STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JARETH FOSTER,

Petitioner,

vs. Case No. 21-2087MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

This case came before Administrative Law Judge ("ALJ") John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing on September 14, 2021, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
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For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUES

The issues for determination are whether a lesser portion of Petitioner's total recovery from a third-party tortfeasor should be designated as recovered medical expenses than the share presumed by statute; and, if so, what is the amount of Petitioner's recovery to which Respondent's Medicaid lien may attach?

PRELIMINARY STATEMENT

Petitioner Jareth Foster ("Foster") settled a personal injury action for $888,000.00. Respondent Agency for Health Care Administration (the "Agency" or "AHCA") asserted its intent to enforce a Medicaid lien in the amount of $324,425.61 against this recovery. The Agency relies, as is its right, on the formula set forth in section 409.910(11)(f), Florida Statutes, to determine that portion of the settlement which should be allocated as past medical expense damages.

Foster objected to this presumptive allocation of the recovery, and, on June 30, 2021, he timely filed a petition with DOAH to contest the default amount designated by statute as recovered medical expense damages payable to the Agency.

On September 7, 2021, the parties filed a Joint Pre-hearing Stipulation, which contains a statement of facts that "are admitted and will require no proof at hearing." As a result, many of the material historical facts of this case are undisputed.

At the final hearing, which took place as scheduled on September 14, 2021, with both parties present, Foster called trial attorneys Richard Perlini and Karen Gievers as witnesses. Petitioner's Exhibits 1 through 6 were received in evidence without objection. The Agency rested without offering any evidence.

The final hearing transcript was filed on October 11, 2021. The parties timely filed proposed final orders on October 25, 2021, which have been considered.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2021.

FINDINGS OF FACT

1. On May 23, 2020, Foster, who was then 17 years old, was a passenger in a car that struck a tree and burst into flames. He was pulled from the burning wreck by a heroic bystander but suffered catastrophic and permanent injuries. These included fractures to both legs, which required orthopedic surgery, and severe burns over 60 percent of his body, which led, in turn, to multiple surgeries, finger amputations, and disfiguring scarring. Foster is permanently disabled. He cannot eat without having his mother cut his food into small bites, and he must drink through a straw. Even friends avoid him due to his appearance. Foster will suffer from these terrible injuries for the rest of his life.

2. Foster's injury-related medical care was paid for by Medicaid. As the state Medicaid agency, AHCA paid medical bills totaling $934,002.58. It is undisputed that this sum constitutes Foster's entire damages claim for past medical expenses.

3. Foster pursed a personal injury claim against the parties (the "Defendants") allegedly liable for his damages. The Defendants' liability insurance was limited to $250,000.00 in coverage, which would be woefully inadequate to compensate Foster for his losses, assuming Foster prevailed. The parties eventually settled Foster's personal injury lawsuit through a series of confidential settlements, pursuant to which Foster received an unallocated lump-sum payment of $888,000.00. This figure exceeded the limits of available insurance but is a mere fraction of Foster's monetary damages.

4. AHCA elected not to present evidence at hearing bearing on the relative strength of Foster's tort case on the question of liability. Based on the limited record on this point, the undersigned finds that Foster likely would have

prevailed had his personal injury suit been tried to conclusion. In view of the extremely high value of his total damages ("Total Value"), which will be discussed below, it is likely (based, again, on the limited record) that Foster accepted a settlement of $888,000.00, not because he had a weak case, but because the Defendants simply did not have the wherewithal to satisfy a multi-million dollar judgment, much less an award likely to be in the tens of millions of dollars.

5. AHCA was timely notified of Foster's personal injury action. AHCA did not "institute, intervene in, or join in" the personal injury action to enforce its rights as provided in section 409.910(11), or participate in any aspect of the personal injury action against the Defendants. Instead, AHCA asserted a Medicaid lien against Foster's cause of action and settlement of that action. By letter, AHCA was notified of the settlement. AHCA has not filed a motion to set-aside, have declared void, or otherwise disputed Foster's settlement.

6. As mentioned, the Medicaid program, through AHCA, spent $934,002.58 on behalf of Foster, all of which represents expenditures paid towards Foster's past medical care and treatment. Foster's taxable costs incurred in securing the $888,000.00 settlement totaled $17,148.78. Application of the section 409.910(11)(f) formula to Foster's $888,000.00 recovery produces a statutory default allocation of $324,425.61 in settlement funds to past medical expenses.

7. There is no dispute that, under the anti-lien provisions in the federal Medicaid statute, the Medicaid lien attaches only to the portion of Foster's recovery attributable to past medical expenses. Foster's recovery, however, was an undifferentiated lump-sum payment, meaning that the parties did not negotiate an apportionment of the settlement proceeds as between the several categories of damages comprising the Total Value of Foster's loss.

8. The ultimate question presented is whether the Agency's default distribution, in the amount of $324,425.61, reflects "the portion of the total recovery which should be allocated" to Foster's recovery of past medical

damages, or whether a lesser sum, from the total settlement, "should be allocated" to the recovery of past medical damages. It is Foster's burden to prove that the statutory allocation is greater than the amount which "should be" distributed to the Agency, and that the default Medicaid lien amount "should be" adjusted to better reflect the portion of the plaintiff's total recovery attributable to past medical expenses.

9. To meet his burden, Foster presented evidence at hearing, as is now typically done in cases such as this, with the goal of establishing the "true value" of the plaintiff's damages. Usually, and again as here, this evidence comes in the form of opinion testimony, from a trial attorney or attorneys who specialize in personal injury law and represent plaintiffs in negligence actions.

10. Foster called two experienced plaintiff's personal injury lawyers, one of whom represented him in the underlying personal injury lawsuit, to give opinions on the valuation of his damages. The undersigned finds the opinions of these attorneys on valuation of damages to be credible and persuasive. Moreover, the Agency did not offer any evidence to challenge Foster's proof of the full value of the plaintiff's damages. Having no evidential basis for discounting or disregarding the opinions of Foster's expert witnesses, the undersigned bases the findings on valuation that follow upon their unchallenged testimony.

11. Foster is requesting—and his expert witnesses opined— that the Medicaid lien should be adjusted according to a method that will be referred to herein as a "proportional reduction." A proportional reduction adjusts the lien so that the Agency's recovery is discounted in the same measure as the plaintiff's recovery. In other words, if the plaintiff recovered 25% of the "true value" of his damages, then, under a proportional reduction, the Medicaid lien is adjusted so that the Agency recovers 25% of the plaintiff's past medical damages.

12. The mathematical operation behind a proportional reduction is simple and requires no expertise. Using "r" to signify the plaintiff's recovery; "v" to represent the "value" of his damages; "m" for past medical expenses; and "x" as the variable for the adjusted lien amount, the equation is: $(r \div v) \times m = x$. In these cases, the only unknown number (usually) is v, i.e., the "value" of the plaintiff's total damages.

13. "True value," sometimes also called "full value" or "total value," is an elusive concept, given that the actual, true value of damages which have not been liquidated by a judgment is not, and cannot be, known in a case that settles before the entry of a judgment.

14. The uncontested and unimpeached expert testimony in this case establishes, by any standard of proof, that the "true value" of Foster's damages lies somewhere between $20 million and $60 million, and is no less than $20 million, which is the most conservative figure presented by Foster's witnesses, Richard Perlini, Esquire, and Karen Gievers, Esquire. Thus, the undersigned finds as a matter of ultimate fact that the Total Value is $20 million.

15. It is true that, except for past medical damages, Foster's expert witnesses did not have discrete numbers for Foster's economic damages such as lost wages and future medical expenses. Their opinions focused on the likely gross jury award without differentiating the components of such a verdict. Such opinions are sufficiently precise, however, for the purposes of this case. This is because Foster's noneconomic damages for past and future pain and suffering, mental anguish, loss of capacity for the enjoyment of life, etc., which are compensable but cannot be objectively quantified, so eclipse the quantifiable economic damages as to make the latter almost a rounding error. As a practical matter, setting the Total Value at $20 million (instead of, say, $50 million, which the evidence would also support) eliminates any issue regarding the value of Foster's economic losses. There is no getting

around the fact that the settlement is paltry in relation to Foster's total damages, at most reflecting only a small percentage thereof.

16. Ms. Gievers testified that because Foster recovered only 4.44 percent of the Total Value of his damages, conservatively appraised, it stands to reason that he recovered only 4.44 percent of his total past medical damages ($934,002.58), a sum equal to $41,469.71. Ms. Gievers testified that it would be reasonable to allocate $41,469.71 of the settlement to past medical expenses and thereby limit the Medicaid lien to that amount. Mr. Perlini, the other expert on allocation methodology, concurred.[1]

17. An allocation of $41,469.71 from the settlement to past medical expenses, pursuant to the proportional reduction methodology, would be consistent with the expert testimony presented in this case (and other Medicaid lien adjustment cases) and supported by the case law.

18. Once Foster made a prima facie showing of Total Value by adducing competent substantial evidence thereof, and offered expert testimony regarding the proportional reduction methodology, the Agency might have introduced some evidence that would have given the fact-finder an evidentiary basis for discounting or rejecting the $20 million Total Value figure, or for rejecting the pro-rata allocation method.[2] The Agency, however,

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[1] AHCA argues that Mr. Perlini neither understood the proportional reduction formula, nor comprehended the mathematical operation behind it. The undersigned rejects this characterization. To be sure, when asked on cross-examination to explain the math, Mr. Perlini seemed slightly confused and came across as somewhat inarticulate relative to the rest of his testimony; it is fair to say that he was unprepared to "run the numbers" while testifying. But the undersigned puts little weight on this. Performing the mathematical operation (especially while testifying) is much less important than grasping the rationale behind the proportional reduction approach. Mr. Perlini clearly understood the concept, i.e., that a settlement-to-value ratio is used to discount *all* of the damages, including total past medical expenses, so that AHCA's percentage of recovery matches the plaintiff's.

[2] To be clear, the undersigned is not shifting the burden of proof to the Agency. The Agency is not *required* to put on any such evidence. The Agency is free to present no evidence, rely solely on cross-examination of the petitioner's witnesses to undermine the testimony elicited by the petitioner on direct, and then argue that the petitioner has failed to meet his burden of proof—as the Agency has done in this case. If the Agency takes this approach, however, it loses the opportunity affirmatively to prove that the Total Value is too high, and it risks a

elected not to present evidence, preferring instead to *argue* that Foster has failed to prove that the particular medical-expense allocation he advocates should be made, and that, as a result, the default, statutory allocation should be made. As far as the *evidence* goes, therefore, the undersigned has no reasonable basis for rejecting the full value figure of $20 million, which Foster's witnesses established, via credible and compelling expert opinion, was a conservative appraisal of Foster's total damages, or for declining to use the proportional reduction approach.

19. The opinion testimony elicited at hearing, in addition to being unchallenged and unimpeached, is otherwise persuasive to the fact-finder and convincingly establishes that the probable "full value" of Foster's damages, i.e., ***v*** in the proportional reduction formula, is $20 million. The unchallenged expert testimony convincingly shows, as well, that a proportional reduction methodology appropriately identifies the "portion of the total recovery which should be allocated" in this case as past medical expense damages.

20. Accordingly, the undersigned determines as a matter of ultimate fact that the portion of Foster's $888,000.00 recovery that "should be allocated" to past medical expenditures is $41,469.71, or 4.44 percent of Foster's total past medical expenses.

finding that the unrebutted evidence of Total Value is a fair reflection of the full value of the petitioner's damages. If, however, the Agency presents evidence of full value, or settlement value, or some alternative value, then the petitioner must rebut the evidence and try to overcome it, for the petitioner bears the ultimate burden of persuasion with regard to establishing the value of the petitioner's damages.

CONCLUSIONS OF LAW

21. DOAH has personal and subject matter jurisdiction in this proceeding, as well as final order authority, pursuant to section 409.910(17)(b).

22. Section 409.910(1) provides as follows:

> 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.

23. Section 409.910(6)(c) provides, in relevant part, as follows:

> The agency is entitled to, and has, an automatic lien for the full amount of medical assistance provided by Medicaid to or on behalf of the recipient for medical care furnished as a result of any covered injury or illness for which a third party is or may be liable, upon the collateral, as defined in s. 409.901[, which includes "[a]ny and all causes of action, suits, claims, counterclaims, and demands that accrue to the recipient or to the recipient's legal representative, related to any covered injury, illness, or necessary medical care, goods, or services that necessitated that Medicaid provide medical assistance"].

24. Section 409.910(11)(f) provides, in pertinent part, as follows:

> 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.

25. Section 409.910(17)(b) provides as follows:

> 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). 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.

26. Section 409.910 provides no guidance, instructions, or criteria that the ALJ is required to consider in determining the portion of a recipient's total recovery which "should be allocated" as medical expenses, nor does it prohibit the ALJ from considering any specific criteria or from using any particular methodology. This lack of specific statutory standards limiting the decision-maker's discretion extends to the recipient, as well, who must prove that some amount less than the default allocation "should be allocated" to medical expense damages, without any clear statutory direction as to what must be proved to make the required showing.

27. 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. State*, 181 So. 3d 1233, 1235 (Fla. 1st DCA 2015).

28. In *Gallardo v. Dudek*, 963 F.3d 1167, 1181-82 (11th Cir. 2020), the U.S. Eleventh Circuit Court of Appeals held that Florida's statutory formula is *not* preempted by federal law. Under *Dudek*, the Medicaid lien may attach to *all* medical expenses recovered, including damages for future care and treatment, and the standard of proof by which the recipient must rebut the formulaic allocation is clear and convincing evidence. *Id.* at 1178-79, 1182.

29. In *Giraldo v. Agency for Health Care Administration*, 248 So. 3d 53, 54 (Fla. 2018), however, the Florida Supreme Court ruled that, under preemptive federal law, the state's Medicaid lien may attach only to that portion of a recipient's settlement recovery attributable to *past* medical expense damages. Thus, the Florida Supreme Court held that section 409.910(17)(b) is invalid and unenforceable to the extent it would allow the Agency to recover from future medical expense damages. As an authoritative decision of the state's highest court, *Giraldo* is binding precedent on all lower courts, which a state ALJ, applying state law, must follow. *See Dudek*, 963 F.3d at 1192-93 ("Florida Medicaid recipients will now head to state administrative court to benefit from the Florida Supreme Court's holding in *Giraldo*.") (Wilson, J., concurring in part and dissenting in part).

30. Florida state courts have not held that the clear and convincing standard of proof as prescribed in section 409.910(17)(b) is preempted or otherwise unenforceable. Foster has proved his case by clear and convincing evidence, as required by statute.

31. Regarding the methodology for determining that portion of the total recovery which should be allocated to past medical expense damages, recent appellate decisions have moved towards acceptance of the proportional reduction as a valid, albeit nonexclusive, basis for making the required distribution. Indeed, it is probably accurate to say that, under the present state of the law, an ALJ is practically required to accept the use of a proportional reduction, provided certain conditions are met, e.g., where unrebutted expert testimony is received both as to the value of the recipient's damages and as to the use of the pro-rata methodology. 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).

32. To the cases cited by the court in *Rodriguez* may be added another decision, *Bryan v. Agency for Health Care Administration*, 291 So. 3d 1033 (Fla. 1st DCA 2020). In *Bryan*, the recipient settled a medical malpractice action arising out of a catastrophic brain injury for $3,000,000, and then initiated an administrative proceeding to adjust the Medicaid lien, which the Agency asserted should be payable in the full amount of approximately $380,000. *Bryan*, 291 So. 3d 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.*

33. 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 approximately $380,000] claim for past medical expenses—[or, approximately $38,000]—from the settlement to settle [the Agency'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*.

34. Regarding the Agency's case, the court wrote:

> In turn, AHCA did not: (1) call any witnesses, (2) present any evidence as to the value of Ms. Bryan's damages, (3) propose a differing valuation of the damages, or (4) present evidence contesting the methodology used to calculate the $38,106.28 allocation to past medical expenses.

Id. at 1035.

35. The ALJ rejected the recipient's proposed proportional reduction methodology as a "'one size fits all' approach which place[s] each element of [the recipient's] damages at an equal value." *Id*. The ALJ determined that it was the recipient's burden to "prove that it was more probable than not" that the parties in the personal injury action had intended to allocate only 10 percent of the settlement recovery as past medical expenses, and that the recipient had failed to do that. *Id*. Accordingly, the ALJ ordered the recipient to pay the Medicaid lien in full. *Id*.

36. The court reversed the ALJ's order, explaining:

> [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*. [The Agency] 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. Without any evidence to contradict the pro rata methodology

> proposed by [the recipient], the ALJ's rejection of that methodology was not warranted.

Id.

37. There are many similarities between this case and *Bryan*. Here, as in *Bryan*, two trial attorneys (one of whom, Ms. Gievers, is a retired circuit judge) gave unrebutted testimony that, using a conservative (and uncontested) appraisal of the recipient's case ($20 million), the settlement ($888,000.00) represented only a small fraction (4.44 percent) of the recipient's total damages. They expressed the opinion, as in *Bryan*, 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. As in *Bryan*, the Agency did not present testimony or other evidence as to: (i) the value of the recipient's case; (ii) an alternative appraisal of the recipient's damages; or (iii) the weaknesses, if any, in the proportional reduction methodology as applied to the particular facts.

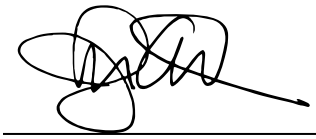
38. The undersigned concludes that *Bryan* is applicable and controlling. Following that court's lead, the undersigned accepts the premise that the proportional reduction methodology, when established, as here, by unrebutted, competent substantial evidence, provides a valid formula for determining the portion of the recipient's recovery which should be allocated as past medical expense damages.

39. Accordingly, as found above, Foster carried his burden, as a matter of fact, by proving that the portion of his total recovery which should be designated as compensation for past medical expenses is $41,469.71.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the amount payable to the Agency for Health Care Administration in satisfaction of the Medicaid lien for medical assistance provided to Foster is $41,469.71.

DONE AND ORDERED this 10th day of November, 2021, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the First District Court of Appeal in Leon County, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.