

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ANGELA D. SHARPE, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
THOMAS KENNETH SHARPE, DECEASED,

Petitioner,

vs.

Case No. 21-0052MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

A final hearing was conducted on March 9, 2021, before Robert L. Kilbride, Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), by video teleconference, using Zoom technology.

APPEARANCES

For Petitioner: Darryn L. Silverstein, Esquire
Silverstein, Silverstein and Silverstein, P.A.
20801 Biscayne Boulevard, Suite 504
Aventura, Florida 33180

For Respondent: Alexander R. Boler, Esquire
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

What amount of the wrongful death settlement recovered by Petitioner, Angela D. Sharpe, as Personal Representative of the Estate of Thomas Kenneth Sharpe, deceased ("Sharpe"), must be paid to Respondent, Agency for Health Care Administration ("AHCA" or "Agency"), pursuant to section

409.910, Florida Statutes (2020), to satisfy the Agency's claimed \$119,687.65 Medicaid Lien.

PRELIMINARY STATEMENT

On January 6, 2021, Sharpe filed a Petition to Determine Medicaid's Lien Amount to Satisfy Claim Against Personal Injury/Wrongful Death Recovery by the Agency for Health Care Administration, pursuant to section 409.910(17)(b). The petition challenged the amount of AHCA's lien and requested a hearing.

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

The case was set for final hearing on March 9, 2021, and proceeded to a hearing on that date.

The parties filed a pre-hearing stipulation that included undisputed facts. At the final hearing, Sharpe's Exhibits 1, 4, and 6 were admitted into evidence without objection. Sharpe presented testimony of personal injury/wrongful death lawyer, Darryn L. Silverstein, Esquire; additional testimony from Kenneth Bush, Esquire; and testimony from the defense attorney in the personal injury lawsuit, Benjamin Bedard, Esquire. The Agency did not offer any exhibits nor did it call any witnesses.

Petitioner ordered the hearing Transcript. After the hearing, the undersigned issued an Order on March 29, 2021, requesting that the parties address the applicability of the First District Court of Appeal's recent decision in *Cabrera v. State of Florida, Agency for Health Care Administration*, issued on March 29, 2021, in Case No. 1D18-755 and any

related case. Both parties did so and timely filed proposed final orders, which were reviewed and 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.

FINDINGS OF FACT

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

PARTIES' STIPULATED FACTS

1. On June 23, 2016, Mr. Sharpe was operating a motor scooter and was seriously injured after he had a collision with an automobile. Mr. Sharpe died on July 17, 2019.

2. Mr. Sharpe was survived by his wife, Angela D. Sharpe.

3. Medicaid claims that Mr. Sharpe's medical care, related to the injuries, was paid in the amount of \$119,687.65 by AHCA. Mr. Sharpe's entire claim for past medical expenses based on liens was \$133,423.67.

4. The death certificate related Mr. Sharpe's death to the collision.

5. Angela D. Sharpe was appointed Personal Representative of the Estate of Thomas Kenneth Sharpe.

6. Angela D. Sharpe, as the Personal Representative of the Estate of Thomas Kenneth Sharpe, deceased, brought a wrongful death action to recover both the individual statutory damages of Mr. Sharpe's surviving spouse, as well as the individual statutory damages of the Estate of Thomas Kenneth Sharpe, deceased and a survival claim against the operator of the automobile. ("Defendant").

7. The case was settled through a settlement in the amount of \$100,000.00.

8. During the pendency of the action, AHCA was notified of the action and AHCA asserted a \$119,687.65 Medicaid lien against the Estate of Thomas Kenneth Sharpe's cause of action and settlement of that action.

9. By letter, AHCA was notified of the settlement. This letter requested AHCA to advise as to the amount AHCA would accept in satisfaction of the \$119,687.65 Medicaid lien

10. AHCA calculated its payment pursuant to the section 409.910(11)(f) formula based on the gross \$100,000.00 settlement, under which AHCA demanded \$29,353.30.

OTHER STIPULATIONS OF THE PARTIES

11. Based on AHCA's claimed lien of \$119,687.65, Petitioner and AHCA agree that application of the formula at section 409.910(11)(f) to the \$100,000.00 settlement amount requires payment to AHCA in the amount of \$29,353.30, if that amount is less than AHCA's lien.

12. Petitioner and AHCA agree that pursuant to section 409.910(17)(b), Petitioner may contest the amount payable to AHCA per the formula in section 409.910(11)(f) by filing a Petition with DOAH.¹

13. Petitioner and AHCA agree that DOAH has jurisdiction, pursuant to section 409.910(17)(b), to determine the "portion of a total recovery which should be allocated as past medical expenses," including when the total recovery is an unallocated lump-sum settlement.

ADDITIONAL EVIDENCE AT THE HEARING

14. At the final hearing, Sharpe presented expert testimony from several qualified attorneys who either represented Mr. Sharpe for his claims

¹ As explained further herein, this stipulation is contrary to, or, at least, is severely undermined by the law outlined by the *Cabrera* case.

(Silverstein), defended the opposing party defendant (Bedard), or reviewed the file and case documents in preparation for the hearing (Bush).

15. The thrust of Petitioner's evidence was to establish an evidentiary basis to justify the application of the pro rata or proportionality test--one method frequently utilized by litigants to reduce AHCA's lien. *See generally Eady v. State, Ag. For Health Care Admin.*, 279 So. 3d 1249 (Fla. 1st DCA 2019).

16. However, application of the Medicaid lien principles articulated in *Cabrera* fully dispose of this case. The recitation of additional facts and opinions regarding the qualifications of the experts or the appropriate methodology to use is unwarranted. It is unnecessary and improper to reach any remaining issues as judicial restraint requires that the undersigned resolve this case on the narrowest possible grounds. *Digiport, Inc. v. Forum Development BFC, LLC*, 2020 WL 7379128, N. 5, (Dec. 16, 2020)(Florida Third District Court of Appeal)(Applying the principle of judicial restraint); *The Bank of New York Mellon Corp. v. Hernandez*, 299 So. 3d 461, 466, concurring opinion by Fernandez (Fla. 3rd DCA, 2020)

17. It was undisputed that the settlement of the underlying wrongful death case occurred *after* Mr. Sharpe had passed away from his injuries related to the automobile accident.

18. These are the relevant and material facts necessary to establish a basis for the conclusions and ultimate action taken in this Final Order. As explored more fully below, because Mr. Sharpe died before the settlement agreement was reached, the anti-lien provisions of the Medicaid Act do not apply to limit the recovery by AHCA, which properly utilized the formula found at section 409.910(11)(f). *Cabrera v. State of Fla., Ag. for Health Care Admin.*, 2021 WL 1152328 (Mar. 26, 2021).

CONCLUSIONS OF LAW

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

20. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

FEDERAL MEDICAID LAW OF GENERAL APPLICABILITY

21. "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.*

22. 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.

23. 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" provisions at 42 U.S.C. § 1396p(a)(1) generally prohibit a Medicaid lien on any proceeds from a Medicaid recipient's tort settlement.

24. However, the provisions requiring states to seek reimbursement of their Medicaid expenditures from liable third parties, 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.

25. 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).

26. In this case, Petitioner settled the personal injury/wrongful death claim against a third party who was liable for Mr. Sharpe's damages related to AHCA's Medicaid lien, and for Mrs. Sharpe's damages. Therefore, AHCA's lien may be enforced against Sharpe's tort settlement.²

27. Notably, and of paramount importance to the proper resolution of this dispute, Mr. Sharpe succumbed to his injuries and passed away *prior* to the settlement of the wrongful death case.

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

² However, to the extent and degree that the \$100,000.00 undifferentiated settlement included intangible damages Mrs. Sharpe may have suffered, those damages would not be recoverable by AHCA. Regardless, there was no credible or persuasive testimony at the hearing to quantify what portion of the settlement was for her damages.

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.

29. 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).

30. Here, the parties agreed that application of the section 409.910(11)(f) formula to Petitioner's settlement would require payment to AHCA of \$29,353.30.

31. Another corresponding section, section 409.910(17)(b), outlined below, provides a method by which a Medicaid recipient, under certain circumstances, may challenge the amount AHCA seeks under the formula found above at section 409.910(11)(f).

32. 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.

33. In simple terms, if a qualified Petitioner can demonstrate that the portion of a settlement fairly allocable as payment for past medical expenses is less than the amount the Agency seeks, then the amount Petitioner is obligated to pay to AHCA for its lien would be reduced.

APPLICATION OF THE FEDERAL ANTI-LIEN STATUTE IN THIS CASE

34. Federal law imposes some limits on a state's authority to recover medical expenses paid by Medicaid. One limit is imposed by the federal Medicaid "anti-lien" statute, 42 U.S.C. § 1396p(a)(1). It provides, in

pertinent part, that: "[n]o lien may be imposed against the property of any individual *prior to his death* on account of medical assistance paid or to be paid on his behalf under the State plan," except under specified circumstances. 42 U.S.C. § 1396p(a)(1) (emphasis added).

35. Notably, however, Florida case law addressing the interplay between this federal anti-lien statute and section 409.910 has consistently held that in cases where the Medicaid recipient dies *before* the settlement of an action for third-party benefits, the federal anti-lien statute does not operate to preempt or negate the applicability of section 409.910(11)(f). In those cases, the formula under section 409.910(11)(f) governs the distribution of benefits recovered from a third-party. *Goheagan v. Perkins*, 197 So. 3d 112 (Fla. 4th DCA 2016) and *Estate of Hernandez v. Ag. for Health Care Admin.*, 190 So. 3d 139 (Fla. 3d DCA 2016).

36. This principle of Medicaid recovery law was recently reaffirmed by the First District Court of Appeal in *Cabrera v. State of Florida, Agency for Health Care Administration*, 2021 WL 1152328 (Mar. 26, 2021). Under very similar facts involving a tragic accident where the victim died before the underlying wrongful death case was settled, the court announced several controlling principles that drive the outcome of this case as well.

37. First, the court determined:

While nothing in section 409.910(17)(b) expressly prohibits a deceased Medicaid recipient or her personal representative from challenging the amount payable to the Agency, the statute unambiguously states that a recipient may challenge the amount payable “[i]f federal law limits the agency to reimbursement from the recovered medical expense damages.” Federal law did not limit the Agency to reimbursement in the present case.

38. The court added:

Medicaid is a joint federal-state cooperative program, and participating states must comply with certain statutory requirements. *Eady*, 279 So. 3d at 1254–55 (citing *Giraldo v. Agency for Health Care Admin.*, 248 So. 3d 53 (Fla. 2018)). Among those requirements are the anti-lien provision (42 U.S.C. § 1396p(a)), the anti-recovery provision (42 U.S.C. § 1396p(b)), and the forced-assignment provisions (42 U.S.C. § 1396k) of the Federal Medicaid Act. As detailed below, none of these limits the Agency's reimbursement for purposes of section 409.910(17)(b) *when a Medicaid recipient is deceased*.

(emphasis added).

39. Of particular importance to this case, the court unequivocally stated:

The federal anti-lien provision states, “[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan ...” 42 U.S.C. § 1396(p)(a)(1) (2017). *Thus, by its express terms, the Medicaid Act's anti-lien provision applies only to living Medicaid recipients. Estate of Hernandez v. Agency for Health Care Admin.*, 190 So. 3d 139, 143–46 (Fla. 3d DCA 2016) (citing *Austin v. Capital City Bank*, 353 P.3d 469 (Kan. Ct. App. 2015)).

(emphasis added).

40. After analyzing both the federal anti-lien and forced-assignment provisions, and concluding that neither applied, the *Cabrera* court affirmed the administrative law judge's dismissal of the petition challenging AHCA's Medicaid lien and concluded:

Nothing in the federal anti-lien, anti-recovery, or forced-assignment provisions apply to limit the Agency's reimbursement or allow Appellant to challenge the amount of medical expenses

allocated under the formula in the present case. To hold otherwise would contradict statutory provisions and clear legislative intent: “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.”

§ 409.910(1), Fla. Stat. (2017).

41. As outlined above, because this case involves the recovery and settlement of third-party benefits *after* the death of the Medicaid recipient, Mr. Sharpe, section 409.910(17)(b) does not afford Petitioner the right to challenge Respondent's recovery pursuant to the formula AHCA utilized found in section 409.910(11)(f). *Cabrera*, 2021 WL 1152328 (Mar. 26, 2021).

42. The parties stipulated that Petitioner was entitled to contest the amount payable to AHCA under the formula found in section 409.910(11)(f). JPBS, p. 7.

43. However, under the circumstances of this case and due to Mr. Sharpe's death prior to the settlement, his challenge, regrettably, fails since his challenge ultimately relies on the Medicaid Act's anti-lien provisions, which only apply to living Medicaid recipients. *Cabrera*, 2021 WL 1152328 (Mar. 26, 2021).

44. To the extent the parties' stipulations seek to circumvent or ignore the application of *Cabrera*, their agreement must be rejected.

45. There is no question in the mind of the undersigned that Mr. Sharpe's family has suffered, and continues to suffer, a tragic loss.

46. The outcome of this Final Order may seem unfair. However, the Florida Legislature has clearly stated that equity cannot serve as the basis for reducing a Medicaid lien. § 409.910(6)(a) and (b)2., Fla. Stat.

47. As compelling as the circumstances of this proceeding may be, the undersigned is constrained and obliged to follow the law. Here, the

applicable law, discussed in detail above, dictates that pursuant to section 409.910(11)(f), Respondent is entitled to recover \$29,353.30 in third-party benefits paid to Petitioner through settlement of his action in tort.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED AND ADJUDGED that the Petition to Determine Medicaid Lien filed by Angela Sharpe, as Personal Representative of the Estate of Thomas Kenneth Sharpe, deceased, is dismissed with prejudice, and Respondent is entitled to recover \$29,353.30 under the formula outlined in section 409.910(11)(f).

DONE AND ORDERED this 30th day of April, 2021, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
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this 30th day of April, 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.