, and the unavailability of witnesses and counsel, the final hearing was held on May 13, 2014.

Petitioners presented the testimony of two fact and expert witnesses, Robert Borrello, Esquire, and Herman Russomanno, Esquire. Petitioners' Exhibits 1 through 24, 26 through 29, and 32 were admitted into evidence. Respondent offered no witnesses or documentary evidence. The parties filed a Joint Pre-hearing Stipulation, and the facts stipulated therein are accepted and made a part of the Findings of Fact below. The Transcript of the final hearing, consisting of one volume, was filed June 9, 2014, and the parties timely filed proposed orders

that have been carefully 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. Unless otherwise noted, all statutory references are to Florida Statutes (2013).

FINDINGS OF FACT

1. Ethan Hunt (Ethan) was born on January 7, 2003, and died on May 31, 2006. Petitioners, Elsa and Eric Hunt (Petitioners or the Hunts), allege that Ethan's death resulted from complications arising from his birth-related catastrophic neurological injury and severe disabilities.

Factual Allegations that Served As a Basis for the Underlying Wrongful Death Litigation

2. According to Petitioners,[2/] Mrs. Hunt experienced a normal pregnancy and vaginal delivery with Ethan. Ethan was born at 1:27 p.m., at Mercy Hospital in Miami with meconium-stained amniotic fluid. As a result, a neonatologist was called in to check on Ethan. The neonatologist gave Ethan an Apgar score of nine out of nine. At birth, Ethan was considered healthy and was then transferred to the nursery at the hospital with no further workup.

3. When returned to Mrs. Hunt, Ethan was fussy, crying, and seemed not to be doing well and was returned to the nursery for approximately four hours from 2:00 p.m., until 6:00 p.m. The neonatologist checked on Ethan at approximately 5:00 p.m., but

did not order any tests. Ethan was taken back to Mrs. Hunt at approximately 6:00 p.m., but was grunting and having difficulty breathing so he was returned to the nursery at 6:45 p.m.

4. At approximately 7:15 p.m., a pediatric advanced registered nurse practitioner (ARNP) examined Ethan, saw that Ethan was grunting, gasping for air, pale and unable to register oxygenation on a pulse oximeter. The ARNP decided to transfer the baby to the hospital's neonatal intensive care unit. Ethan continued having difficulty breathing and was eventually intubated with a ventilator to assist breathing. Ethan was later flown to Miami Children's Hospital.

5. Petitioners allege that there was an unreasonable delay at Mercy Hospital in properly evaluating and intubating Ethan, and as a result, Ethan suffered hypoxic ischemic encephalopathy (HIE), damage to the brain caused by respiratory insufficiency, and pulmonary hemorrhage resulting in severe damage to the tissue of his brain.

6. Ethan experienced irreversible, extensive, and profound neurological injury for the rest of his brief life. Ethan suffered from cerebral palsy, microcephaly, and a swallowing disorder that created a high risk of choking or gagging. Ethan was initially fed through a nasogastric tube through his nose. He was eventually able to have a feeding tube inserted into the stomach for nutrition.

7. Ethan never developed beyond the age of a two-month-old infant. Ethan was unable to feed himself, unable to hold onto things, unable to roll over and unable to eat on his own. Ethan required round-the-clock medical attention and care for his activities of daily living. Ethan's medical condition required numerous overnight stays in the hospital. Ethan was hospitalized at Miami Children's Hospital for the first three months of his life.

8. Ethan's medical condition made him prone to conditions such as pneumonia and respiratory insufficiency. In May 2006, he was brought back to Miami Children's Hospital because he was having difficulty breathing. Ethan was put on a ventilator and it became apparent he was not going to recover on this occasion. Ultimately, the Hunts made the decision to disconnect Ethan from the ventilator and Ethan died on May 31, 2006, at age three and a half.

9. During Ethan's three and half-years of life, Petitioners, and Ethan's older sister, did everything possible to include Ethan in all activities to make his life as normal as possible. This included taking him to Disney World, having birthday parties for Ethan, and showing him constant love and affection. The extensive care and affection demonstrated towards Ethan by the Hunt family was well documented by a daily calendar/diary maintained by Mrs. Hunt, numerous photographs

collected into a baby binder by Mrs. Hunt for Ethan, and video compilation taken of Ethan with his parents and sister.

The Wrongful Death Litigation

10. Petitioners, individually, as parents of Ethan, and as the co-personal representatives of the Estate of Ethan Hunt (Estate), brought a wrongful death lawsuit against Mercy Hospital where Ethan was born, the neonatologist, the neonatologist's practice group, and the ARNP, to recover their individual damages as the surviving parents of Ethan, as well as the individual claim for damages of the Estate.

11. The Hunts retained the Miami law firm of Russomanno & Borrello, P.A., a firm concentrating in the areas of personal injury, wrongful death, and medical malpractice.

12. In accordance with the limitation on damages recoverable in wrongful death actions contained in section 768.21, Florida Statutes, the Hunts' wrongful death lawsuit specifically sought the individual damages of each parent for their "mental pain and suffering and loss of companionship" of their deceased son. Further, the wrongful death action sought, on behalf of the Estate, recovery of "medical and funeral expenses."

The Medicaid Lien

13. Ethan was a Medicaid recipient and a portion of his medical care was paid for by Medicaid. AHCA, through the

Medicaid program, paid $315,632.17 in benefits on behalf of Ethan for medical benefits related to the alleged negligent medical care received by Ethan. Ethan first received medical treatments for which Medicaid was obligated to make payments on June 11, 2003, and AHCA, through the Medicaid program, made its last payment for Ethan's medical care on May 29, 2006.

14. As a condition of Ethan's eligibility for Medicaid, Ethan's right to recover from liable third parties medical expenses paid by Medicaid was assigned to AHCA. See 42 U.S.C. § 1396a(a)(25)(H) and § 409.910(6)(b), Fla. Stat.

15. Pursuant to section 409.910(6)(c), AHCA's Medicaid lien attached and was perfected on June 11, 2003, when Ethan first received medical care for which Medicaid was obligated to make payments. On May 25, 2005, AHCA recorded in the Miami-Dade County public record its Claim of Lien and Notice of Assignment and Other Statutory Rights (Lien), Book 23409, pages 2856-2858. By letter dated May 28, 2008, to Herman J. Russomanno (Russomanno), an attorney representing the Hunts and the Estate, from AHCA's contracted vendor, Health Management Systems (HMS), AHCA indicated that the Medicaid lien was in the amount of $315,632.17.

Valuation of the Wrongful Death Claim

16. Robert J. Borrello (Borrello) and Russomanno, the attorneys representing the Hunts and Ethan's Estate in their

wrongful death action, prepared a litigation risk assessment and valuation of the claims for the Hunts and the estate of Ethan, in preparation for trial and/or settlement negotiations. Borrello has extensive experience representing parties in personal injury, wrongful death, and medical malpractice cases since 1988. Russomanno has practiced in this field for 37 years, is a board-certified civil trial attorney, first certified in 1986, who has litigated hundreds of these types of cases. Russomanno is the past president of the American Board of Trial Advocates (ABOTA), the Florida Chapter of ABOTA (FLABOTA), the Dade County Bar, the Florida Supreme Court Historical Society, and the Florida Bar. He has served as an adjunct professor of law for many years and lectured internationally on the calculation of damages.

17. In making the determination regarding the valuation of the Hunt's wrongful death litigation, Borrello and Russomanno reviewed Ethan's medical records, conducted interviews and depositions of fact and expert witnesses, and personally interacted with the Hunts and Ethan. Russomanno met with the Hunts approximately 40 times, including visits to their home and to see Ethan when he was hospitalized. Borrello and Russomanno were very familiar with the injuries suffered by Ethan at his birth, his medical condition during his life, and the events leading up to his death. Borrello and Russomanno were also very familiar with the medical treatment that was allegedly negligent

and the pain and suffering by Ethan's parents associated with Ethan's injury and death.

18. To properly evaluate the value of the claims of the Hunts, Borrello searched for Florida jury verdicts for wrongful death cases brought by parents for the death of their children. Excluding those cases in which a defense verdict was returned, Borrello and Russomanno, reviewed ten comparable cases with verdicts for the parents. The amounts awarded to the parents in these ten cases ranged from 4.1 to 10 million dollars and totaled $71,110,000. Eighteen parents were involved in these ten verdicts. The average jury award per parent was $3,950,555.55.

19. The case most closely comparable to that of the Hunts was the case of Bravo v. United States of America, a decision rendered by Judge José Gonzalez for the United States District Court, Southern District of Florida. The Bravo case was a Federal Torts Claims Act bench trial in which Judge Gonzalez awarded $5,000,000.00 for pain and suffering to each parent. The injuries suffered by the Bravo child and Ethan were substantially similar. In Ethan's case, his injuries and death were alleged to be as a result of the delay in intubation which caused a neurological injury based on insufficient oxygenation of the brain. In Bravo, the severe brain injury allegedly occurred during the delivery itself. Both the Bravo child and Ethan died at three years of age. Both deceased children had an older

sibling and both had attentive and loving parents who were actively involved in their day-to-day care. The Bravo trial was conducted in Miami, in the Southern District of Florida, and the Hunt's wrongful death lawsuit was brought in Miami-Dade Circuit Court. In formulating his opinion as to the value of the parents' damages, Russomanno consulted with the lead attorney for the Bravo case who confirmed that the two cases were substantially similar.

20. Based upon the ten verdicts, including the Bravo bench trial decision, review of the medical records, extensive personal interaction with the Hunt family, including Ethan, and their personal experience and knowledge of valuing personal injury, medical malpractice and wrongful death claims from decades of practice in this field, Borrello and Russomanno conservatively valued the damages for mental pain and suffering and loss of companionship of the Hunts to be between four to five million dollars for each parent.[3/]

21. The medical and funeral expenses of Ethan's estate were $650,000.00. This includes the full amount of the Medicaid lien asserted ($315,632.17), plus the medical expenses billed and/or covered by other insurance carriers, and a nominal amount for funeral expenses (estimated at less than $7,500.00).[4/]

22. Borrello and Russomanno estimated the total value of the wrongful death claim at $9,650,000.00. This figure

represents $4.5 million dollars for the pain and suffering for each parent and $650,000.00 for medical and funeral expenses incurred by Ethan's estate. The valuation by Borrello and Russomanno of Petitioners' claims of $9.650 million dollars is accepted as credible and reliable, as well as persuasive.

23. Borrello acknowledged litigation risk issues with this wrongful death action, which included insurance caps on the coverage of the defendants, whether statutory caps on liability for non-practitioners (such as the hospital) would apply, proving vicarious liability of the hospital, and causation.

24. On July 11, 2008, the Hunts, on behalf of themselves and Ethan's Estate, submitted to the defendants in the wrongful death action, Plaintiffs' Proposal for Settlement to All Defendants (Proposal). As explained by Borrello, the purpose of the Proposal was to introduce a settlement effort and create the possibility of recovering attorneys' fees if the verdict ultimately exceeded the Proposal by 25 percent or more. The Proposal offered a settlement of $7,250,000.00 to be allocated as follows:

Elsa Hunt	$3,300,000.00	45.5%
Eric Hunt	$3,300,000.00	45.5%
Estate of Ethan Hunt	$650,000.00	9.0%

25. The Hunts' July 11, 2008, Proposal was rejected, and a mediation of the wrongful death lawsuit was held on May 12, 2009.

26. By letter dated May 4, 2009, to HMS, the attorney representing the Hunts in the wrongful death action notified AHCA's designated vendor of the May 12, 2009, mediation and provided a copy of the notice of mediation. AHCA did not attend or participate in the mediation.

The Settlement Allocation

27. A global settlement was reached at the May 12, 2009, mediation for the total amount of $1,800,000.00. As part of the mediated settlement, the parties made an allocation of the settlement proceeds between individual claims of the surviving parents and the claim of the Estate. This allocation was memorialized in the Addendum to Mediation Settlement Agreement Allocation of Settlement (Addendum). Each parent was allocated a total amount of $819,000.00 "in satisfaction of their individual claims for mental pain and suffering and loss of companionship." The Estate was allocated a total of $162,000.00 "in satisfaction of its claims for medical expenses and funeral expenses." The parties allocated these amounts in accordance with the percentages as presented in the prior Proposal.

28. The total settlement included recovery of the policy limits for the doctor in the amount of $250,000.00, recovery of 80 percent of the policy limits for the ARNP in the amount of $800,000.00, and $750,000.00 from the hospital, which was an amount equal to the then existing cap for recovery against a non-

practitioner. Borrello explained that although he and Russomanno valued the case at $9.65 million, the mediated settlement figure of $1.8 million was reasonable taking into consideration the litigation risk factors, the policy limits available for the defendants, and the Hunts' strong desire to end the "emotionally wrenching" case.

29. Rather than comparing the amount of the medical and funeral expenses to the estimated full value of the claims asserted in the lawsuit ($9.6 million dollars), Borrello and Russomanno used the ratio of the full amount of medical and funeral expenses ($650,000.00) to the reduced Proposal figure of $7.25 million dollars, resulting in a larger percentage (nine percent) allocated to medical and funeral expenses of the Estate. Both Borrello and Russomanno testified that this allocation of $162,000.00 was reasonable and rational.

30. By letter dated May 20, 2009, AHCA received notice that the case settled at the May 12, 2009, mediation and of the intent to issue a dismissal of the defendants in the case.

31. On June 9, 2009, the court entered a Final Judgment of Dismissal with Prejudice.

32. AHCA took no action to intervene in the wrongful death action or to seek relief from the settlement reached by the parties.

33. At the final hearing, AHCA called no witnesses to contest the valuation of damages made by Borrello and Russomanno or to offer an alternative methodology to calculate the allocation to past medical expenses. No evidence was presented indicating the settlement agreement was not reasonable given all the circumstances of the case. No evidence was offered suggesting that the parties colluded to minimize the share of the settlement proceeds attributable to Medicaid's payment of costs of Ethan's medical care. In fact, the evidence established that the settlement was conservative in its valuation of Petitioners' claims and that the settling parties could have reasonably apportioned less for the medical expenses than they actually did.

34. Upon receipt of the settlement proceeds, the amount of $315,632.17 was placed into a trust account for the benefit of AHCA pending an administrative determination of AHCA's rights.

35. Pursuant to 42 U.S.C. sections 1396a(a)(25)(A), (B), and (H), section 1396k(a), and section 1396p(a), AHCA may only assert a lien against, and seek recovery from, the portion of a Medicaid recipient's settlement representing the Medicaid recipient's compensation for medical expenses paid by Medicaid.

36. The Hunts requested that AHCA calculate the amount owed in satisfaction of the lien pursuant to the statutory formula set forth in section 409.910(11)(f). The Hunts requested that this calculation be based only on the Estate's recovery of

$162,000.00, minus the Estate's share of attorneys' fees and the Estate's $15,559.01 share of the litigation costs (which represents the Estate's nine percent proportionate share of the gross $172,877.87 in litigation cost).

37. AHCA continues to seek payment of its full $315,632.17 Lien from the gross settlement award of $1.8 million, which includes those funds allocated to the parents for their individual claims of pain and suffering and loss of companionship. AHCA correctly computed the Lien amount pursuant to the statutory formula in section 409.910(11)(f). Deducting the 25 percent attorneys' fee or $450,000.00 from the $1,800,000.00 total recovery leaves 1,350,000.00. Deducting the Estate's $15,559.01 share of the litigation costs[5/] leaves $1,334,440.99, half of which is $667,220.50. That figure exceeds the actual amount expended by Medicaid on Ethan's medical care. Application of the formula against the total mediated settlement amount would provide sufficient funds to satisfy the Medicaid Lien.

38. Petitioners proved by clear and convincing evidence that the Proposal offer of $7,250,000.00, representing a reduction from the total value of the claims from $9,650,000.00, was a reasonable, if not unduly conservative amount. Petitioners proved, by clear and convincing evidence, based on the dramatic injuries sustained by Ethan and devastating emotional toll on his

parents by Ethan's brief, medically compromised life, and his death, that the amount agreed upon in the settlement of Petitioners' claims constitutes a fair settlement, including the portion attributed to the Estate for medical expenses.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings (DOAH) has jurisdiction over the subject matter and the parties in this case, and final order authority pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes (2015).

40. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors. See Ark. Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268, 276 (2006). To secure reimbursement from liable third parties, the state must require a Medicaid recipient to assign to the state his right to recover medical expenses from those third parties. In relevant part, 42 U.S.C. section 1396a(a)(25) provides:

> (H) that to the extent that payment has been made under the State Plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State Plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.

41. To comply with this federal mandate, the Florida Legislature enacted section 409.910, Florida's Medicaid Third-Party Liability Act. This statute authorizes and requires the State, through AHCA, to be reimbursed for Medicaid funds that paid for a recipient's medical care when that recipient later receives a personal injury judgment or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590, 590 (Fla. 5th DCA 2009).

42. In its statement of intent, the statute provides as follows:

> (1) 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.

43. It was undisputed that Medicaid provided $315,632.17 in medical expenses for Petitioner or that AHCA asserted a Medicaid Lien against Petitioner's settlement and the right to seek reimbursement for its expenses. The mechanism by which AHCA enforces its right is set forth in section 409.910 as follows:

> (11) The agency may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.
>
> (a) If either the recipient, or his or her legal representative, or the agency brings an action against a third party, the recipient, or the recipient's legal representative, or the agency, or their attorneys, shall, within 30 days after filing the action, provide to the other written notice, by personal delivery or registered mail, of the action, the name of the court in which the case is brought, the case number of such action, and a copy of the pleadings. If an action is brought by either the agency, or the recipient or the recipient's legal representative, the other may, at any time before trial on the merits, become a party to, or shall consolidate his or her action with the other if brought independently. Unless waived by the other, the recipient, or his or her legal representative, or the agency shall provide notice to the other of the intent to dismiss at least 21 days prior to voluntary dismissal of an action against a third party. Notice to the agency shall be sent to an address set forth by rule. Notice to the recipient or his or her legal representative, if represented by an attorney, shall be sent to the attorney, and, if not represented, then to the last known

address of the recipient or his or her legal representative.

(b) An action by the agency to recover damages in tort under this subsection, which action is derivative of the rights of the recipient or his or her legal representative, shall not constitute a waiver of sovereign immunity pursuant to s. 768.14.

(c) In the event of judgment, award, or settlement in a claim or action against a third party, the court shall order the segregation of an amount sufficient to repay the agency's expenditures for medical assistance, plus any other amounts permitted under this section, and shall order such amounts paid directly to the agency.

(d) No judgment, award, or settlement in any action by a recipient or his or her legal representative to recover damages for injuries or other third-party benefits, when the agency has an interest, shall be satisfied without first giving the agency notice and a reasonable opportunity to file and satisfy its lien, and satisfy its assignment and subrogation rights or proceed with any action as permitted in this section.

(e) Except as otherwise provided in this section, notwithstanding any other provision of law, the entire amount of any settlement of the recipient's action or claim involving third-party benefits, with or without suit, is subject to the agency's claims for reimbursement of the amount of medical assistance provided and any lien pursuant thereto.

(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.
>
> 4. Notwithstanding any provision of this section to the contrary, the agency shall be entitled to all medical coverage benefits up to the total amount of medical assistance provided by Medicaid. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical payments under coverage for workers' compensation, personal injury protection, and casualty.

44. As discussed in Finding of Fact 37, supra, AHCA correctly computed the Lien amount pursuant to the statutory formula in subsection (11)(f). One-half of the amount remaining, after deduction of the attorneys' fees and costs, would be $667,220.50, which exceeds the actual amount expended by Medicaid on Petitioner's medical care. Application of the formula would provide sufficient funds to satisfy the Medicaid lien of $315,632.17.

45. Section 409.910(13) provides that AHCA is not automatically bound by the allocation of damages set forth in Petitioner's settlement agreement:

> (13) No action of the recipient shall prejudice the rights of the agency under this section. No settlement, agreement, consent decree, trust agreement, annuity contract, pledge, security arrangement, or any other device, hereafter collectively referred to in this subsection as a "settlement agreement," entered into or consented to by the recipient or his or her legal representative shall impair the agency's rights. However, in a structured settlement, no settlement agreement by the parties shall be effective or binding against the agency for benefits accrued without the express written consent of the agency or an appropriate order of a court having personal jurisdiction over the agency.

46. Section 409.910(17)(b)[6/] provides a mechanism whereby a recipient may challenge AHCA's presumptively correct calculation of medical expenses payable to the agency:

> 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.

47. In Evans Packing Company v. Department of Agriculture & Consumer Services, 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

> [C]lear 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 evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

48. The evidence is clear and convincing that the allocation for Petitioner's past medical expenses in the amount of $162,000.00, as set forth in the settlement agreement, constitutes a fair, reasonable, and accurate share of the total recovery for those past medical expenses actually paid by Medicaid.

49. The evidence is clear and convincing that the parties to the settlement engaged in no manipulation of the apportionment to minimize or prejudice AHCA's right to reimbursement for medical expenditures. If anything, the parties to the settlement were overly generous in the apportionment for medical expenses. They based the apportionment on a conservative estimate of the value of Petitioners' claims and included those medical expenses "boarded" (billed but not paid) by other insurers.

50. Petitioners argue that the undersigned should go one step further and apply the formula of 409.910(11)(f) only to the portion of the settlement proceeds designated as the Estate's recovery for medical and funeral expenses ($162,000.00). After a reduction for a 25 percent attorneys' fee, reduction of attorneys' fees and costs and then dividing by two, the result would be $52,980.50. This ignores the plain language of 409.910(13) that "no settlement shall prejudice the rights of the agency" and the directive in subsection (17) that to successfully challenge the amount payable to the agency, the recipient must prove 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)." The total recovery in this case was $1,800,000.00.

51. Alternatively, Petitioners seek a reduction in the $162,000.00 amount payable to AHCA for its proportionate share of attorneys' fees and costs. Notably absent from section 409.910(17) is any authorization for such a reduction. Arguments of fairness and equity might suggest such a result, however, as discussed in Agency for Health Care Administration v. Wilson, 782 So. 2d 977 (Fla. 1st DCA 2001), under section 409.910, the Legislature made clear that Medicaid was to be the "payor of last resort" regardless of whether a recipient is made whole or other creditors paid. Id. at 978. "The Legislature has abrogated principles of common law and equity 'to the extent necessary to ensure full recovery by Medicaid from third-party resources.'" Id.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is DETERMINED that the amount payable to AHCA from Petitioners' settlement, in satisfaction for the medical expenses paid by Medicaid for the care of Ethan Hunt, is $162,000.00.

DONE AND ORDERED this 10th day of September, 2015, in Tallahassee, Leon County, Florida.

MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of September, 2015.

ENDNOTES

[1/] The original Final Order for this matter was issued by the undersigned on July 29, 2014. The Final Order determined that Respondent's Medicaid lien rights expired due to AHCA's failure to timely re-record its lien, and its rights of subrogation and assignment were extinguished due to Respondent's lack of affirmative action. Accordingly, no determination was made as to the amount Respondent was entitled to receive as reimbursement for medical expenses paid by Medicaid on behalf of Ethan Hunt.

Respondent timely filed an appeal with the First District Court of Appeals (DCA). The DCA reversed the Final Order, holding that the Administrative Law Judge (ALJ) has authority only to determine the amount reimbursable to Respondent in satisfaction for medical expenses paid by Medicaid, irrespective of the defenses the Petitioners might assert in an enforcement proceeding. Therefore, in compliance with the mandate of the DCA, this new Final Order only addresses the correct amount of the portion of the settlement funds received from alleged third-party tortfeasors due to Respondent.

[2/] To provide an understanding of the underlying wrongful death action, Petitioners provided a copy of the Second Amended Complaint filed on behalf of the Hunts and the estate of Ethan Hunt. The lawyers who litigated those claims, Borrello and

Russomanno, testified about Ethan's injuries and the pain, suffering and loss of companionship suffered by his parents, based upon their first-hand knowledge, interactions with the family, including Ethan, their review of Ethan's medical records and interviews with witnesses. Also admitted into evidence were the baby book compiled by Mrs. Hunt, a video consisting of a compilation of clips of Ethan's life, and Mrs. Hunt's daily dairy/calendar, which chronicled Ethan's medical care and her family's emotions. Respondent objected to this testimony and evidence on the basis of hearsay. Hearsay is admissible in a proceeding conducted by the Division of Administrative Hearings (DOAH) and can serve as a basis for a finding of fact if admissible over objection in a civil action. See § 120.57(1)(c), Fla. Stat. Ann. Here, the evidence was offered not to prove that Ethan's injuries were, in fact, the result of medical negligence, but merely to explain what was alleged, and how the valuation of the Petitioners' damages in the wrongful death action was derived.

[3/] As explained by Borrello, it is a widely held belief of trial attorneys that the damages awarded at a bench trial are usually less than those recoverable from a sympathetic jury in a personal injury, medical malpractice, or wrongful death action.

[4/] Funeral expenses were not an itemized portion of the Estate's recovery and no evidence regarding the exact amount of those expenses was provided. Accordingly, the total amount of $162,000.00 is considered as reimbursement of medical expenses.

[5/] The formula provided at section 409.910(11)(f) permits a deduction from the total settlement recovery for "taxable costs." There was some debate regarding whether $15,559.01 was a proportionate share of all costs or taxable costs. The undersigned makes no finding regarding whether these costs are taxable as defined by the Florida Rules of Civil Procedure. Regardless of whether the amount of $15,559.01 is used, or some lesser amount representing only taxable costs is used, the result is the same--there would be more than enough to cover the medical expenses paid by Medicaid using the formula of subsection 11(f).

[6/] The federal anti-lien statute at 42 U.S.C. section 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 section 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." As discussed herein, pursuant to these

federal directives, Florida enacted the "Medicaid Third-Party Liability Act." See § 409.910, Fla. Stat.

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. Ahlhorn, 547 U.S. 268, 284, 126 S. Ct. 1752, 164 L. Ed. 459 (2006).

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.

Effective July 1, 2013, section 910.10(17)(b) was enacted to provide a recipient the right to rebut the presumptively valid allocation created by section 910.10(11)(f).

Respondent argues that the federal anti-lien statute is inapplicable because it restricts only those liens imposed prior to the death of a recipient. Respondent asserts that the Supreme Court's rulings of Alhorn and Wos, limiting the agency's recovery to amounts attributable to past and future medical expenses, have no bearing on the instant case because, although the Lien was recorded during Ethan's life, AHCA seeks proceeds of a settlement reached after Ethan's death.

Although Respondent's reading of the federal anti-lien provision is accurate, and the Alhorn and Wos cases involved liens against the property of living Medicaid recipients, the Florida Legislature made no such distinction when enacting subsection 17(b), which provides recipients and their representatives the mechanism to prove 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).

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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.