

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GEORGIA-ROSE GIBBONS, BY AND
THROUGH HER GUARDIANS ROBERT
GIBBONS AND ROBERT GIBBONS, JR.,

Petitioners,

vs.

Case No. 13-4720MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Sarasota and Tallahassee, Florida, on March 5, 2014, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344

For Respondent: Adam James Stallard, Esquire
Xerox Recovery Services Group
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Tallahassee, Florida 32309

STATEMENT OF THE ISSUE

What is the amount from Petitioners' settlement proceeds that should be paid to satisfy Respondent's Medicaid lien under section 409.910, Florida Statutes (2013)?^{1/}

PRELIMINARY STATEMENT

On December 6, 2013, Georgia-Rose Gibbons, by and through her guardians, Robert Gibbons and Robert Gibbons, Jr.

(collectively referred to as "Petitioners"), filed with the Division of Administrative Hearings (DOAH) a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien. At the final hearing Petitioners offered testimony from Jeffrey Luhrsen, Esquire, and Frankie Dichio, Contract Manager, Agency for Health Care Administration. The Agency for Health Care Administration (Respondent or AHCA) did not call any witnesses to testify on its behalf.

Petitioners' Exhibits 1 through 10, 11A through 11F, 12 and 13 were admitted into evidence. Respondent did not offer any exhibits into evidence. Pertinent legal authorities identified by the parties were officially recognized including those authorities identified post final hearing.

A Transcript of the final hearing was filed with DOAH on March 28, 2014. Each party filed a proposed order, and the same have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. By Order entered August 15, 2013, the Circuit Court of the Twelfth Judicial Circuit, in and for Manatee County, Florida, appointed Robert Gibbons and Robert Gibbons, Jr., as joint plenary guardians of Georgia-Rose Gibbons. On April 6, 2012, Georgia-Rose Gibbons (Ms. Gibbons), who was a college freshman at the time, sustained numerous severe and permanent injuries, including a traumatic head injury, when she was struck by a motor vehicle while walking across a multi-lane road.

2. Ms. Gibbons is totally incapacitated and currently resides in a nursing home. As of the date of this Order, Ms. Gibbons has a rated life expectancy of approximately 47 additional years.

3. At the final hearing, Petitioners presented the testimony of Jeffrey A. Luhrsen, an attorney with extensive experience representing injured claimants in personal injury litigation. Mr. Luhrsen has practiced law in the State of Florida for more than twenty years and has tried multiple personal injury cases to jury verdict. Mr. Luhrsen opined that based upon a reasonable degree of certainty, and taking into consideration issues of comparative fault, \$20,000,000 is the value of Ms. Gibbons' claim. AHCA did not offer evidence to the contrary. Mr. Luhrsen also credibly opined that the \$400,000 settlement (explained below), which Ms. Gibbons received as a

consequence of her injuries, did not fully compensate Ms. Gibbons for her damages. Mr. Luhrsen's opinions are accepted.

4. The operator of the vehicle that collided with Ms. Gibbons was uninsured. Pursuant to an automobile insurance policy with AAA Auto Club South Insurance Company, Ms. Gibbons was insured in the amount of \$400,000.00 against personal injury resulting from the negligent operation of a motor vehicle by an uninsured motorist.

5. By correspondence dated September 19, 2013, Respondent informed Petitioners' personal injury attorney (PI attorney) that \$220,519.42 is the amount of Respondent's Medicaid lien. In response, Petitioners' PI attorney, by correspondence dated October 3, 2013, advised Respondent that Ms. Gibbon's uninsured motorist claim against AAA was settled, pending approval of the Circuit Court, for \$400,000. A copy of the proposed limited release and settlement agreement was included with the correspondence.

6. The Circuit Court approved the settlement agreement on October 4, 2013. On October 17, 2013, Petitioners' PI attorney provided Respondent with copies of the Circuit Court's Order Granting Authority to Settle Claim on Behalf of Ward, and the executed Limited Release and Settlement Agreement. Respondent neither joined in the settlement nor participated in any way in settlement negotiations.

7. The Limited Release and Settlement Agreement provides in part as follows:

1. For and in consideration of the payment of \$400,000, the receipt of which is hereby acknowledged, the Releasors being of lawful age, do hereby release, acquit and forever discharge, AAA AUTO CLUB, limited to the uninsured/underinsured liability limits of the Subject Policy, of or in any way growing out of any and all known or unknown personal injuries result[ing] from, related to and/or arising out of the Subject Accident. The Releasors acknowledge that the damages sustained as a result of the Subject Accident are permanent and that recovery therefrom is uncertain and indefinite.

* * *

8. It is understood and agreed that this is a partial release and settlement agreement and that the payment referenced herein does not fully compensate the Releasors for the damages arising out of or related to the Subject Accident. . . .

* * *

11. Although this settlement does not fully compensate GEORGIA ROSE GIBBONS for all the damages she has suffered, this settlement shall operate as a full and complete Release as to the Releasees without regard to this settlement only compensating GEORGIA ROSE GIBBONS for a fraction of the total monetary value of her damages. The Releasees in this settlement are specifically not compensating one element of damage disproportionately from any other element of damage. Given the nature of the injuries suffered by GEORGIA ROSE GIBBONS, the value of the damages associated with those injuries, and the limited ability of this settlement to compensate even a fraction of GEORGIA ROSE GIBBONS' damages, the parties have agreed to an allocation of the settlement. The parties agree that a fair assessment would place 20% of her total claim for damages as past and future medical expenses, and

the remaining 80% of her total claim for damages for other economic damages and non-economic damages. Accordingly, the parties have allocated 20% of the settlement, \$80,000, to past and future medical expenses and the remainder of the settlement, \$320,000, towards satisfaction of other damages.^{2/}

8. Respondent, pursuant to section 409.910(11)(f), calculates the amount that it is to be paid to satisfy its lien as follows: \$400,000 less 25% (attorney fees) is \$300,000; \$300,000 less \$11,029.89 in taxable costs is \$288,970.01; \$288,970.01 divided by 2 is \$144,485.01, which is less than Respondent paid for Ms. Gibbons' treatment. Accordingly, Respondent seeks \$144,485.01 in satisfaction of its Medicaid lien.^{3/}

9. For the period mid-September 2013 through January 5, 2014, Medicaid paid \$14,402.94 in additional medical assistance benefits on behalf of Ms. Gibbons. There is no evidence of record indicating that Respondent amended its lien to reflect the additional benefits paid.

CONCLUSIONS OF LAW

10. DOAH has jurisdiction in this matter. §§ 409.910(17), 120.569, and 120.57, Fla. Stat. (2013).

11. In Roberts v. Albertson's Inc., 119 So. 3d 457, 465 (Fla. 4th DCA 2012), modified on reh'g, 2013 Fla. App. LEXIS 10067 (Fla. 4th DCA June 26, 2013), the Court held that "section 409.910, Florida Statutes, creates a presumptively valid

allocation of settlement proceeds subject to a Medicaid lien when AHCA does not participate in the settlement agreement." Under such circumstances, a challenger can "seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses." Davis v. Roberts, 130 So. 3d 264, 268 (Fla. 5th DCA 2013).

12. The clear and convincing evidence establishes that the total amount of \$220,519.42 paid by Medicaid for past medical expenses represents 1.10% of the total value of Ms. Gibbon's damages ($(\$220,519.42 \div \$20,000,000) \times 100 = 1.10\%$). When the settlement figure of \$400,000 is multiplied by 1.10%, the resulting figure of \$4,400 represents the portion of the \$400,000 settlement attributable to past medical expenses.

13. In addition to being able to satisfy its lien from the portion of the settlement proceeds representing payment for past medical expenses, AHCA also contends that settlement funds received by Petitioner for payment of future medical expenses are subject to AHCA's lien. Section 409.910(17)(b) provides in part that "[i]n 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)." (emphasis added). It is important to note that prior to July 1, 2013, section 409.910 did not contain any language authorizing AHCA to seek satisfaction of its Medicaid lien from settlement funds earmarked for the payment of future medical expenses.

14. The primary purpose of the Medicaid program is to provide federal financial assistance to States that elect to reimburse certain costs of medical treatment for needy individuals. See Harris v. McRae, 448 U.S. 297, 301 (1980). Once a State voluntarily agrees to participate in the Medicaid program, it must comply with federal requirements governing the same. Id. Therefore, in administering the Medicaid program, AHCA's authority, with respect to pursuing its lien in the instant case, is limited by the anti-lien provision found in federal Medicaid law.

15. In Ahlborn v. Arkansas Department of Human Services, 397 F.3d 620 (8th Cir. 2004), the United States Court of Appeals for the Eighth Circuit reviewed a district court's grant of summary judgment in favor of the Arkansas Department of Human Services in a dispute concerning the extent to which a recovery from a tortfeasor could be taken by the State as reimbursement for the cost of medical care paid by the Medicaid program. The Ahlborns argued that the Arkansas Department of Human Services could "only recover that portion of [the] settlement representing

payment for past medical expenses." Id. at 622. The parties in Ahlborn entered into a stipulation regarding damages, whereby the Arkansas Department of Human Services would recover \$215,645.30 if the agency's interpretation of the Medicaid statute prevailed, or recover only \$35,581.47 if the Ahlborn's interpretation of the Medicaid statute prevailed.

16. In concluding that "Ahlborn has the better of the argument," the appellate court held that "a straightforward interpretation of the text of these [Medicaid] statutes demonstrates that the federal statutory scheme requires only that the State recover payments from third parties to the extent of their legal liability to compensate the beneficiary for medical care and services incurred by the beneficiary." Id. at 625. The court reversed the judgment of the district court and remanded the case with directions to enter judgment for the Arkansas Department of Human Services in the lesser amount of \$35,581.47. On appeal, the United States Supreme Court agreed with the Eighth Circuit Court of Appeal that the federal Medicaid lien law limited the State's recovery to only that portion of the Ahlborn's settlement representing payment for past medical expenses. Accordingly, the Supreme Court unanimously affirmed, without modification, the decision of the Eighth Circuit. Ark. DHS v. Ahlborn, 547 U.S. 268 (2006).

17. In E.M.A. v. Cansler, 674 F.3d 290 (4th Cir. 2011), the United States Court of Appeals for the Fourth Circuit, in a dispute concerning the extent to which a state Medicaid program could satisfy its lien from personal injury settlement proceeds, held that "[a]s the unanimous Ahlborn [Supreme] Court's decision makes clear, federal Medicaid law limits a state's recovery to settlement proceeds that are shown to be properly allocable to **past medical expenses.**" (emphasis added). Id. at 312. In reaching its holding, the court noted that "Ahlborn is properly understood to prohibit recovery by the state of more than the amount of settlement proceeds representing payment for medical care already received." Id. at 307. On review, the United States Supreme Court affirmed the decision of the Court of Appeals. Wos v. E.M.A., __U.S.__, 133 S. Ct. 1391 (2013).

18. In the case of Davis v. Roberts, 130 So. 3d 264 (Fla. 5th DCA 2013), the court reviewed a trial court's order which determined, pursuant to the formula outlined in section 409.910(11)(f), Florida Statutes (2012), that AHCA was entitled to recover the full amount of its Medicaid lien from personal injury settlement proceeds received by appellants. In reversing the trial court, the Court of Appeal specifically agreed with appellant's argument that "section 409.910 is unenforceable to the extent it allows AHCA to recover more than what [the] settlement allocated for past medical expenses." Id. at 266.

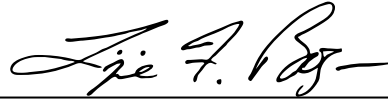
Specifically, the court held that "Ahlborn and Wos make clear that section 409.910(11)(f) is preempted by the federal Medicaid statute's anti-lien provision to the extent it . . . permits recovery beyond that portion of the Medicaid recipient's third-party recovery representing compensation for past medical expenses." Id. at 270.

19. While it is true that the court in Davis v. Roberts resolved the dispute under the 2012 version of section 409.910, which did not contain language allowing for recovery from "future medical expenses," it is also true that during all times relevant to the instant proceeding there have been no changes to the anti-lien provision in federal Medicaid law. Therefore, in accordance with Davis v. Roberts, the anti-lien provision in federal Medicaid law, as interpreted by Ahlborn and Wos, limits AHCA's recovery to that portion of Petitioners' settlement representing compensation for past medical expenses.

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' \$400,000 settlement is \$4,400.

DONE AND ORDERED this 7th day of May, 2014, in Tallahassee,
Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of May, 2014.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2013,
unless otherwise indicated.

^{2/} In the Circuit Court Order Granting Authority to Settle Claim
on Behalf of Ward, the court held that "[t]he allocation of
damages contained in the proposed release is fair and accurate,
and is expressly adopted by this Court." Section 409.910(6)(c)7.
provides, in part, that "[n]o release or satisfaction of any
cause of action, suit, claim, counterclaim, demand, judgment,
settlement, or settlement agreement shall be valid or effectual
as against a lien created under this paragraph, unless the agency
joins in the release or satisfaction or executes a release of the
lien." Ordinarily, the undersigned would show appropriate
deference to the factual findings of the Circuit Court. However,
because Respondent did not join in the settlement agreement, the
undersigned, pursuant to section 409.910(6)(c)7. affords no
weight to the Circuit Court's finding that the allocation of
damages set forth in the settlement agreement "is fair and
accurate."

3/ Section 409.910(11)(f) provides in part that:

"[n]otwithstanding 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. (emphasis added).

The settlement in the instant case resulted from a claim for uninsured motorist benefits. A claim for uninsured motorist benefits is not an "action in tort," but is instead an action in contract. Lumbermens Mut. Cas. Co. v. August, 530 So. 2d 293, 295 (Fla. 1988) ("Although we recognize that an action to recover uninsured motorist benefits is not strictly an action dealing with contract, but also involves some aspects of a tort action, we agree . . . that the rights and obligations of the parties under an insurance policy are governed by contract law since they arose out of an insurance contract.").

Section 409.910(1), provides in part that it is the intent of the Legislature that "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." Section 409.901(28) defines a third-party benefit, in part, as "any benefit that is or may be available at any time through contract, court award, judgment, settlement, agreement, or any arrangement between a third party and any person or entity, including, without limitation, a Medicaid recipient . . . for any Medicaid-covered injury, illness, goods, or services, including costs of medical services related thereto, for personal injury or

for death of the recipient. . . ." "It is axiomatic that statutes must be read with other related statutes and other related portions of the same statute." State v. Negrin, 306 So. 2d 606, 607 (Fla. 1st DCA 1975). "Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992). In harmonizing that portion of section 409.910(11)(f) that speaks to "an action in tort" with related statutory provisions found in section 409.910, it is evident that the intent of the Legislature, as applied to the instant case, was not to deprive a Medicaid recipient of the right to contest the lien amount designated as recovered medical expense damages payable to the Agency for Health Care Administration when such recovery derives from an action in contract.

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.