STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICK OSMOND,

Petitioner,

vs. Case No. 16-3408MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on August 11, 2016, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Shaun M. Cummings, Esquire
Chad K. Florin, Esquire
Florin Roebig, P.A.
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Palm Harbor, Florida 34683

For Respondent: Alexander R. Boler, Esquire
Xerox Recovery Services Group
2073 Summit Lake Drive, Suite 300
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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 AHCA), for medical expenses paid on behalf of Petitioner,

Patrick Osmond (Petitioner), from settlement proceeds received by Petitioner from third parties.

PRELIMINARY STATEMENT

On June 20, 2016, Petitioner filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien, by which he challenged AHCA's lien for recovery of medical expenses paid by Medicaid in the amount of $303,757.77. 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 AHCA pursuant to the formula established in section 409.910(11)(f).

The final hearing was scheduled for August 11, 2016. On August 9, 2016, the case was transferred to the undersigned. Thereafter, the final hearing was held as scheduled.

The parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof would be necessary. The stipulated facts have been accepted and considered in the preparation of this Final Order.

At the final hearing, the parties presented argument on a stipulated record and facts. Petitioner's Exhibits 1 through 4, 6, and 7, and Respondent's Exhibit 1 were received into evidence.

The hearing was not transcribed. Petitioner timely filed his Proposed Final Order. Respondent filed its Proposed Final Order on August 22, 2016, the date due, but after 5:00 p.m., thus appearing on the docket as having been filed on August 23, 2016. Respondent filed a Motion to Treat Proposed Final Order as Timely Filed, which is hereby granted. Both of the proposed orders have been duly considered in the preparation of this Final Order.

All citations are to the 2016 Florida Statutes, except as otherwise indicated.

FINDINGS OF FACT

1. Petitioner was injured in a single-vehicle collision after he and several underage friends were served alcoholic beverages at an Applebee's restaurant, owned by Neighborhood Restaurant Partners, LLC (Applebee's).

2. As a result of his injuries, Petitioner brought suit against Applebee's, for dram shop liability, and against Joseph Raub, the driver of the vehicle in which Petitioner was a passenger, for negligence.

3. The Complaint also included a claim against the bartender from Applebee's, however, she was eventually dropped from the lawsuit.

4. After a two-week jury trial, the jury returned a verdict in favor of Petitioner, awarding a total of $41,956,473.73 in damages, allocated as follows:

a. Past Medical Expenses: $436,473.73
b. Future Medical Expenses: $15,000,000.00
c. Past Lost Wages: $20,000.00
d. Future Loss of Earning Capacity: $1,500,000.00
e. Past Non-Economic Damages: $5,000,000.00
f. Future Non-Economic Damages: $20,000,000.00

5. The past medical expenses included $303,757.77 for payments made by Medicaid through AHCA, $13,985.96 for payments administered through the Rawlings Company, and $118,730.00 which represented an outstanding bill from Petitioner's neurosurgeon.

6. After the verdict, Petitioner reached a settlement agreement with Applebee's, whereby Applebee's agreed to pay the sum of $4,300,000.00 to Petitioner.

7. As a condition of the settlement with Applebee's, the parties executed a Release that included the following language:

> 1.6 The parties agree that Patrick Osmond's damages have a total value of $41,956,473.73 (Forty-One Million, Nine Hundred Fifty-Six Thousand, Four Hundred Seventy-Three Dollars and Seventy-Three Cents), of which $317,743.73 (Three Hundred Seventeen Thousand, Seven Hundred Forty-Three Dollars and Seventy-Three Cents)[1/] represents the past medical expenses paid for by Medicaid. Given the facts, circumstances and nature of Patrick Osmond's injuries and this settlement, $35,568.73 (Thirty-Five Thousand, Five Hundred Sixty-Eight Dollars and Seventy-Three Cents) of this settlement has been allocated to Patrick Osmond's claim for past medical expenses paid by Medicaid

> and the remainder of the settlement has been allocated toward the satisfaction of claims other than past medical expenses paid by Medicaid.

8. After the jury verdict was rendered, Petitioner recovered $25,000.00 in settlement from Joseph Raub and his insurers.

9. As a condition of the settlement with Mr. Raub, the parties executed a Release that included the following language:

> The parties agree that Patrick Osmond's damages have a total value of $41,956,473.73 (Forty-One million, Nine Hundred Fifty-Six Thousand, Four Hundred Seventy-Three Dollars and Seventy-Three Cents), of which $317,743.73 (Three Hundred Seventeen Thousand, Seven Hundred Forty-Three Dollars and Seventy-Three Cents) represents the past medical expenses paid for by Medicaid. Given the facts, circumstances and nature of Patrick Osmond's injuries and this settlement, $190.43 (One Hundred ninety Dollars and Forty-Three Cents) of this settlement has been allocated to Patrick Osmond's claim for past medical expenses paid by Medicaid and the remainder of the settlement has been allocated toward the satisfaction of claims other than past medical expenses paid by Medicaid.

10. After the verdict, Petitioner's insurer, Geico General Insurance Company ("Geico"), paid its policy limits of $10,000.00 to Petitioner under his Uninsured and/or Underinsured Motorist Coverage. The documentary evidence did not reflect that payment, but its existence was acknowledged by both parties during the argument, and is accepted as a stipulation. The

purpose for the payment was not disclosed. The burden in this case is on Petitioner to prove "that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses." There is no proof that the Geico settlement should be excluded from the amount available to satisfy the Medicaid lien.

11. The $303,757.77 in Medicaid funds paid by AHCA is the maximum amount that may be recovered by AHCA.

12. There was no evidence to suggest that statutory conditions precedent to AHCA asserting its claim or Petitioner bringing this action were not met. The Pre-hearing Stipulation, Respondent's statement, the stipulation of facts, and the statement of issues of fact that remained to be litigated, indicate clearly that the issue of allocation of the settlement proceeds under sections 409.910(11)(f) and 409.910(17)(b) were the only issues in dispute remaining for disposition.

13. There was no evidence that the monetary figure agreed upon by the parties represented anything other than a reasonable settlement. There was no evidence of any manipulation or collusion by the parties to minimize the share of the settlement proceeds attributable to past medical expenses for Petitioner's medical care. However, an issue remains as to the correct amount of "past medical expenses" to be used in establishing the

proportional amount of those expenses vís-a-vís the total settlement.

14. No portion of the $303,757.77 paid by AHCA through the Medicaid program on behalf of Petitioner represented expenditures for future medical expenses, with all amounts reflected in its Provider Processing System Report being for past medical expenses incurred.

CONCLUSIONS OF LAW

15. 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.

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

17. 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.

18. 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 Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006).

19. 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, award, 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, award, or settlement for the medical assistance provided by Medicaid. § 409.910(6)(c), Fla. Stat.

20. The statutory formula for calculating the lien is established as one-half of the settlement proceeds after attorney fees (calculated at 25 percent of the judgment, award, or settlement) and taxable costs are subtracted, up to the full lien amount. § 409.910(11)(f), Fla. Stat.; see also Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

21. Section 409.910(1) establishes the primacy of repayment to Medicaid for medical assistance paid by Medicaid, and provides that:

> It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are

> primary to medical assistance provided by Medicaid. If benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

22. As a condition of providing Medicaid funds, the state of Florida is placed in a priority position for recovery of all funds expended, as expressed in section 409.910(6)(a), which provides that:

> The agency is automatically subrogated to any rights that an applicant, recipient, or legal representative has to any third-party benefit for the full amount of medical assistance provided by Medicaid. Recovery pursuant to the subrogation rights created hereby shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the agency from any and all third-party benefits. Equities of a recipient, his or her legal representative, a recipient's creditors, or health care providers shall not defeat, reduce, or prorate recovery by the agency as to its subrogation rights granted under this paragraph.

23. AHCA 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. § 409.910(13), Fla. Stat. ("No action of the recipient shall prejudice the rights of the agency under this section. No . . . 'settlement agreement,' entered into or consented to by the recipient or his or her legal representative shall impair the agency's rights."); 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.").

24. In cases as this, where AHCA 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).

25. Section 409.910(17)(b) provides, in pertinent part, 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) . . . . 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.

26. 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:

> [E]ntails 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).

Geico Proceeds

27. "Third-party benefits for medical services shall be primary to medical assistance provided by Medicaid." § 409.910(3), Fla. Stat.

28. The terms "third-party," and "third-party benefit" are defined in section 409.901 as follows:

> (27) "Third party" means an individual, entity, or program, excluding Medicaid, that is, may be, could be, should be, or has been liable for all or part of the cost of medical services related to any medical assistance covered by Medicaid. A third party includes a third-party administrator or a pharmacy benefits manager.
>
> (28) "Third-party benefit" means any benefit that is or may be available at any time through contract, court award, judgment, settlement, agreement, or any arrangement between a third party and any person or entity, including, without limitation, a Medicaid recipient, a provider, another third party, an insurer,

> or the agency, for any Medicaid-covered injury, illness, goods, or services, including costs of medical services related thereto, for personal injury or for death of the recipient, but specifically excluding policies of life insurance on the recipient, unless available under terms of the policy to pay medical expenses prior to death. The term includes, without limitation, collateral, as defined in this section, health insurance, any benefit under a health maintenance organization, a preferred provider arrangement, a prepaid health clinic, liability insurance, uninsured motorist insurance or personal injury protection coverage, medical benefits under workers" compensation, and any obligation under law or equity to provide medical support. (emphasis added).

29. Furthermore, section 409.910(11)(f)4. provides that AHCA is entitled to "all medical coverage benefits," including "the portion of benefits designated for medical payments under coverage for . . . personal injury protection."

30. The uninsured motorist payment to Petitioner of $10,000.00 is available for medical coverage, and is subject to the AHCA's reimbursement rights.

Proof as to Reimbursement for Past Medical Expenses

31. A settlement agreement does not dictate, but may inform, the administrative determination of the appropriate portion of the recovery subject to reimbursement to AHCA. Mobley v. Ag. for Health Care Admin., Case No. 13-4785MTR, FO at 33 (Fla. DOAH Mar. 2, 2016).

32. The Medicaid lien was accounted for in the Releases 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).

33. The Releases limited the amount of past medical expenses to that amount actually paid by AHCA. However, Medicaid is a priority lien, that "is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. (emphasis added). § 409.910(1), Fla. Stat. Thus, the full amount of past medical expenses as calculated by the jury, $436,473.73, is the amount to be applied to the formula in calculating that portion of the settlement that is available for reimbursement of the Medicaid lien.

Reimbursement from Future Medical Expense Settlement Proceeds

34. The jury calculated that future medical expenses needed over the course of Petitioner's life will amount to $15,000,000.00. If that amount is applied to the calculation of "medical expenses" from which the Medicaid lien may be paid under the formula in section 409.910(11)(f), the full amount of the $303.757.77 lien could be reimbursed.

35. The undersigned recognizes the split in DOAH Final Orders regarding the extent to which a Medicaid lien may be recovered from portions of a settlement reserved for future medical expenses, in addition to those allocated to recovery for past medical expenses. That split was ably described by Administrative Law Judge F. Scott Boyd in Mobley v. Ag. for Health Care Admin., Case No. 13-4785MTR, FO at 36 n.4 (Fla. DOAH Mar. 2, 2016).

36. The debate over the limits on recovery from settlement proceeds allocated to future medical expenses under the Medicaid anti-lien statute is not limited to administrative law judges at the Florida DOAH, but is one that is being engaged nationwide. See, e.g., Lewis v. W. Va. Dep't of Health & Human Res. (In re E.B.), 729 S.E.2d 270, 305-306 (W. Va. 2012)(Davis, J., concurring).[2/]

37. Among the issues posed in this case is whether the state Medicaid lien for reimbursement of medical expenses authorizes not only reimbursement from that portion of a third-party recovery fairly attributable to past medical expenses, but also authorizes reimbursement from funds allocated for other classes of damages, including future medical expenses. For the reasons set forth herein, the undersigned concludes it cannot.

Federal Anti-lien Statute

38. Notwithstanding the public policy favoring recovery to the state for Medicaid assistance, the federal Medicaid anti-lien statute, 42 U.S.C. § 1396p(a)(1), limits the scope of said recovery, and provides that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid."

39. 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 Health & Human Servs. v. Ahlborn, 547 U.S. at 272. 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.

40. Ms. Ahlborn settled her lawsuit for $550,000.00, of which $35,581.47 was attributable to "medical expenses."[3/]

41. 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."

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

> [T]o 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).

43. The Supreme Court identified the following provisions of the Medicaid anti-lien statute, 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 . . . .

Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. at 283-284.

44. 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:

> [T]he 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.

Id. at 283.

45. 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.

Id. at 284-285.

46. 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." Id. at 292.

47. 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.

48. 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.

49. 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.

50. 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.

51. "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 future expenses that have yet to be incurred, and have not been paid by Medicaid.

52. 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.

53. 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." Id. at 294.

54. 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.

Id. 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" (Id. 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." Id. at 312.

55. 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.

56. The conclusion drawn herein finds support in the Florida 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 AHCA 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 effect of the Medicaid anti-lien statute, as construed by Ahlborn and Wos, on the presumption created by the section 409.910(11)(f) statutory formula, and 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., 143 So. 3d 478, 480 (Fla. 1st DCA 2014)("As

the Fifth District recently noted, '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.'"); Suarez v. Port Charlotte HMA, LLC, 171 So. 3d 740, 742 (Fla. 2d DCA 2015)("Prior to the amendment [of section 409.910], recipients were able to challenge the amount of a settlement designated as a recovery for past medical expenses by motion in the circuit court.").

57. 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 opinion. Therefore, the Fifth District Court of Appeal's analysis that the Medicaid anti-lien statute, as interpreted by Ahlborn and Wos, limits AHCA'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.

58. The argument has been made that recovery of past versus future medical expenses was not the direct issue before the courts in Davis, Harrell, and Suarez. Nonetheless, those cases provide the clearest expression of the limits of recovery under Florida law, taking into account the application of the federal Medicaid anti-lien statute as mandated by Ahlborn and Wos.

59. In addition to the more abbreviated assessment of the issue by the courts in Davis, Harrell, and Suarez, the issue of Medicaid reimbursement being limited to that portion of a third-party recovery allocated to past medical expenses has been squarely addressed in cases from no fewer than seven of Florida's 20 judicial circuits. As an example, in his Order Allocating Settlement and Determining Medicaid Lien, Judge Kevin Blazs determined that:

> Ahlborn and Wos are controlling. Those cases dictate that Section 409.910, Florida Statutes, is preempted by the federal Medicaid statute's anti-lien provision to the extent the statute authorizes a lien against any portion of the settlements that did not represent recovery for past medical expenses paid by Medicaid. See also, Davis v. Roberts 130 So. 3d 264, 270 (Fla. 5th DCA 2013); Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014). When, as with the instant settlements, a settlement is undifferentiated, Ahlborn, Wos, Davis, and

> Harrell dictate that a plaintiff be afforded an opportunity to demonstrate with evidence that the amount of a Medicaid lien resulting from application of the formula in section 409.910(11)(f) exceeds the amount recovered for past medical expenses; and, that reimbursement be limited to only the amount recovered for past medical expenses.

Adams v. Orange Park Med. Ctr., 2015 Fla. Cir. LEXIS 147, at *4-5 (Fla. 4th Cir. Ct., June 21, 2015). Judge Blazs also included, as a footnote to the text quoted above, that:

> The Court rejects the Agency's argument that the cases authorize a lien against the settlements and reimbursement for all medical expenses recovered, including recovery for future medical expenses. The clear implication of the cited authorities was to limit Medicaid's lien and reimbursement to the amount recovered for past medical expenses.

Id. at *10; see also Harrell v. Bay Hosp., Inc., Case No. 02-3998CA (Fla. 14th Cir. Ct., Jan. 27, 2015)(Final Order on Medicaid Lien)("Accordingly, AHCA is entitled to recover from [Plaintiff's] settlement only the $115,437.27 which represents compensation for past medical expenses."); Davis v. Roberts, Case Nos. 09-4294-CA-B and 09-4389-CA-G (Fla. 5th Cir. Ct., Oct. 20, 2014)(Final Order on Medicaid Lien)("The settlement allocation agreed to by the parties of 10% of the past medical expenses is reasonable, appropriate and equitable. Accordingly, AHCA is entitled to recover from [Plaintiff's] settlement only the $23,292.88 which represents compensation received for past

medical expenses."); Roberts v. Albertson's Inc., Case No. 2005 CA 6389 AO (Fla. 15th Cir. Ct., Mar. 14, 2014)(Order on Plaintiff's Motion to Determine Equitable Lien Amount)("[T]he case settled for approximately 10% of the total damages at the time of settlement. Accordingly, the sum of $34,345.28 represents the appropriate allocation for past medical expenses pursuant to [Ahlborn and Wos]."); Williams v. Carson, Case No. 0714107 (Fla. 17th Cir. Ct., July 18, 2014)(Final Order Allocating Settlement and Determining Medicaid Lien) ("This Court finds that [Ahlborn] is controlling. [AHCA] is entitled to assert its Section 409.910, Florida Statutes, Medicaid lien against only the portion of the Plaintiff's settlement representing compensation for past medical expenses."); Virgo v. Arnold, Case No. 06-CA-009121-G (Fla. 13th Cir. Ct., Mar. 14, 2014)(Final Amended Order on Medicaid Lien)("Because the Court found . . . that the allocation to past medical expenses of $22,152.95 was reasonable, . . . the court finds that Plaintiffs have rebutted the formula at § 409.910(11)(f), Fla. Stat."); Roye v. Beltre, Case No. 12-CA-5553-09-W (Fla. 18th Cir. Ct., Jan. 17, 2014)(Order Determining Medicaid Lien)("Plaintiffs have demonstrated that the $301.996.81 Medicaid lien exceeds the amount recovered for past medical expenses. Accordingly, AHCA may assert its Medicaid lien against, and seek recovery from Plaintiffs, only in the total sum of $100,000.00.").

60. What is clear from an analysis of the cases construing the effect of the Medicaid anti-lien statute is that the exception[4/] 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.

61. Future medical expenses reserved for costs necessary to sustain an injured party in the future, are no more related to costs actually spent by Medicaid than are reservations for future skilled home care or future loss of earning capacity. 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, AHCA 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 paid under a State plan. Thus, payment of the Medicaid lien from proceeds reserved and designated for future medical expenses violates the Medicaid anti-lien statute.

Section 409.910(17)(b)

62. 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."

63. 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."

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

65. 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.

66. In this case, Medicaid spent $303,757.77, all of which represented expenditures paid for Petitioner's past medical expenses.

67. There was no evidence that any portion of the Medicaid expenditures were for future medical expenses.

68. In order to allow reimbursement to AHCA from those portions of a settlement reserved for future, but as yet unincurred, medical expenses, section 409.910(17)(b) should provide for "reimbursement from past and future medical expenses." However, the statute allows "reimbursement for past and future medical expenses." 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.

69. It is the opinion of the undersigned that reimbursement for past medical expenses to be recovered from funds designated to as yet unincurred future medical expenses is not a result required by section 409.910(17)(b). Thus, AHCA can seek reimbursement of Medicaid funds actually spent for future medical expenses, if any. However, section 409.910 does not suggest that AHCA can be reimbursed from funds set aside for expenses unrelated to those actually paid by Medicaid.

Conclusion

70. Petitioner has proven, by clear and convincing evidence, that a lesser portion of the total recovery than the amount calculated pursuant to the formula in paragraph (11)(f) should be reimbursed to AHCA as the proportionate share of the

settlement proceeds fairly attributable to expenditures that were paid by AHCA for Petitioner's past medical expenses.

71. The total damages, as calculated by the jury, are $41,956,473.73.

72. The amount recovered from all third parties is $4,300,000.00 from Applebee's, $25,000.00 from Mr. Raub, and $10,000.00 from Geico, for a total recovery from third parties of $4,335,000.00.

73. $4,335,000.00 is 10.33 percent of 41,956,473.73. Thus, the amount recovered by Petitioner in damages is 10.33 percent of the total claim.

74. The Settlement Agreement and Releases recognized that a lesser, but proportionate share of the total recovery should be allocated in satisfaction of the Medicaid lien for past medical expenses. In calculating the proportionate share, the Releases failed to include the full amount of past medical expenses incurred on Petitioner's behalf, regardless of the provider. Thus, the appropriate amount from which the proportionate share representing the Medicaid lien should be calculated is the total amount of $436,473.73.

75. Thus, since 10.33 percent of $436,473.73 is $45,087.74, that figure represents the correct proportionate share of the total recovery that should be allocated to the Medicaid lien.

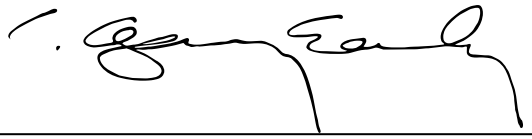
CONCLUSION

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 $45,087.74 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 8th day of September, 2016, in Tallahassee, Leon County, Florida.



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this 8th day of September, 2016.

ENDNOTES

[1/] This amount represents the sum of the $303,757.77 paid by Medicaid, and the $13,985.96 in payments administered through the Rawlings Company.

[2/] As with Administrative Law Judge Boyd's analysis of Florida cases, Justice Davis's concurring opinion is an admirable analysis of the issue nationwide and is recited here in its entirety:

The majority opinion in this case is a thorough, well-reasoned, and comprehensive compendium of this Court's jurisprudence regarding DHHR's statutory right, afforded by W. Va. Code § 9-5-11 (2009) (Supp. 2011), to recover monies it has paid for a Medicaid recipient's medical expenses. I write separately to reiterate my agreement with the majority's recognition that DHHR's recovery pursuant to W. Va. Code § 9-5-11 is limited to that portion of a Medicaid recipient's damages award that is allocated to, or specified as payment for, his/her past medical expenses only. Unquestionably, the seminal case on this point, Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006), remains silent as to whether a recovery of previously paid Medicaid benefits attaches only to the recipient's damages award for past medical expenses or whether reimbursement also may be sought from the recipient's future medical damages award, referring only to "medical expenses," generally, without distinction between past and future medical expenses. See Ahlborn, 547 U.S. at 291, 126 S. Ct. at 1766, 164 L. Ed. 2d 459 (citation omitted). Whether the Supreme Court intentionally or astutely failed to resolve this quandary remains to be seen, although the most logical explanation is that the Court simply did not need to reach this issue insofar as the parties therein had agreed that the Medicaid payor's recovery would be limited to that portion of the Medicaid recipient's settlement proceeds that "constituted reimbursement for medical payments made." See 547 U.S. at 274, 126 S. Ct. at 1758, 164 L. Ed. 2d 459 (citation omitted).

Nevertheless, this absence of a definitive ruling inevitably has led to a difference of opinion regarding the source of a Medicaid payor's recovery: whether the recovery source is limited to *past* medical damages

only or whether *both* past *and* future medical damages are available to satisfy the payor's previously paid expenses. The dissenters favor attaching that portion of the recipient's damages award representing his/her future medical expenses that is intended to provide the recipient financial security and ensure that he/she will have sufficient resources to continue receiving necessary medical care. By contrast, the majority of the Court, as we consistently have done in our prior opinions, resolves this issue by consulting the other courts who have carefully considered and answered this question. The *majority* view in the country, with which the majority of this Court agrees, permits a Medicaid payor to recover benefits it previously has paid on behalf of a Medicaid recipient from that portion of the recipient's damages award representing his/her *past* medical expenses *only*. See, e.g., E.M.A. v. Cansler, 674 F.3d 290 (4th Cir. 2012); McKinney v. Philadelphia Hous. Auth., No. 07-4432, 2010 U.S. Dist. LEXIS 86773, 2010 WL 3364400 (E.D. Pa. Aug. 24, 2010); Price v. Wolford, No. CIV-07-1076-M, 2008 U.S. Dist. LEXIS 85808, 2008 WL 4722977 (W.D. Okla. Oct. 23, 2008); Branson v. Sharp Healthcare, Inc., 193 Cal. App. 4th 1467, 123 Cal. Rptr. 3d 462 (2011); Garcon v. Agency for Health Care Admin., No. 3D11-925, 2012 Fla. App. LEXIS 9480, 2012 WL 2120870 (Fla. Dist. Ct. App. June 13, 2012); Lugo v. Beth Israel Med. Ctr., 13 Misc. 3d 681, 819 N.Y.S.2d 892 (N.Y. Sup. Ct. 2006); Doe v. Vermont Office of Health Access, 191 Vt. 517, 54 A.3d 474, 2012 Vt. LEXIS 41, 2012 WL 752727 (2012). The view espoused by the dissenting members of this Court is the country's *minority* view, which permits the attachment of *both* past *and* future medical damages awarded to the Medicaid recipient. See, e.g., I.P. v. Henneberry, 795 F. Supp. 2d 1189 (D. Colo. 2011); Special Needs Trust for K.C.S. v. Folkemer, No. 08:10-CV-1077-AW, 2011 U.S. Dist. LEXIS 32442, 2011 WL 1231319 (D. Md.

> Mar. 28, 2011); In the Matter of Matey v. Matey, 147 Idaho 604, 213 P.3d 389 (2009).
>
> I agree with the soundness of the legal reasoning supporting the decisions of a majority of the courts in the country, which this Court's majority has adopted in its decision of this case: the recovery of previously paid Medicaid expenses is limited to the recipient's damages award for his/her *past* medical expenses. Accordingly, I respectfully concur with the majority's opinion in this case.

Lewis v. W. Va. Dep't of Health & Human Res. (In re E.B.), 729 S.E.2d at 305-306.

Justice Davis's concurring opinion, authored in 2012, would now undoubtedly include Aguilera v. Loma Linda University Medical Center, 185 Cal. Rptr. 3d 699 (Cal. Dist. Ct. App. 2015); State Department of Health Care Policy & Finance v. S.P., 356 P.3d 1033 (Colo. Ct. App. 2015); and In re Estate of Solivan, 2015 N.J. Super. Unpub. LEXIS 2406, * 17 ((N.J. Super. Ct. App. Div. 2015), in his analysis of the "majority view."

[3/] 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.

[4/] 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).

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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.