STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAY A. SIEWERT AND ROSE E. SIEWERT,

Petitioners,

vs. Case No. 21-1654MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on June 29, 2021, by Zoom conference, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Jason D. Lazarus, Esquire
2420 South Lakemont Avenue, Suite 160
Orlando, Florida 32814

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

STATEMENT OF THE ISSUE

The issue to be determined is the amount to be reimbursed to Respondent, Agency for Health Care Administration (Respondent or AHCA), from settlement proceeds received from third parties by Petitioners, Ray A. Siewert and Rose E. Siewert, for medical expenses paid on behalf of Petitioner, Mr. Siewert.

PRELIMINARY STATEMENT

On May 21, 2021, Petitioners filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien, by which they challenged AHCA's lien for recovery of medical expenses paid through AHCA's Medicaid program. Through the Petition, and as specified in the Joint Pre-hearing Stipulation, the amount of AHCA's lien is $33,836.09. The basis for the challenge was the assertion that the application of section 409.910(17)(b), Florida Statutes, warranted reimbursement of a lesser portion of the total third-party settlement proceeds than the amount calculated by AHCA pursuant to the formula established in section 409.910(11)(f).

The final hearing was scheduled for June 29, 2021, and was held as scheduled.

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

At the final hearing, Petitioners presented the testimony of Jonathan T. Gilbert, Esquire, who represented Petitioners in the medical malpractice action from which the third-party settlement proceeds were obtained, and T'anjuiming "Ming" Marx, Esquire. Both Mr. Gilbert and Mr. Marx were accepted, without objection, as experts in valuation of damages. Petitioners' Exhibits 1 through 4 were received into evidence. AHCA offered no independent witnesses or exhibits.

The hearing was not transcribed. The parties agreed to file their proposed final orders within 10 days of the closing of the final hearing. Both parties timely filed Proposed Final Orders, which have been duly considered in the preparation of this Final Order.

All citations are to the 2020 Florida Statutes, except as otherwise indicated.

FINDINGS OF FACT

Stipulated Findings of Fact

1. On October 15, 2017, the Siewerts were involved in a motorcycle versus automobile crash, which required extensive hospital, skilled nursing, therapy, and other medical treatment including, but not limited to, a four-level spinal fusion procedure and rehabilitative care and services for Mr. Siewert and multiple leg surgeries for Mrs. Siewert, that ultimately led to an above-the-knee amputation (hereinafter referred to as the "auto claims").

2. On January 3, 2018, Mr. Siewert was discharged from a rehabilitation facility to his home, where he began receiving home health nursing, physician, and therapy services.

3. On January 22, 2018, Mr. Siewert was diagnosed with an abscess near his surgical site, which was allegedly not properly addressed in the days that followed.

4. On January 31, 2018, Mr. Siewert was hospitalized due to worsening neurological deficits, namely in his lower body, and he was transferred to the hospital that had performed his prior spinal surgery.

5. On February 1, 2018, Mr. Siewert had another spinal surgery to address an abscess compressing on his spinal cord, leading to the decreased neurological function.

6. The damage done to his spinal cord preoperatively was significant enough that he has been unable to walk since January 31, 2018, and remains bedbound to present.

7. Mr. Siewert has a neurogenic bladder/bowel, wears diapers, has to be catheterized multiple times per day,[1] and is unable to ambulate. To date, he is living with his wife in a single room residence at a skilled nursing facility in the Orlando area, where he is expected to remain.[2]

8. The Siewerts brought the following claims: negligence claims relating to the auto claims; nursing home neglect claims under chapter 400, Florida Statutes; and medical malpractice claims under chapter 766, Florida Statutes, each of which were pursued against several companies/entities, individuals, and healthcare providers, seeking, in part, compensable damages to the Siewerts for past bills and future economic needs as well as noneconomic mental pain and suffering and consortium claims for their injuries and losses.

9. In April 2021, the Siewerts settled one of the medical malpractice claims for a limited confidential amount.

10. The Siewerts have had a health plan with Aetna Better Health of Florida, which is a Medicaid plan through AHCA, that has retained the services of Equain relating to the settlement of part of the Siewerts' medical malpractice claims (referred to below as "Aetna").

11. Aetna was properly notified of the Siewert's medical malpractice claims against those defendants and indicated it had paid benefits related to the injuries from the incident in the amount of $75,923.82, as it relates to the settlement at issue. Through their counsel, the Siewerts have asked Aetna to accept a reduced lien amount given the other claims still pending and large

[1] The evidence adduced at hearing indicates that Mr. Siewert has now been fitted with a permanent abdominal suprapubic catheter.

[2] Though Mrs. Siewert could manage in an assisted living facility, Mr. Siewert could not. Thus, Mrs. Siewert has chosen to stay in the skilled nursing facility to be with her husband.

total case value. Nonetheless, Aetna has continued to assert a lien, for the amount of $75,923.82, against the Siewerts' settlement proceeds relating to the single settlement.

12. Aetna has maintained that it is entitled to application of section 409.910's formula to determine the lien amount. Applying the statutory reduction formula to this particular settlement would result in no reduction of this lien given the amount of the settlement.

13. The Siewerts also have been covered by AHCA's fee-for-service Medicaid program. AHCA has contracted with Health Management Systems and Conduent to run its recovery program.

14. AHCA was properly notified of the Siewerts' medical malpractice claims against those defendants. AHCA provided medical assistance benefits related to the injuries from the incident in the amount of $33,836.09. Through their counsel, the Siewerts have asked AHCA to accept a reduced lien amount. AHCA has continued to assert a lien for the amount of $33,836.09, against the Siewerts' settlement proceeds relating to the single settlement.

15. AHCA has maintained that it is entitled to application of section 409.910's formula to determine the lien amount. Applying the statutory reduction formula to this particular settlement would result in no reduction of this lien given the amount of the settlement.

16. AHCA's $33,836.09 payment and Aetna's $75,923.82 payment total $109,759.91, and this amount constitutes Mr. Siewert's claim for past medical expense damages.

17. There remain claims against numerous other defendants which also relate to the AHCA and Aetna liens at issue, including all remaining defendants in the auto and medical malpractice claims.

18. Repayment to AHCA's Medicaid program is prioritized by law and contract over Medicaid-managed care plans

Facts Adduced at Hearing

19. During the pendency of the medical malpractice action, AHCA was notified of the action. AHCA did not commence a civil action to enforce its rights under section 409.910, nor did it intervene or join in the medical malpractice action against the Defendants. AHCA has not filed a motion to set aside, void, or otherwise dispute the settlement.

20. The Medicaid program, through AHCA, spent $33,836.09 on behalf of Mr. Siewert, all of which represents expenditures paid for past medical expenses. No portion of the $33,836.09 paid by AHCA through the Medicaid program on behalf of Mr. Siewert represented expenditures for future medical expenses. The $33,836.09 in Medicaid funds paid by AHCA is the maximum amount that may be recovered by AHCA.

21. There was no evidence of the taxable costs incurred in securing the settlement.

22. Application of the formula at section 409.910(11)(f) to the settlement requires payment to AHCA of the full $33,836.09 Medicaid lien asserted by AHCA, and the full $75,923.82 Medicaid lien asserted by Aetna.

23. Petitioners have deposited the full Medicaid lien amount in an interest-bearing account for the benefit of AHCA pending an administrative determination of AHCA's rights, and this constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17).

24. There was no suggestion that the monetary figure agreed upon by the parties represented anything other than a reasonable settlement.

25. The evidence firmly established that Mr. Siewert incurred economic damages, consisting of lost future earnings, past medical expenses, and future medical expenses. Mr. Gilbert and Mr. Marx testified that those economic damages totaled roughly $2,000,000. However, the economic loss analysis upon which their testimony was based showed a total of $1,770,775

in future life care needs for Mr. Siewert, reduced to present value.[3] The only direct evidence of past medical expenses was the $109,759.91 in Medicaid expenditures. There was no evidence of other economic damages. Thus, the evidence established that economic damages total $1,880,534.90.

26. The total amount of damages for Mr. Siewert was calculated to be $10,000,000, which was described as a conservative figure based on the knowledge and experience of Mr. Gilbert and Mr. Marx, and based on an analysis of representative jury verdicts involving comparable facts and damages. However, Mr. Gilbert engaged in a more detailed analysis of Mr. Siewert's non-economic damages, which requires review.

27. Although comparable jury verdicts suggest that it could be considerably more, Mr. Gilbert testified that his calculation, though subjective, would include $3,000,000 in non-economic damages in the past three years, and an additional $4,000,000 in non-economic damages into the future based upon a projected 12-year life expectancy, for a total amount of non-economic damages of $7,000,000. That figure was accepted by both of the testifying experts.

28. As part of Petitioners' calculation of the total value of the claim was $1,000,000 in loss-of-consortium damages incurred by Mrs. Siewert. Although the loss of consortium technically applies to the loss of the full marital relationship previously enjoyed by Mrs. Siewert, who is not the Medicaid recipient, that value was included as an element of the claim and settlement.

29. Based on the forgoing, the evidence supports, and it is found that $9,880,534.90, as a full measure of Petitioners' combined damages, is a conservative and appropriate figure against which to calculate any lesser

[3] Respondent objected to the life care plan on the basis of hearsay. However, the plan was not being offered for the truth of the matter asserted, i.e., that Mr. Siewert would be expected to incur $1,770,775 for future care, but was offered as evidence of the more general value of a claim in litigation. Furthermore, the life care plan, even if inadmissible, could be used as support of an expert opinion as to claim valuation "when those underlying facts are of a type relied upon by experts in the subject to support the opinions expressed." Charles W. Ehrhardt, *Florida Evidence*, § 704.1 (2020 Edition). A life care plan is evidence that, for that purpose, would "be sufficiently trustworthy to make the reliance reasonable." *Id.*

portion of the total recovery that should be allocated as reimbursement for the Medicaid lien for past medical expenses.

30. The full value of the settlement is 5.06 percent of the $9,880,534.90 value of the claim.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes.

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

33. The Medicaid program "provide[s] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980). Though participation is optional, once a state elects to participate in the Medicaid program, it must comply with federal requirements governing the same. *Id.*

34. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who later recover from legally liable third parties. *See* 42 U.S.C. § 1396a(a)(25); § 409.910(4), Fla. Stat.; *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 276 (2006).

35. Consistent with this federal requirement, the Florida Legislature has enacted section 409.910, which authorizes and requires the state to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment, award, or settlement from a third party. *Smith v. Ag. for Health Care Admin.*, 24 So. 3d 590 (Fla. 5th DCA 2009).

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

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

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

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

38. The statute creates an automatic lien on any such judgment, award, or settlement for the medical assistance provided by Medicaid. § 409.910(6)(c),

Fla. Stat. In addition, section 409.910(7) authorizes AHCA to recover payments paid from any third party, the recipient, the provider of the recipient's medical services, or any person who received the third-party benefits.

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

40. AHCA is not automatically bound by any allocation of damages set forth in a settlement between a Medicaid recipient and a third party that may be contrary to the formulaic amount. § 409.910(13), Fla. Stat. ("No action of the recipient shall prejudice the rights of [AHCA] under this section. No ... 'settlement agreement,' entered into or consented to by the recipient or his or her legal representative shall impair [AHCA]'s rights."); *see also* § 409.910(6)(c)7., Fla. Stat. ("No release or satisfaction of any ... settlement agreement shall be valid or effectual as against a lien created under this paragraph, unless [AHCA] joins in the release or satisfaction or executes a release of the lien.").

41. In cases such as this, where AHCA has not participated in or approved the settlement, the administrative procedure created by section 409.910(17)(b) is the means for determining whether a lesser portion of a total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f). "[W]hen AHCA has not participated in or approved a settlement, the administrative procedure created by section 409.910(17)(b), serves as a means for determining whether a lesser portion of the total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f)." *Eady v. Ag. for Health Care Admin.*, 279 So. 3d 1249, 1255 (Fla. 1st DCA

2019) (quoting *Delgado v. Ag. for Health Care Admin.*, 237 So. 2d 432, 435 (Fla. 1st DCA 2018)).

42. Section 409.910(17)(b) provides, in pertinent part, that:

> A recipient may contest the amount designated as recovered medical expense damages payable to [AHCA] 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 [AHCA] or after the date of placing the full amount of the third-party benefits in the trust account for the benefit of [AHCA] pursuant to paragraph (a). ... In order to successfully challenge the amount payable to [AHCA], 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 [AHCA] pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by [AHCA].

43. Section 409.910(17)(b) states that Petitioner's burden of proof to challenge the statutory lien is the clear and convincing evidence standard. Previously, a federal injunction barred AHCA from requiring the clear and convincing standard. However, the United States Court of Appeals for the Eleventh Circuit recently reversed the district court's decision, and, *inter alia*, held that the application of the "clear and convincing evidence" burden of proof does not violate federal law. *Gallardo v. Dudek*, 963 F.3d 1167, 1181 (11th Cir. June 26, 2020). Prior to the Eleventh Circuit's decision, Florida appellate courts applied the preponderance of the evidence standard prescribed under section 120.57(1)(j). To date, no Florida appellate court has applied the clear and convincing evidence standard in a Medicaid third-party recovery proceeding. The Florida Supreme Court has held that "[g]enerally, state courts are not required to follow the decisions of intermediate federal appellate courts on questions of federal law." *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007). The undersigned has considered this matter

under both the preponderance of the evidence and clear and convincing evidence standards.

44. A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not tends to prove a certain proposition." *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 871 (Fla. 2014).

45. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). The Florida Supreme Court further enunciated the standard:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.
>
> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986 (Fla. 1st DCA 1991).

46. The U.S. Supreme Court has interpreted the anti-lien provision in federal Medicaid law as imposing a bar which, pursuant to the Supremacy Clause, precludes "a state from asserting a lien on the portions of a

settlement not allocated to medical expenses." *See, e.g., Mobley v. Ag. for Health Care Admin.,* 181 So. 3d 1233, 1235 (Fla. 1st DCA 2015).

47. Under preemptive federal law as construed by the Florida Supreme Court, the state's Medicaid lien may attach only to that portion of a recipient's settlement recovery attributable to past medical expense damages, and section 409.910(17)(b) cannot be applied to allow AHCA to recover from future medical expense damages. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53, 54 (Fla. 2018).

48. Evidence of all past medical expenses must be presented, as AHCA may recover from the entirety of the past medical expense portion -- not just the portion that represents its lien. *Smith v. Ag. for Health Care Admin.*, 24 So. 3d 590 (Fla. 5th DCA 2009); *see also Garcia v. Ag. for Health Care Admin.*, Case No. 19-2013MTR, F.O. at ¶ 31 (Fla. DOAH Aug. 27, 2019)("The full amount of all past medical expenses must then be considered, not just the past medical expenses representing the amount of AHCA's lien."). Further, section 409.910(17)(b) grants the undersigned the power to find "the portion of the total recovery which should be allocated as past … medical expenses," and to limit AHCA to that amount. The statute does not authorize a reduction of the Medicaid lien based only on the AHCA-paid Medicaid portion of a recipient's recovery. Accordingly, the undersigned concludes that Petitioner's past medical expenses consist of the amounts provided by Medicaid ($33,836.09) and Aetna ($75,923.82). The sum of these benefits ($109,759.91) constitutes the total amount of Petitioner's past medical expenses.

49. With regard to the methodology for determining that portion of settlement proceeds to be allocated to past medical expenses, recent appellate decisions have accepted a proportional reduction as a valid, albeit nonexclusive, basis for making the required distribution. As the First District Court of Appeal explained:

> [W]hile not established as the only method, the pro rata [or proportional reduction] approach has been accepted in other Florida cases where the Medicaid recipient presents competent, substantial evidence to support the allocation of a smaller portion of a settlement for past medical expenses than the portion claimed by AHCA. *See Giraldo v. Agency for Health Care Admin.*, 248 So. 3d 53 (Fla. 2018); *Mojica v. Agency for Health Care Admin.*, 285 So. 3d 393 (Fla. 1st DCA 2019); *Eady v. State*, 279 So. 3d 1249 (Fla. 1st DCA 2019). *But see Willoughby v. Agency for Health Care Administration*, 212 So. 3d 516 (Fla. 2d DCA 2017) (quoting *Smith v. Agency for Health Care Administration*, 24 So. 3d 590, 591 (Fla. 5th DCA 2009)) (explaining that the pro rata formula is not the "required or sanctioned method to determine the medical expense portion of an overall settlement amount").

Ag. for Health Care Admin. v. Rodriguez, 294 So. 3d 441, 444 (Fla. 1st DCA 2020).

50. In *Bryan v. Agency for Health Care Administration*, 291 So. 3d 1033 (Fla. 1st DCA 2020), the Medicaid recipient settled a medical malpractice action for $3,000,000, and then initiated an administrative proceeding to adjust the Medicaid lien, which AHCA asserted should be payable in the full amount of approximately $380,000. *Id.* at 1034. At hearing, the recipient "offered the testimony of two trial attorneys who were both admitted as experts in the valuation of damages." *Id.* These witnesses relied upon a life care plan and an economist's report, which were filed as exhibits, as well as jury verdicts in similar cases, to support their opinion that "the value of [the recipient's] damages exceeded $30 million." *Id.*

51. The "experts both testified that, using the conservative figure $30 million, the $3 million settlement only represented a 10% recovery," and that, "based on that figure, it would be reasonable to allocate 10% of [the

recipient's] $381,106.28[4] claim for past medical expenses - $38,106.28 - from the settlement to satisfy AHCA's lien." *Id.* The recipient also "submitted an affidavit of a former judge," who affirmed that the proportional allocation was a reasonable, rational, and logical "method of calculating the proposed allocation." *Id.*

52. In upholding the validity of proportional reduction as a valid means of establishing a lesser portion of the total recovery subject to reimbursement pursuant to section 409.910(17)(b), the court explained that:

> [I]n this case, [the recipient] presented unrebutted competent substantial evidence to support that the value of her case was at least $30 million. She also presented unrebutted competent substantial evidence that her pro rata methodology did indeed support her conclusion that $38,106.28 was a proper allocation to her past medical expenses. Such methodology was similar to the methodology employed in *Giraldo*, *Eady*, and *Mojica*. AHCA did not present any evidence to challenge [the recipient's] valuation, nor did it present any alternative theories or methodologies that would support the calculation of a different allocation amount for past medical expenses.

Id.

53. A question arose in the course of the hearing as to the extent to which Mrs. Siewert's damages for loss of consortium, which were part of the claim and the settlement, should be included in the calculation of any proportional reduction of the Medicaid lien based on the percentage of damages recovered to the value of the claim. Though there is little directly on point, the case of *Agency for Health Care Administration v. Rodriguez*, 294 So. 3d 441 (Fla. 1st DCA 2020), is instructive. In that case, the court found that Mr. Rodriguez "had proved the value of his civil case," and that his case included noneconomic damages, including loss of consortium. *Id.* at 443.

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[4] The actual number was, as set forth at other places in the *Bryan* opinion, $381,062.84, which makes the 10 percent calculation correct.

54. Loss of consortium is a derivative right that inures to the spouse of an injured person. As established in the seminal case of *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971), in which an action for loss of consortium by the wife of an injured plaintiff was first recognized, the court held that:

> The rule that we now recognize is that the wife of a husband injured as a proximate result of the negligence of another shall have a right of action against that same person for her loss of consortium. We further hold that her right of action is a derivative right and she may recover only if her husband has a cause of action against the same defendant.

Id. at 45. The *Gates* court further explained "that any loss to the wife of her husband's material support is fully compensated by any award to him for impairment of his lost earning and that the wife is entitled to recover only for loss of consortium... ." *Id.*

55. The recognition by the *Rodriguez* court that loss of consortium damages are to be included as evidence of the total value of a claim, despite the fact that they do not inure to the Medicaid recipient, but rather to the spouse, is persuasive authority that they are to be considered in the calculation of a proportional reduction of the Medicaid lien.

56. In this case, as in *Bryan*, two expert trial attorneys gave unrebutted testimony to establish a conservative (and uncontested) appraisal of Petitioners' damages. The combined settlement for all of Mr. Siewert's economic and noneconomic damages represented 5.06 percent of the full, supported, and very conservative, $9,880,534.90 value of his damages. As in *Bryan*, the experts opined that a proportional reduction was the proper method of determining the portion of the recipient's recovery which should be allocated as past medical expenses. Their testimony, which was unrebutted, is credited.

57. The undersigned accepts the premise that the proportional reduction methodology, when established, as here, by unrebutted, competent

substantial evidence, provides a valid formula for determining the portion of the recipient's recovery which should be allocated as past medical expense damages.

58. Applying the more stringent of the evidentiary standards, Petitioners proved their case by clear and convincing evidence.

Summary

59. Petitioners have established that a lesser portion of the total recovery than the amount calculated pursuant to the formula in section 409.910(11)(f) should be reimbursed to AHCA as the proportionate share of the settlement proceeds fairly attributable to expenditures that were paid by AHCA for Petitioners' past medical expenses.

60. The total value of Petitioners' damages is, conservatively, $9,880,534.90.

61. The amount recovered by Petitioners in damages is 5.06 percent of the value of the total claim.

62. The appropriate amount from which the proportionate share of the Medicaid lien reimbursement should be calculated is the total amount of past medical expenses paid on behalf of Mr. Siewert by AHCA and Aetna Healthcare in the amount of $109,759.91.

63. Thus, since 5.06 percent of $109,759.91 is $5,553.85, that figure represents the appropriate proportionate share of the total recovery that should be allocated to the Medicaid lien.

CONCLUSION

Upon consideration of the above Findings of Fact and Conclusions of Law, it is, hereby,

ORDERED that:

The Agency for Health Care Administration is entitled to $5,553.85 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 16th day of July, 2021, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 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.