STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VALERIA ALCALA, A MINOR, BY YOBANY E. RODRIGUEZ-CAMACHO AND MANUEL E. ALCALA, AS NATURAL GUARDIANS AND NEXT FRIENDS,

Petitioners,

vs. Case No. 20-0605MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

A final hearing was conducted before Robert L. Kilbride, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018), on June 30, 2020, by video teleconference using Zoom technology.

APPEARANCES

For Petitioners: Jason Dean Lazarus, Esquire
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For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

What amount of the personal injury settlement recovered by Petitioners, Valeria Alcala ("Alcala"), et al., must be paid to Respondent, Agency for

Health Care Administration ("AHCA" or "Agency"), pursuant to section 409.910, Florida Statutes (2018), to satisfy the Agency's claimed $76,973.33 Medicaid Lien?

PRELIMINARY STATEMENT

On February 3, 2020, Alcala, filed a Petition to Determine Medicaid's Lien Amount to Satisfy Claim Against Personal Injury Recovery by the Agency for Health Care Administration, pursuant to section 409.910(17)(b). The petition disputed the amount of the AHCA lien and requested a hearing.

The matter was assigned to the undersigned to conduct a formal administrative hearing and render a final order establishing AHCA's lien recovery amount.

On June 15, 2020, Alcala filed an Amended Petition to Determine Medicaid's Lien, without objection from AHCA.

The matter was set for a final hearing on June 30, 2020, and proceeded to hearing as scheduled on that date.

The parties filed a pre-hearing stipulation that included several undisputed facts. At the final hearing, Alcala's Exhibits 1 through 7 were admitted into evidence without objection. Alcala presented testimony of her personal injury lawyer, Andrew Needle, Esquire, and additional expert testimony from Kenneth Bush, Esquire. The Agency did not offer any evidence, nor did it call any witnesses.

Petitioners ordered the hearing Transcript. Both parties timely filed proposed final orders, which were duly considered by the undersigned in the preparation of this Final Order.

All references to the Florida Statutes are to the version in effect on the date of the action or conduct involved. Otherwise, the parties agree that the 2019 version applies to the operative statute, section 409.910.

FINDINGS OF FACT

The undersigned makes the following Findings of Fact based on the stipulations of the parties and the evidence presented at the hearing.

PARTIES' STIPULATED FACTS AND LAW

1. On November 3, 2005, Yobany Rodriguez, age 38, was a passenger in a motor vehicle involved in a minor collision. She was eight months pregnant. Fire Rescue examined her on the scene.

2. She had a sore back, elevated blood pressure, and no other visible injuries. She declined hospital transport.

3. The following day (November 4, 2005) she went to the Public Health Trust's Penalver Clinic ("Penalver") where she had been receiving her pre-natal care as a "county indigent" without insurance. She had been experiencing irregular contractions since 7:00 a.m. and Penalver referred her to Jackson Memorial Hospital to rule out pregnancy induced hypertension.

4. She was examined. Fetal movement was noted, membranes were intact, and she was admitted at 4:40 p.m., November 4, 2005, as high risk based on age and concerns regarding pregnancy induced hypertension.

5. On November 6, 2005, at 00:29 a.m., Valeria Alcala was delivered over a right midline episiotomy with no respirations and apgars of 1/2/3 at 1, 5, and 10 minutes respectively.

6. On that same day, Valeria Alcala was delivered in a severely depressed state, with an apparent subgaleal hematoma, possible subdural and cerebral hemorrhage, and hypoxic/anoxic injury to her brain.

7. Shortly after her birth, it was noticed that Valeria's head was extremely swollen. CT of the brain showed an occipital bone fracture with bilateral

posterior parietal bones overriding the occipital bone; severe scalp soft tissue swelling; subgaleal hemorrhage; bilateral parieto-occipital epidural hematomas; and a frontal contusion.

8. As a result of the alleged malpractice on November 6, 2005, Alcala suffered a hypoxic event at birth leading to cognitive deficits and significant damage to her kidneys.

9. Alcala brought a medical malpractice action to recover all of her damages from the malpractice. This action was brought against Jackson Memorial Hospital and the University of Miami School of Medicine ("University of Miami").

10. In 2019, Alcala settled her tort action for $750,000.00, even though Petitioners believed Alcala's injuries were tens of millions of dollars in excess of the recovery.

11. AHCA was properly notified of Alcala's lawsuit against Jackson Memorial and the University of Miami. AHCA paid benefits related to the injuries from the incident in the amount of $76,973.33. AHCA has asserted a lien for the full amount it paid, $76,973.33, against Alcala's settlement proceeds.

12. The parties stipulated that AHCA is limited in the section 409.910(17)(b) procedure to the past medical expenses portion of the recovery, and that a preponderance of the evidence standard should be used.

13. Petitioners and AHCA also agreed that application of the formula found at section 409.910(11)(f), to the $750,000.00 settlement amount, requires payment to AHCA in the amount of $76,973.33.

14. Petitioners and AHCA agreed that the burden of proof for a Medicaid recipient to successfully contest the amount payable to AHCA in a section 409.910(17)(b) proceeding is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

15. Petitioners and AHCA agree that the 2019 version of section 409.910 controls DOAH's jurisdiction and this case, and further they agree that Petitioners have met the conditions precedent to bring the petition.

ADDITIONAL EVIDENCE AT THE HEARING

16. At the final hearing, Alcala presented expert testimony from Andrew Needle, Esquire ("Needle"), her personal injury attorney, and Kenneth Bush, Esquire ("Bush"), an experienced trial lawyer who handles catastrophic damages cases with a specialty in medical malpractice. Both Needle and Bush were accepted as experts on the valuation of personal injury damages for an injured individual.

17. Needle is a 43-year practicing attorney who is a partner with the Miami, Florida law firm of Needle & Ellenberg, P.A. He testified regarding his representation of Alcala. Needle handles serious/catastrophic medical malpractice injury cases throughout Florida exclusively for plaintiffs. He specializes in litigating complex medical malpractice claims. In his practice he has handled, and currently handles, cases with personal injuries similar to those suffered by Alcala. He is admitted to practice law in Florida.

18. Needle regularly evaluates the damages suffered by injured people such as Alcala. He is familiar with Alcala's damages from his representation of Alcala in this personal injury lawsuit.

19. Needle was tendered as an expert regarding valuation of personal injury damages. The Agency did not object to the witness or his qualifications, and the undersigned accepted him as such an expert.

20. Needle testified as to the nature of the litigation on behalf of Alcala and the difficult liability issues related to Alcala and her injuries.

21. As part of his work-up of the case, he evaluated all elements of damages suffered by Alcala. After litigating the case for a lengthy period of time, Needle negotiated a settlement of $750,000.00 against the defendants.

22. He testified regarding the process that he followed to evaluate and arrive at his opinion related to the total value of the damages suffered in

Alcala's case. Through the course of his representation, he met with the family; reviewed all the medical information; evaluated the facts of the case; determined how the alleged malpractice occurred; reviewed all records and reports regarding the injuries Alcala suffered; analyzed liability issues and fault; developed economic damages figures; and also valued noneconomic damages such as pain and suffering--both future and past, loss of capacity to enjoy life, scarring and disfigurement, and mental anguish.

23. Needle testified about the significant impact of the injuries on Alcala's life. He related that Alcala has endured significant medical treatment as a result of the alleged malpractice and resulting injuries to her kidneys. As a result of her injuries, Alcala's life has been severely impacted due to the brain injury, seizures, and treatment to her kidneys.

24. Needle testified that the total value of Alcala's damages was conservatively $9 million. That figure included Alcala's pain and suffering, mental anguish, loss of quality of life, and the economic damages.

25. He opined that in comparing the $9 million total valuation to the settlement proceeds of $750,000.00, this resulted in Alcala recovering only 8.3% of her total damages. Needle's testimony was not contradicted by AHCA, and was persuasive on this point.

26. Bush is a 37-year practicing plaintiff attorney whose practice focuses on litigating serious plaintiff personal injuries involving medical malpractice. He testified as an expert as to the total valuation of Alcala's damages, and resolution of healthcare liens on behalf of Alcala.

27. Bush and his firm specialize in litigating serious and catastrophic personal injury cases throughout Florida. As part of his practice, Bush has reviewed thousands of personal injury cases as it relates to damages. Bush has worked closely with economists and life care planners to identify the relevant types of damages in catastrophic personal injuries, and he regularly evaluates the types of damages suffered by those who are catastrophically injured.

28. Bush was tendered as an expert regarding valuation of personal injury damages and resolution of liens in personal injury cases. The Agency did not object to the witness or his qualifications, and this tribunal accepted him as such an expert.

29. Bush testified as to how he arrived at his valuation opinion by explaining the elements of damages suffered by Alcala. Similar to Needle, he stated that the greatest element of loss Alcala suffered was noneconomic damages.

30. He testified that, in his opinion, the total damages suffered by Alcala were in the range of $9 to $10 million, and agreed with the conservative $9 million total valuation testified to by Needle. He testified that the future care of Alcala would be in the high seven figures based upon a life care plan. His opinion as to the total value of the claim was not persuasively rebutted or contradicted by AHCA's counsel on cross examination or by any other evidence.

31. Bush also testified that he believed that the standard accepted practice when resolving liens in Florida was to look at the total value of damages compared to the settlement recovery. This results in a ratio which may be used to reduce the lien amount sought by AHCA.[1]

32. Both Needle and Bush testified about the total value of the claim for Alcala's personal injury medical malpractice case. They also testified as to a method that, in their opinions, reasonably allocated a percentage of the settlement amount to past medical expenses. Both witnesses reviewed Alcala's medical information and other information before offering an opinion regarding her total damages.

33. AHCA offered no convincing or credible evidence to question the credentials or opinions of either Needle or Bush, or to persuasively assail the methodology used by Petitioners.

[1] This is also commonly referred to as the proportionality ratio or methodology.

34. Further, the Agency did not offer any evidence to rebut the testimony of either Needle or Bush regarding the total value of Alcala's claim or the proportionality ratio they proposed which would reduce Alcala's claim.

35. Likewise, AHCA did not offer any alternative expert opinions on the damage valuation or allocation method proposed by either Needle or Bush.

36. The undersigned finds that Petitioners have established by unrebutted and uncontradicted evidence that the $750,000.00 recovery is 8.3% of the total value ($9 million) of Petitioners' total damages.

37. Using that same 8.3% and applying the current proportionality methodology required by the First District Court of Appeal, Petitioners have established that 8.3% of $76,973.33, or $6,414.44, is the amount of the recovery fairly allocable to past medical expenses and is the portion of the Medicaid lien payable to AHCA.

CONCLUSIONS OF LAW

38. AHCA is the state agency responsible for administering Florida's Medicaid program. § 409.910(2), Fla. Stat.

39. DOAH has jurisdiction of this matter, pursuant to section 409.910(17)(b). The parties acknowledged that the proper standard of proof in this proceeding for Petitioners is a preponderance of the evidence.

40. "Medicaid is a cooperative federal-state welfare program providing medical assistance to needy people." *Roberts v. Albertson's Inc.*, 119 So. 3d 457, 458 (Fla. 4th DCA 2012). Although state participation in this federal program is voluntary, once a state elects to participate, it must comply with the federal Medicaid law. *Id.*

41. Federal law requires that participating states seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who later recover from legally-liable third parties.

42. Under the United States Supreme Court's reasoning in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006),

the federal Medicaid anti-lien provision at 42 U.S.C. § 1396p(a)(1) prohibits a Medicaid lien on any proceeds from a Medicaid recipient's tort settlement.

43. However, the provisions requiring states to seek reimbursement of their Medicaid expenditures from liable third parties, also create an express exception to the anti-lien law, and authorize states to seek reimbursement from the medical expense portion of the recipient's tort recovery.

44. As noted, the Federal Medicaid Act limits a state's recovery to certain portions of the settlement funds received by the Medicaid recipient. In Florida, this has been recently interpreted by the Florida Supreme Court to be the amount in a personal injury settlement which is fairly allocable to past (not future) medical expenses. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53, 56 (Fla. 2018).[2]

45. In this case, Alcala settled her personal injury claim against third parties who were liable to her for injuries related to AHCA's Medicaid lien. Therefore, AHCA's lien may be enforced against Alcala's tort settlement.

46. The underlying question in this case, however, is how much is AHCA entitled to recover from Petitioners for the medical payments it provided to Alcala?

47. Section 409.910(11) establishes a formula to determine the amount AHCA may recover for medical assistance benefits paid from a judgment,

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[2] Recently, in *Gallardo v. Dudek*, 963 F.3d 1167 (11th C.A. 2020), the Eleventh Circuit Court of Appeals determined that amounts in a settlement agreement fairly allocable to both past and future medical expenses are subject to the agency's lien. However, this is contrary to the Florida Supreme Court's holding in *Giraldo*. Generally, state courts are not required to follow the decisions of intermediate federal appellate courts on questions of federal law. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220–221, 51 S.Ct. 453, 75 L.Ed. 983 (1931), there is no similar obligation with respect to decisions of the lower federal courts." *Abela v. Gen. Motors Corp.*, 469 Mich. 603, 677, N.W. 2d 325, 327 (2004), cert. denied, 543 U.S. 870, 125 S.Ct. 98, 160 L.Ed.2d 117 (2004). Decisions of numerous state supreme courts have similarly held that state courts are under no obligation to follow the decisions of the lower federal courts. *See, e.g., Skelly Oil Co. v. Jackson*, 194 Okla. 183, 148 P.2d 182, 185 (1944) ("[D]ecisions of lower federal courts are persuasive and usually followed unless a conflict between the decisions of such courts makes it necessary to choose between one or more announced interpretations."). *Carnival Corp. v. Carlisle*, 953 So. 2d 461 (Fla.

award, or settlement from a third party. Section 409.910(11)(f) states, in pertinent part:

> Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:
>
> 1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.
>
> 2. The remaining amount of the recovery shall be paid to the recipient.
>
> 3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.
>
> 4. Notwithstanding any provision of this section to the contrary, the agency shall be entitled to all medical coverage benefits up to the total amount of medical assistance provided by Medicaid. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical payments under coverage for workers' compensation, personal injury protection, and casualty.

2007). As a result, the undersigned has limited his inquiry to that portion of Alcala's settlement allocable to past medical expenses.

48. In essence, section 409.910(11)(f) provides that the agency's recovery for a Medicaid lien is the lesser of: (1) its full lien; or (2) one-half of the total award, after deducting attorney's fees of 25% of the recovery and taxable costs, not to exceed the total amount actually paid by Medicaid on the recipient's behalf. *See Ag. for Health Care Admin. v. Riley*, 119 So. 3d 514 (Fla. 2d DCA 2013).

49. Here, the parties agreed that application of the section 409.910(11)(f) formula to Petitioners' settlement would require payment to AHCA of $76,973.33.

50. However, another corresponding section, section 409.910(17)(b), outlined below, provides a method by which a Medicaid recipient may challenge the amount AHCA seeks under the default formula found above at section 409.910(11)(f).

51. More specifically, following the United States Supreme Court's decision in *Wos v. E.M.A.*, 568 U.S. 627, 633 (2013), the Florida Legislature created an administrative process to challenge and determine what portion of a judgment, award, or *settlement* in a tort action is properly allocable to medical expenses and, thus, what portion of a petitioner's settlement may be recovered to reimburse the Medicaid lien held by AHCA. Section 409.910(17)(b) states:

> 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.[3]

52. In simple terms, if Petitioners can demonstrate by a preponderance of the evidence, that the portion of Alcala's settlement agreement fairly allocable as payment for past medical expenses is less than the amount the agency seeks, then the amount Petitioners are obligated to pay to AHCA for its lien would be reduced.

53. Notably, the question of how to fairly allocate the past medical expense portion of an undifferentiated settlement agreement has been the subject of considerable and ongoing debate. Unfortunately, this has not yet been squarely decided by the United States Supreme Court, as it acknowledged:

> A question the Court had no occasion to resolve in *Ahlborn* is how to determine what portion of a settlement represents payment for medical care. The parties in that case stipulated that about 6 percent of respondent Ahlborn's tort recovery (approximately $35,600 of a $550,000 settlement) represented compensation for medical care. *Id.,* at 274, 126 S. Ct. 1752. The Court nonetheless anticipated the concern that some settlements would not include an itemized allocation. It

[3] The parties agree, however, that the standard of proof is a preponderance of the evidence, not clear and convincing.

> also recognized the possibility that Medicaid beneficiaries and tortfeasors might collaborate to allocate an artificially low portion of a settlement to medical expenses.

Wos, 568 U.S. at 627, 634.

54. In an effort to ascertain the proper answer to the "allocation conundrum," several Florida District Court of Appeal opinions have relied on the following statement by the Florida Supreme Court as a basis to settle the question and discern the correct methodology to establish AHCA's lien:

> Because we hold that the federal Medicaid Act prohibits AHCA from placing a lien on the future medical expenses portion of a Medicaid recipient's tort recovery, we remand with instructions that the First District direct the ALJ to reduce AHCA's lien amount to $13,881.79. *Although a factfinder may reject "uncontradicted testimony," there must be a "reasonable basis in the evidence" for the rejection. Wald v. Grainger,* 64 So. 3d 1201, 1205-06 (Fla. 2011). *Here, Villa presented uncontradicted evidence establishing $13,881.79 as the settlement portion properly allocated to his past medical expenses, and there is no reasonable basis in this record to reject Villa's evidence. For this reason, no further fact finding is required.* (Emphasis added)

Giraldo, 248 So. 3d at 56.

55. Fortunately, the vexing question that had existed in the law regarding an appropriate methodology to use has been resolved by the First District Court of Appeal in a series of related opinions. While the Florida Supreme Court has not issued a definitive or express opinion on the matter, the prevailing law in the First District Court of Appeal appears to be settled when certain evidentiary circumstances exist.

56. In *Eady v. Agency for Health Care Admininistration*, 279 So. 3d 1249 (Fla. 1st DCA 2019); *Larrigui-Negron v. Agency for Health Care Administration*, 280 So. 3d 550 (Fla. 1st DCA 2019); and *Mojica v. Agency for*

Health Care Administration, 285 So. 3d 393 (Fla. 1st DCA 2019), the First District Court of Appeal panels accepted the proportionality test or pro-rata method advanced by Petitioners as one acceptable method of proof.[4]

57. More to the point, a petitioner may carry his/her burden of proof and the tribunal may reduce AHCA's lien by the same ratio that petitioner's settlement bears to the total damage claim. This may be accomplished through the testimony of expert witnesses. Most significantly, if the expert testimony is not adequately contradicted or rebutted, it stands as the proper allocation in the settlement agreement and sets the amount AHCA may recover.

58. In this case, there was no evidence presented by AHCA to contest or contradict the amount of $6,414.44 presented by Petitioners' expert as the fair allocation of past medical expenses in Petitioners' settlement.

59. Counsel for AHCA cross-examined Petitioners' experts, but elicited no compelling information or persuasive evidence to assail their opinions that a fair allocation of past medical expenses recovered in the Petitioners' undifferentiated settlement was $6,414.44.

60. In short, Petitioners' expert testimony concerning a fair allocation of the settlement agreement was unchallenged by AHCA, without any contrary or contradictory facts or evidence in the record.

61. In the aforementioned cases, the First District Court of Appeal has determined that it would be an error to reject the expert testimony, unless there is a basis in the record to do so. There was no basis in this record to do so.

62. As such, and based on this record, the undersigned is obliged to apply *Eady*, *Larrigui-Negron*, and *Mojica* and concludes that 8.3% of $76,973.33 or $6,414.44--is the amount due to AHCA.

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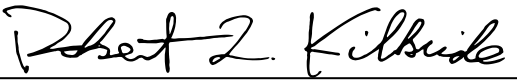
[4] These cases recognize, however, that AHCA may present evidence to refute or contradict the expert testimony offered. Likewise, every case is different. *Eady, Larrigui-Negron*, and *Mojica* do not define the exact parameters of the pro-rata formula. Nor do they exclude the possibility that there may be other methods of proof, or facts elicited from the experts or other evidence presented, which may warrant an adjustment to the proportionality test or the total damages projected by the experts.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency for Health Care Administration is entitled to recover $6,414.44 from the amount recovered in Petitioners' personal injury matter.

DONE AND ORDERED this 18th day of August, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.