

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARISSA GAUDIO, BY AND THROUGH
HER MOTHER AND GUARDIAN, ROSEANN
GAUDIO,

Petitioner,

vs.

Case No. 15-3159MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a final hearing was held in this case via video teleconference with locations in Tallahassee and West Palm Beach, Florida, on October 23, 2015, before W. David Watkins, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

The issue is the amount of Petitioner's \$800,000 personal injury settlement payable to Respondent, Agency for Health Care Administration ("AHCA"), to satisfy AHCA's \$187,950.01 Medicaid lien.

PRELIMINARY STATEMENT

On June 2, 2015, Petitioner filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien, pursuant to section 409.910(17)(b), Florida Statutes.^{1/} Thereafter, the matter was assigned to the undersigned administrative law judge to conduct a formal administrative hearing and enter a final order.

After once being continued, then briefly placed in abeyance, the matter was ultimately set for hearing to commence on October 23, 2015. Prior to hearing the parties filed a Joint Prehearing Stipulation, which included numerous stipulated and admitted facts. To the extent relevant, those facts have been incorporated herein.

The hearing proceeded as scheduled, with the Petitioner calling two witnesses, Joseph J. Slama, Esquire, and R. Vinson Barrett, Esquire. Petitioner's Exhibits 1 through 16 were admitted in evidence, and official recognition was taken of Petitioner's Exhibits 17 and 18. Respondent called no witnesses and offered no documentary evidence.

The one-volume Transcript of the hearing was filed with DOAH on November 25, 2015. After jointly requesting and receiving two extensions of time to file proposed final orders, both parties timely filed Proposed Final Orders on January 12, 2016. On the same day, Petitioner also filed a Notice of Supplementary Authority, attached to which was a memorandum of law filed by AHCA in Davis v. Roberts, 130 So. 3d 264 (Fla. 5th DCA 2013), and copies of several circuit court orders.

FINDINGS OF FACT

Based on the stipulations of the parties, evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

Background

1. On July 13, 2008, Carissa Gaudio (Carissa), then 26 years old, suffered severe physical injury and catastrophic brain damage when her car was struck by a train.

2. Carissa received extensive medical intervention to save her life and address her injuries. Eventually, her medical condition stabilized and she was discharged to her parent's home. While Carissa demonstrated consciousness and awareness, due to her catastrophic brain damage, she was unable to speak, ambulate, eat, toilet or care for herself in any manner. She was totally dependent on others for every aspect of her daily care.

3. Carissa's past medical expenses related to her injuries suffered on July 13, 2008, were paid by private health insurance through Blue Cross Blue Shield of Florida, Medicare, and Medicaid. Blue Cross Blue Shield of Florida provided \$494,868.51 in benefits, Medicare provided \$6,364.89 in benefits, and Medicaid provided \$187,950.01 in benefits. The combined amount of these benefits is \$689,183.41, and this \$689,183.41 represented Carissa's entire claim for past medical expenses.

4. Carissa, or others on her behalf, did not make payments in the past or in advance for Carissa's future medical care, and no claim for damages was made for reimbursement, repayment, restitution, indemnification, or to be made whole for payments made in the past or in advance for future medical care.

5. Due to Carissa's incapacity, Carissa's mother, Roseann Gaudio, was appointed her legal guardian.

6. Roseann Gaudio, as Carissa's mother and guardian, brought a personal injury action in Broward County, Florida to recover all of Carissa's damages against the railway company and train engineer ("Tortfeasor").

7. On January 10, 2015, Roseanne Gaudio, as Carissa's mother and guardian, settled Carissa's personal injury lawsuit for \$800,000.

8. In making this settlement, the settling parties agreed that: 1) the settlement did not fully compensate Carissa for all her damages; 2) Carissa's damages had a value in excess of \$16,000,000, of which \$689,183.41 represents her claim for past medical expenses; and 3) allocation of \$34,459.17 of the settlement to Carissa's claim for past medical expenses was reasonable and proportionate.

9. Because Carissa was incapacitated, her settlement required Court approval. Accordingly, by Order Approving Settlement dated February 11, 2015, the Circuit Court Judge, Honorable Jack Tuter, approved Carissa's settlement.

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

11. During the pendency of Carissa's lawsuit, AHCA was notified of the lawsuit and AHCA, through its collections contractor, Xerox Recovery Services Group, asserted a \$187,950.01 Medicaid lien against Carissa's cause of action and future settlement of that action.

12. By letter of February 17, 2015, Carissa's personal injury attorney notified AHCA of the settlement and provided AHCA with a copy of the executed Final Release and a copy of the Order Approving Settlement. This letter requested AHCA to

advise as to the amount AHCA would accept in satisfaction of the Medicaid lien.

13. AHCA did not respond to Carissa's attorney's letter of February 17, 2015.

14. AHCA did not file an action to set aside, void, or otherwise dispute Carissa's settlement with the Tortfeasor.

15. The Florida Medicaid program spent \$187,950.01 on behalf of Carissa, all of which represents expenditures paid for Carissa's past medical expenses.

16. Carissa died on August 12, 2015 (Death Certificate filed by Petitioner on September 11, 2015).

17. No portion of the \$187,950.01 paid by the Medicaid program represents expenditures for future medical expenses, and AHCA did not make payments in advance for medical care.

18. AHCA has determined that of Carissa's \$226,478.73 in litigation costs, \$210,463.10 are taxable costs for purposes of the section 409.910(11)(f) formula calculation.

19. Based on \$210,463.10 in taxable costs, the section 409.910(11)(f) formula applied to Carissa's \$800,000 settlement, requires payment of \$194,768.45 to AHCA in satisfaction of its \$187,950.01 Medicaid lien. Since \$187,950.01 is less than the \$194,768.45 amount required to be paid to AHCA under the section 409.910(11)(f) formula, AHCA is seeking reimbursement of

\$187,950.01 from Carissa's \$800,000 settlement in satisfaction of its Medicaid lien.

20. The full Medicaid lien amount has been deposited into an interest-bearing account pending an administrative determination of AHCA's rights, and this constitutes "final agency action" for purposes of chapter 120, pursuant to section 409.910(17)(b).

21. At hearing, Petitioner called Joseph J. Slama, a board-certified civil trial lawyer. Mr. Slama handles aviation crash, products liability, roadway defect, and automobile accident cases, including handling catastrophic brain injury cases through jury trial. He stays abreast of jury verdicts through review of publications and participation in trial attorney organizations. He testified that he routinely evaluates his client's injuries and makes assessments concerning the value of their damages, and he explained his process for making these determinations based on his experience and training. Mr. Slama was accepted as an expert in the valuation of damages suffered by injured parties.

22. Mr. Slama testified that he represented Carissa in relation to her personal injury action. He explained that he first met with Carissa and her mother after she was discharged home from the hospital. Mr. Slama testified that he had reviewed the accident report, Carissa's medical records, taken

depositions of witnesses and experts, and reviewed the Life Care Plan prepared by Craig H. Lichtblau, M.D.

23. Mr. Slama explained in great detail the facts and circumstances of Carissa's accident. He explained that Carissa's car became stuck on the railroad tracks. Unfortunately, a train approached and shortly before impact, Carissa exited her vehicle. Her vehicle was struck by the train and she was propelled 167 feet from the point of impact.

24. Mr. Slama testified that as a result of the accident, Carissa suffered catastrophic physical injury and brain damage. He testified that due to this catastrophic brain injury, Carissa was left in a semi-vegetative state and was unable to ambulate. While she was conscious and aware of her condition, she was unable to communicate other than with limited facial expressions. She lived in her parents' living room where she received around the clock care, provided by her family, until her recent death.

25. Mr. Slama testified that through his representation of Carissa, interactions with her, review of her medical records and reports, and based on his training and experience in similar cases, it was his opinion that the "minimum reasonable value" of Carissa's damages was \$16,000,000. He testified that this \$16,000,000 would be the amount a jury would award in damages if the question of damages alone was presented to the jury, and he

would be disappointed in this result because he would ask for much more in damages. Mr. Slama explained that the basis of his opinion was her past expenses, her need for future life care needs, and her non-economic damages, including pain and suffering, which would have been awarded from the date of her injury by a jury and would be a huge amount.

26. Mr. Slama explained that Carissa's lawsuit to recover all her damages had issues related to comparative negligence and disputed facts that called into question the responsibility of the defendants to pay for Carissa's damages. He testified that based on these issues, Carissa's lawsuit was settled for \$800,000. Mr. Slama testified that this \$800,000 settlement did not fully compensate Carissa for the full value of her damages and that based on the \$16,000,000 valuation of all Carissa's damages, the \$800,000 settlement represented a five percent recovery of Carissa's damages. He testified that because she only recovered five percent of her damages in the settlement, she "only recovered 5 percent of each and every element of her damages, including only 5 percent of her \$689,183.41" claim for past medical expenses, or \$34,459.17.

27. R. Vincent Barrett has been a trial attorney since 1977 and is a partner with the Tallahassee law firm of Barrett, Fasig & Brooks. He practices in the area of medical malpractice and medical and pharmaceutical product liability. He has

handled catastrophic injury cases and handled numerous jury trials. Mr. Barrett stays abreast of jury verdicts by reviewing Jury Verdict Reports, talking with other lawyers, and attending seminars. He testified that as a routine part of his practice, he ascertains the value of damages suffered by injured parties and has served as an expert in the valuation of damages in civil cases. Mr. Barrett was accepted as an expert in the valuation of damages suffered by injured parties.

28. Mr. Barrett testified that he was very familiar with Carissa's injuries and had reviewed a substantial amount of Carissa's medical records, the Life Care Plan, accident report, before and after pictures of Carissa, Day in the Life Video, the Second Amended Complaint, the Release, and the Order Approving Settlement. Mr. Barrett explained that he was familiar with the type of injury suffered by Carissa because he had handled a number of traumatic brain and orthopedic injury cases with injuries similar to Carissa's. He testified that with respect to virtually every injury that Carissa suffered, he had handled a case that involved one or more of those injuries.

29. Mr. Barrett stated that Carissa's case is "one of the worst cases I've ever seen," and he described Carissa's accident and extensive injuries. Mr. Barrett explained that Carissa's injuries were "horrible" and "dramatic" and that "tractor trailer versus car, train versus car, those kinds of cases are

worth in a jury trial generally twice as much as in a regular car accident just because of the dramatic traumatic nature of the impact it has on jurors.”

30. Mr. Barrett testified that Carissa’s damages had a value of at least up in the \$30,000,000 range and that the valuation of her damages at \$16,000,000 was extremely conservative. He explained that he had reviewed jury verdicts in developing his opinion as to the value of Carissa’s damages, and he compared a number of the verdicts he had reviewed with Carissa’s case, including the Mosley 2014 Broward verdict for \$75,543,527, noting that the Mosley plaintiff, unlike Carissa, was left with limited verbal language and the ability to walk short distances with assistance. Mr. Barrett stated in relation to the \$16,000,000 valuation of Carissa’s damages that, “in Broward County for a pretty, young, 26-year old, gainfully employed, Hispanic lady, who was engaged, it’s got to be the limit. I mean, some of those verdicts were \$75 million and some of those people weren’t hurt as bad as Carissa. So, yes, it’s very conservative.”

31. The testimony of Mr. Slama and Mr. Barrett that the minimum reasonable value of Carissa’s damages was \$16,000,000 was unrebutted, and is credible.

32. Respondent’s position is that it should be reimbursed for its Medicaid expenditures on behalf of Petitioner pursuant to

the formula set forth in section 409.910(11)(f). Under the statutory formula, the lien amount is computed by deducting a 25 percent attorney's fee (\$200,000) and taxable costs (\$210,463.10) from the \$800,000 recovery, which yields a sum of \$389,536.90, then dividing that amount by two, which yields a result of \$194,768.45.

33. Under the statute, Respondent is limited to recovery of the amount derived from the statutory formula or the amount of its lien, whichever is less. Since the Medicaid lien amount is \$187,950.01, which is less than the \$194,768.45 amount required to be paid to AHCA under the section 409.910(11)(f) formula, AHCA is seeking reimbursement of \$187,950.01 from Carissa's \$800,000 settlement in satisfaction of its Medicaid lien.

34. Petitioner's position is that reimbursement for past medical expenses should be limited to the same ratio as Petitioner's recovery amount to the total value of damages. Petitioner urges Respondent should be reimbursed \$34,459.17 in satisfaction of its Medicaid lien.

35. The settlement amount of \$800,000 is five percent of the reasonable total value (\$16 million) of Petitioner's damages. By the same token, five percent of \$689,183.41 (Petitioner's past medical expenses paid by both Medicaid and private insurance) is \$34,459.17.

36. Petitioner proved by clear and convincing evidence that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the amount calculated by Respondent pursuant to the formula set forth in section 409.910(11)(f).

CONCLUSIONS OF LAW

37. 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.

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

39. 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.

40. 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).

41. 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 (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.

42. 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).

43. 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). 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 such 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).

44. 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.

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 lien 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. 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).

47. The evidence in this case is clear and convincing that the allocation for Petitioner’s past medical expenses in the amount of \$34,459.17 constitutes a fair and reasonable, and

accurate share of the total recovery for those past medical expenses actually paid by Medicaid.

48. Petitioner has proven, by clear and convincing evidence, that \$34,459.17 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.

ORDER

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 \$34,459.17 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 17th day of February, 2016, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of February, 2016.

ENDNOTE

^{1/} Unless otherwise noted, all statutory references are to the 2015 version of the Florida Statutes.

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.