STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CALLENA JONES, AS THE NATURAL GUARDIAN AND NEXT FRIEND OF NAZYRAH JONES, A MINOR,

Petitioners,

vs. Case No. 14-3250MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

On January 6, 2015, a duly-noticed hearing was held in Daytona Beach and Tallahassee, Florida, via video teleconference, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioners: William H. Ogle, Esquire
Ogle Law, LLC
444 Seabreeze Boulevard, Suite 800
Daytona Beach, Florida 32118

For Respondent: Kevin A. Joyce, Esquire
Xerox Recovery Services Group
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue to be decided is the amount payable to Respondent in satisfaction of the Agency's Medicaid lien from a settlement

received by Petitioners from a third party, pursuant to section 409.910(17), Florida Statutes.[1/]

PRELIMINARY STATEMENT

On July 18, 2014, Petitioners filed a Petition for Declaratory Judgment with the Division of Administrative Hearings. The Petition is taken as a Petition to Determine Amount Payable to the Agency for Health Care Administration in Satisfaction of Medicaid Lien.

A final hearing was initially scheduled for September 10, 2014, but was rescheduled to October 16, 2014, for the convenience of a witness, and again to January 6, 2015, upon Respondent's unopposed Motion for Final Hearing Continuance. The final hearing commenced as rescheduled.

Petitioners presented the testimony of Mr. Richard Kolodinsky, an expert in medical malpractice litigation, and Petitioner, Callena Jones. Petitioners offered no exhibits into evidence. Respondent offered neither witnesses nor exhibits. The undersigned granted Petitioners' Request for Official Recognition of two orders by the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, and one order by the Tenth Judicial Circuit in and for Polk County, Florida. A Transcript of the final hearing was filed January 26, 2015, and the parties timely filed Proposed Final

Orders that have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Nazyrah Jones was born May 13, 2008, at North Florida Regional Hospital. The attending physician was Dr. Anthony Agrios.[2/]

2. During her birth, Nazyrah suffered an anoxic brain injury, a deprivation of oxygen to her brain. As a result, Nazyrah is totally disabled, unable to sit up, stand, crawl, walk, speak, or feed herself. Nazyrah is unable to swallow and requires frequent suctioning of her airway to remove substances which are, or may become, aspirated. Nazyrah's condition is permanent.

3. Nazyrah's mother, Callena Jones, lives alone with Nazyrah and is Nazyrah's primary care-giver. Ms. Jones relies upon a home-health care agency, to assist with Nazyrah's daily care.

4. Ms. Jones currently attends Webster University where she is working toward a master's degree in mental health counseling.

5. No evidence was introduced upon which to base a finding that Ms. Jones is employed.

6. Claims for compensation for birth-related neurological injuries alleging medical malpractice are governed by Florida's

Neurological Injury Compensation Plan administered by the Florida Birth-Related Neurological Injury Compensation Association (NICA), pursuant to sections 766.301 through 766.316, Florida Statutes. NICA is the exclusive remedy for such medical malpractice claims, except that a civil action "shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property[.]" § 766.303(2), Fla. Stat.

7. Ms. Jones filed a civil medical malpractice lawsuit on her behalf and on behalf of Nazyrah, against both North Florida Regional Hospital and Dr. Agrios, alleging "willful and wanton misconduct" on behalf of the medical providers.

8. Petitioners obtained a settlement of $825,000.00[3/] from the medical providers related to Nazyrah's injuries.

9. Petitioners presented no evidence as to what portion of the $825,000.00 total settlement was designated by the parties as compensation to Petitioners for medical expenses, or conversely, for various other types of damages either Nazyrah or her mother may have suffered, such as pain and suffering, loss of enjoyment of life, or loss of future earnings. Neither the settlement agreement itself, nor any documents prepared in connection therewith, was introduced into evidence. No witness offered any testimony on this issue. Based upon the evidence

presented at hearing, all of the settlement might have been apportioned to medical care, or none of it might have been.

10. Petitioners offered the testimony of Richard Kolodinsky, a civil trial lawyer who has practiced since 1978, has been board certified in civil trial law for approximately 20 years, and is a member of the American Board of Trial Advocates, among other professional distinctions.

11. Mr. Kolodinsky was retained by Petitioners to review the case and offer his opinion on the full value, or total damages, of the underlying medical malpractice claim.

12. In preparation for his testimony, Mr. Kolodinsky reviewed Petitioners' medical records, the Life Care Plan for Nazyrah Jones, the pleadings filed in the underlying medical malpractice lawsuit, a list of payments by Medicaid on behalf of Nazyrah Jones, the NICA statute, the settlement in the underlying medical malpractice lawsuit, the Guardian ad Litem report to the court evaluating the settlement, the court order approving the settlement, and a "tender" from Dr. Agrios.

13. Mr. Kolodinsky testified that, in his opinion, the full value of the underlying medical malpractice claim was at least $25 million.

14. Mr. Kolodinsky testified that his opinion was "based primarily on the Life Care Plan . . . in summary . . . that

provided for costs of about $11 million over the child's lifetime[.]"[4/] Further, he testified that

> it's my understanding that Ms. Jones is a college graduate and may have a master's degree, if I'm remembering correctly, and so I looked at the potential for lost earnings that was also mentioned in the Life Care Plan. And for a college graduate, lifetime earnings are in the range of 2.1 million.[5/]

15. The Life Care Plan was not introduced into evidence. Mr. Kolodinsky testified, generally, that a Life Care Plan is usually prepared as evidence in a personal-injury case by a life care planner who evaluates the cost of services, as determined by a physician after examination of the injured party, to be needed by the injured party over his or her lifetime.

16. Mr. Kolodinsky testified that, together, the expenses for Nazyrah's ongoing care plus Ms. Jones' potential lost earnings "brings us to a special damages number of about $13 million."[6/]

17. Mr. Kolodinsky next testified as to his opinion of the full value of non-economic damages in the underlying case. His explanation was as follows:

> And so on top of that, you know, you have of course the noneconomic damages component . . . for a profoundly injured, profoundly handicapped child, that is a life of constant care and deprivation that this child suffers minute to minute and the mother deals with minute to minute and will deal with for the rest of their lives.

> So, you know, these are big numbers. You know, the valuation on personal injury and medical malpractice claims, you know, there was sort of a rule of thumb that people talk about three times the specials, but that really is a rule of thumb that almost never is accurately applied, and as we all know that is very difficult to predict what a jury would do in any particular cases but you have to think that when you have special damages in the $13 million range that the damages for the child could easily be another $10 million on top of that and for the mom somewhere in the couple million to 5 million range. So, that brings us up to in the 25 million plus range, and if there were no damage caps, if there were no limitations on insurance, if there was no NICA, if there were no problems with the case, and you were looking at, okay, what are the full damages for this case absence of any of those other issues, that's what I would think that that would be worth.[7/]

18. On cross-examination, when questioned whether he had tried cases similar to Nazyrah's, Mr. Kolodinsky testified, "I don't do NICA cases and in part because of the limitations on damages,"[8/] and that he has never tried a case involving an anoxic injury at birth "because of NICA."[9/]

19. Mr. Kolodinsky has tried cases in which a child was a victim of medical malpractice, and has tried cases which involve Medicaid and Medicare liens.

20. Mr. Kolodinsky conducted no jury verdict research and did not compare this case to any case tried to verdict.

21. Mr. Kolodinsky's testimony regarding Petitioners' economic damages was imprecise, utilizing hedging language such as costs "of about $11 million" and earnings "in the range of $2.1 million." Mr. Kolodinsky provided no basis for his opinions other than the Life Care Plan, which was not introduced into evidence and the genesis and role of which was explained only in the most general terms.

22. Mr. Kolodinsky's testimony regarding Petitioners' non-economic damages was lacking in detail, failed to establish the basis for his opinion, and was unpersuasive. No other evidence was introduced as to the basis for Mr. Kolodinsky's opinion on the full value of the non-economic damages in the underlying medical malpractice claim.

23. Mr. Kolodinsky's opinion was the only evidence introduced on the issue of valuing the total damages in the underlying medical malpractice claim.

24. Respondent, Agency for Health Care Administration (AHCA), is the Florida state agency authorized to administer Florida's Medicaid program. § 409.902, Fla. Stat.

25. The Florida Statutes provide that Medicaid shall be reimbursed for medical assistance that it has provided if resources of a liable third party become available. § 409.910(1), Fla. Stat.

26. Florida Medicaid, through AHCA, paid $172,890.44 for Nazyrah's medical expenses. Thus, Respondent has asserted a Medicaid lien in the amount of $172,890.44 against any proceeds received from a third party.

27. 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 establishes the amount at one-half of the total recovery, after deducting attorney's fees of 25% of the recovery and all taxable costs, up to the total amount actually paid by Medicaid on the recipient's behalf.

28. The parties stipulated that application of the formula in section 409.910(11)(f) to the entire proceeds of the settlement yields $172,890.44.[10/]

29. Petitioners argued that the Agency should be reimbursed a lesser amount than the lien of $172,890.44. Petitioners offered two theories for calculating the correct amount to be reimbursed to the Agency.

30. The first theory, and the one advanced by Petitioners' expert, is that the Agency should recover from its lien in the same proportion that Petitioners' recovered from the full value of the damages in the underlying case.

31. Petitioners again relied upon Mr. Kolodinsky to establish the proportion of the Medicaid lien which the Agency should be reimbursed under this theory.

32. In this regard, Mr. Kolodinsky testified as follows:

> So then you look at what proportion the settlement is to the 25 million and you get I think it's like 3 or 4 percent. We can do the math and determine correctly. Then you apply the percentage, the 3 or 4 percent, to the $172,000 that Medicaid is seeking and that's the net that Medicaid gets; 4 percent, 3 percent of 172,000, because that is the proportion that the settlement was of the total value of the case.[11/]

33. Mr. Kolodinky's testimony, again, was imprecise and unpersuasive.

34. Assuming the full value of the damages at $25 million, Petitioners recovered 3.3% of the full value of their claim in the $825,000 settlement. Under Petitioners' first theory, the Agency should be reimbursed 3.3% of its lien for medical expenses, or $5,705.38.[12/]

35. Under an alternate theory, advanced for the first time in Petitioners' Proposed Final Order, Petitioners maintain the Agency should recover in the same proportion that past medical expenses are to the full value of the damages in the underlying case. Under this theory, Petitioners designate the amount paid by Medicaid, $172,890.44, as Petitioners' past medical expenses.

36. Petitioners introduced no direct evidence to establish the amount to be recovered by the Agency under this theory.

37. Petitioners posit, correctly, that $172,890.44 is .69% of $25 million. Applying that percentage to the settlement amount returns a figure of $5,692.50, which Petitioners claim is due to the Agency in satisfaction of its lien.[13/]

38. Both theories rely upon establishing the full value of damages in the underlying medical malpractice claim at $25 million.

39. Petitioners did not prove the value of the damages in underlying medical malpractice by clear and convincing evidence.

40. Petitioners failed to prove by clear and convincing evidence that the statutory lien amount of $172,890.44 exceeds the amount actually recovered in the settlement for medical expenses.

CONCLUSIONS OF LAW

41. 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.

42. 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 Arkansas Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268 (2006).

43. Consistent with this federal requirement, the Florida Legislature has enacted section 409.910. This statute authorizes and requires the State to be reimbursed for Medicaid funds paid for a plaintiff's medical care when that plaintiff later receives a personal-injury judgment or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 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.

44. Section 409.910(11)(f) sets forth a formula to determine the amount the State is to be reimbursed. The statute sets that amount at half the amount of the total recovery, after deducting taxable costs and 25 percent attorney's fees, not to exceed the amount actually paid by Medicaid on the beneficiary's behalf. Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

45. Section 409.910(17)(b) thus makes clear that the formula set forth in subsection (11) constitutes a default allocation of the amount of a settlement that is attributable to medical costs, and sets forth an administrative procedure for adversarial testing of that allocation. See Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014)(adopting the holding in

Riley that petitioner "should be afforded an opportunity to seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the line amount exceeds the amount recovered for medical expenses") (quoting Roberts v. Albertson's, Inc., 119 So. 3d 457, 465-466 (Fla. 4th DCA 2012), reh'g and reh'g en banc denied sub nom. Giorgione v. Albertson's, Inc., 2013 Fla. App. LEXIS 10067 (Fla. 4th DCA June 26, 2013)).

46. Section 409.910(17)(b) provides that a Medicaid recipient has the right to rebut the default allocation in an administrative hearing by establishing, through clear and convincing evidence, that either: 1) a lesser portion of the total recovery should be allocated as medical expense reimbursement than has been calculated by the statutory formula; or 2) Medicaid actually provided a lesser amount of medical assistance than has been asserted by AHCA.

47. Petitioners did not dispute the amount of medical assistance provided by Medicaid, but attempted to show that a lesser portion of the total recovery should be allocated as medical expense reimbursement than that calculated by the statutory formula, principally through expert witness testimony.

48. Petitioners argue that $825,000.00 represents 3.3% of the purported $25 million total damages and concludes that the

Medicaid lien should be likewise limited to 3.3%, that is, to the sum of $5,705.38.

49. Alternately, Petitioners argue that $172,890.44 is 0.69% of the total damages and concludes that the Medicaid lien should therefore be limited to 0.69% of the settlement amount, that is, to the sum of $5,700.75.

50. In reliance on these pro rata approaches, Petitioners' case was centered on proof of only three facts: the amount of the total damages; the amount of the Medicaid lien; and the amount of the settlement. The parties stipulated to the two latter facts.

51. 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 of the total of the evidence must be of sufficient weight to convince the trier of facts without hesitancy.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

52. Petitioners failed to prove by clear and convincing evidence the full value of Petitioners' damages in the underlying medical malpractice claim. Without this variable,

Petitioners' formulas are meaningless, and Petitioners' case fails under either theory.

53. Petitioners failed to prove by clear and convincing evidence that less than $172,890.44 of the total recovery should be allocated as reimbursement for medical expenses.

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 $172,890.44 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 19th day of February, 2015, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of February, 2015.

ENDNOTES

[1/] Except as otherwise provided herein, all references to the Florida Statutes are to the 2014 version.

[2/] The record does not include direct evidence of the spelling of Dr. Agrios' name, which was recorded phonetically by the court reporter.

[3/] While the parties stipulated to the settlement amount of $825,000, it is noteworthy that the record contains other evidence, in the form of testimony from Petitioners' expert, that the case settled for "850,000" [T.17:15], and "$850,620 or so net, after attorney's fees." [T.32:19-21]

[4/] T.23:22-25.

[5/] T.24:4-10.

[6/] T.24:10-11.

[7/] T.24:12-25:12.

[8/] T.26:14-15.

[9/] T.27:11.

[10/] Assuming no taxable costs, application of the formula yields $309,375.00, which is more than the Medicaid lien; thus the Agency's recovery is limited to the "total amount of medical assistance provided by Medicaid." § 409.910(11)(f)1., Fla. Stat.

[11/] T.32:18-33:4.

[12/] The record contains no direct evidence of the dollar amount which Petitioners allege should be reimbursed to the Agency under this theory of the case. Petitioners' attorney alleged in his opening statement that the amount the Agency should be reimbursed under this theory was $5,348.00. However, that figure was based on a full value of $20 million, rather than $25 million, which yields a ratio of 4.125%. Further, counsel arrived at his total by deducting a 25% attorney's fee after applying the ratio. Of course, counsel's opening statement does not constitute evidence.

[13/] In their Proposed Final Order, Petitioners maintain the dollar amount under this theory is $5,700.75.

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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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the

District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.