STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEIGH ANN HOLLAND,

Petitioner,

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION, Case No. 14-2520MTR

Respondent.
_________________________________/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on July 25, 2014, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joel F. Foreman, Esquire
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Stephen A. Smith, P.A.
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Lake City, Florida 32055

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

The issue to be determined is the amount to be reimbursed to Respondent, Agency for Health Care Administration (Respondent or Agency), for medical expenses paid on behalf of Petitioner, Leigh Ann Holland (Petitioner), from a medical-malpractice settlement received by Petitioner from a third-party.

PRELIMINARY STATEMENT

On May 28, 2014, Petitioner filed a Petition to Contest Calculation of Recovered Medical Expense Damages, by which she challenged Respondent's lien for recovery of medical expenses paid by Medicaid in the amount of $129,804.69. The basis for the challenge was the assertion that the application of section 409.910(17)(b), Florida Statutes (2013), warranted reimbursement of a lesser portion of the total third-party settlement proceeds than the amount calculated by Respondent pursuant to the formula established in section 409.910(11)(f).

On May 28, 2014, Respondent referred the petition to the Division of Administrative Hearings. The final hearing was scheduled for July 25, 2014, and was held as scheduled.

At the final hearing, Petitioner testified on her own behalf, and presented the testimony of: Richard Schwann, an attorney who represented the North Florida Regional Medical Center, Inc., in the medical malpractice action from which the third-party settlement proceeds were obtained; Stephen Smith, an

attorney who represented Petitioner in the medical malpractice action from which the third-party settlement proceeds were obtained;[1/] and John P. Roberts, a life care planner, who testified by videorecorded deposition in lieu of live testimony.[2/] Petitioner's Exhibits 1 and 3 through 9 were received into evidence. Respondent offered no independent witnesses or exhibits.

A one-volume Transcript of the proceedings was filed on August 27, 2014. By agreement, post-hearing submittals were to be filed within 20 days of the filing of the Transcript. Both parties timely filed Proposed Final Orders, which have been duly considered by the undersigned in the preparation of this Final Order.

All citations are to the 2014 Florida Statutes except as otherwise indicated.

FINDINGS OF FACT

1. On or about November 19, 2010, Petitioner entered the North Florida Women's Physicians, P.A. facility in Gainesville, Florida, for the birth of her second child.

2. North Florida Women's Physicians, P.A. (NFWP) operates in space leased from the North Florida Regional Medical Center (NFRMC). The two are separate entities.

3. By all accounts, Petitioner was in good health at the time of her admission. The child, Colt, was delivered on November 19, 2010, by a nurse midwife employed by NFWP.

4. After Colt was delivered, Petitioner was transferred to a room at the NFRMC, where she was attended to by staff of the NFRMC. However, decisions regarding her care remained the responsibility of the health care providers and staff of the NFWP.

5. On November 21, 2010, Petitioner was slated for discharge. The NFRMC nurse attending was concerned that Petitioner was exhibiting low blood pressure, an elevated heart rate, and some shaking. Petitioner's nurse midwife was off-work on November 21, 2010.

6. The NFRMC nurse called the nurse midwife at her home. The substance of the call was disputed, with the NFRMC nurse asserting that she expressed her concern with Petitioner's condition, and with the nurse midwife asserting that the NFRMC nurse failed to convey the potential seriousness of Petitioner's condition.[3/] Regardless, Petitioner was discharged on November 21, 2010.

7. Over the course of the following two days, Petitioner's health deteriorated. On November 23, 2010, Petitioner was taken to the hospital in Lake City. Her condition was such that she

was sent by Life Flight to Shands Hospital (Shands) in Gainesville.

8. While in route to Shands, Petitioner "coded," meaning that, for practical purposes, she died. She was revived by the Life Flight medical crew.

9. As a result of the efforts to revive her, drugs were administered that had the effect of drawing blood away from her extremities and toward her core organs. Petitioner's fingers and toes were affected by blood loss. They mostly recovered, except for her right big toe, which later had to be partially amputated. Petitioner has since experienced some difficulty in balance and walking normally.

10. Upon arrival at Shands, Petitioner was admitted with post-partum endometritis which had developed into a widespread sepsis infection. She spent the next three months in the hospital, and underwent five surgeries. She had 2/3 of her colon removed and underwent two ileostomies. She bears scars that extend from sternum to pelvis. While in the hospital, her body temporarily swelled to twice its normal size, leaving her with scars and stretch marks on her torso and legs.

11. Medicaid paid for Petitioner's medical expenses in the amount of $148,554.69.

12. Because Petitioner's ability to process food and absorb nutrients is so dramatically compromised, she must use

the restroom 9 to 15 times per day, occasionally with no advance warning which can lead to accidents. Thus, both her social life and her ability to get and hold employment are severely limited.

13. Petitioner has little stamina or endurance, limiting her ability to play and keep-up with her six-year-old son. Her sex life with her husband is strained, due both to issues of physical comfort and body image. Finally, Petitioner can have no more children, a fact rendered more tragic by Colt's unexpected death at the age of three months, scarcely a week after Petitioner's release from the hospital.

14. As a result of the foregoing, Petitioner suffered economic and non-economic damages. Therefore, Petitioner filed a lawsuit in Alachua County seeking recovery of past and future economic and non-economic damages. Petitioner's husband also suffered damages, and was named as a plaintiff in the lawsuit. Named as defendants to the lawsuit were NFWP and NFRMC.

15. Medicaid is to be reimbursed for medical assistance provided if resources of a liable third party become available. Thus, Respondent asserted a Medicaid lien in the amount of $148,554.69 against any proceeds received from a third party.

16. NFWP was under-insured, which compelled Petitioner to settle with NFWP for its policy limits of $100,000. As a result, NFWP was removed as a party to the ongoing lawsuit. Of the NFWP settlement proceeds, $18,750.00 was paid to Respondent

in partial satisfaction of its Medicaid lien, leaving a remaining lien of $129,804.69.

17. On July 10, 2013, and November 15, 2013, Petitioner's counsel, Mr. Smith, provided NFRMC's counsel, Mr. Schwann, with his assessment of the damages that might reasonably be awarded by a jury.

18. Mr. Smith testified convincingly that a jury would have returned a verdict for non-economic damages well in excess of $1.5 million. However, in calculating the total damages, he conservatively applied the statutory cap on non-economic damages of $1.5 million that would have been allowed by the judgment. With the application of the capped amount, the total damages -- i.e., the "value" of the case -- came to $3.1 million. That figure was calculated by the application of the following:

Past lost wages - $61,000

Future loss of earning capacity - between $360,000 and $720,000

Past medical expenses - $148,982.90[4/]

Future medical expenses - $682,331.99

Past and future non-economic damages - $1,500,000 (capped)

19. The elements of damages are those that appear on a standard jury form.

20. The numbers used in assessing Petitioner's economic damages were developed and provided by Mr. Roberts. The

evidence in this case was convincing that the calculation of economic damages reflected a fair, reasonable, and accurate assessment of those damages.

21. Mr. Smith was confident that the damages could be proven to a jury, a belief that is well-founded and supported by clear and convincing evidence. However, the existence of a Fabre defendant[5/] led to doubt on the part of Petitioner as to the amount of proven damages that would be awarded in a final judgment.

22. Counsel for NFRMC, Mr. Schwann, performed his own evaluation of damages prior to the mediation between the parties. Mr. Schwann agreed that a jury verdict could have exceeded $3 million. Although he believed the strengths of the NFRMC's case to be significant, he had concerns as to "what the worst day would have looked like," especially given the wild unpredictability of juries. In Mr. Schwann's opinion, the NFRMC nurse, Ms. Summers, was a credible, competent and believable witness. However, the nurse midwife presented with a reasonably nice appearance as well. Thus, there was little to tip the balance of believability far in either direction, leaving it to the jury to sort out. Mr. Schwann understood Petitioner's personal appeal, and the significant personal and intangible damages suffered by Petitioner, that could lead a jury to award

a large verdict. He also credibly testified that juries were consistent in awarding economic damages "to the penny."

23. The case was submitted to mediation, at which the parties established a framework for a settlement. Given the uncertainty of obtaining a verdict for the full amount of the damages due to the Fabre defendant, NFWP, the parties agreed that the most likely scenarios would warrant a settlement with NFRMC for some fraction of the total damages.

24. After mediation, Petitioner ultimately accepted a settlement offer of $700,000 from NFRMC, which reflected, after rounding, 22.5% percent of the total value of the case as estimated by Mr. Smith. Given the facts of this case, the figure agreed upon was supported by the competent professional judgment of the trial attorneys in the interests of their clients.

25. There is no evidence that the monetary figure agreed upon by the parties represented anything other than a reasonable settlement, taking into account all of the strengths and weaknesses of their positions. There was no evidence of any manipulation or collusion by the parties to minimize the share of the settlement proceeds attributable to the payment of costs expended for Petitioner's medical care.

26. On December 6, 2013, Petitioner and NFRMC executed a Release of Claims which differentiated and allocated the

$700,000 total recovery in accordance with the categories identified in Mr. Smith’s earlier letters. As a differentiated settlement, the settlement proceeds were specifically identified and allocated, with each element of the total recovery being assigned an equal and equitable percentage of the recovery.

27. The parties knew of the Medicaid lien, and of the formula for recovery set forth in section 409.910(11)(f). They understood that if the damages were undifferentiated, the rote formula might apply. However, since the Medicaid lien applied only to medical expenses, the parties took pains to ensure a fair allocation as to each element of the damages, including that element reflecting the funds spent by Medicaid.

28. The differentiated settlement proceeds, after rounding, were allocated as follows:

Past lost wages - $15,000

Future loss of earning capacity - $160,000

Past medical expenses - $35,000

Future medical expenses - $150,000

Past and future non-economic damages - $340,000

The evidence was clear and convincing that all elements of the damages were subject to the same calculation and percentage of allocation, were fact-based and fair, and were subject to no manipulation to increase or decrease any element.

29. The full amount of the Medicaid lien (prior to the partial payment from the NFWP described herein) was accounted for and allocated as "past medical expenses" in the stipulated Release of All Claims that was binding on all parties.

30. Respondent was not a party to the lawsuit or the settlement. Petitioner did not invite Respondent to participate in litigation of the claim or in settlement negotiations, and no one represented Respondent's interests in the negotiations. Except for the amount recovered from the settlement with NFWP, Respondent has not otherwise executed a release of the lien.

31. Respondent correctly computed the lien amount pursuant to the statutory formula in section 409.910(11)(f). Deducting the 25 percent attorney's fee from the $700,000.00 recovery leaves a sum of $525,000.00, half of which is $262,500.00. That figure establishes the maximum amount that could be reimbursed from the third-party recovery in satisfaction of the Medicaid lien. Thus, application of the formula allows for sufficient funds to satisfy the unsatisfied Medicaid lien amount of $129,804.69.

32. Petitioner proved by clear and convincing evidence that the $3.1 million total value of the claim was a reasonable and realistic value. Furthermore, Petitioner proved by clear and convincing evidence, based on the relative strengths and weaknesses of each party's case, and on a competent and

professional assessment of the likelihood that Petitioner would have prevailed on the claims at trial and the amount she reasonably could have expected to receive on her claim if successful, that the amount agreed upon in settlement of Petitioner's claims constitutes a fair, just, and reasoned differentiated settlement for each of the listed elements, including that attributable to the Medicaid lien for medical expenses.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes (2013).

34. Respondent is the agency authorized to administer Florida's Medicaid program. § 409.902, Fla. Stat.

35. The Medicaid program "provide[s] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." Harris v. McRae, 448 U.S. 297, 301 (1980). Though participation is optional, once a State elects to participate in the Medicaid program, it must comply with federal requirements governing the same. Id.

36. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who later recover from

legally liable third-parties. See Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006).

37. Consistent with this federal requirement, the Florida Legislature has enacted section 409.910, which authorizes and requires the State to be reimbursed for Medicaid funds 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). The statute creates an automatic lien on any such judgment or settlement for the medical assistance provided by Medicaid. § 409.910(6)(c), Fla. Stat.

38. The amount to be recovered for Medicaid medical expenses from a judgment, award, or settlement from a third party is determined by the formula in section 409.910(11)(f), which sets that amount at one-half of the total recovery, after deducting attorney's fees of 25 percent of the recovery and all taxable costs, up to, but not to exceed, the total amount actually paid by Medicaid on the recipient's behalf. Ag. For Health Care Admin. v. Riley, 119 So. 3d 514, 515, n.3 (Fla. 2d DCA 2013).

39. Application of the formula to Petitioner's $700,000.00 settlement results in a maximum reimbursement amount of $262,500.00, which exceeds the remaining Medicaid lien sought by Respondent of $129,804.69.

40. Respondent correctly asserts that it is not automatically bound by any allocation of damages set forth in a settlement between a Medicaid recipient and a third party that may be contrary to the formulaic amount, citing section 409.910(13), Florida Statutes. See also, § 409.910(6)(c)7., Fla. Stat. ("No release or satisfaction of any . . . 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."). Rather, in cases as this, where Respondent has not been provided prior notice and has not participated in or approved the settlement, the administrative procedure created by section 409.910(17)(b) is the means for determining whether a lesser portion of a total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f).

41. Section 409.910(17)(b) provides that

> 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.

42. 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). The clear and convincing evidence level of proof

> 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 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 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 [the clear and convincing] 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, 989 (Fla. 1st DCA 1991).

Proof as to Reimbursement for Past Medical Expenses

43. The evidence in this case is clear and convincing that the allocation for Petitioner's past medical expenses in the amount of $35,000.00[6/] as set forth in the differentiated settlement agreement constitutes a fair, reasonable, and accurate share of the total recovery for those past medical expenses actually paid by Medicaid. The evidence is equally clear and convincing that the parties to the settlement engaged in no manipulation of the differentiated settlement to minimize or prejudice Respondent's interest in its right to reimbursement for medical expenditures made.

44. There was no evidence that Medicaid funds were either committed to or paid for future medical expenses.

45. The full amount of the Medicaid lien (prior to the partial payment from the NFWP described herein) was accounted for, and made subject to "an allocation between medical and nonmedical damages--in the form of either a jury verdict, court decree, or stipulation binding on all parties," a process approved in Wos v. E.M.A., 528 U.S. ___, 2013 U.S. LEXIS 2372 *18 (2013).

46. Petitioner has proven, by clear and convincing evidence, that $35,000.00 of the total third-party recovery represents that share of the settlement proceeds fairly attributable to expenditures that were actually paid by Respondent for Petitioner's medical expenses.

Reimbursement from Future Medical Expense Settlement Proceeds

47. The remaining issue for determination in this proceeding is whether the state Medicaid lien for reimbursement of medical expenses authorizes not only recovery of funds identified in a differentiated third-party settlement as applying to medical expenses actually paid, i.e. past medical expenses, but also authorizes recovery against separately identified and allocated funds for other classes of damages, including future, but as yet unincurred, medical expenses. For the reasons set forth herein, the undersigned concludes it cannot.

Federal Anti-lien Statute

48. 42 U.S.C. § 1396p(a)(1), generally referred to as the federal Medicaid anti-lien statute, provides that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid."

49. In Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006), the Supreme Court addressed the extent of recovery from a third-party settlement under a Medicaid lien, in light of the Medicaid anti-lien statute. In that case, the Medicaid recipient, Ms. Ahlborn, filed suit for injuries sustained in an automobile accident, in which she sought damages for past medical costs; future medical expenses; permanent physical injury; past and future pain, suffering, and mental anguish; past loss of earnings and working time; and permanent impairment of the ability to earn in the future. Ark. Dep't of Human Servs. v. Ahlborn, 547 U.S. at 467. The total value of Ms. Ahlborn's damages was estimated at $3,040,708.12. The past medical costs paid by Medicaid and subject to the Medicaid lien totaled $215,645.30.

50. Ms. Ahlborn settled her lawsuit for $550,000.00, of which $35,581.47 was attributable to "medical expenses."[7/]

51. The Supreme Court posed the question as one in which "[w]e must decide whether ADHS can lay claim to more than the

portion of Ahlborn's settlement that represents medical expenses."

52. To facilitate reimbursement from liable third parties, states participating in Medicaid must provide:

> 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.

42 U.S.C. § 1396a(a)(25)(H).

53. The Supreme Court identified the following provisions of 42 U.S.C. § 1396p as being pertinent to its decision:

> (a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan
>
> (1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except--
>
> (A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, . . .
>
> * * *
>
> (b) Adjustment or recovery of medical assistance correctly paid under a State

plan

> (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made . . . .

Ahlborn, 547 U.S. at 283-284.

54. The Court recognized 42 U.S.C. § 1396a(a)(25)(H) to be an exception to the broader anti-lien provisions of 42 U.S.C § 1396p, and held that:

> the federal statute places express limits on the State's powers to pursue recovery of funds it paid on the recipient's behalf. These limitations [in 42 U.S.C. § 1396p] . . . prohibit[] States (except in circumstances not relevant here) from placing liens against, or seeking recovery of benefits paid from, a Medicaid recipient.

Ark. Dep't of Human Servs. v. Ahlborn, 547 U.S. at 283.

55. Based on its analysis of the interplay between the Medicaid reimbursement provisions and the Medicaid anti-lien provisions, the Supreme Court held that the States could recover for their Medicaid expenditures to the extent a recovery from a third-party accounted for such expenditures, but conditioned its decision to state:

> But that does not mean that the State can force an assignment of, or place a lien on, any other portion of Ahlborn's property. As explained above, the exception carved out by §§ 1396a(a)(25) and 1396k(a) is limited to payments for medical care. Beyond that, the anti-lien provision applies.

Ark. Dep't of Human Servs. v. Ahlborn, 547 U.S. at 284-285.

56. The Court concluded that "Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47, and the federal anti-lien provision affirmatively prohibits it from doing so." Ark. Dep't of Human Servs. v. Ahlborn, 547 U.S. at 292.

57. The analysis of the Supreme Court opinion in Ahlborn, including the facts regarding the nature of the $35,581.47 in "medical expenses" established in the lower court opinion, leads to the conclusion that the $35,581.47 recovery against the Medicaid lien represented the allocation of the third-party settlement for past medical care. In reviewing the case as a whole, the only conclusion that can be drawn is that the Court intended the narrow exception to the anti-lien statute to allow for reimbursement from that portion of a recovery intended to account for "medical expenses" actually paid by the state, i.e., past medical expenses, as opposed to that portion of a recovery designated and reserved for future medical or life care costs that may be required to sustain a Medicaid recipient in the future, and which have not yet been paid by Medicaid.

58. Subsequent to its decision in Ahlborn, the Supreme Court was again called upon to resolve issues relating to the allocation of funds from a third-party recovery.

59. In Wos v. E.M.A., 528 U.S.___, 2013 U.S. LEXIS 2372 (2013), the Court reaffirmed its decision, as expressed in

Ahlborn, that the Medicaid anti-lien 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 [and] 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.'" Wos v. E.M.A., 2013 U.S. LEXIS 2372 at *6. In Wos, the Court disapproved of an irrebuttable formula by which the Medicaid share subject to reimbursement would be calculated. Rather, the court required some form of evidence-based process to determine the actual amount of medical expenses subject to recovery. Wos v. E.M.A., 2013 U.S. LEXIS 2372 at *27.

60. The Court's discussion of the reasons that an evidence-based calculation is necessary to determine that portion of a third-party recovery that is attributable to "medical expenses" includes the following:

> The facts of the present case demonstrate why Ahlborn anticipated that a judicial or administrative proceeding would be necessary in that situation. Of the damages stemming from the injuries E.M.A. suffered at birth, it is apparent that a quite substantial share must be allocated to the skilled home care she will require for the rest of her life. See App. 112. It also may be necessary to consider how much E.M.A. and her parents could have expected to receive as compensation for their other tort claims had the suit proceeded to trial. An irrebuttable, one-size-fits-all statutory presumption is incompatible with the

> Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses.

Wos v. E.M.A., 2013 U.S. LEXIS 2372 at *20.

61. "Skilled home care" for the rest of one's life is sufficiently analogous to "future medical expenses" to convince the undersigned that the "medical expenses" that may be recovered in derogation of the Medicaid anti-lien statute are to be limited to expenses that have been incurred and paid by Medicaid, and not to include expenses that have yet to be incurred, and have not been paid by Medicaid. Thus, that portion of the third-party recovery from which the Medicaid lien may be satisfied is that designated and set aside for past medical expenses actually paid by Medicaid.

62. Consideration of the underlying Fourth Circuit Court of Appeals case affirmed by Wos demonstrates with even greater clarity and persuasiveness that the Medicaid anti-lien statute prohibits recovery of paid Medicaid funds from funds designated for future medical expenses.

63. In E.M.A. v. Cansler, 674 F.3d 290 (4th Cir. 2012), the Fourth Circuit noted that, in the underlying third-party tort case, "the plaintiffs had alleged that '[E.M.A.] suffered severe and permanent injuries and that both parents . . . have incurred liability for past, present and future medical and life

care expenses for treatment of [E.M.A.],'" and that "the sums set out in the Settlement Schedule were fair and just compensation for their respective claims." E.M.A. v. Cansler, 674 F.3d at 294.

64. The Fourth Circuit construed Ahlborn, as does the undersigned, that:

> In Ahlborn, the Supreme Court reconciled seemingly conflicting legal standards when it considered whether an Arkansas third-party liability statute permitting the state to claim a right to the entirety of the costs it paid on a Medicaid recipient's behalf, regardless of whether that amount exceeded the portion of the recipient's judgment or settlement representing past medical expenses, violated federal Medicaid law. 547 U.S. at 278. In an opinion by Justice Stevens for a unanimous Court, Ahlborn held that Arkansas' assertion of a lien on a Medicaid recipient's tort settlement in an amount exceeding the stipulated medical-expenses portion was not authorized by federal Medicaid law; to the contrary, the state's attempt to do so was affirmatively prohibited by the general anti-lien provision in 42 U.S.C. § 1396p.

E.M.A. v. Cansler, 674 F.3d at 292. The Fourth Circuit 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" (E.M.A. v. Cansler, 674 F.3d at 307), and concluded that "[a]s the unanimous Ahlborn 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.”
E.M.A. v. Cansler, 674 F.3d at 312.

65. Based on the foregoing, the undersigned is convinced that reimbursement of Medicaid expenditures from that portion of a settlement reserved for future care, including medical expenses, is prohibited by the Medicaid anti-lien statute.

66. The conclusion drawn herein finds support in the case of Davis v. Roberts, 130 So. 3d 264 (Fla. 5th DCA 2013). In that case, the Court disapproved of a lower court order which determined that the Agency for Health Care Administration was entitled to recover the full amount of its Medicaid lien, calculated pursuant to the formula established in section 409.910(11)(f), from a Medicaid recipient’s third-party recovery. In reversing the trial court, the Court engaged in an analysis of the combined effect of Ahlborn and Wos as requiring a procedure by which the presumption created by application of the section 409.910(11)(f) statutory formula could be rebutted in an evidence-based proceeding.

67. In its opinion, 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 creates an irrebuttable presumption and permits recovery beyond that portion of the Medicaid recipient's third-party recovery representing compensation for past medical expenses.

Davis v. Roberts, 130 So. 3d at 270; see also Harrell v. Ag. for Health Care Admin., ___ So. 3d ___, 2014 Fla. App. LEXIS 11574 *3-4 (Fla. 1st DCA July 28, 2014). Although the issue of recovery of past versus future medical expenses was not the direct issue before the Court, the Court's understanding of the nature of reimbursable expenses, as derived from its review of Ahlborn and Wos, is worthy of consideration.

68. The 2012 version of section 409.910 at issue in Davis, did not contain the procedure now established in section 409.910(17)(b) allowing a Medicaid recipient 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)." (emphasis added). However, there has been no change to the Medicaid anti-lien statute that formed the basis for the Davis Court's opinion. Therefore, the Fifth District Court of Appeal's analysis that the Medicaid anti-lien statute, as interpreted by Ahlborn and Wos, limits Respondent's recovery to that portion of Petitioners' settlement representing compensation for past medical expenses remains viable and effective, regardless of the 2013 amendment to section 409.910.

69. What is clear from an analysis of the cases construing the effect of the Medicaid anti-lien statute is that the exception[8/] for reimbursement of medical expenses is designed to

allow for Medicaid to recover those costs that it actually spent on behalf of a Medicaid recipient. Thus, satisfaction of a Medicaid lien from that portion of a third-party recovery designed and designated to compensate for past medical expenses expended on behalf of the Medicaid recipient is allowable under the narrow exception to the anti-lien statute.

70. Future medical expenses identified and specified in a differentiated settlement agreement, and reserved for as yet unincurred and unexpended costs necessary to sustain the injured party in the future, are no more related to costs actually spent by Medicaid than are reservations for future loss of earning capacity or future skilled home care. By seeking recovery against property -- in the form of third-party settlement proceeds -- that is unrelated to the costs expended on Petitioner's behalf by Medicaid, Respondent seeks to enforce a lien against the property of Petitioner that exceeds the amount of benefits allocated in an agreed upon and approved recovery of medical assistance correctly paid under a State plan. Thus, payment of the Medicaid lien from proceeds designated as future medical expenses violates the Medicaid anti-lien statute.

Section 409.910(17)(b)

71. In 2013, the Florida Legislature amended section 409.910(17) to address the Supreme Court's opinion in Wos that a State may implement administrative procedures to ascertain that

portion of a third-party recovery that may be recoverable as allowable "medical expenses." Even assuming the Florida statute can supersede a limitation established by the Medicaid anti-lien statute, the 2013 amendment does not, by its terms, allow reimbursement from that portion of a third-party recovery designated as future medical expenses.

72. Section 409.910(17)(b) provides, in pertinent part, that in order to challenge a Medicaid lien calculated pursuant to the statutory formula, "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."

73. The term "reimburse" is commonly understood to mean "to pay someone an amount of money equal to an amount that person has spent." MERRIAM WEBSTER ONLINE DICTIONARY, at http://www.merriam-webster.com/dictionary/reimburse.

74. In this case, Medicaid spent $148,554.69, all of which represented expenditures paid <u>for</u> Petitioner's past medical expenses.

75. There was no evidence that any portion of the Medicaid expenditures were <u>for</u> future medical expenses.

76. Respondent, in its proposed final order, argues that section 409.910(17)(b) should be read to mean that:

> the Agency can be reimbursed from the medical expense portion of settlement, to include both past and future medical expenses. The statute is clear that it allows for recovery from the past and future medical expense portion of a settlement. (emphasis added.)

77. Respondent's proposed construction would require the undersigned impute words to section 409.910(17) that simply are not there. There is a fundamental linguistic difference between Respondent being reimbursed for future medical expenses paid by Medicaid, and Respondent being reimbursed for its past medical expenses from that portion of a settlement reserved for as yet unpaid future medical expenses.

78. Respondent correctly cites the case of Paul v. State, 129 So. 3d 1058, 1064 (Fla. 2013) for the proposition that "[o]ur purpose in construing a statute is to give effect to the Legislature's intent. When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent."

79. The statute is clear. Respondent can seek reimbursement of Medicaid funds spent for future medical expenses. Here, there were no Medicaid funds spent for future medical expenses. There is nothing in section 409.910 to suggest that Respondent can be reimbursed from funds set aside for expenses unrelated to those actually paid by Medicaid, and

such a construction would be contrary to the plain language of the statute.

80. It is the opinion of the undersigned that an interpretation of section 409.910(17)(b) that allows for reimbursement for past medical expenses to be recovered from funds designated for as yet unincurred future medical expenses -- an interpretation that requires the modification of, or addition of words to, the statute -- is clearly erroneous.[9/]

81. Petitioner has proven, by clear and convincing evidence, that the differentiated settlement allocated a fair and reasonable percentage of the total recovery to reimbursement of medical expenses paid by Medicaid, and that a lesser portion of the total recovery than the amount calculated pursuant to the formula in paragraph (11)(f) should thus be reimbursed to Respondent for Petitioner's medical expenses, that amount being $35,000.00.

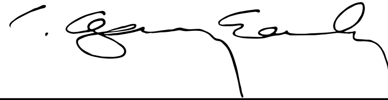
CONCLUSION

Upon consideration of the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED that:

The Agency for Health Care Administration is entitled to $35,000.00 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 29th day of September, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 2014.

ENDNOTES

[1/] Both Mr. Schwann and Mr. Smith had demonstrable degrees of knowledge and experience in the field of medical malpractice and personal injury. It was clear from the record that both parties regarded them as having expertise in their field, with counsel for Respondent asking them on several occasions to express their opinions with regard to the value and likelihood of success of the underlying malpractice proceeding. Based upon their knowledge, skill, and experience, they demonstrated the quantum of reliability so as to warrant giving weight to their testimony offered in the form of opinion.

[2/] Although Mr. Roberts was not formally tendered as an expert, he exhibited a degree of knowledge, skill, experience, training, and education in the listed field of life care planning that served to assist the undersigned in understanding the evidence or in determining a fact in issue. His qualifications were such as to warrant his acceptance by the undersigned as an expert in life care planning in accordance with his designation in the Joint Prehearing Stipulation.

[3/] The testimony regarding the conversation is hearsay. However, it is not used herein for the truth of the matters asserted, but as evidence of the rationale of the attorneys in

formulating a reasonable settlement of Petitioner's lawsuit against NFRMC.

[4/] In the Joint Prehearing Stipulation, the parties agreed that the actual amount spent by Medicaid for Petitioner's medical expenses was $148,554.69.

[5/] As a result of the settlement with NFWP for its policy limits, NFWP was no longer a party to the lawsuit. Of concern to Petitioner was the fact that a jury could have determined that much or all of the liability for Petitioner's injuries rested with the negligence of NFWP and its staff.

Liability must be apportioned among responsible parties on the basis of fault, regardless of whether each party is joined in the action. Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993); see also § 768.81(3), Fla. Stat. A Fabre defendant is not a party to a lawsuit, but is alleged to be wholly or partially at fault for the damages. The Fabre defendant is placed on the verdict form so that a jury may apportion a percentage of fault, and thereby a percentage of the awarded damages, to that defendant.

By application of Fabre, if a jury verdict awarded the full amount of the calculated economic and non-economic damages, but believed that some percentage of liability for Petitioner's damages for the authorization of a premature discharge rested with the NFWP nurse midwife, the verdict would be reduced by that percentage in the judgment.

[6/] The amount allotted to Respondent is actually greater than the 22.5% share applied to other elements of the settlement due to the fact that the 22.5% was applied to the entire lien amount without subtracting the $18,750 already paid as a result of the NFWP settlement. Had the 22.5% been applied to the $129,804.69 remaining lien amount, the amount payable to Respondent would have been reduced by $4,125.00.

[7/] A review of Ahlborn, in light of the facts recited in the lower court proceeding affirmed by the Supreme Court, demonstrates that the $215,645.30 in "medical expenses" at issue in Ahlborn was limited to amounts spent for past medical expenses, and that the $35,581.47 ultimately paid to the State in satisfaction of its Medicaid lien represented "a fair representation of the percentage of the settlement constituting payment by the tortfeasor for past medical care." Ahlborn v. Ark. Dep't of Human Servs., 397 F.3d 620, 622 (8th Cir. 2005). Thus, the "medical expenses" for which recovery from the

settlement was authorized under the anti-lien statute were limited to those for past medical expenses.

Though the full value of Ms. Ahlborn's suit included an estimate of future medical expenses, there was no suggestion by the Supreme Court that recovery of past medical expenses from the future medical expenses component of the settlement proceeds would be allowed under the anti-lien statute. Based on an analysis of the underlying case and facts being decided, the undersigned concludes that when the Supreme Court stated that "the relevant 'liability' extends no further than [$35,581.47]," (Ahlborn, 547 U.S. at 280-281) the liability for "medical expenses" at issue was that for past medical expenses.

8/ In analyzing the effect of the Medicaid anti-lien statute in light of the exception created in 42 U.S.C. § 1396a(a)(25)(H) by which a State is considered to have acquired the rights of a Medicaid recipient to payment by a liable third party "for such health care items or services," the undersigned recognizes the general and oft-held proposition that "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." Comm'r v. Clark, 489 U.S. 726, 739 (1989).

9/ The undersigned recognizes that at least two Administrative Law Judges have suggested that Medicaid expenditures may be recovered from a portion of a settlement reserved for future, but as yet unincurred medical expenses. See, Holland v. Ag. for Health Care Admin., Case No. 13-4951 (DOAH May 2, 2014); Silnicki v. Ag. for Health Care Admin., Case No. 13-3852MTR (DOAH July 15, 2014). With those decisions, the undersigned must, respectfully, disagree.

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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.