STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GREGORY MCELVEEN, THROUGH THE PERSONAL REPRESENTATIVE OF HIS ESTATE, DANIEL HALLUP,

Petitioner,

vs. Case No. 20-4223MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020),[1] on November 12, 2020, by Zoom video conference from Tallahassee, Florida.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton & Faglie, PL
189 East Walnut Street
Monticello, Florida 32344

For Respondent: Alexander R. Boler, Esquire
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Tallahassee, Florida 32317

[1] All references to the Florida Statutes are to the 2020 version, unless otherwise noted. Although Petitioner's medical expenses were incurred in 2017, Petitioner's estate settled his negligence lawsuit in 2020. The Agency obtained its right to reimbursement from third-party benefits on that date. Accordingly, the 2020 version of the governing statute (section 409.910, Florida Statutes) controls DOAH's jurisdiction. *See Suarez v. Port Charlotte HMA, LLC*, 171 So. 3d 740, 742 (Fla. 2d DCA 2015).

STATEMENT OF THE ISSUE

This matter concerns the amount of money to be reimbursed to the Agency for Health Care Administration for medical expenses paid on behalf of Gregory McElveen, a Medicaid recipient, following a settlement recovered from a third party.

PRELIMINARY STATEMENT

On September 18, 2020, Petitioner, Gregory McElveen, through the personal representative of his estate, Daniel Hallup, filed a Petition to Determine Amount Payable to Agency for Health Care Administration In Satisfaction of Medicaid Lien (the "Petition"). Through his Petition, Petitioner challenged the Agency for Health Care Administration's (the "Agency") lien for medical expenses following Petitioner's recovery from a third party. The Agency seeks reimbursement from Petitioner for medical expenses Medicaid paid on his behalf. The Agency calculated the amount it believes it is owed using the "default" formula set forth in section 409.910(11)(f). Petitioner asserts that reimbursement of a lesser portion of his recovery is warranted pursuant to section 409.910(17)(b).

On September 21, 2020, the Division of Administrative Hearings ("DOAH") notified the Agency of Petitioner's Petition for an administrative proceeding to determine the amount payable to the Agency to satisfy the Medicaid lien.

The final hearing was held on November 12, 2020. Prior to the final hearing, Petitioner and the Agency filed a Joint Pre-hearing Stipulation agreeing to several facts upon which the undersigned relied. At the final hearing, Petitioner's Exhibits 1 through 8 were admitted into evidence. Petitioner presented the testimony of Charles T. Moore and R. Vinson Barrett. The Agency did not offer any additional evidence or witnesses.

A one-volume Transcript of the final hearing was filed with DOAH on December 26, 2020. At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals. Following the hearing, the parties jointly moved for an extension of the filing deadline, which was granted.[2] Both parties filed Proposed Final Orders, which were duly considered in preparing this Final Order.

FINDINGS OF FACT

1. This proceeding determines the amount the Agency should be paid to satisfy a Medicaid lien following Petitioner's recovery of a $240,000.00 settlement from a third party. The Agency asserts that it is entitled to recover the full amount of its $72,907.93 lien.

2. The incident that gave rise to this matter resulted from alleged medical malpractice. In 2016, Mr. McElveen saw his primary care physician complaining of pain and redness in his hand. The pain was ultimately traced to a metal shaving that had lodged in his finger. Despite repeated visits complaining of pain and swelling, however, Mr. McElveen's physician failed to locate and remove the foreign object. In the meantime, his health worsened. On July 17, 2017, Mr. McElveen was admitted to the hospital, and was found to be critically ill with septic emboli. On August 15, 2017, Mr. McElveen died as a result of a systemic infection. He was survived by his wife and three daughters.[3]

[2] By requesting a deadline for filing post-hearing submissions beyond ten days after receipt of the Transcript at DOAH, the 30-day time period for filing the Final Order was waived. *See* Fla. Admin. Code R. 28-106.216(2).

[3] Although Mr. McElveen's three daughters survived his death, in his subsequent wrongful death lawsuit, only one of his daughters was considered a "minor child" under the Florida Wrongful Death Act, because the other two were over the age of 25. § 768.18, Fla. Stat.

3. The Agency, through the Medicaid program, paid a total of $72,907.93 for Mr. McElveen's medical care, which was the full amount of his past medical expenses.

4. In 2019, Mr. McElveen's estate brought a wrongful death action against his treating physician.[4] Charles T. Moore, Esquire, represented Petitioner's estate and was the primary attorney handling the litigation. Ultimately, Mr. Moore was able to settle the wrongful death action for $240,000.

5. The Agency was not a party to, nor did it intervene in, Petitioner's wrongful death lawsuit.

6. Under section 409.910, the Agency is to be repaid for its Medicaid expenditures out of any recovery from liable third parties. Accordingly, when the Agency was notified of the settlement of Petitioner's lawsuit, it asserted a Medicaid lien against the amount Petitioner recovered. The Agency asserts that, pursuant to the formula set forth in section 409.910(11)(f), it should collect $72,907.93 to satisfy the medical costs it paid on Petitioner's behalf. The Agency maintains that it should receive the full amount of its lien regardless of the fact that Petitioner settled for less than what Petitioner believes is the full value of his damages.

7. Petitioner, on the other hand, argues that, pursuant to section 409.910(17)(b), the Agency should be reimbursed a lesser portion of the settlement than the amount the Agency calculated pursuant to the section 409.910(11)(f) formula. Petitioner specifically asserts that the Medicaid lien should be reduced proportionately, taking into account the full value of Petitioner's damages. Otherwise, the application of the statutory formula would permit the Agency to collect more than that portion of the settlement that fairly represents Petitioner's compensation for medical expenses. Petitioner insists that reimbursement of the full lien amount violates the federal Medicaid law's anti-lien provision (42 U.S.C. § 1396p(a)(1)) and

[4] Petitioner Daniel Hallup was appointed Personal Representative of Mr. McElveen's estate.

Florida common law. Petitioner requests that the Agency's allocation from Petitioner's recovery be reduced to $5,832.63.

8. To establish the value of Mr. McElveen's damages, Petitioner offered the testimony of Mr. Moore. Mr. Moore has practiced law for 24 years and is a partner with the law firm of Morgan & Morgan in Tampa, Florida. In his practice, Mr. Moore focuses exclusively on medical malpractice causes of action. Mr. Moore represented that he has taken a number of his cases to jury.

9. As part of his practice, Mr. Moore routinely evaluates damages similar to those Petitioner suffered. This activity includes analyzing jury verdicts to keep current on case values, as well as discussing cases with other attorneys.

10. In calculating the value of Mr. McElveen's wrongful death claim, Mr. Moore reviewed Mr. McElveen's medical records. Mr. Moore stated that, based on his professional assessment and experience, Mr. McElveen's damages equaled between three to five million dollars which is the total monetary value of the survivors' and estate's wrongful death damages. Therefore, Mr. Moore opined that a conservative value of Mr. McElveen's damages is $3,000,000.

11. Based on his evaluation, Mr. Moore asserted that the $240,000 settlement was far less than the value of the actual damages Mr. McElveen suffered. Mr. Moore explained that Petitioner settled for a much lower amount because his potential recovery was limited due to the fact that the one potential defendant (Mr. McElveen's physician) was retiring and carried minimal insurance coverage ($250,000). Mr. Moore also felt that the other possible liable parties (including the hospital) had met the appropriate standard of medical care when treating Mr. McElveen. Therefore, Mr. Moore believed that he had settled for the best deal he could under the circumstances, and Mr. McElveen's estate was not likely to recover more.

12. Finally, to support the Petition to reduce the amount of the Medicaid lien, Mr. Moore explained that Petitioner's estate received only eight percent

of the true value of Mr. McElveen's damages ($3,000,000 divided by $240,000). Because only eight percent of the damages were recovered, in like manner, the $72,907.93 Medicaid lien should be reduced to eight percent, or $5,832.63, as a fair and reasonable allocation of the amount of Petitioner's past medical expenses recovered the $240,000 settlement.

13. The Agency did not present evidence or testimony disputing Mr. Moore's valuation of the "true" value of Petitioner's damages or his calculation of the amount of the settlement that should be allocated as Petitioner's past medical expenses.

14. Petitioner also offered the testimony of R. Vinson Barrett, Esquire, to established the value of Mr. McElveen's damages. Mr. Barrett is a trial attorney with over 40 years' experience. Mr. Barrett works exclusively in the area of plaintiff's personal injury, medical malpractice, and medical products liability cases. He has also handled wrongful death cases.

15. Mr. Barrett expressed that, as a routine part of his practice, he makes assessments concerning the value of damages suffered by injured parties. In addition, not only does he have personal experience with jury trials, but he stays current in recent jury verdicts and regularly discusses jury results with other attorneys. Mr. Barrett was accepted as an expert in the valuation of damages suffered by injured persons.

16. Prior to testifying, Mr. Barrett familiarized himself with the facts and circumstances of Mr. McElveen's injuries and death. He reviewed Petitioner's exhibits, including Petitioner's medical records. He also reviewed the sample jury verdicts Petitioner introduced as Petitioner's Exhibit 8.

17. Based on his valuation of Petitioner's injuries, as well as his professional training and experience, Mr. Barrett placed a "very conservative value" on Petitioner's injuries at $3,000,000. Mr. Barrett explained that injuries similar to Petitioner's would result in jury awards averaging approximately $3.5 million dollars.

18. Mr. Barrett supported Mr. Moore's pro rata methodology of calculating a reduced portion of Petitioner's $240,000 settlement to equitably and fairly represent past medical expenses. With injuries valued at $3,000,000, the $240,000 settlement only compensated Petitioner for eight percent of the total value of his damages. Therefore, the most "fair" and "reasonable" manner to apportion the $240,000 settlement is to apply that same percentage to determine Petitioner's recovery of medical expenses. Petitioner asserts that applying the same ratio to the total amount of medical costs produces the definitive value of that portion of Petitioner's $240,000 settlement that represents compensation for past medical expenses, i.e., $5,823.63 ($72,907.93 times eight percent).

19. Similar to Mr. Moore's testimony, Mr. Barrett's expert testimony was unrebutted. Further, the Agency did not offer evidence or testimony proposing a more appropriate or different valuation of Mr. McElveen's total damages, or contesting the methodology Petitioner used to calculate the portion of the $240,000 settlement fairly allocable to Petitioner's past medical expenses.

20. Based on the testimony from Mr. Moore and Mr. Barrett that the $240,000 settlement does not fully compensate Petitioner for Mr. McElveen's damages, Petitioner argues that a lesser portion of the medical costs should be calculated to reimburse Medicaid, instead of the full amount of the lien. Petitioner proposes that a ratio be applied based on the true value of Petitioner's damages ($3,000,000) compared to the amount that Petitioner actually recovered ($240,000). Using these numbers, Petitioner's settlement represents approximately an eight percent recovery of the full value of Petitioner's damages. In similar fashion, the Medicaid lien should be reduced to eight percent or approximately $5,832.63 ($72,907.93 times .08). Therefore, Petitioner asserts that $5,832.63 is the portion of his third-party settlement that represents the equitable, fair, and reasonable amount the Florida

Medicaid program should recoup for its payments for Petitioner's medical care.

21. All of the expenditures Medicaid spent on Petitioner's behalf are attributed to past medical expenses. No portion of the $72,907.93 Medicaid lien represents future medical expenses.

22. The undersigned finds that the unrebutted testimony at the final hearing demonstrates that the full value of Petitioner's damages from this incident equals $3,000,000. Further, based on the evidence in the record, Petitioner met his burden of proving, by clear and convincing evidence, that a lesser portion of Petitioner's settlement should be allocated as reimbursement for medical expenses than the amount the Agency calculated using the formula set forth in section 409.910(11)(f).[5] Accordingly, the undersigned finds that the competent substantial evidence adduced at the final hearing establishes that the Agency should be reimbursed in the amount of $5,832.63 from Petitioner's recovery of $240,000 from a third party to satisfy the Medicaid lien.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this proceeding pursuant to sections 120.569,

[5] Regarding the standard of proof to be used in this matter, Petitioner argues that, based on a pre-hearing stipulation between the parties, Petitioner should only be required to prove his case by a preponderance of the evidence. In *Gallardo by & through Vassallo v. Dudek*, 963 F.3d 1167 (11th Cir. 2020), however, the U.S. Court of Appeals for the Eleventh Circuit upheld the statutory standard of proof by which a Florida Medicaid recipient must rebut the formula set forth in section 409.910(11)(f) as clear and convincing evidence. *Gallardo*, 963 F.3d at 1182 ("nothing about this [clear and convincing] standard of proof stands in clear conflict with federal law under *Wos*.")

The undersigned concludes, however, that it is unnecessary to decide whether the parties' stipulation regarding the standard of proof should be set aside. The stricter evidentiary standard does not change the outcome of this case as Petitioner successfully proved, by clear and convincing evidence, that the portion of his settlement recovery that should be allocated as past medical expenses is less than the amount of the Medicaid lien.

120.57(1), and 409.910(17)(b). DOAH has final order authority. § 409.910(17)(b), Fla. Stat.

24. The Agency is the Medicaid agency for the State of Florida, as provided under federal law, and administers Florida's Medicaid program. *See* § 409.901(2), Fla. Stat.

25. The federal 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). While a state's participation is entirely optional, once a state elects to participate in the federal Medicaid program, it must comply with federal requirements governing the program. *Id.*; and 42 U.S.C. § 1396, *et seq.*

26. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses from Medicaid recipients who later recover from legally liable third parties. *See Ark. Dep't of Health & Hum. Servs. v. Ahlborn*, 547 U.S. 268, 276 (2006); and 42 U.S.C. § 1396a. To comply with this federal requirement, the Florida Legislature enacted section 409.910, Florida's "Medicaid Third-Party Liability Act," which authorizes and requires the Agency to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment or settlement from a third party. *See Smith v. Ag. for Health Care Admin.*, 24 So. 3d 590 (Fla. 5th DCA 2009). The Legislature expressly set forth in section 409.910(1):

> 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.

27. Accordingly, by accepting Medicaid benefits, Medicaid recipients automatically subrogate their rights to any third-party benefits for the full amount of medical assistance provided by Medicaid and automatically assign to the Agency the right, title, and interest to those benefits, other than those excluded by federal law. *See* § 409.910(6)(a), and (b), Fla. Stat.; *see also* 42 U.S.C. § 1396k(a)(1) (requiring states participating in the federal Medicaid program to provide, as a condition of Medicaid eligibility, assignment to the state of the right to payment for medical care from any third party). Section 409.910 creates an automatic lien on any such judgment or settlement with a third party for the full amount of medical expenses Medicaid paid on behalf of the Medicaid recipient. *See* § 409.910(6)(c), Fla. Stat.

28. However, the obligation to reimburse the Agency (and Medicaid) following recovery from a third party is not unbounded. Pursuant to 42 U.S.C. §§ 1396a(a)(25)(A), (B), and (H), 1396k(a), and 1396p(a), the Agency may only assert a Medicaid lien against that portion of Petitioner's award from a third party that represents the costs of the medical assistance made available for the individual. *See Ahlborn*, 547 U.S. at 278; *Wos v. E.M.A.*, 133 S. Ct. 1391, 1396 (2013); *Harrell v. State*, 143 So. 3d 478, 480 (Fla. 1st DCA 2014); and *Davis v. Roberts*, 130 So. 3d 164, 266 (Fla. 5th DCA 2013). The federal Medicaid statute's anti-lien provision, 42 U.S.C. § 1396p(a)(1), prohibits a state from attaching a lien for medical assistance on a Medicaid recipient's property other than that portion of a Medicaid recipient's recovery

designated as payment for medical care. *See also* §§ 409.910(4), (6)(b)1., and (11)(f)4., which provides that the Agency may not recover more than it paid for the Medicaid recipient's medical treatment.

29. As *Ahlborn* explains, the anti-lien provision of the federal Medicaid Act circumscribes these obligations by authorizing payment to a state only from those portions of a Medicaid recipient's third-party settlement recovery allocated for payment of medical care. *Ahlborn*, 547 U.S. at 285; *See also E.M.A. ex rel. Plyler v. Cansler*, 674 F.3d 290, 312 (4th Cir. 2012)("As 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.")

30. Section 409.910(11) establishes a formula to determine the amount the Agency may recover for medical assistance benefits paid from a judgment, award, or settlement from a third party.[6] 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.

[6] "Third-party benefit" is broadly defined to include any settlement between a Medicaid recipient and a third party for any Medicaid-covered injury, including costs of medical services related thereto, for personal injury or for death of the recipient. § 409.901(28), Fla. Stat.

> 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.

31. In short, section 409.910(11)(f) establishes that the Agency's recovery for a Medicaid lien is limited to the lesser of: (1) its full lien; or (2) one-half of the total award, after deducting attorney's fees of 25 percent of the recovery and all taxable costs, up to, but not to exceed, the total amount actually paid by Medicaid on the recipient's behalf. *See Ag. for Health Care Admin. v. Riley*, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013). In this matter, using the section 409.910(11)(f) formula, Petitioner's recovery ($240,000) is sufficient to fully satisfy the medical assistance provided by Florida Medicaid. Therefore, the Agency is authorized to seek recovery of the full amount of its lien ($72,907.93).

32. However, section 409.910(17)(b) provides a method by which a Medicaid recipient may contest the amount designated as recovered medical expenses payable under section 409.910(11)(f). Following the U.S. Supreme Court decision in *Wos*, the Florida Legislature created an administrative process to determine the portion of the judgment, award, or settlement in a tort action that is properly allocable to medical expenses; and, thus, the

portion of the recovery that may be used to reimburse the Medicaid lien. Section 409.910(17)(b) states:

> If federal law limits the agency to reimbursement from the recovered medical expense damages, a recipient, or his or her legal representative, 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 designated as recovered medical expenses, the recipient must prove, by clear and convincing evidence, that the portion of the total recovery which should be allocated as past and future medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f).*[7] Alternatively, the recipient must prove by clear and convincing evidence that Medicaid provided a lesser amount of medical assistance than that asserted by the agency. (emphasis added).

[7] The Florida Supreme Court interprets federal law to limit the Agency's lien to only the past medical expense portion of a third-party tort recovery. *Giraldo v. Agency for Health Care Admin.*, 248 So.3d 53, 54 (Fla. 2018). The court held that the section 409.910(17)(b) procedure must be read to comply with the federal law, and thus effectively excised the portions that would allow the Agency to impose a lien on recovered future medical expense damages. *Giraldo*, 248 So.3d at 56.

33. Section 409.910(17)(b) establishes that the section 409.910(11)(f) formula constitutes a default allocation of the amount of a settlement that is attributable to medical costs, and sets forth an administrative procedure for an adversarial challenge of that allocation. *See Harrell*, 143 So. 3d at 480 ("we now hold that a plaintiff must be given the opportunity to seek reduction of the amount of a Medicaid lien established by the statutory formula outlined in section 409.910(11)(f), by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses").

34. In order to successfully challenge the amount payable to the Agency, the burden is on the Medicaid recipient to prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for (past) medical expenses than the amount the Agency calculated.[8] § 409.910(17)(b), Fla. Stat. In other words, in this matter, if Petitioner can demonstrate that the portion of the settlement attributed to past medical expenses is less than the amount the Agency calculated using the section 409.910(11)(f) formula, the amount Petitioner must reimburse the Agency may be reduced below $72,907.93.

35. With respect to Petitioner's $240,000 settlement, the undersigned finds that Petitioner persuasively demonstrated that a lesser portion of his third-party recovery should be allocated to satisfy the Agency's Medicaid lien, instead of the default amount calculated under section 409.910(11)(f).

36. Regarding the specific amount of Petitioner's settlement that should be allotted to reimburse the Agency, the Florida Legislature, despite establishing a procedure for a Medicaid recipient to challenge the amount of a Medicaid lien, provided little guidance as to the standard DOAH should use to determine what portion of the third-party recovery should represent (past) medical expenses.

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[8] Although Mr. McElveen was deceased at the time the Agency sought to impose the Medicaid lien, Petitioner, as the personal representative of Mr. McElveen's estate, may contest the lien on his behalf. *Al Batha v. Agency for Health Care Admin.*, 263 So. 3d 817, 819 (Fla. 1st DCA 2019)

37. Petitioner contends that the Medicaid lien should be reduced using a ratio that factors in the full value of Petitioner's damages. Petitioner specifically asserts that only $5,832.63 of the total settlement amount should be attributed to past medical expenses ($72,907.93 times eight percent). Petitioner maintains that his calculation apportions a fairer and more reasonable share of the settlement to Petitioner in light of his significant injuries. This "pro rata" methodology of lien reduction has been recognized and approved by Florida courts. *See Giraldo*, 248 So. 3d at 56; *Soto v. Agency for Health Care Admin.*, -- So. 3d --, 45 Fla. L. Weekly D2604 (Fla. 1st DCA Nov. 18, 2020); *Agency for Health Care Admin. v. Rodriguez*, 294 So. 3d 441, 442 (Fla. 1st DCA 2020); *Mojica v. Agency for Health Care Admin.*, 285 So. 3d 393, 398 (Fla. 1st DCA 2019); and *Eady v. State*, 279 So. 3d 1249, 1259 (Fla. 1st DCA 2019).

38. The Agency, on the other hand, emphatically opposes Petitioner's pro rata calculation to quantify the past medical expense portion of Petitioner's $240,000 settlement. However, although the Agency does not have the burden of proof, it did not elicit testimony or present evidence contradicting Petitioner's expert's testimony that using a ratio comparing the "full" value of Petitioner's damages with the total amount Petitioner recovered produces a reasonable share of a settlement available as reimbursement for past medical expenses.

39. The undersigned is mindful that, "[t]he Medicaid program provides federal and state funding to pay healthcare costs for individuals who cannot afford it." *Vestal v. First Recovery Grp., LLC*, 292 F. Supp. 3d 1304, 1310 (M.D. Fla. 2018); *see also Roberts v. Albertson's Inc.*, 119 So. 3d 457, 458 (Fla. 4th DCA 2012); and 42 U.S.C. § 1396a(a)(25)(A)-(B). To keep the Medicaid program viable, Congress recognized that it is necessary to obtain reimbursement when a third party makes payment to the Medicaid beneficiary for medical care already paid for by Medicaid. *Roberts*, 119 So. 3d at 459. *Roberts* further observed that the Medicaid program's requirement

that states take all reasonable measures to seek reimbursement from legally liable third parties ensures that tax dollars are protected, while preventing Medicaid recipients from receiving "a windfall by recovering medical costs they did not pay." *Roberts*, 119 So. 3d at 459 (citing *Tristani v. Richman*, 652 F.3d 360, 373 (3d Cir. 2011)).

40. The Florida Medicaid Third-Party Liability Act emphasizes this mandate by instructing: "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." § 409.910(1), Fla. Stat. Section 409.910(6)(a) further directs that, "Equities of a recipient, [or] his or her legal representative ... shall not defeat, reduce, or prorate recovery by the agency as to its subrogation rights under this paragraph."[9]

41. However, in balancing the competing interests of Petitioner and the Agency, to determining the fair and reasonable portion of Petitioner's recovery to allocate as past medical expenses paid for by the Florida Medicaid program, the undersigned concludes that the Agency's lien should be reduced to eight percent of its total value, or $5,832.63. The Agency did not present any evidence contradicting Petitioner's position that Mr. McElveen's damages have a full value of $3,000,000 or contesting the pro rata methodology Petitioner used to calculate the proper portion of the settlement to designate as past medical expenses. Neither is there a reasonable basis in the record to reject Petitioner's evidence and testimony.

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[9] See also section 409.910(13), which states, in part:

> No action of the recipient shall prejudice the rights of the agency under this section. No settlement, agreement, consent decree, trust agreement, annuity contract, pledge, security arrangement, or any other device, hereafter collectively referred to in this subsection as a "settlement agreement," entered into or consented to by the recipient or his or her legal representative shall impair the agency's rights.

42. Therefore, Petitioner met his burden of proving that $5,832.63 is the portion of Petitioner's settlement "which should be allocated as past … medical expenses," pursuant to section 409.910(17)(b). Accordingly, the Agency is entitled to be reimbursed $5,832.63 from Petitioner's $240,000 settlement.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner, Gregory McElveen, through the personal representative of his estate, Daniel Hallup, shall pay to Respondent, Agency for Health Care Administration, the sum of $5,832.63 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 2nd day of February, 2021, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of February, 2021.

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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.