STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KRYSTAL COMBS.,

Petitioner,

vs. Case No. 20-2062MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

On June 29, 2020, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by Zoom.

APPEARANCES

For Petitioner: David H. Charlip, B.C.S., Esquire
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For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUES

The issues are whether, pursuant to section 409.910(17)(b), Florida Statutes (17b),[1] Petitioner has proved that Respondent's recovery of $224,000[2] in medical assistance expenditures[3] from $1.4 million in proceeds from the settlement of a personal injury action must be reduced to avoid conflict with 42 U.S.C. § 1396p(a)(1) (Anti Lien Statute)[4]; and, if so, the maximum allowable amount of Respondent's recovery.

PRELIMINARY STATEMENT

On April 29, 2020, Petitioner filed with DOAH a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien (Petition). The Petition invokes Petitioner's right to a 17b proceeding and alleges that Respondent's recovery of $224,000 is excessive because it violates the Anti-Lien Statute. The Petition alleges that Petitioner accepted $1.4 million to settle a personal injury action with a true value of $10 million. The Petition alleges that Petitioner's total past medical expenses were $1,383,416, loss of future earning capacity was $1.6 million, and noneconomic damages over a remaining life expectancy of five years were sufficient to generate a total true value of $10 million.

The Petition claims that the settlement was driven by past and future pain and suffering with no more than $10,000 allocated to past medical

[1] All references to sections are to Florida Statutes, and all statutory references are to 2019. Stipulation, p. 8.

[2] Respondent's total medical assistance expenditures are less than its recovery under section 409.910(11)(f), so the issue in this case is whether Petitioner has proved that Respondent's recovery must be less than its actual medical assistance expenditures. Also, to avoid mathematical mistakes and, more importantly, to facilitate their detection, this final order rounds off many values.

[3] "Medical assistance expenditures" is synonymous with Medicaid payments.

[4] All references to the "Anti-Lien Statute" include its counterpart, 42 U.S.C. § 1396p(b)(1), which operates similarly as an "Anti-Recovery Statute." "Recovery" and "lien" are used interchangeably in this final order to describe the portion of judgment or settlement proceeds allocable to the state Medicaid agency.

expenses. The Petition states that Petitioner agreed to pay her trial counsel a contingency fee of one-third of the recovery, or $466,200, and costs, which totaled $40,602.

The Petition calculates Respondent's recovery by reducing the $10,000 allocated to past medical expenses by a 25% attorney's fee and by the entire $40,602 in costs, so as to result in a net recovery of zero dollars. The Petition requests a final order determining that Respondent's recovery is zero dollars.

The parties filed a Joint Prehearing Stipulation on June 24, 2020. Applying the proportional reduction in a more conventional fashion, Petitioner conceded that Respondent could recover about $19,000. Stipulated facts[5] have been incorporated, as appropriate, into the Findings of Fact below.

At the hearing, Petitioner called one witness and offered into evidence ten exhibits: Petitioner Exhibits 1-10. Respondent called no witnesses and offered into evidence one exhibit: Respondent Exhibit A. All exhibits were admitted.

The parties did not order a transcript. Each party filed a proposed final order on July 9, 2020.

FINDINGS OF FACT

1. On the evening of March 13, 2016, 28-year-old Petitioner presented at a regional hospital in eastern Kentucky, where she has lived all of her life, with a chief complaint of abdominal pain, as well as nausea and vomiting throughout the day. Petitioner reported that she had suffered intermittent

[5] Most significantly, page 7 of the Prehearing Stipulation states: "Petitioner's injuries will significantly shorten her life and will require a lifetime of medical care and will not allow her to work, likely for the remainder of her life."

abdominal pain and nausea since undergoing a gastric bypass procedure seven years earlier. A physical exam revealed normal bowel sounds in all four quadrants and a nondistended abdomen. Petitioner underwent a CT scan, and the radiologist reported a normal gastrointestinal tract, other than "postoperative changes of [the] gastric bypass." Petitioner was admitted to the hospital for observation.

2. After being released from the hospital and returning the next day,[6] Petitioner complained of increased abdominal pain, although she did not have a fever, and her vital signs and white blood cell count were normal. Early on March 15, Petitioner began to vomit blood and was transferred to the intensive care unit. A second abdominal CT scan revealed a twisted bowel, which necessitated emergency surgery that resulted in the removal of her entire small intestine and part of her large intestine. The radiologist had misread the first CT scan or failed to communicate adequately the intestinal blockage from which Petitioner was suffering when she was admitted to the hospital.

3. On March 16, Petitioner developed sepsis. She was intubated and transferred by helicopter to the University of Kentucky medical center, where she remained hospitalized until April 11. At the university medical center, Petitioner began total parenteral nutrition through a peripherally inserted central catheter (PICC) line. When discharged, Petitioner returned home, where a home health nurse visited her to provide care.

4. A physician at the University of Kentucky medical center recommended that Petitioner consider transplant surgery at the intestinal-transplant program at Jackson Memorial Hospital in Miami (Program). An intestinal transplant is the rarest type of transplant and presents exceptional challenges in managing the potential for the rejection of the foreign organ by

[6] Stipulation, p. 5. Actually, this stipulated finding is incorrect. The hospital medical records state that Petitioner was "released" from the emergency department, but to a medical-surgical bed, rather than from the hospital. In her deposition, Petitioner confirmed that her hospitalization was continuous. Petitioner Exhibit 15, p. 39.

the host. The Program is one of the leading programs of its type in the United States.

5. In July 2016, Petitioner and her mother flew to Miami to meet a Program surgeon and discuss whether she would be a good candidate for the procedure. At the time of this trip, Petitioner was so lacking in strength and stamina that she required the use of a wheelchair within the airport.

6. The surgeon and Petitioner agreed that she would likely benefit from a transplant. Petitioner and her mother returned to Florida on September 1 to be placed on the organ-transplant waiting list and wait for a suitable organ to become available.

7. Petitioner underwent successful intestinal-transplant surgery at Jackson Memorial on December 22 during a procedure that took five and one-half hours. At this time, the total parenteral nutrition was discontinued and PICC line removed. Petitioner was discharged from the hospital on January 9, 2017, with instructions to remain in the Miami area for at least six months so that any post-operative problems could be addressed by the Program physicians. Either by the time of discharge or one week later, a Program physician placed in Petitioner an ostomy bag for the elimination of waste. The ostomy bag typically remains in place for six months after an intestinal-transplant procedure, at which time a Program surgeon removes the bag, and the patient is released to return home.

8. About three weeks after the transplant surgery, Petitioner became ill and exhibited abdominal discharge because she had developed a small leak in the colon, which required corrective surgery of two or three hours to trim the involved tissue. Due to post-surgical adhesions, three or four weeks after the transplant surgery is a bad time to reopen the patient, but there was no other option, and Petitioner remained hospitalized for a couple of weeks.

9. Petitioner visited one of the Program surgeons for routine checks in early February and mid-March, and, on both occasions, the surgeon found that Petitioner was doing well and had no complaints. However, on March 28,

Petitioner was readmitted to Jackson Memorial due to vomiting and dehydration. On April 21, a Program surgeon performed an exploratory laparotomy and partial gastrectomy after determining that Petitioner was experiencing gastritis from an alteration of her native stomach that had taken place during the gastric bypass. The procedure to rework this portion of the stomach took about two hours, and Petitioner remained hospitalized seven to ten days after this procedure.

10. Finally, in late July, Petitioner underwent a two- or three-hour procedure for the removal of the ostomy bag. Petitioner remained hospitalized for a couple of weeks after this procedure.

11. Except for the leak in the colon and the failure of the alteration of the native stomach, as well as, perhaps, the extra month that elapsed before the removal of the ostomy bag, Petitioner's post-transplant care and progress were normal for a patient who had just undergone an intestinal transplant. For the first year after a transplant, Program physicians and staff meet regularly with the transplant patient to perform lab work and educate the patient about dietary changes and medication regimes, as initially the patient is taking 20 to 40 pills daily. For the first few months, these office visits take place once or twice weekly. Eventually, the number of pills tapers off, but, based on the present state of medical science, for the rest of her life, Petitioner will have to take anti-rejection medication, which presently must be taken twice daily. Over time, the frequency of office visits is reduced. At the time of the deposition in August 2019 of the Program surgeon primarily responsible for Petitioner's care, Petitioner was having lab work done monthly, and the surgeon was seeing Petitioner every six months, which would later be reduced to every year.

12. On March 1, 2017, Petitioner commenced a personal injury action in Kentucky against the radiologist and the regional hospital where the intestinal-removal surgery had taken place. Petitioner agreed to pay her trial

counsel costs plus 33.3% of the gross recovery.[7] In December 2019, prior to trial, the parties settled the case for $1.4 million, which represented the radiologist's policy limits of $1 million and $400,000 from the hospital. The liability of the radiologist was clear, but the liability of the hospital was doubtful; in fact, Petitioner's trial counsel never obtained an expert witnesses to testify that the hospital was liable. The trial court did not allocate the settlement proceeds among damages components. On April 9, 2020, Petitioner deposited in trust for the benefit of Respondent an amount equal to Respondent's lien of $224,000.

13. According to the testimony of Petitioner's trial lawyer, paid past medical expenses totaled about $578,000, so one or more other payors paid $354,000 in addition to Respondent's Medicaid payments of $224,000.[8] Future medical expenses following the settlement appear to be limited to the anti-rejection medication, which is expensive, but the record does not specify its cost.

14. Petitioner claims a loss of earning capacity of about $1.6 million. Her trial counsel hired an economist who, in August 2019, issued a report projecting a loss in this amount. The economist's report notes that Petitioner completed high school and 45 credit hours at a local community college. She obtained a medical assistant certificate in 2012 and, as of March 13, 2016, Petitioner was working as a nursing service clerk at the regional hospital where she presented with a twisted intestine.

15. The economist comprehensively analyzed Petitioner's earnings, including benefits, to project a loss of earnings and benefits through age 65 and pension benefits through age 82. Although the parties stipulated that

[7] Stipulation, p. 7.

[8] Total billed past medical expenses equaled about $1.383 million, consisting of the following items: the regional hospital--$66,000; the air ambulance--$53,000; the University of Kentucky medical center--$206,000; miscellaneous Kentucky medical services--$29,000; and Jackson Memorial Hospital--$1.029 million.

Petitioner's life expectancy will be "significantly" shortened,[9] as explained in the Conclusions of Law, the loss of future earnings or earning capacity is determined by using the life expectancy immediately prior to the actionable injury, so the terms of the economist's calculations were proper.

16. Notwithstanding persuasive evidence to the contrary in the record, the findings are controlled by the parties' stipulation that Petitioner likely will never work again.[10] The economist assumed as much based on the report of a "vocational expert," who issued an "employability evaluation" on February 12, 2019, determining that Petitioner was permanently totally disabled in terms of future employment. The employability evaluation consisted of an interview with Petitioner, vocational testing, and a review of background information, which did not include the deposition of Petitioner's Program surgeon, as it took place later in the same year. Although the stipulation renders the employability evaluation irrelevant as to the issue of Petitioner's ability to return to gainful employment, the employability evaluation is useful in assessing Petitioner's claim for pain and suffering damages.

17. In the interview, which took place about one month prior to the issuance of the report or just over two years after the intestinal-transplant surgery, Petitioner reported that she could drive for one to two hours, but experienced pain and had to stop to use the restroom, which she invariably had to use while and after eating. Petitioner stated that, daily, she had to use the restroom six to ten times and experienced pain in her stomach and lower back. Petitioner also reported anxiety, depression, dehydration, chronic weakness, fatigue, and cognitive difficulties, including brain fog, difficulty concentrating and memory problems.

18. Petitioner stated that she could not lift any weight, was unable to sit for more than three hours or stand for more than one hour, and could walk only short distances. Petitioner denied that a course of physical therapy had

[9] See footnote 5.

produced any relief. Believing that her condition was not improving, Petitioner opined that she could not perform any work due to pain and the need to use the restroom, although, later contradicting herself, she testified that she had thought about going into nursing.

19. The evaluator interpreted a series of ability and aptitude tests to mean that, without regard to any physical disability, Petitioner could return to the "semi-skilled" work that she had performed since graduating from high school, but failed to address her suitability for a nursing program. After considering Petitioner's physical disability, the evaluator concluded that Petitioner was precluded from further employment, even though he lacked any apparent basis for inferring that Petitioner had reached maximum medical improvement.

20. Petitioner filed portions of the transcript of her deposition, which was taken on October 26, 2018--ten months after the transplant surgery. Petitioner testified that she was receiving disability benefits from the Social Security Administration. She understandably did not recall much of March 2017, but she failed to describe her daily activities or her condition, such as her cognitive function, fatigue, and level of pain, prior to moving to south Florida for one year for the transplant surgery, during the year in south Florida, and after her return to Kentucky. She and her husband divorced sometime after the March 2017 surgery, but Petitioner had been dating someone for the three months preceding her deposition.

21. As of the time of her deposition, Petitioner testified that she was always tired, never wanted to do anything, and would not go out due to fear that, in an immunocompromised state, she would contract a disease. Petitioner explained that she could not swim or go barefoot due to the possibility of infection, and she had to wear a mask wherever she went outside of her home during the flu season. However, Petitioner had

[10] See footnote 5.

undergone Botox treatments to her forehead, most recently about one month prior to her deposition.

22. Petitioner stated that walking was difficult. The "few times" that she had gone to Disney World, Petitioner had had to use a wheelchair to navigate the park. Petitioner testified that her Program medications produced side effects, such as headaches, and admitted that she drank a lot of carbonated beverages rather than water, which made her nauseous.

23. Toward the end of her deposition, Petitioner testified that her primary Program surgeon had advised her some time ago not to return to work, but she had not asked him lately "because I want to go back to work."[11] At his deposition, the Program surgeon testified that presently there were no restrictions on Petitioner's activities. In response to a question based on Petitioner's reported fatigue, the surgeon stated that generally Program physicians expected full recoveries from their patients; patients obtained a good quality of life, even if they suffered from fatigue; and the one-year point after surgery was an important milestone in a patient's recovery, which underscored the fact that Petitioner's deposition likely took place too early for her testimony to serve as a good measure of where she was in her recovery by the time of the settlement, which took place just over one year after her deposition.

24. The most prominent restriction recognized by the Program surgeon was pregnancy. He recommended that Petitioner not become pregnant for the "first few years" after the transplant surgery, until her immune system reestablishes itself. Additionally, the anti-rejection drugs are strong and can produce neurological side effects, so a transplant patient who became pregnant would need to be closely monitored.

25. The Program surgeon emphasized the importance of proper hydration through the drinking of water. The surgeon explained that the large intestine absorbs fluids. Because Petitioner lacks much of her large intestine, it was

even more important to overcome fatigue and preserve kidney function for Petitioner to remain hydrated--not just now, but for the next "10, 15, 20 years," according to the surgeon.

26. The surgeon testified that Petitioner could eat whatever food she wished, although she would learn which foods caused diarrhea, which is a side effect of Petitioner's surgeries. At the time of the deposition, Program physicians were monitoring monthly lab work and seeing Petitioner every six months, which eventually would be reduced to every year.

27. Petitioner's trial attorney referred to the testimony of a Dr. Gore, "the leading bariatric radiologist in the country," who reportedly testified that he did not share the Program surgeon's optimism, and Petitioner could never bear children, work, or lead the active life of a young person. Petitioner did not explain why she did not file in this proceeding the original testimony of Dr. Gore, so the administrative law judge could assess, among other things, the bases for such testimony by a radiologist, whose involvement with transplant patients would seem not to be as comprehensive or extended as the involvement of a Program surgeon. The reported testimony of Dr. Gore is disregarded.

28. The trial attorney broke down the true value of the damages as follows: the loss of future earnings--$1.6 million; paid past medical expenses--$578,000; and $8 million in noneconomic damages. In support of a true value of $10 million, the trial attorney testified that his law firm had obtained $11 million from a surgeon in a bariatric case brought by the estate of a deceased patient, who had resided in a nearby city. But the trial attorney provided no other details about that case to allow its use as a comparator.

29. The putative true value is properly based on the loss of future earnings and paid past medical expenses, but not the $8 million in noneconomic damages, nearly all of which is pain and suffering. The stipulation to a "significantly" shortened life expectancy provides no basis for

[11] Petitioner Exhibit 15, p. 99.

calculating a reasonable term of future pain and suffering. The record is not especially detailed as to pain and suffering at and before the time of the settlement. Petitioner's description of the limitations upon her life pertained to a point relatively early in the recovery process, only ten months following the transplant surgery, and a little over one year prior to the relevant point, which is the time of the settlement.

30. The deposition of the Program surgeon, which took place only four months prior to the settlement, is entitled to greater weight in terms of its closer proximity to the settlement date. Addressing a typical patient, the Program surgeon portrayed a life of relatively few restrictions--provided the transplant patient takes care of her crucial need for hydration, which Petitioner had not. The Program surgeon did not detail any setbacks experienced by Petitioner, which her trial attorney who took the deposition would have developed, if they had existed.

31. Doubtlessly, Petitioner has suffered a considerable diminution in the quality of her life, extensive inconvenience, and periods of intense pain, but, balancing Petitioner's somewhat generalized description of these elements and the Program surgeon's more upbeat description of the typical transplant patient, as well as Petitioner, the relationship of Petitioner's pain and suffering to money supports an award of no more than $2 million.[12]

[12] This finding of $2 million in pain and suffering is supported by the facts of the administrative law judge's two Medicaid recovery cases immediately preceding the present case. These cases involved personal injury actions in south and central Florida, not eastern Kentucky, where jury verdicts may run higher or lower. But these cases include $5-$10 million of pain and suffering, and Petitioner's case does not.

In DOAH Case 20-2038MTR, the recipient's attorney sought noneconomic damages of only $5 million for catastrophic brain injuries to a five-year-old child, which left her cognitively intact, but unable to express herself in any fashion and subject to contracture of the limbs, painful spasms, and a shortened lifetime of inability to self-ambulate, feed, bathe, or clothe herself--with a major impact on her parents and siblings, who were caring for her at home. The true value of the noneconomic damages was closer to $10 million for reasons unique to that case, in which a summary jury trial had returned this damages component in a highly abbreviated proceeding designed to facilitate settlement by addressing primarily liability.

32. Adding noneconomic damages of $2 million to the paid past medical expenses of $578,000 and loss of future earnings of $1.6 million yields a true value of $4.2 million. A settlement of $1.4 million represents a recovery of 33.3% of the true value. Applying this settlement recovery percentage to the total paid past medical expenses, the proportional reduction method would allocate about $193,000 of the settlement proceeds to total paid past medical expenses. Applying this settlement recovery percentage to the past medical expenses paid by Respondent, the proportional reduction method would allocate about $75,000 of the settlement proceeds to Respondent's Medicaid payments. As explained in the Conclusions of Law, Respondent's tentative recovery is $193,000 because Petitioner has failed to prove the extent to which, if any, that the $354,000 of past medical expenses paid by a payor other than Respondent is subject to a Medicaid recovery claim.

33. Petitioner agreed to pay costs, which were $41,000, and one-third of any recovery, which is $466,000, so her total obligation to the law firm is $507,000. The record provides no basis for finding that this obligation is unreasonable in amount or was not reasonably expended to produce the settlement. On these facts, a failure to require Respondent's recovery to bear its pro rata share of this obligation would allow Respondent's recovery to reach a portion of the settlement proceeds not allocable to paid past medical expenses.

34. Without regard to the fees and costs, the gross settlement proceeds are tentatively allocated as follows: $193,000 to Respondent and $1.207 million to Petitioner. Applying to 13.8% of the gross settlement proceeds, Respondent's

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In DOAH Case 19-5547MTR, the recipient's attorney sought noneconomic damages of $10 million for catastrophic injuries to an 11-year-old child that left her in a vegetative state, incapable of speech or other expression, incapable of walking or assisting with the transfer into a wheelchair, and incapable of assisting with feeding, except to open her mouth at the sight of a spoon, for the remainder of her injury-shortened life, during which time she too was cared for by her parents at home.

If the administrative law judge lacks the authority to find pain and suffering damages, the administrative law judge rejects the proof of noneconomic damages in its entirety.

lien must bear 13.8%, or $70,000, of the $507,000 in fees and costs that produced the settlement. Respondent's net recovery is thus $123,000.

CONCLUSIONS OF LAW

35. DOAH has jurisdiction over 17b proceedings. §§ 120.569, 120.57(1), and 409.910(17)(b); *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53 (Fla. 2018).

36. Respondent is obligated by statute to obtain reimbursement of medical assistance expenditures from judgment or settlement proceeds obtained by a Medicaid recipient[13] from a third party whose negligence or other wrongdoing necessitated the Medicaid payments. To effect this recovery, Respondent is subrogated to the recipient's rights to any proceeds derived from a third party, the recipient assigns to Respondent its rights to any such proceeds, and Respondent has a lien against any such proceeds.[14]

37. In *Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), the Supreme Court ruled that the imposition of a state Medicaid agency's lien on the full amount of settlement proceeds conflicts with the Anti-Lien Statute to the extent that the encumbered proceeds include "medical expenses,"[15] because the Anti-Lien Statute reserves to the recipient the portion of the proceeds allocable to medical expenses.[16] To determine the agency's allowable recovery, the Court applied the stipulation of the parties that, if the Court ruled for the recipient, the agency's lien would undergo a

[13] A "recipient" is the person on whose behalf the state Medicaid agency expends medical assistance. All references to "recipient" are to the recipient and its legal representative.

[14] § 409.910(6).

[15] The Court has never indicated whether "medical expenses" includes future medical expenses or only past medical expenses, but, as noted below, the Florida supreme court in *Giraldo* has held that "medical expenses" is limited to past medical expenses.

[16] The Court impliedly invoked the Supremacy Clause of the U.S. Constitution in holding that the Arkansas statute was unenforceable to the extent that it authorized a lien on the medical expenses of settlement proceeds.

proportional reduction. The agency had paid about $216,000 in medical assistance and the recipient had obtained settlement proceeds of $550,000 that were unallocated as to medical expenses and other damages components. The parties had stipulated that the true value of the case was about $3 million, the true value ratio--i.e., the settlement divided by the true value--was about 1:6, and one-sixth of the Medicaid payments was about $36,000, which represented the agency's recovery, once the recipient prevailed on the issue presented to the Court.

38. In *Wos v. E.M.A.*, 568 U.S. 627, 638 (2013), the Supreme Court invoked the Supremacy Clause to set aside a state statute that applied a formula to settlement proceeds to determine the state Medicaid agency's recovery--without providing the recipient an opportunity to show that the statutory recovery would violate the Anti-Lien Statute. An expert witness estimated the true value of the recipient's medical malpractice action to be over $42 million in economic damages, including over $37 million of future medical expenses in the form of skilled home care. The state Medicaid agency expended about $1.9 million in medical assistance, and the recipient settled for $2.8 million. The settlement did not allocate the proceeds among the various damages components, and the relatively low settlement recovery percentage was driven largely by the defendants' policy limits. In declining to allow the agency to recover $933,333[17] of the $2.8 million settlement without a hearing to determine the portion of the settlement proceeds allocable to past medical expenses, the Court rejected the state's argument that ascertaining the true value of a case was impossible and instead exhorted trial judges and lawyers to find "objective benchmarks" to project the damages that the recipient would have been able to prove, if its case had gone to trial.

[17] The amount is one-third of the gross proceeds, as confirmed in *E.M.A. v. Cansler*, 674 F.3d 290, 294 (4th Cir. 2012), *aff'd sub nom.*, *Wos v. E.M.A.*, 568 U.S. 627 (2013).

39. Responding to *Wos*,[18] the Florida legislature enacted section 409.910(17)(b), which authorizes a recipient to commence a 17b proceeding to prove that the portion of Respondent's recovery that "should be allocated as past and future medical expenses" is less than its recovery under section 409.910(11)(f), which is an allocation formula not much different from the North Carolina statutory formula at issue in *Wos*.[19] Construing 17b in conjunction with the Anti-Lien Statute and relevant case law, the *Giraldo* court held that Respondent's recovery is limited to settlement proceeds properly allocable to past medical expenses only.

40. When the settlement amount and true value are supported by the evidence, there is no reason not to apply the same settlement recovery percentage to the past medical expenses or past medical expenses paid by Respondent, as applicable, to determine the maximum recovery that Respondent may obtain without violating the Anti-Lien Statute. Although neither *Ahlborn* nor *Wos* mandates a method for making this determination, each decision requires analysis of the settlement proceeds in terms of the relationship of the relevant medical expenses to the other damages components. A proportional reduction of each damages component--if each

[18] A few months after the *Wos* decision, the legislature passed and the Governor signed into law two slightly different bills: chapter 2013-48, sections 6 and 14, and chapter 2013-150, sections 2 and 7, Laws of Florida.

[19] Section 409.910(11)(f) (11f) sets Respondent's recovery as the lesser of its medical assistance expenditures or the amount produced by a formula that allocates to Respondent one-half of the net settlement or judgment proceeds remaining after the reduction of the gross proceeds by 25% for attorneys' fees and by taxable costs. This statutory formula is irrelevant to the present case because Respondent's medical assistance expenditures are less than the amount derived by the formula. As the statute states, under no circumstances may Respondent's recovery ever exceed its total medical assistance expenditures; thus, in this case, Respondent's maximum recovery is $224,000, not its 11f recovery.

damages component is similarly supported by the evidence--is uniquely suitable because a proportion is inherently comparative.[20]

41. As a general matter, Petitioner's acceptance of $1.4 million for a case with a putative true value of $10 million may be explained, as to the hospital, on the basis of very weak liability, but this accounts for only $400,000 of the settlement. The question is why Petitioner would accept a large settlement discount as to the radiologist, whose liability was clear. Policy limits may be part of the explanation, assuming that the radiologist could not satisfy a personal judgment against him of several million dollars. But factors other than weakness in damages do not fully justify the large settlement discount.

42. The loss of earning capacity escapes reduction solely due to Respondent's stipulation that it is likely that Petitioner will never return to work, even though, based on the record, it is likely that she will, if she has not already. The vagueness of the stipulation as to a shortened life expectancy, but not by how much, is irrelevant to this damages component because the loss of earning capacity is calculated based on the life expectancy of the claimant immediately before the injury at issue. *Estrada v. Mercy Hosp., Inc.*, 121 So. 3d 51 (Fla. 3d DCA 2013).

43. However, Petitioner's claim of about $8 million in pain and suffering is inflated. Petitioner's proof of pain and suffering damages was inadequate to support more than $2 million of such noneconomic damages. With this adjustment, the new true value supports the proportional reduction undertaken in the Findings of Fact that results in the tentative recovery of $193,000.

44. This case presents four noteworthy legal issues. First, this case represents the principle that stipulations have consequences. *Delgado v. Ag.*

[20] Three definitions in Webster's online dictionary are: 2.a. "proper or equal share//each did her proportion of the work"; 2.b. "quota, percentage"; and 3. "the relation of one part to another or to the whole with respect to magnitude, quantity, or degree : ratio." https://www.merriam-webster.com/dictionary/proportion.

for Health Care Admin., 237 So. 3d 432 (Fla. 1st DCA 2018). *Delgado* and similar decisions should serve as a warning to parties contemplating the execution of a stipulation that they may anticipate its unyielding enforcement, even if contrary to the underlying facts, because, in this matter, Florida courts insist that the administration of justice is served by expedience, even at the expense of informed decisionmaking.

45. Second, this case requires a determination of the nature of the factfinding responsibility of the administrative law judge with respect to noneconomic damages. The Florida supreme court's Model Form of Verdict for Personal Injury Damages[21] details the elements of pain and suffering, which is typically the most prominent element of noneconomic damages:

> What is the total amount of (claimant's) damages for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect (list any other noneconomic damages) and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future?

46. Noneconomic damages are determined by the factfinder--usually, a jury--based on a few basic principles that are entirely accessible to nonexperts. In *Braddock v. Seaboard Air Line Railroad Co.*, 80 So. 2d 662, 667-68 (Fla. 1955), the court cited, with approval, an earlier decision setting forth the jury charge for measuring pain and suffering and discussed generally the means by which the factfinder determines damages for pain and suffering:

> "As to pain and suffering the law declares that there is no standard by which to measure it except the enlightened conscience of impartial jurors . . .. It would be your duty to determine from the evidence what sort of injuries the plaintiff received, if any, their character as producing or not producing pain, the mildness or intensity of the pain; its probable duration, and allow such sum as

[21] https://jury.flcourts.org/civil-jury-instructions-home/civil-instructions/#model.

> would fairly compensate her for her pain and suffering, if any, such sum as would receive the approval of the enlightened conscience of each of you." [citation omitted] . . .
>
> The rule does not seek to instruct the jury in the process by which they shall determine the amount of damages for pain and suffering. Jurors know the nature of pain, embarrassment and inconvenience, and they also know the nature of money. Their problem of equating the two to afford reasonable and just compensation calls for a high order of human judgment, and the law has provided no better yardstick for their guidance than their enlightened conscience. Their problem . . . involves an exercise of their sound judgment of what is fair and right.

47. At trial, the role of expert testimony in the determination of pain and suffering is difficult to define, as reflected in *Angrand v. Key*, 657 So. 2d 1146 (Fla. 1995), in which the justices wrote four different opinions as to whether an expert witness may testify on the narrow issue of grief. The difficulty arises because, in general, the determination of damages for pain and suffering is well-suited for a layperson, who has the means to relate the nature of money to the nature of pain, embarrassment, inconvenience, disability, physical impairment, disfigurement, mental anguish, and loss of capacity for the enjoyment of life--both in the past and to be experienced in the future.

48. Allowing an expert witness to intervene in this factfinding process by testifying generally to the value of pain and suffering raises the twin issues of whether the witness is (or could be) an expert and whether the witness has invaded the province of the factfinder. These related issues were addressed directly in *Mills v. Redwing Carriers, Inc.*, 127 So. 2d 453, 456-57 (Fla. 2d DCA 1961):

> An observer is qualified to testify usually because he has firsthand knowledge which the jury does not

> have of the situation or transaction at issue. The expert, however, has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of testimony from a qualified expert, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier of facts in its search for truth. McCormick, Handbook of the Law of Evidence, 1954, page 28 and authorities collected therein. Moreover, where the opinion is nothing more than the speculation of an admitted non-expert on the issue involved, to that extent it does invade the province of the jury, which is equally competent to reach such a conclusion upon the same physical facts observed by the witness and made known to the jury by exhibits and testimony. There would appear therefore to be no material conflict between the basis for the objection by defendant to the evidence in the instant case [the failure of the witness to have been qualified as an expert] and the ground asserted by the court in granting the new trial [the witness invaded the province of the jury].

49. Stating the issue somewhat differently, the court in *Summers v. A.L. Gilbert Co.,* 82 Cal. Rptr. 2d 162, 178 (Cal. App. 5th Dist. 1999) explained:

> Expert opinions which invade the province of the jury are not excluded because they embrace an ultimate issue, but because they are not helpful (or perhaps too helpful). "[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. 'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.' [Citation omitted.]" (*People*

> *v. Torres* (1995) 33 Cal.App.4th 37, 47, 39 Cal.Rptr.2d 103; see 1 McCormick on Evidence, *supra*, § 12, p. 49, fn. 11 ["The fact that an opinion or inference is not objectionable because it embraces an ultimate issue does not mean, however, that all opinions embracing the ultimate issue are admissible… . Thus, an opinion that plaintiff should win is rejected as not helpful."].) In other words, when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not aid the jurors, it *supplants* them.

50. Obviously, this decisional law applies directly to a personal injury trial. It remains to be seen how Florida courts will allow the parties in a 17b proceeding to prove pain and suffering for the purpose of determining the true value of a recipient's case. At least one court has stated that a trial lawyer in a 17b proceeding testifies merely as a fact witness about facts from the personal injury action known to the lawyer from the preparation and settlement of the case.[22] If a trial lawyer is able to provide useful testimony in a 17b proceeding by identifying jury verdicts awarding specific sums for pain and suffering on comparable facts, such testimony may meet the evidentiary standard for admissibility in a chapter 120 proceeding, which is "evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." § 120.569(2)(g). But such testimony would be to inform, not supplant, the administrative law judge in finding a reasonable value for pain and suffering in order to determine a reasonable true value, so as to be able to perform a sound proportional reduction of the past medical expenses. If the administrative law judge were to lack such factfinding authority, the administrative law judge would be equally unable to correct an

[22] *Ag. for Health Care Admin. v. Rodriguez*, 294 So. 3d 441, 443 (Fla. 1st DCA 2020). *But see Giraldo*, 248 So. 3d at 56: "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)." The *Grainger* case stands for the principle stated by the court, but as to the testimony of an expert witness, not a fact witness, so *Giraldo* implies that the trial lawyer testifying in a 17b proceeding appears as an expert witness.

overstatement of the pain and suffering by $40 as by $8 million, leaving it to Petitioner's trial lawyer effectively to dictate Respondent's recovery.

51. Third, this case presents the question as to whether, under the proportional reduction method, Respondent's recovery is based on the portion of settlement proceeds allocable to the total paid[23] past medical expenses, not merely the past medical expenses paid by Respondent. This issue is not present in many cases, in which Respondent's Medicaid payments equal the past medical expenses. Where Respondent's Medicaid payments are less than the total past medical expenses, 17b, which addresses "past . . . medical expenses," not past medical expenses paid by or presented for reimbursement to Respondent,[24] seems to favor calculating the recovery based on the portion of settlement proceeds allocable to the total past medical expenses, not merely the past medical expenses paid by Respondent. But a hard-and-fast rule will violate the Anti-Lien Statute in some cases.

52. As noted above,[25] if the settlement recovery percentage of 33.3% is applied to the total past medical expenses of $578,000, Respondent recovers $193,000. But if the settlement recovery percentage of 33.3% is applied only to the past medical expenses paid by Respondent, Respondent would recover only $75,000 of its Medicaid payments.

53. The problem with applying the settlement recovery percentage to the total past medical expenses of $578,000 emerges clearly, if we assume that the payor of the additional $354,000 was a Medicaid payor and that the payor has imposed a lien against the settlement proceeds to recovery the entirety of

[23] The Petition seemed to raise the issue of whether paid or billed past medical expenses is the correct measure, but the parties have settled correctly on the use of paid past medical expenses, rather than the higher billed past medical expenses, which would tend to increase Respondent's recovery. A useful discussion of why paid, not billed, past medical expenses is the proper measure is found in *Department of Health Care Policy & Financing v. S.P.*, 356 P.3d 1033, 1039-40 (Colo. App. 2015) (the court warned, though, that unspecified different factual situations could justify the use of billed past medical expenses).

[24] From this point forward, the final order will no longer refer to "paid" past medical expenses, even though all past medical expenses discussed in the remainder of this final order are paid.

[25] See paragraph 32.

its medical assistance expenditures. The proportional reduction method has allocated $193,000 of the settlement proceeds to past medical expenses, so the total recovery by the two Medicaid agencies may not exceed this sum. If the settlement recovery percentage of 33.3% is applied to the total past medical expenses, the other Medicaid payor would recover $193,000, and the total recovery of the two Medicaid payors would be $386,000, which would violate the Anti-Lien Statute because $193,000 of the payors' recoveries would be from settlement proceeds not allocable to past medical expenses. On the other hand, if the settlement recovery percentage of 33.3% is applied to the past medical expenses paid by the other Medicaid payor, it would recover only $118,000, and the total recovery of the two payors would be $193,000, which is, of course, a recovery of the entirety of the portion of the settlement proceeds allocable to past medical expenses, but no more.

54. The application of the settlement recovery percentage to the past medical expenses paid by the state Medicaid agency is not unprecedented in the case law. *See, e.g.*, *Doe v. Vt. Office of Health Access*, 54 A.3d 474, 482 (Vt. 2012) (construing the Vermont reimbursement statute, the court held that the Medicaid lien attached only to the extent of Medicaid payments made by the agency). *Compare Aguilera v. Loma Linda University Medical Center*, 185 Cal. Rptr. 3d 699 (Cal. 4th DCA 2015) (in a jurisdiction allowing the state Medicaid agency to recover from settlement proceeds allocable to past and future medical expenses, the Medicaid lien attached only to future medical expenses likely to be paid by the agency).

55. Florida courts have tended to regard the role of the 17b proceeding as identifying the portion of settlement proceeds allocable to the total past medical expenses, even where Respondent's Medicaid payments are less than this amount, and allowing Respondent to recover its Medicaid payments up to the portion of the settlement proceeds allocable to the total past medical expenses. For instance, in *Bryan v. Agency for Health Care Administration*, 291 So. 3d 1033 (Fla. 2020), Respondent paid 99.6% of the past medical

expenses. The settlement recovery percentage was 10%, which the court applied against the total past medical expenses, not merely the past medical expenses paid by Respondent, although the difference amounted to about $200 in recovery amounts, so the economic impact of the court's choice was negligible.

56. The economic impact of the court's choice is not negligible where Respondent's Medicaid payments are smaller fractions of the total past medical expenses, as in *Mojica v. Agency for Health Care Administration*, 285 So. 3d 393 (Fla. 1st DCA 2019). Here, the settlement recovery percentage was 35.2%, and total Medicaid payments were about $595,000, of which Respondent had paid about $322,000, or 54%, and the remaining 46% had been paid by two other Medicaid payors. The recipient argued that Respondent's recovery was about $113,000: $595,000 x 35.2% x 54%. This is another way of applying the proportional reduction to Respondent's payment of past medical expenses, rather than to the total past medical expenses. The administrative law judge rejected the proportional reduction--i.e., the 35.2%--as unsupported by the evidence. Reversing, the court sustained the 35.2% settlement recovery percentage, but failed to address the second proportional reduction to reflect that Respondent had paid only 54% of the total past medical expenses. On remand, though, the administrative law judge performed the second proportional reduction, so that Respondent recovered about $113,000; otherwise, the administrative law judge noted, the recoveries of the other two Medicaid payors, when combined with Respondent's recovery, would have exceeded 35.2% of $595,000 in violation of the Anti-Lien Statute.[26] The holding of *Mojica* is thus at least consistent with the proposition that Respondent's recovery from settlement proceeds that have undergone a proportional reduction must be limited to the past medical expenses paid by Respondent, if the proportional reduction is to serve the purpose of limiting Respondent's recovery to the portion of the settlement

proceeds allocable to past medical expenses--at least where all of the remaining past medical expenses also represent Medicaid payments.

57. The recipient in a 17b proceeding bears the burden of proof, so, if Respondent's Medicaid payments are less than the total past medical expenses, the recipient must prove that all or part of the total past medical expenses in excess of Respondent's Medicaid payments were also Medicaid payments. Absent such proof, Respondent's recovery is based on the settlement recovery percentage of the total past medical expenses, not merely Respondent's Medicaid payments. The present record contains no evidence of the source or sources of the additional $354,000 in past medical expenses. Therefore, the settlement recovery percentage is applied to the total past medical expenses, not the past medical expenses paid by Respondent, so that Respondent's tentative recovery is $193,000, not $75,000.

58. Fourth, this case raises the issue of whether Respondent's recovery must be further reduced by its proportionate share of attorneys' fees and costs imposed on the gross settlement. Respondent's recovery of $193,000 is tentative because it must be undergo this reduction. As noted in the Findings of Fact, Respondent's recovery after reduction for its proportionate share of attorneys' fees and costs is $123,000.

59. The half million dollars of attorneys' fees and costs paid out of the gross settlement proceeds did not represent the payment of some personal or extraneous obligation of Petitioner, such that it must be allocated entirely to Petitioner's share of the gross proceeds. These legal expenses produced the settlement against which Respondent has imposed its lien. In no real sense did the settlement proceeds ever amount to $1.4 million--due to this cost-of-goods-sold expenditure of a half million dollars to produce the settlement. Because the net settlement proceeds are the real settlement proceeds, relieving Respondent's recovery from its proportional share of this integral

[26] https://www.doah.state.fl.us/ROS/2017/17001966.2.pdf.

financial obligation essentially allows Respondent to recover from portions of the settlement allocable to components other than the past medical expenses.

ORDER

It is

ORDERED that Respondent shall recover $123,000 from Petitioner's $1.4 million settlement in full satisfaction of its Medicaid lien.

DONE AND ORDERED this 6th day of August, 2020, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 6th day of August, 2020.

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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.