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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC12-2406

NADIA GARCON and
JOSHUA D. ROBINSON,

Petitioners,

-vs-

AGENCY FOR HEALTH-CARE ADMINISTRATION (AHCA),

Respondent.
_____/

INITIAL BRIEF OF PETITIONERS ON THE MERITS

On appeal from the Third District Court of Appeal of the State of Florida

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PREFACE

This is an appeal from an Order entered on Petitioners' Petition to Allocate Settlement and Determine Medicaid Lien, which was affirmed by the Third District Court of Appeal. Petitioners, Nadia Garcon and Joshua D. Robinson, are referred to as "Petitioners" or "Garcon." Respondent, Agency for Healthcare Administration, will be referred to as "Respondent" or "AHCA." The following designations will be used:

(R) - Record-on-Appeal

(DCA IB) - Initial Brief of Appellants filed in the Third District Court of Appeal

(DCA AB) - Answer Brief of Appellee filed in the Third District Court of Appeal

(DCA RB) - Reply Brief of Appellants filed in the Third District Court of Appeal

(T) - Trial Transcript

STATEMENT OF THE CASE AND FACTS

On April 18, 2008, two year old Joshua Robinson, Jr. ("Joshua") was hit by a stray bullet at the apartment complex where he lived with his mother (R1:55; T:13). Joshua suffered injuries to his spinal cord and to his right kidney, which had to be removed (R1:55; T:14-15). Joshua also suffered a large laceration to his liver which was repaired, a right rib fracture, and damage to his diaphragm (R1:55). As a result of this incident, Joshua will be paralyzed from the bellybutton down for the rest of his life (R1:55; T:15).

Sometime after the incident, Joshua's parents ("Garcon") contacted an attorney to aid in their efforts to take action against those responsible for their son's injuries (T1:14-15). The attorney investigated all possible avenues of recovery for Joshua and determined that the apartment complex where Joshua was shot was the only financially viable potential defendant (T:15-18). Before Garcon initialized legal proceedings against the apartment complex, it tendered, and Garcon accepted, the policy limits of $1,000,000 as a settlement of all potential claims Garcon had against it (R1:5-7, 21-22, 55). The parties did not allocate the settlement to different elements of damages.

After Garcon settled with the apartment complex, Medicaid, which had paid for Joshua's medical care, asserted a lien of $244,590.57 against the settlement

proceeds (R1:56). This was the full amount paid by Medicaid for Joshua's medical care (R1:56).

Garcon filed a Petition with the circuit court to allocate the settlement and determine the Medicaid lien (R1:55-118). Garcon asked the court to reduce the Medicaid lien to $19,568.23[1] (R1:56; R2:232-33). Garcon argued that the Florida statute upon which Medicaid relied to assert its lien, subsection 409.910(11)(f),[2]

---

[1] Garcon originally requested that the lien be reduced to $20,220.50 (R1:56); however, after recognizing a mathematical error, they amended their request and asked that the lien be reduced to $19,568.23 (R2:232-33).

[2] Subsection 409.910(11)(f) provides:

> Notwithstanding any provision in this section to the contrary, in 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.
>
> 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

Florida Statutes (2010),[3] violated Federal law, as interpreted by the United States Supreme Court in Arkansas Dep't of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006) (R1:56-68). Garcon contended that, pursuant to Ahlborn, the state was entitled to only that portion of the settlement which represented reimbursement for past medical expenses.

To support their Petition, Garcon submitted a "Special Needs Analysis," which had been prepared by Anne Koerner ("Koerner"), a special needs nurse consultant (R1:108-18). Koerner reviewed Joshua's medical records from Jackson Health System, the Medicaid lien documentation, and had a phone conference with Joshua's father (R1:108). With this information, Koerner developed projections of Joshua's future medical needs as well as the costs of his care (R1:108-18). Koerner estimated that the cost of Joshua's future medical care, discounted to present value, was $8,088,464 (R1:108-09). Thus, combined with the cost of Joshua's past medical care of $244,590.57, Joshua's lifetime medical costs were estimated at $8,333,054.57.

> 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. [Emphasis added.]

[3] Section 409.910 was amended effective July 1, 2013. It is the 2010 version of the statute that is the subject of the instant appeal.

Garcon argued that because the settlement of $1 million was just 12% of Joshua's total medical costs ($1,000,000 / $8,333,054.57 = 12%), the Medicaid lien should be reduced to 12% of the claimed amount, or $29,350.87 ($244,590.57 x 12% = $29,350.87) (R2:232-33). Garcon also requested that that sum be further reduced by 33.33% to account for attorney's fees and costs, to $19,568.23 ($29,350.87 x 66.67% = $19,568.23) (R2:232-33).

The Agency for Health Care Administration ("AHCA"), the Medicaid Third Party Liability Recovery vendor for the State of Florida, objected to the proposed reduction of the lien (R1:192-202, R2:203-07). AHCA argued that it was entitled to reimbursement of the full amount paid for Joshua's care, pursuant to section 409.910(11), Florida Statutes (R1:202).

Garcon set the matter for a hearing before the trial court. Garcon intended to introduce evidence to support their position that the Medicaid lien had to be reduced (T:5-6). At the hearing, AHCA immediately objected to the introduction of evidence, arguing that it was entitled to its full lien pursuant to subsection 409.910(11)(f) (T:4-5, 7). AHCA contended that this statute conclusively established the amount of its lien and that Garcon had no right to present evidence or obtain a reduction of the lien (T:4-5, 7). Because the parties were there and Garcon had witnesses ready to testify, the trial court decided to hear Garcon's evidence and then decide the legal issues later (T:11).

Jennete Lewis ("Lewis"), the lawyer who had been retained by Garcon, testified about her efforts at obtaining the maximum recovery for Joshua (T:14-18). She testified that she investigated all avenues of recovery and that the apartment complex was the only financially viable potential defendant (T:14-18). Before filing suit, she sent a demand for the policy limits, which was accepted (T:16-17). There were no other potential sources of recovery for Joshua (T:14-18). Accordingly, Garcon settled with the complex for its policy limits of $1,000,000.

Koerner, the special needs nurse consultant, also testified for Garcon (T:18). Koerner testified that she had been a nurse for 30 years and that for the past 15 years, she worked exclusively in the area of "proof settlement special needs nurse case management" (T:18). Koerner testified that she had been asked by Garcon to determine the costs for Joshua's future medical needs (T:19-20). Koerner's report, discussed above, was admitted into evidence (T:20-21).

Koerner explained that in coming up with her projections, she reviewed Joshua's records from Jackson Health System, spoke to Joshua's father, and examined Joshua (T:20, 33-34; R1:108). Koerner also reviewed the Medicaid lien and the items paid for, so that she could determine the value of Medicaid to Joshua throughout his lifetime (T:21-22). Using this information, Koerner developed a schedule of all of Joshua's medical needs for the rest of his life and the costs associated with those needs, which was contained in her report (R1:108-18).

AHCA did not present any evidence at the hearing. After Koerner testified, the trial court heard argument from the parties regarding whether subsection 409.910(11)(f) required that the trial court award AHCA its full lien, regardless of the evidence presented by Garcon establishing that the lien exceeded the portion of the settlement recovered as reimbursement for past medical expenses (T:44-78). The hearing concluded with no indication from the trial court as to how it would rule.

Later, the trial court entered an order awarding AHCA the full amount if its lien, $244,590.57 (R2:244). The order was void of reasoning or explanation as to why the court ruled as it did.

On appeal, the Third District affirmed the trial court's decision, holding that "section 409.910 (1)(11)(f) [sic] is not federally preempted and is, as the lower court held, fully effective and enforceable." Garcon v. Agency for Health Care Admin., 96 So.3d 472, 473 (Fla. 3d DCA 2012). The court concluded:

> Moreover, as these authorities indicate, there is nothing in the Ahlborn case which is contrary to this position. Ahlborn struck down an Arkansas statute to the extent that it allowed for Medicaid recovery that could impinge on an entire plaintiff's award and not merely past medical damages for which Medicaid may be reimbursed. Indeed, Ahlborn specifically recognized that even when a settlement is not allocated-as was this one-entirely to a recovery amount representing medical damages, a state was free to adopt "special rules and procedures" to fix the lien. Id. at 288 n. 18, 126 S.Ct. 1752. The Florida statute is just such a "special rule."

Garcon, 96 So.3d at 473-74. This appeal timely followed.

In the time since the Third District issued its opinion in the instant case, significant legal authorities have been issued, both at the state and federal level. As discussed further below, the United States Supreme Court's decision in Wos v. E.M.A. ex rel. Johnson, 133 S. Ct. 1391 (2013), makes it quite clear that section 409.910 is preempted by federal law insomuch as it operates as an irrebuttable presumption allowing the state to take a portion of a Medicaid recipient's settlement not recovered as reimbursement for past medical expenses.

SUMMARY OF ARGUMENT

Section 409.910(11)(f), Florida Statutes (2010), is federally preempted and unenforceable to the extent that it allows the state to recover more of a Medicaid recipient's settlement with a third party tortfeasor than was recovered as reimbursement for past medical expenses.

Here, the trial court erred in awarding AHCA the full amount of its lien. Section 409.910, attempts to place a lien on up to 50% of a Medicaid recipient's settlement or judgment without regard to whether that is an accurate estimation of the amount paid by the state for medical expenses. Because the state is prohibited by federal law from being reimbursed out of the portion of the settlement which is not reimbursement for past medical expenses, the state must prove that its lien does not exceed the third party's payment of past medical expenses. Proving that fact requires either a stipulation by the parties, or evidence of the proper allocation.

In this case, Robinson presented competent, uncontradicted evidence establishing that the state's lien was greater than the portion of the settlement that was recovered as reimbursement for past medical expenses. AHCA argued that reimbursement pursuant to section 409.910(11)(f) was conclusive; however, allowing for a conclusive 50% reimbursement is a violation of federal law as expressed by the United States Supreme Court in Ahlborn.

Accordingly, the Order on appeal must be reversed and the case remanded for a hearing.

ARGUMENT

POINT-ON-APPEAL

THE TRIAL COURT'S ORDER MUST BE REVERSED AS THE FLORIDA STATUTE RELIED UPON BY THE TRIAL COURT IS PREEMPTED BY FEDERAL LAW TO THE EXTENT THAT IT ALLOWS THE STATE TO TAKE A PORTION OF A MEDICAID RECIPIENT'S SETTLEMENT THAT WAS NOT RECOVERED AS REIMBURSEMENT FOR PAST MEDICAL EXPENSES.

Standard of Review

Whether state law is preempted by federal law is a pure question of law that is subject to *de novo* review. Vreeland v. Ferrer, 71 So.3d 70, 73 (Fla. 2011), reh'g denied (Sept. 13, 2011), cert. denied, 132 S. Ct. 1557 (U.S. 2012).

Merits

It is well-established that, pursuant to the Supremacy Clause of the United States Constitution,[4] state laws may be preempted by federal laws in three situations:

[4] The Supremacy Clause provides (U.S. Const., art. VI, cl. 2):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

> (1) where express federal statutory language so provides; (2) where federal law has so thoroughly occupied a legislative field as to create a reasonable inference that there is no room for the state to supplement it; or (3) where a state law conflicts with a federal law.

Rosado v. DaimlerChrysler Fin. Services Trust, 112 So.3d 1165, 1167 (Fla. 2013) (citing Vargas v. Enter. Leasing Co., 60 So.3d 1037, 1040–41 (Fla.)). Here, Florida Medicaid law conflicts with federal law and is, thus, preempted.

A. The Relevant Law

The issue to be decided here involves the interplay between the federal and state Medicaid laws. Caselaw at both the federal and state level is critical to recognizing why the Florida law violates federal law and is, thus, preempted.

1. Federal Medicaid Law

The Medicaid program is a cooperative one between each state and the federal government that provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs. Arkansas Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268, 275 (2006). States are not required to participate in Medicaid, but they all do. Id. Under the program, the federal government reimburses states for a percentage of the costs the states incur for patient care. The states pay their portion of the costs and comply with certain statutory requirements for maintaining and administering the program. Id.

One such requirement is that the state agency in charge of Medicaid (here, AHCA) determine whether someone, such as a third-party tortfeasor, is legally liable "to pay for care and services available under the plan." 42 U.S.C. §1396a(a)(25)(A). Where the legal liability of a third party is found to exist "after medical assistance has been made available" to a recipient, the state must "seek reimbursement for such assistance to the extent of such legal liability," §1396a(a)(25)(B).

To facilitate reimbursement from liable third parties, state Medicaid laws must provide:

> that **to the extent that payment has been made** under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, **to the extent that payment has been made** under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services; and

Section 1396a(a)(25)(H) (emphasis added).

To that end, Medicaid recipients must assign the state any rights to payment for medical care from any third party. See §1396k(a)(1)(A). Any amount collected by the state pursuant to such an assignment "shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed . . . and the remainder of such amount collected shall be paid to such individual," §1396k(b).

While federal law requires states to seek reimbursement from third parties for medical assistance paid on behalf of Medicaid recipients, it also "places express limits on the State's powers to pursue recovery of funds it paid on the recipient's behalf." Ahlborn, 547 U.S. at 283. Specifically, states are prohibited (except in circumstances not relevant here) from imposing liens "against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf," §1396p(a)(1). This provision is often referred to as the "anti-lien provision."

2. The Ahlborn Case

The seminal case interpreting the federal Medicaid law is Arkansas Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268, 274 (2006). In Ahlborn, the United States Supreme Court examined how the anti-lien provision and the Medicaid reimbursement requirements, which appear to be at odds with each other, co-exist. In Ahlborn, a woman was severely injured in a car accident. Arkansas' Medicaid program paid $215,645.30 in medical bills on her behalf. The woman ultimately settled a claim against the driver who caused the accident for $550,000. The parties did not allocate the settlement between categories of damages. Pursuant to Arkansas law, the state agency administering the Medicaid program

asserted a lien against the settlement proceeds in the amount of the total cost of payments made on Ahlborn's behalf.

Ahlborn sought a declaration by the federal district court that the state's lien violated federal Medicaid law insomuch as its satisfaction required "depletion of compensation for injuries other than past medical expenses." Id. at 274. To facilitate the district court's resolution of the legal issues presented, the parties stipulated that Ahlborn's damages were reasonably valued at $3.04 million, that the settlement of $550,000 was approximately 1/6 of that sum, and that if Ahlborn's construction of Medicaid law was correct, Medicaid would be entitled to only the portion of the settlement that constituted reimbursement for **past medical payments** (1/6 of the $215,645.30 lien, or $35,581.47). Thus, Ahlborn's position was that because the case settled for 1/6 of its full value, Medicaid's lien should be reduced to 1/6 of its value. Both sides moved for summary judgment. The trial court granted Medicaid's motion and allowed Medicaid to recover its full lien amount from the settlement. On appeal, the appellate court reversed, finding that Medicaid was entitled to only the $35,581.47 (1/6th of the lien). The United States Supreme Court affirmed.

In Ahlborn, the Supreme Court began by recognizing that, pursuant to sections 1396a(a)(25) and 1396k(a), "the State can require an assignment of the right, or chose in action, to receive payments for medical care." Id. at 284.

Moreover, the Court assumed "that the State can also demand as a condition of Medicaid eligibility that the recipient 'assign' in advance any payments that may constitute **reimbursement for medical costs**." Id. (emphasis added). The Court determined that "[t]o the extent that the forced assignment is expressly authorized by the terms of §§1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision," section 1396p, discussed above. Id. The Court cautioned, however, that states could not place a lien on any portion of a beneficiary's property other than that recovered as reimbursement for past medical costs. Id. Beyond that, the ourt explained, "the anti-lien provision applies." Id. at 284-85. Thus, the Arkansas statute was unenforceable to the extent that it allowed the state to assert a lien on more than what was recovered as reimbursement for past medical care. Id. at 292.

The Ahlborn Court determined that where a settlement is not allocated between types of damages, the parties could either stipulate to an allocation, as the parties had in that case, or, if necessary, submit the matter to a court for decision. Id. at 289. Because the parties in Ahlborn had stipulated to the full value of the claim and to the portion of the settlement intended to reimburse Ahlborn for past medical care, the Court did not have the occasion to determine how a trial court is to determine what portion of an unallocated settlement is recovered as reimbursement for past medical care in the absence of a stipulation. Though it refused to express a view on the matter that was not before the Court, the Court left

open the possibility that "special rules and procedures" could be adopted by states to allocate tort settlements in such situations. Id. at 288, n.18. This issue, left unresolved by the Court in Ahlborn, has been the basis for many subsequent cases throughout the country, including the instant case.

3. Florida Medicaid Law

Section 409.910, Florida Statutes, referred to as the "Medicaid Third-Party Liability Act," governs Florida Medicaid's rights to assert a lien against a Medicaid recipient's settlement or recovery. This statute violates federal Medicaid law, as expressed in Ahlborn, in that it permits the state to recover more from a settlement with a third party than the amount recovered for past medical expenses.

Several subsections of 409.910 unequivocally demonstrate that the statute violates the federal anti-lien provision as they make clear that the state is permitted to recover more than the amount allocated for past medical expenses. Section 409.910(4) requires the state to "seek recovery of reimbursement from third-party benefits to the limit of legal liability and for the full amount of third-party benefits . . . ." Furthermore, pursuant to subsection (6)(a), AHCA is automatically subrogated to rights a recipient has to payment from a third party for the full amount of medical assistance provided by Medicaid. The statute expressly provides that recovery pursuant to such subrogation "shall not be reduced,

prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the agency from any and all third-party benefits," §409.910(6)(a). To that end, Florida law grants an automatic lien over any third-party benefits for the full amount of medical assistance provided by Medicaid, §409.910(6)(c). Subsection 11(e) provides that "notwithstanding any other provision of law, the entire amount of any settlement of the recipient's action or claim involving third-party benefits, with or without suit, is subject to the agency's claims for reimbursement of the amount of medical assistance provided and any lien pursuant thereto."

The subsection specifically at issue here is subsection 409.910 (11)(f), which provides, "[n]otwithstanding any provision in this section to the contrary," that after deducting 25% of the settlement or judgment for attorney's fees:

> one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.

This subsection operates to permit AHCA to recover its entire lien, up to one-half of the settlement or judgment (after a 25% reduction for attorney's fees), without any regard for how much of a settlement was actually recovered as reimbursement for past medical expenses and, in the situation where a judgment has been rendered pursuant to a jury verdict, without regard to how much the jury awarded plaintiff for past medical expenses. This statute is indistinguishable from the Arkansas statute rejected in Ahlborn to the extent that it allows the state to take more than

that recovered as reimbursement for past medical expenses. Pursuant to Ahlborn, application of section 409.910 in such a manner is a clear violation of the federal Medicaid law.

4. Post-Ahlborn Florida Caselaw

At the time this case was decided by the trial court, two Florida District Courts had addressed the interplay between the federal law, the Supreme Court's decision in Ahlborn, and the Florida law: The Second District in Smith v. Agency for Health Care Admin., 24 So.3d 590 (Fla. 5th DCA 2009) and the Fifth District in Russell v. Agency for Health Care Admin., 23 So.3d 1266, 1267 (Fla. 2d DCA 2010). Since the Third District's decision in the instant case, the Fourth District also weighed in on the issue in Roberts v. Albertson's Inc., 119 So.3d 457 (Fla. 4th DCA 2012).

a. Smith v. Agency for Health Care Admin.

In Smith v. Agency for Health Care Admin., 24 So.3d 590 (Fla. 5th DCA 2009), the plaintiff settled her personal injury case for $2,225,000, which she claimed was just 1/3 of the value of her damages. The state asserted a Medicaid lien of $122,783.87, the full amount of the benefits paid on behalf of the plaintiff, against the settlement proceeds. The plaintiff sought to reduce the lien from $122,783.87 to $40,927.96. According to the plaintiff, pursuant to Ahlborn, the

lien had to be reduced "in the same ratio as the settlement bears to actual damages." Id. at 591. Thus, because the claim settled for just 1/3 of the actual damages, the lien had to be reduced by 1/3 ($122,783.87 ÷ 3 = $40,927.96).

The Fifth District rejected this argument, finding that "Ahlborn simply held that under federal law a state's Medicaid lien recovery is limited to the portion of a verdict or settlement representing amounts recovered by a plaintiff for medical expenses." Id. The court also pointed out that the parties in Ahlborn had stipulated to a figure representing the total recovery for medical expenses. The court explained that "the court in Ahlborn simply accepted the stipulation, and in no way adopted the formula as a required or sanctioned method to determine the medical expense portion of an overall settlement amount." Id. at 591.

The Fifth District in Smith rejected the plaintiff's attempt to utilize the formula agreed to by the parties in Ahlborn, finding that the formula improperly assumed the Medicaid lien amount to be the *only* medical expense included by the plaintiff as part of his or her overall damage claim. "Stated another way, without knowing how much of a plaintiff's total damage claim is comprised of medical expenses, there is no way to calculate the medical expense portion of a settlement by simply comparing the damage claim to the ultimate settlement amount." Id. The court explained further that if it knew the amount of the medical expense portion of the total damage claim, it could reduce that amount "to approximate the settlement

amount attributable to medical expenses. But, knowing only the total damages claimed and the ultimate settlement amount simply does not allow one to reasonably estimate the medical expense portion of a settlement." Id. at 591-92.

Although the court rejected the plaintiff's attempts to utilize the formula used in Ahlborn, it did recognize that, pursuant to Ahlborn, "a plaintiff should be afforded an opportunity to seek the reduction of a Medicaid lien amount by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses." Id. at 592. Finding that the plaintiff in that case had not done so, the court determined that the trial court had properly applied §409.910, Florida Statutes, to permit the state to recover the full amount of its lien.

b. Russell v. Agency for Health Care Admin.

The Second District addressed the issue next in Russell v. Agency for Health Care Admin., 23 So.3d 1266, 1267 (Fla. 2d DCA 2010). In Russell, the plaintiff settled her medical malpractice claim for $3 million. The parties did not allocate the settlement among the various heads of damages. The state asserted a Medicaid lien of $221,434.24, the full amount of the benefits paid on behalf of the plaintiff, against the settlement proceeds.

In Russell, the plaintiff moved to reduce the lien to 1/10 of the claimed amount. She argued that the total value of her claim was $30 million and, thus, the $3 million settlement constituted a recovery of only 1/10 of her claim.

Accordingly, the plaintiff contended, pursuant to Ahlborn, the Medicaid lien had to be reduced by 1/10. The trial court rejected this argument, finding that "the state of Florida's Medicaid lien is equivalent to the past medical damages portion of the parties undifferentiated settlement agreement." Id. at 1267.

On appeal, the Second District agreed with the trial court and determined that the plaintiff was not entitled to a reduction of the lien. The court explained that central to the Ahlborn Court's decision was the stipulation by the parties as to the portion of the settlement attributable to medical expenses. In Russell, there was no such stipulation and no similar basis for determining an allocation of the settlement proceeds.

The Second District concluded that because the plaintiff failed to establish any basis for concluding that the lien asserted by the state extended to a portion of the settlement meant to compensate her for damages distinct from medical costs, the allocation scheme in section 409.910, Florida Statutes, applied. Additionally, the court held that a judicial determination as to the amount of a settlement meant to compensate a plaintiff for past medical expenses was not necessary where the parties to the settlement agreement had not agreed on an allocation.

Thus, both the Second and the Fifth Districts ultimately applied section 409.910 and refused to reduce the Medicaid liens at issue. The decisions of the two courts appeared to have been in conflict, however, because the Fifth District held

in Smith that Medicaid recipients were entitled to hearings to establish that the lien amounts exceeded the amounts recovered for medical expenses, while the Second District in Russell held that a hearing was not required because section 409.910 was conclusive.

c. The Instant Case

Citing, *inter alia*, Smith and Russell, the Third District in the instant case determined that subsection 409.910(11)(f) is not federally pre-empted and is "fully effective and enforceable." Garcon v. Agency for Health Care Admin., 96 So.3d 472, 473 (Fla. 3d DCA 2012). The Third District held that a trial court is not required to allocate settlement proceeds based upon a fair evaluation of a plaintiff's injuries. Id. The court reasoned that subsection 409.910(11)(f) is a procedure to fix a Medicaid lien which is in compliance with federal Medicaid law, as interpreted by the Supreme Court in Ahlborn. Id. at 473-74.

d. Roberts v. Albertson's Inc.

After the Third District issued its decision in the instant case, the Fourth District weighed in on the issue in Roberts v. Albertson's Inc., 119 So.3d 457 (Fla. 4th DCA 2012). In Roberts, the Fourth District held that subsection 409.910(11)(f) "creates a presumptively valid allocation of settlement proceeds subject to a Medicaid lien when AHCA does not participate in the settlement agreement." Id. at 465. However, the court held that the statutory allocation "is a default allocation,

which could run afoul of federal anti-lien and anti-recovery statutes if, for example, the majority of an award (after attorney's fees and costs) is not allocable to medical expenses." Id. Thus, the Fourth District disagreed with the Third District in the instant case and held that a Medicaid beneficiary "should be afforded an opportunity to seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses." Id. The Fourth District originally[5] certified conflict with the instant case and with the Second District's decision in Russell, "to the extent those cases stand for the proposition that a plaintiff is not entitled to an opportunity to prove the Medicaid lien exceeds the amount recovered for medical expenses." Id.

5. Wos v. E.M.A.

While the instant case was pending before this Court on jurisdiction, the United States Supreme Court issued a decision in Wos v. E.M.A. ex rel. Johnson, 133 S. Ct. 1391 (2013). The question in Wos was the same one faced by the district

[5] AHCA moved for rehearing in Roberts. The Fourth District ultimately stayed rehearing pending the United States Supreme Court's decision in Wos v. E.M.A. ex rel. Johnson, 133 S. Ct. 1391 (2013), which was expected to be issued at any time. After the Supreme Court issued its decision in Wos, which is discussed further below, the Fourth District denied rehearing, but "in light of the decision issued by the United States Supreme Court" in Wos, it withdrew its certification of conflict with the instant case and with Russell.

courts in Smith, Russell, Roberts and the instant case: Whether an inflexible state statute which purported to fix the amount of a Medicaid lien with no regard for how much of the settlement or judgment after verdict was meant to reimburse the recipient for past medical expenses, violated the anti-lien provision.

The specific issue in Wos was whether a North Carolina "virtually indistinguishable" (DCA AB 21) from section 409.910 was "compatible with the federal anti-lien provision." Id. at 1395. In Andrews ex rel. Andrews v. Haygood, 669 S.E.2d 310 (2008), a divided North Carolina Supreme Court determined that the statute did not violate the anti-lien provision.[6] However, in E.M.A. ex rel. Plyler v. Cansler, 674 F.3d 290 (4th Cir. 2012), the Fourth Circuit disagreed and found that North Carolina's statutory presumption violated the federal anti-lien provision, to the extent that it did not allow for "adversarial testing." In Wos, the United States Supreme Court resolved the conflict between the courts by affirming the Fourth Circuit's decision.

In Wos, a plaintiff in a medical malpractice action entered into an unallocated settlement with the tortfeasor. Medicaid, which paid medical expenses on plaintiff's behalf, asserted a lien on one-third of the settlement proceeds, pursuant to North Carolina's third-party liability statutes. These statutes allowed the state to assert a lien upon the lesser of its actual medical expenditures or one-

[6] AHCA relied heavily on the North Carolina Supreme Court's decision in Andrews to support its position before the Third District (DCA AB 17-18).

third of the recipient's total recovery. The plaintiff brought an action in the federal district court, seeking declaratory and injunctive relief based upon the federal anti-lien provision. The district court, relying on Andrews, the North Carolina Supreme Court decision holding the statute to be valid, granted summary judgment in favor of the state. The Fourth Circuit reversed.

The Supreme Court affirmed the Fourth Circuit, finding that the North Carolina statute violated the anti-lien provision, insofar as it operated to make a claim for a part of a Medicaid beneficiary's tort recovery not designated as payments for medical care. The Court explained that North Carolina "picked an arbitrary number – one-third – and by statutory command labeled that portion of a beneficiary's tort recovery as representing payment for medical care." Id. at 1398. The Court explained that "[a]n irrebuttable, one-size-fits-all statutory presumption is incompatible with the Medicaid Act's clear mandate that a State may not demand any portion of a beneficiary's tort recovery except the share that is attributable to medical expenses." Id. at 1399. Such a presumption violates federal Medicaid law because it "sets forth no process for determining what portion of a beneficiary's tort recovery is attributable to medical expenses." Id. The Supreme Court concluded:

> The law here at issue . . . reflects North Carolina's effort to comply with federal law and secure reimbursement from third-party tortfeasors for medical expenses paid on behalf of the State's Medicaid beneficiaries. In some circumstances, however, the statute

> would permit the State to take a portion of a Medicaid beneficiary's tort judgment or settlement not "designated as payments for medical care." Ahlborn, 547 U. S., at 284. The Medicaid anti-lien provision, 42 U. S. C. §1396p(a)(1), bars that result.

Id. at 1402.

6. Agency for Health Care Admin. v. Riley

After Wos was issued, the Second District revisited the issue in Agency for Health Care Admin. v. Riley, 119 So.3d 514 (Fla. 2d DCA 2013). Riley was heard by the trial court before the decisions in Wos and Roberts were issued. There, as here, a Medicaid recipient brought suit against a property owner after she was shot by a third party while on the property. The beneficiary ultimately settled with the tortfeasor and sought to have a Medicaid lien reduced. AHCA claimed that it was entitled to full satisfaction of its lien and that the trial court should not consider evidence presented by the recipient that might rebut the application of the formula set forth in subsection 409.910(11)(f). The trial court disagreed and, after a hearing, reduced Medicaid's lien. AHCA appealed.

While Riley was pending at the Second District, the Fourth District issued its decision in Roberts and the Supreme Court of the United States decided Wos. In a supplemental memorandum filed to address Wos, AHCA did an about-face and argued that section 409.910 *should be* read in such a way as to allow a recipient to attempt to rebut the presumption set forth in section 409.910(11)(f). It argued,

however, that in that case, Riley had failed to present evidence that rebutted the presumption.

In its decision in Riley, the Second District recognized that its reasoning in Russell was severely undermined by Wos. Riley, 119 So.3d at 515. Accordingly, the court adopted the holding of Roberts, to wit:

> that a plaintiff should be afforded an opportunity to seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses.

Id. at 516 (quoting Roberts, 119 So.3d at 464).

After deciding in Riley that its decision in Russell had been undermined and that federal law requires that a Medicaid recipient be permitted to rebut the "statutory default allocation" outlined in 409.910(11)(f), the Second District was faced with the question of how to direct the case. Recognizing that the law was in flux when the case was decided by the trial court, the court concluded:

> Although the hearing conducted by the trial court in this case may be similar to the hearing contemplated by the Fourth District in Roberts and the United States Supreme Court in Wos, the trial court obviously had no ability to apply this new law during the hearing. AHCA had the right to rely on our Russell opinion at the time of that hearing. We conclude that Russell is no longer correct law. Recognizing that the trial court may ultimately make a decision similar to the decision that it has already made, we nevertheless conclude that the issue should be newly decided at a hearing at which both parties and the trial court will be guided by the decisions in Wos and Roberts. Accordingly, we reverse the order on appeal and remand for a supplemental hearing. The trial court is free to rely on evidence in the record from the prior hearing and, as needed, to consider additional evidence.

Id.

Here, as in Riley, the trial court decided the case before the Fourth District's decision in Roberts and the United States Supreme Court's decision in Wos were issued. For the reasons expressed by the Second District in Riley, this case should be reversed and remanded for a hearing before the trial court at which both the parties and the trial court will be guided by the law as it has been clarified since this case was originally decided.

B. The Florida Law Violates the Federal Law, as Interpreted by the United States Supreme Court in Ahlborn

In Ahlborn, the United States Supreme Court determined that federal law prohibits states from asserting a lien against the property of a Medicaid recipient other than that which was paid as reimbursement for past medical expenses. In Wos, the court explained further that an irrebuttable, one-size-fits-all statutory presumption, such as the one in section 409.910(11)(f), is incompatible with this clear mandate.

Florida law permits the state to assert a lien against an amount up to 50% of a settlement or judgment (after a 25% reduction for attorney's fees), regardless of how much of the settlement or judgment is for reimbursement for past medical expenses. In light of Wos, it is clear that section 409.910(11)(f) is unenforceable

and violates the anti-lien provision of the federal law to the extent that it does not limit the lien to that portion of a Medicaid recipient's settlement that is attributable to past medical expenses and does not require or contain a method for such allocation to be made. As such, the Third District's determination that section 409.910(11)(f) is not federally preempted and is "fully effective and enforceable" is incorrect and must be reversed.

In Wos, the United States Supreme Court addressed, and rejected, most of the arguments raised by AHCA in the instant case before the trial court and the Third District. For instance, one of AHCA's primary arguments was that section 409.910(11)(f) was a "rule or procedure" approved by the United States Supreme Court in Ahlborn as a method of determining the portion of the settlement recovered for past medical expenses (R1:194; DCA AB 17-26). The Third District adopted this argument. See Garcon, 96 So.2d at 473-74. However, in Wos, the Supreme Court explained that such an argument "misreads Ahlborn." Wos, 133 S.Ct. at 1400. The Court made clear that Ahlborn "did not endorse irrebuttable presumptions that designate some arbitrary fraction of a tort judgment to medical expenses in all cases." Id.

Another argument advanced by AHCA here which was rejected in Wos was AHCA's contention that without a formula, mini-trials would be required which would prove wasteful, time-consuming, and costly (DCA AB 42-43). In Wos, the

Supreme Court held that even if this argument were true, "it would not relieve the State of its obligation to comply with the terms of the Medicaid anti-lien provision." Wos, 133 S.Ct. at 1401. In any event, the Court noted that the state's position was "not true as a general proposition." Id. According to the Court, states have ample means available to allocate Medicaid recipients' tort recoveries in an efficient manner without adopting "arbitrary, one-size-fits-all allocation[s] for all cases." Id. at 1402. Subsection 409.910(11)(f) is just such an arbitrary, one-size-fits-all allocation scheme.

AHCA also implied here that there was no ascertainable true value of a case that should control what portion of the settlement is subject to the state's third-party recovery rights (DCA AB 45-46). In Wos, the Supreme Court rejected this argument, noting that "allocations, while to some extent perhaps not precise, need not be arbitrary." Id. at 1400. The Court explained that where no binding judgment or stipulation allocates the plaintiff's recovery across different claims, "[t]rial judges and trial lawyers . . . can find objective benchmarks to make projections of the damages the plaintiff likely could have proved had the case gone to trial." Id.

AHCA's steadfast position in this case, both before the trial court and the Third District, was that the formula in subsection (11)(f) was conclusive and that no evidentiary hearing was required or permitted (T:4-5; DCA AB 37, 38). It appears that AHCA has accepted, to some extent, the fallacy of its position that

section 409.910(11)(f) can operate as an irrebuttable presumption without violating the federal anti-lien provision.[7] AHCA has withdrawn its past claims that federal law does not require that a recipient have an opportunity to rebut the "presumption" contained in subsection 409.910(11)(f). It contends, however, that the Florida law is not preempted because it actually provides for a hearing in subsection 409.910(17).[8] In addition to being contrary to its position in this case, this argument is contrary to the Florida law.

Subsection 409.910(17) requires a Medicaid recipient who recovers third-party benefits to pay such benefits to AHCA within 60 days of receipt or place the full amount of benefits in trust for the benefit of AHCA "pending judicial or administrative determination of the agency's right thereto." Contrary to AHCA's belated claims that this subsection saves the Florida law from federal preemption, this subsection does not provide a "right to challenge" the amount of Medicaid's lien; it merely permits a hearing to address Medicaid's entitlement to funds. The language of subsection 409.910(11)(f) supports this conclusion. That subsection

[7] Contemporaneous with this Brief, Garcon has filed a Motion for Judicial Notice, in which they ask this Court to take judicial notice of a Memorandum of Law filed by AHCA in the Second District in Riley. This memorandum was filed by AHCA at the request of the Second District to discuss the impact of the United States Supreme Court's decision in Wos.

[8] AHCA did address subsection (17) in its Answer Brief filed at the Third District in the instant case; however, it remained adamant that no hearing was required pursuant to Ahlborn.

begins with the instruction that "notwithstanding any provision in this section to the contrary," before outlining the inflexible formula relied upon by AHCA. Thus, to the extent that AHCA contends that subsection (17), allows for a hearing for the recipient to rebut the presumption contained in subsection (11)(f), that provision itself precludes any such reliance.

While AHCA may now concede that a beneficiary must be permitted an opportunity to present evidence to establish that the amount of a settlement recovered to reimburse the recipient for past medical expenses is less than the amount permitted by the statute, AHCA took a contrary position when this issue was presented to the trial court. There, AHCA was steadfast in its argument that Garcon was not entitled to a hearing and that it was entitled to its full lien pursuant to section 409.910(11)(f). In light of Wos, it is clear that this position, adopted by the Third District here, is erroneous. As the Second District recognized in Riley, the law has developed significantly in the time since these cases were presented to the trial court. This case should be remanded for the trial court to consider the evidence presented in light of Wos.

In its response to a Motion to Remand filed by Garcon after Wos was issued, AHCA argued that Wos was inapplicable to the instant case because Robinson settled for medical expenses alone. AHCA contends that this "fact" takes this case outside the ambit of Wos and Ahlborn because those cases permit the state to

recover its lien from money recovered in a settlement for all "medical expenses," not just past medical expenses. This argument is both factually and legally incorrect.

First, the factual premise of AHCA's argument is misplaced. Garcon did not settle for just medical damages. Garcon accepted the only available money, just $1,000,000, as settlement for all of Joshua's damages as a result of the negligence of the apartment complex. At the hearing on their Petition to Allocate Settlement, Garcon presented evidence of only past and future medical expenses and asked the court to reduce the lien based only upon the values of those heads of damages. Garcon did not present the court with evidence regarding values for Joshua's pain and suffering or for loss of future earning capacity. By limiting the total "value" of the claim as such, Garcon actually increased the portion of the settlement attributable to past medical expenses, thereby increasing AHCA's recovery pursuant to the formula put forth by Garcon. Although Garcon certainly had claims for pain and suffering and loss of future earning capacity, they chose not to present such evidence to the trial court in an effort to assuage concerns expressed by other courts that irrebuttable formulas such as the one contained in section 409.910(11)(f) were favorable to attempting to determine values for such "speculative" heads of damages.

The legal basis for AHCA's contention that it can recover its lien from money recovered for all medical expenses, both past and future, is also misplaced. AHCA appears to base its argument on the fact that in both Ahlborn and Wos, the Court used the general phrase "medical expenses" several times, as opposed to the more specific, "past medical expenses." This interpretation of the cases ignores both the extensive discussion of the law as well as the factual context in which the Supreme Court made its decisions in those cases. A thorough reading of Ahlborn and Wos makes clear that state Medicaid agencies are limited to recovering their liens from the portion of settlements recovered as reimbursement for past medical expenses only.

First, the relevant law, discussed in depth by the Supreme Court in Ahlborn and Wos makes clear that AHCA may not recover its lien from the portion of a settlement recovered to reimburse for future medical expenses. For instance, section 1396(a)(25)(H), one of the federal reimbursement statutes discussed in Ahlborn, provides as follows:

> **to the extent that payment has been made** under the State plan for medical assistance in any case where a third party has a legal liability to make payment for **such assistance**, [have] in effect laws under which, **to the extent that payment has been made** under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party **for such health care items or services**.

This section makes clear that the state is only permitted to seek reimbursement from funds recovered for reimbursement of past medical expenses paid by the state. Likewise, the anti-lien provision prohibits states from placing liens 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." As pressed in Ahlborn, to the extent that the forced assignment is expressly authorized by the terms of sections 1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision. Thus, the exception applies only to money recovered to reimburse the beneficiary "for such healthcare items or services" already paid for by the state.

The overriding premise of both Ahlborn and Wos is that a state may not take the property of a recipient to satisfy its liens for medical payments made on behalf of the recipient. The very nature of future medical costs is that the expenses have not yet been incurred. Thus, Medicaid has obviously not made any expenditure for those items. Money recovered by a recipient such as Garcon for future medical expenses is property of the recipient to be used to pay for future medical expenses. As such, the state may not assert a lien on these funds.

The facts of Ahlborn and Wos also support the conclusion that those cases mandate that the state may not recover its lien from the portion of a settlement recovered as reimbursement for future medical expenses. In Ahlborn, after laying out the relevant statutory framework, the court explained that there, Ahlborn had

contested Medicaid's lien "insofar as its satisfaction would require depletion of compensation for injuries other than **past medical expenses**." Ahlborn, 547 U.S. at 274. Further, the Court explained that the parties had stipulated that if Ahlborn's construction of federal law was correct the state would be entitled to only the portion of the settlement that constituted reimbursement for **past medical expenses**." Id. This was the starting point for the Court's discussion and analysis.

In its opinion, the Court made clear that federal law requires an assignment to the state of "the right to recover that portion of a settlement that represents **payments for medical care**," but it also "precludes attachment or encumbrance of the remainder of the settlement." Id. at 282, 284. Finally, in conclusion, the court held that Federal Medicaid law did not permit the state "to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47, and the federal anti-lien provision affirmatively prohibits it from doing so." Id. at 292. In this case, $35,581.47 is the amount that the parties had stipulated as the portion of the settlement recovered as reimbursement for past medical expenses; thus, the court held that the state could not assert a lien on any portion of the settlement not recovered as reimbursement for past medical expenses.

The Supreme Court utilized its decision in Ahlborn as the basis for its decision in Wos. The starting point for the Court in Wos was its determination in Ahlborn that a state could not assert a lien on any portion of the settlement not

recovered as reimbursement for past medical expenses. Wos, 133 S.Ct. at 1396-97. With that backdrop, the Court went on to determine whether an irrebuttable formula could be utilized to fix the amount of a settlement attributable to past medical expenses. The Court in Wos did not recede from its decision in Ahlborn or otherwise qualify its decision in that case. Thus, the Court's use of the phrase "medical expenses" as opposed to the more specific "past medical expenses" was used as shorthand with the understanding that the Court was using that phrase consistent with federal Medicaid law and the Court's decision in Ahlborn. Thus, contrary to AHCA's argument, the decisions in Ahlborn and Wos do not stand for the proposition that the state can recover its lien from the portion of the settlement recovered to reimburse the recipient for both past and future medical expenses. AHCA has conceded as much in this case.

Before the trial court and the Third District, AHCA accepted that Ahlborn permitted it to take only that portion of a settlement recovered as reimbursement for past medical expenses. In fact, AHCA affirmatively stated that Ahlborn held that "Medicaid liens may not exceed the past medical expense part of a settlement" (R1:197). Furthermore, in its Answer Brief, AHCA stated:

- "[AHCA] argued [before the trial court] that Florida's statutory formula was the sole legal mechanism for determining the **past medical expense** portion of a settlement, **in harmony with Ahlborn** and the Florida cases interpreting that decision" (DCA AB 3). [Emphasis added.]

- "The post-settlement stipulation [in Ahlborn] was the source of the 'value' formula used in the case, which all the parties agreed would define the amount recovered for **past medical expenses**. Because Arkansas Medicaid agreed to the use of a 'value' formula, and likewise to the sum that represented the medical recovery by way of that formula, their attempted recovery beyond their agreement is what violated the Anti-Lien Statute" (DCA AB 13-14). [Emphasis added.]

AHCA also stated repeatedly that subsection 409.910(11)(f) was a "rule or procedure" approved by the Court in Ahlborn, which determined the **past medical expense** portion of a settlement:

- Section 409.910(11)(f) is "a valid method in which to determine the past medical expense portion of a Medicaid recipient's third-party recovery" (DCA AB 21).

- "Section 409.910, Florida Statues, Defines the Past Medical Expense Portion of a Settlement and Mandates that Only that Portion Shall Be Reimbursable to the Medicaid Program" (DCA AB 26). [Emphasis in original.]

- "The statutory formula is clearly a default method in which to determine the *past* medical expense portion of a settlement. Subsection (11)(f) concludes with language that specifically limits recovery to the "medical assistance *provided* by Medicaid." . . . By referring to only Medicaid benefits "provided" to a recipient, it is clear that the legislature intended to limit reimbursement to only past medical expenses" (DCA AB 29). [Emphasis in original.]

- "[Garcon's] argument that the [Florida] Medicaid Act permits the recovery of damages not attributable to **past medical expenses** is based on a faulty premise" (DCA AB 40). [Emphasis added.]

- "Furthermore, the [Florida] Medicaid Act defines this amount as [Garcon's] recovery for past medical expenses" (DCA AB 45-46).

Thus, AHCA clearly recognized that Ahlborn permitted it to recover from **only** that portion of the settlement recovered as reimbursement for past medical expenses. With that understanding, AHCA argued that section 409.910(11)(f) was a statutory determination of the amount recovered for past medical damages. AHCA's belated claims that Ahlborn permits it to recover from the portion of the settlement recovered for both past and future medical expenses ring hollow under the circumstances. Even the Third District recognized in this case that the state can only be reimbursed from the portion of a settlement recovered to reimburse the recipient for past medical expenses. See Garcon, 96 So.3d at 474 ("Ahlborn struck down an Arkansas statute to the extent that it allowed for Medicaid recovery that could impinge on an entire plaintiff's award and not merely past medical damages for which Medicaid may be reimbursed").

Other courts throughout the country also recognize that Ahlborn limits the state's recovery to only that portion of the settlement recovered as reimbursement for past medical expenses. See Morales v. New York City Health & Hospitals Corp., 935 N.Y.S.2d 850, 851 (N.Y. Sup. Ct. 2011) ("Ahlborn stands for the proposition that a state or local Social Services agency may only recover a Medicaid lien arising from the tortious conduct of another from that portion of a third-party personal injury recovery which represents **past medical expenses**"); Bolanos v. Superior Court, 169 Cal. App. 4th 744, 752 (Cal. Ct. App. 2008)

(Pursuant to Ahlborn "the state is entitled only to that portion of the settlement that compensates for past medical expenses"); Chambers ex rel. Reeves v. Jain, 15 Misc. 3d 1120(A), 839 N.Y.S.2d 432 (N.Y. Sup. Ct. 2007) (same).

Therefore, AHCA's contention that it may recover its lien from the portion of the settlement recovered to reimburse the recipient for both past and future medical expenses is meritless. As discussed above, this argument is contradicted by the statutes and by the decisions in Ahlborn and Wos, as recognized below by both AHCA and the Third District.

C. **The Trial Court Erred in Awarding the State its Entire Lien where Garcon Presented Uncontradicted Evidence Establishing that the Portion of the Settlement Allocated to Past Medical Expenses was Significantly Less than the Lien Amount**

Here, Garcon was permitted an opportunity to present evidence to support their claim that the portion of the settlement recovered for past medical expenses was less that than claimed by AHCA. However, the hearing took place under the cloud of AHCA's argument that they were not entitled to a hearing at all and that the formula contained in subsection 409.910(11)(f) was irrebuttable and had to be applied by the court. While the trial court's order granting AHCA its entire lien did not contain any discussion or explain the court's reasoning in deciding as it did, it is clear that the court accepted AHCA's argument and applied the formula mechanically without regard to the evidence presented. For that reason, the case

must be reversed and remanded to the trial court for a hearing of the type envisioned by the Fourth District in Roberts, the Second District in Riley, and the United States Supreme Court in Wos.

Garcon presented the trial court with uncontradicted evidence establishing the value of Joshua's past and expected future medical expenses. Garcon also submitted uncontradicted evidence that the settlement amount of $1,000,000 was accepted because it was the only money available to satisfy Garcon's claim. Pursuant to Ahlborn, Garcon asked that AHCA's lien be reduced to just that portion of the settlement which was recovered as reimbursement for past medical expenses. AHCA did not present any evidence to rebut this evidence or to challenge the reasonableness of the settlement, the method used to determine the allocation, or the sums that were allocated. Under the circumstances, there was no basis for the trial court to deny Garcon's request, absent a strict reliance on the purportedly irrebuttable formula contained in section 409.910(11)(f), per AHCA's urging.

The formula presented by Garcon to determine the portion of the settlement recovered to reimburse them for past medical expenses was, while not identical to the formula utilized by the parties in Ahlborn, certainly guided by the formula utilized there and generally approved by the Supreme Court. Although utilization of the Ahlborn formula was not mandated by the Court in that case, it is certainly

one rational method of allocation, as recognized by other courts. In Smith, Judge Torpy recognized that although Ahlborn did not mandate use of the formula utilized there, it was still "a valid method of arriving at the answer-an answer that is compelled by federal law, Florida Statutes and Ahlborn." 24 So.3d at 594 (Torpy, J. dissenting). He opined that "[t]here is no other method for solving this problem," which may have been why "the parties in Ahlborn used it there." Id. This sentiment has been echoed by other courts. See, e.g., In re E.B., 729 S.E.2d 270, 296 (2012), and cases cited therein.

Here, Joshua was rendered a paraplegic at the age of two. He settled his claim against the tortfeasors for far less than the full value of his claim because that was the only money available. Garcon is not attempting to avoid their responsibilities to repay AHCA that which it is rightfully owed pursuant to federal law; they ask only that AHCA abide by the federal Medicaid law and take only that portion of the settlement that was recovered as reimbursement for past medical expenses. AHCA has not only refused to accept the requirements of federal law, it has fought tooth and nail to avoid it. AHCA refuses to acknowledge that in situations such as this, where it is impossible to make a beneficiary whole through the tort system, everyone involved, including AHCA, must sacrifice the possibility of recovering all which it paid in order to obtain some recovery.

By awarding the state its full lien, the trial court awarded the state a portion of the settlement which Garcon proved was meant to reimburse them, in part, for Joshua's *future* medical care. This was a violation of the federal law, as interpreted by the United States Supreme Court in Ahlborn.

CONCLUSION

For the reasons discussed above, this Court should reverse the Third District's decision and remand the case to the trial court for a hearing, as contemplated by the United States Supreme Court in Wos, Roberts, and Riley.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished to STUART WILLIAMS, ESQ. (stuart.williams@ahca.myflorida.com), 2727 Mahan Dr., MS 3, Tallahassee, FL 32308; ALLEN WINSOR, ESQ. (allen.winsor@myfloridalegal.com), and DIANE DEWOLF, ESQ. (diane.dewolf@myfloridalegal.com), PL-01, The Capitol, Tallahassee, FL 32399; ADAM STALLARD, ESQ., (fltpllegal@xerox.com), 2308 Killearn Center Blvd., Tallahassee, FL 32309, by email, on November 12, 2013.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioners hereby certify that the type size and style of the Initial Brief of Petitioners on the Merits is Times New Roman 14pt.

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