IN THE SUPREME COURT OF FLORIDA

MARIA ISABEL GIRALDO
and JUAN GONZALO VILLA,
as co-personal representatives of
the estate of JUAN L. VILLA,

Petitioners,

v.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

Case No.: SC17-297

L.T. Case Nos.: 1D16-0392
15-4423MTR

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONERS' REPLY BRIEF ON THE MERITS

FLOYD FAGLIE
Florida Bar No. 569690
faglielaw@earthlink.net
STAUNTON & FAGLIE, PL
189 E. Walnut Street
Monticello, Florida 32344
Tel: (850) 997-6300
Fax: (850) 997-6301

Attorneys for Petitioners

PHILIP J. PADOVANO
Florida Bar No. 157473
ppadovano@bhappeals.com
MAEGEN PEEK LUKA
Florida Bar No. 549851
mluka@bhappeals.com
JOSEPH T. EAGLETON
Florida Bar No. 98492
jeagleton@bhappeals.com
BRANNOCK & HUMPHRIES
1111 W. Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
Fax: (813) 262-0604
eservice@bhappeals.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY BRIEF

AHCA's approach to the Answer Brief is as unusual as it is unpersuasive. For starters, AHCA makes no attempt to defend the First District's analysis in *Giraldo* or to rebut the Second District's reasoning in *Willoughby*. Indeed, neither of the cases giving rise to the certified conflict this Court has accepted jurisdiction to resolve are even mentioned in AHCA's brief.

Instead, AHCA spends the first third of its brief discussing an irrelevant amendment to the federal Medicaid Act – irrelevant since AHCA agrees the amendment does not apply to this case, and the amendment was neither raised nor addressed in the courts below. Then, when AHCA finally gets around to it, the Answer Brief's half-hearted discussion of Medicaid law ignores the fact that the United States Supreme Court has already rejected the very same arguments AHCA is making here. Having no response to the analysis in the Initial Brief, AHCA raises a few scattershot issues, all the while ignoring the conflicting interpretations of Florida's Medicaid statute and the uncertainty that conflict creates for the lower courts who must apply the statute to dozens of pending cases.

Not only is AHCA's approach improper, it is also unhelpful. Regardless of prospective amendments to federal law or AHCA's own views of what Florida's Medicaid policy should be, countless Floridians are (and will be) affected by the District Courts' conflicting interpretations of Florida's Medicaid lien law. At the

end of the day, rather than addressing the arguments in the Initial Brief, the Answer Brief serves as little more than the *ipse dixit* of AHCA, supported by an emotional appeal to policy rather than legal analysis. AHCA's hope seems to be that it can make this Court find the issue so frustrating, or perhaps make this Court think it more appropriate for the federal courts to sort out, that this Court will simply throw its hands up and defer to the Agency.

AHCA fails to give this Court enough credit. Medicaid law may be dense in general, but this specific case is not difficult. Florida's District Courts have come to differing conclusions regarding the meaning of a Florida Medicaid statute, in opinions that lay out the competing analytical frameworks. For the reasons stated in the Initial Brief, this Court should quash the First District's opinion, approve the Second District's, and order AHCA to accept, in satisfaction of its lien against Juan's settlement, the undisputed (and unchallenged) portion of that settlement allocated as compensation for Juan's past medical expenses.

I. The amendment to federal law is irrelevant.

The Answer Brief is noteworthy, not for what it says about the recent amendment to federal law, but for what it does not say. For example, AHCA does not dispute that the federal amendment was meant to "overrule *Ahlborn* and *Wos*" by allowing States to recover any portion of a settlement "regardless of whether the payment is compensation for past medical, future medical, or even nonmedical

expenses." Answer Brief ("AB") 5; *see also* AB 8. This is our point exactly! Congress would not have needed to "overrule" *Ahlborn* and *Wos* if those cases did not hold exactly what Juan argues they do: federal law (before the amendment) limited the States to recovering only the portion of a settlement intended as compensation for past medical care (and, correspondingly, the portion intended as compensation for future medical care was protected from Medicaid liens).

Nor does AHCA dispute that the conflict before this Court is over the interpretation of Florida's Medicaid statute, not the amended federal statute. And AHCA also does not dispute that the amendment is prospective in nature and has no application here – or to the dozens of other pending cases. Because AHCA tries to brush it under the rug, we call to the Court's attention that the certified conflict impacts any Florida Medicaid recipient whose lien attached before October 1, 2017, (the effective date of the federal amendment).[1] Since Medicaid recipients'

[1] The Answer Brief claims several times that the new federal statute applies to any settlement entered into after October 1, 2017. AB 2, 3, 5, 25. But AHCA's lien attaches when the medical services are first rendered, not when the case settles. § 409.910(6)(c)(1), Fla. Stat. ("The lien attaches automatically when a recipient first receives treatment...."). So, for example, a person who gets in an accident and receives medical care in September 2017, but does not settle his tort lawsuit until November 2018, would not be impacted by the federal amendment because AHCA's lien would have attached when care was first provided, which was before October 2017. This is all irrelevant to the issue presented in this case, since AHCA agrees the federal amendment does not apply here. But it goes to show that there are a great many Floridians that remain unaffected by the recent amendment and subject to the conflicting interpretations advanced by the First and Second Districts, including some whose tort lawsuits may not even have been filed yet.

tort lawsuits, and the resulting settlements or verdicts from which AHCA seeks to recover, often do not materialize until years after AHCA's lien attaches, the pool of Florida Medicaid recipients potentially impacted by the statutory conflict before this Court is huge. In this case, Juan's lien attached when AHCA first paid for his care in 2010 (footnote 1, *supra*; R.16) and he settled close to three years ago, in April 2015. R.18. This Court alone has encountered three cases where the events giving rise to the Medicaid lien disputes occurred several years ago. *See Mobley v. AHCA*, SC17-403 (tagged to this case); *AHCA v. Willoughby*, SC17-660 (AHCA withdrew its petition in June 2017). There are current lien dispute cases in the trial and appellate pipeline, many of them stayed pending the outcome here. *See, e.g.*, *Manley v. AHCA*, Case No. 1D17-0354; *Gray v. AHCA*, Case No. 1D17-355. And there could be dozens more that have not even been filed yet.

Put simply, AHCA's discussion of an inapplicable amendment is merely an attempt at smoke and mirrors. The fact that a federal amendment may (or may not) moot the controversy for cases where the liens attach after October 2017 does not undo the fact that there is a live conflict regarding Florida law – that only this Court can resolve – affecting all Florida Medicaid recipients who received care before October 2017. Which makes AHCA's extensive discussion of the federal amendment little more than a red herring. (And it is an illusive red herring at that, given that there is legislation currently in the works to postpone the amendment for

another two years, to October 2019. *See* AB 8, fn. 4. If that happens, this Court's resolution of the certified conflict would apply to an even larger class of Floridians than it already does.)

Finally, given that even AHCA agrees that the federal amendment does not and could not apply to currently pending cases, AHCA's barebones request that this Court affirm based on that amendment hardly merits comment. AB 9. A prospective amendment to a federal law cannot retrospectively make the First District's analysis of a Florida statute correct – especially where the First District never even considered the amendment or AHCA's argument.

II. AHCA's views of policy do not trump the law.

The second argument in AHCA's brief is just as misplaced as the first. Essentially, while avoiding any discussion of the relevant caselaw, AHCA argues that various sections of the Florida Medicaid statute relating to legislative intent trump federal law. AB 10-11. It is a perplexing argument given that the doctrine of preemption says the exact opposite (*i.e.*, that state law must yield when it conflicts with controlling federal law). *See, e.g., Davis v. Roberts*, 130 So. 3d 264, 270 (Fla. 5th DCA 2013) ("*Ahlborn* and *Wos* make clear that section 409.910(11)(f) is preempted by the federal Medicaid statute's anti-lien provision to the extent it...permits recovery beyond that portion of the Medicaid recipient's third-party recovery representing compensation for past medical expenses.").

More importantly though, AHCA has no response to the undeniable fact that, regardless of the Florida Legislature's intent, State Medicaid reimbursement statutes are preempted to the extent that they conflict with federal Medicaid law. Which means, even though the Florida Legislature wrote that it intends to be "repaid in full...regardless of whether a recipient is made whole or other creditors paid," that desire, however well-intentioned it may be, must yield to the protections proscribed by controlling federal law. § 409.910(1), Fla. Stat.; AB 11.

Really, though, AHCA's policy argument is just another red herring. This case is not, as AHCA implies, about equities. AB 12-13. It is about property rights – rights that, as explained in the Initial Brief, have been clearly defined by the United States Supreme Court to protect all of Juan's tort settlement other than the portion designated as compensation for his past (already paid for) medical care.

In fairness, AHCA does make a bald claim that there is no infringement of property rights because "[t]he anti-lien provision [of federal Medicaid law] does not limit Florida's recovery." AB 13. The idea apparently being that, although the federal anti-lien provision prevents AHCA from attaching its lien to any property of the recipient, that is not a problem here because Juan "assigned [his] property rights to the state in order to be eligible for Medicaid in the first place." AB 13.

This argument is much bolder than the one AHCA made to the First District, where AHCA claimed that it could take the entire medical expenses portion of the

settlement (past and future). R.74-85. Now, AHCA is going one step further, suggesting for the first time in this Court that it can take *all* of Juan's settlement – medical expenses or not. In light of the analysis provided in *Ahlborn* – analysis the Answer Brief ignores – it is hard to understand AHCA's newfound position.

Specifically, in *Ahlborn*, the State Medicaid agency argued essentially the same thing AHCA is arguing here, and the Supreme Court flatly rejected that argument. *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 281 (2006). The Court noted that § 1396a(a)(25) and § 1396k(a) of the federal Medicaid Act, the same provisions cited in AHCA's brief, create a narrow exception to the anti-lien provision, "[b]ut that does not mean the State can force an assignment of, or place a lien on, any other portion of Ahlborn's property." *Id.* Instead, the exception "carved out by § § 1396a(a)(25) and 1396k(a) ***is limited to payments for medical care***. Beyond that, the anti-lien provision applies." *Id.* (emphasis added). Despite the clear limitation, AHCA claims that Juan assigned all of his property rights to AHCA and that AHCA can take whatever it wants. *Ahlborn* plainly tells us AHCA is wrong.

Even more bizarre is the Answer Brief's failure to discuss in this section any of the other caselaw – *Wos*, the conflict cases (*Giraldo* and *Willoughby*), or any of the other cases discussed in the Initial Brief. Juan can think of no explanation for AHCA's failure other than this: AHCA wants to confuse the issues and ignore the

conflict because it knows that the First District's analysis – analysis AHCA does not even attempt to justify – is simply indefensible.

III. *Ahlborn*, *Wos*, and the federal Medicaid statutes support the Second District's interpretation of Florida's Medicaid reimbursement law.

Even though AHCA spends the first third of its brief characterizing the federal amendment as "overruling" *Ahlborn* and *Wos*, the last section of the Answer Brief makes a cognitively dissonant about-face and argues that *Ahlborn* and *Wos* actually permit AHCA to recover both the past and future medical expense portions of Juan's settlement. AB 14. Putting aside the competing nature of the arguments, AHCA's interpretation of *Ahlborn* and *Wos* is wrong. Nothing in the Answer Brief addresses, let alone overcomes, the undeniable fact that *Ahlborn*, *Wos*, and the federal Medicaid statute refute the First District's opinion in *Giraldo* and support the Second District's conclusion in *Willoughby*.

With regard to *Ahlborn* and *Wos*, AHCA tries to turn Juan's argument on its head and claim that the Supreme Court made a knowing choice to speak in terms of "medical expenses" instead of "past medical expenses." AHCA says "we are required to assume that the Court chose its words carefully and knew what it was saying." AB 14. That would be true if the argument about past versus future medical expenses had been raised by the parties in those cases. But AHCA's argument ignores the fact that the Supreme Court did not need to speak in terms of "past medical expenses" in *Ahlborn* and *Wos* because, as explained in detail in the

Initial Brief, everyone understood that to be what the Court meant. Initial Brief ("IB") 22-29; *see also* R.32-39. There was no need for greater precision because no one was raising the argument AHCA now makes.

No court, not even the Supreme Court, can anticipate every possible way its opinion might later be applied. *Ahlborn* and *Wos* are certainly not the first time, nor will they be the last, where an opinion based on an argument not squarely before the Court at the time has led to the need for subsequent clarification. Indeed, entire bodies of precedent (not to mention libraries full of law review articles) are devoted to interpreting and clarifying Supreme Court opinions.

Moreover, AHCA's efforts to take Supreme Court quotes out of context cannot overcome the Initial Brief's explanation of the procedural and factual posture of *Ahlborn* and *Wos*. IB 22-29. As a matter of fact, AHCA does not even try to address or explain those objective, undeniable facts. For example, the *Ahlborn* opinion may have spoken generically about "medical expenses," but its holding used concrete figures that prove the Court was actually speaking in terms of "past medical expenses." The parties had agreed that $35,581.47 "constituted reimbursement for medical payments made." 547 U.S. at 274. And the Court's holding was that "[f]ederal Medicaid law does not authorize ADHS [the Arkansas equivalent of AHCA] 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 291. Which means, regardless of what language *Ahlborn* used to describe it, the Court's holding was that Arkansas was prohibited from recovering anything more than the precise sum allocated as compensation for medical expenses ***already incurred*** (stated differently, "past medical expenses").

By way of another example, when the *Ahlborn* Court said that "[w]e must decide whether [the State Medicaid program] can lay claim to more than the portion of Ahlborn's settlement that represents medical expenses," it was necessarily speaking in terms of the portion of the settlement in dispute – which represented the past medical expenses. *Id.* at 280. That is irrefutable since the issue presented to the Court was in the form of Heidi Ahlborn's request for a declaration that the Medicaid lien "violated the federal Medicaid laws insofar as its satisfaction would require depletion of compensation for injuries other than ***past medical expenses***." *Id.* at 274 (emphasis added). AHCA, like the First District, has no response to this fact, so it chose to simply ignore the problem.

AHCA's short-shrift explanation of *Wos* fares no better. Again, AHCA tries to dance around the issue but fails to address the undeniable facts. As explained in the Initial Brief at pages 26 to 28 and by the Second District, "the underlying facts of *Wos*" prove why the Court was talking in terms of "past medical expenses." *Willoughby v. AHCA*, 212 So. 3d 516, 524 (Fla. 2d DCA 2017). Specifically, *Wos* was an affirmance of the Fourth Circuit's holding that "federal Medicaid law limits

a state's recovery to settlement proceeds that are shown to be properly allocable to ***past medical expenses***" (and that Medicaid recipients must be given a chance to show what that allocation is). *E.M.A. ex rel. Plyler v. Cansler*, 674 F.3d 290, 312 (4th Cir. 2012) (emphasis added). Moreover, as noted in the Initial Brief (page 28) and discussed in the Joint Amicus Brief (pages 15-16), even the Secretary of Health and Human Services, who is responsible for administering the federal Medicaid program, took the position in *Wos* that North Carolina's Medicaid statute violated federal Medicaid law by overestimating the portion of the settlement that may be regarded as payment for ***past*** medical expenses. AHCA has no response to that fact. Thus, when it comes to *Wos*, Juan absolutely agrees that the Supreme Court "did not change its analysis as to past versus future medical expenses." AB 18. The Court maintained its position that the States cannot collect more of a settlement than the portion intended as compensation for past medical expenses.

Likewise, AHCA's attempts to draw favorable language from *Ahlborn's* interpretation of the federal Medicaid statute fall flat. AHCA points to the language in *Ahlborn* saying that the assignment a State acquires from a Medicaid recipient is for "no more than the right to recover that portion of a settlement that represents ***payments for medical care***." *Ahlborn*, 547 U.S. at 282 (emphasis added). AHCA claims that, because the assignment is for "payments for medical care," then "it must include the right to [payments for] past medical care and the

right to future medical care." AB 23. But, both the language of the federal Medicaid statute and *Ahlborn*'s interpretation of it prove AHCA wrong.

As the *Ahlborn* opinion explained (by quoting the federal Medicaid statute), the only thing a Medicaid recipient assigns to the State is the tortfeasor's liability to pay for the medical care that has been already been furnished and paid for by Medicaid. Specifically, under § 1396a(a)(25)(B), what the Medicaid recipient assigns to the State is the tortfeasor's "legal liability" to pay for "***care and services under the plan***." 547 U.S. at 280 (emphasis in original); *see also id.* at 282 (noting that the assignment is for "no more than the right to recover that portion of a settlement that represents payments for medical care"). The tortfeasor's liability for "such services" is limited to the "health care items or services ***furnished*** to an individual." *Id.* at 281 (emphasis added), quoting § 1396a(a)(25)(H). Thus, on its face, the applicable version of the federal Medicaid statute says that, "to the extent payment has been made [by Medicaid] for health care items or services furnished to an individual," the State is "considered to have acquired the rights [of the Medicaid recipient] to payment by [the tortfeasor] for such health care items and services" (i.e., the right to payment for care/services that have already been furnished – *Ahlborn*, 547 U.S. at 281). 42 U.S.C. § 1396a(a)(25)(H).

The analysis then is straightforward, as noted by the Second District in *Willoughby*. At the time of settlement, the only care that could have been

"furnished" (and thus paid for by Medicaid) is the recipient's past medical care. Everything after the settlement would constitute future care that has not yet been "furnished," let alone paid for by Medicaid. Ergo, since Juan only assigned to AHCA any "payments" for "such health care items and services" that had been "furnished" and paid for by Medicaid, § 1396a(a)(25)(H), the assignment could not encompass money intended for future, yet unpaid medical care. *Ahlborn*, 547 U.S. at 282. That is because "[f]uture medical expenses have neither been [furnished] nor paid." *Willoughby*, 212 So. 3d at 524, citing *Ahlborn*, 547 U.S. at 282. In short, the *Ahlborn* Court's discussion, reported at 547 U.S. 281-283; the language of the federal Medicaid statute itself; and the Second District's interpretation of those two things, eviscerate AHCA's arguments and the First District's logic.

Which means AHCA is left with little more than an appeal to sympathy that would require this Court to reject controlling law. No doubt, there are competing equitable concerns at play. For example, AHCA paid for Juan's care in a time of need. But, as noted by at least one court, AHCA ignores the realities of settlement when it demands a full recovery of what it paid. *McKinney v. Philadelphia Hous. Auth.*, 2010 WL 3364400, at *8 (E.D. Pa. Aug. 24, 2010). If Juan had taken the defendant with whom he settled to trial, his lawyer explained why there was a real risk that Juan might recover nothing. R.19. Hence, trading the risk of zero for the certainty of something less than the value of the case was the prudent decision.

But AHCA wants to "reap the benefits" of Juan's settlement "without giving up anything." *Id.* "That is not the way settlement works. When parties settle, everyone sacrifices." *Id.* AHCA's appeal to sympathy "ignores this reality." *Id.*

But really, the equities, on either side, are irrelevant to the issue at hand. The relevant facts are that the applicable federal Medicaid law protects the property of Medicaid recipients, and the Supreme Court has determined that State Medicaid statutes, like section 409.910, are "unenforceable" to the extent they allow agencies like AHCA to recover anything other than the portion of a settlement intended as compensation for past medical expenses. *Ahlborn*, 547 U.S. at 292 ("[T]he federal anti-lien provision affirmatively prohibits" States from asserting a lien on a settlement "in an amount exceeding [the sum designated as payments for past medical expenses]" and State Medicaid statutes "are unenforceable insofar as they compel a different conclusion.").

Put simply, there is no "open question." AB 22. The First District got it wrong. The Second District got it right. As the Second District found, "*Ahlborn* and its progeny are best read as limiting the recovery of [a] Medicaid recipient to that portion of a settlement allocable to past medical expenses." *Willoughby*, 212 So. 3d at 523. With the exception of the *Giraldo* case, Florida's other District Courts of Appeal agree. *See, e.g.*, *Harrell v. State*, 143 So. 3d 478, 480 (Fla. 1st DCA 2014) ("*Ahlborn* and *Wos* make clear that section 409.910(11)(f) is

preempted by the federal Medicaid statute's anti-lien provision to the extent it...permits recovery beyond that portion of the Medicaid recipient's third-party recovery representing compensation for past medical expenses."), quoting *Davis*, 130 So. 3d at 270; *see also* R.41-44. And the majority of courts outside of Florida concur. *See Willoughby*, 212 So. 3d at 524 (collecting cases); R.44-46. The Answer Brief fails to explain how this overwhelming weight of authority is wrong.

IV. The resolution of this particular case.

We can't help but conclude with one last thing AHCA's Answer Brief does not dispute. Based on its complete silence (to both the Initial Brief and FJA Amicus Brief), AHCA appears to agree that, if the First District got the law wrong, application of the correct law to the facts of this case compels this Court to remand with instructions for AHCA to accept, in satisfaction of its lien, the unchallenged amount allocated as compensation for Juan's past medical expenses. *See* IB 46-50.

Conclusion

This Court should resolve the certified conflict by quashing *Giraldo* and approving *Willoughby* so that the lower courts tasked with resolving Medicaid lien disputes can consistently apply the correct law. In addition, to bring this case to an expeditious conclusion, this Court should remand with directions that AHCA accept, in satisfaction of its lien against Juan's settlement, the unchallenged $13,881.79 allocated as compensation for Juan's past medical expenses.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to Elizabeth Teegen, Assistant Attorney General (elizabeth.teegen@myfloridalegal.com), and Jonathan A. Glogau, Special Counsel (jon.glogau@floridalegal.com), Office of the Attorney General, Complex Litigation, The Capitol, Suite PL-01, Tallahassee, Florida 32399-1050; Tracy George, Chief Appellate Counsel (tracy.george@ahca.myflorida.com), Agency for Health Care Administration, Office of General Counsel, 2727 Mahan Drive, Bldg. 3, MS #3, Tallahassee, Florida 32308; Twyla Sketchley (service@sketchleylaw.com), The Sketchley Law Firm, P.A., 3689 Coolidge Ct., Unit 8, Tallahassee, Florida 32311; Ellen S. Morris (emorris@elderlawassociates.com), Elder Law Associates, P.A., 7284 W. Palmetto Park Rd., Suite 101, Boca Raton, Florida 33433; Ron Landsman (rlm@ronmlandsman.com), Ron M. Landsman, P.A., 200-A Monroe Street, Suite 110, Rockville, Maryland, 20850; Jill Burzynski (jjb@burzynskilaw.com), Burzynski Elder Law, 1124 Goodlette Rd., North, Naples, Florida 34102; and Nichole Segal (njs@flappellatelaw.com; kbt@flappellatelaw.com), Burlington & Rockenbach, P.A., 444 W. Railroad Ave., Suite 350, West Palm Beach, Florida 33401, this 16th day of January 2018.

FLOYD FAGLIE

PHILIP J. PADOVANO

Florida Bar No. 569690
faglielaw@earthlink.net
STAUNTON & FAGLIE, PL
189 E. Walnut Street
Monticello, Florida 32344
Tel: (850) 997-6300
Fax: (850) 997-6301

Florida Bar No. 157473
ppadovano@bhappeals.com
MAEGEN PEEK LUKA
Florida Bar No. 549851
mluka@bhappeals.com
JOSEPH T. EAGLETON
Florida Bar No. 98492
jeagleton@bhappeals.com
BRANNOCK & HUMPHRIES
1111 W. Cass Street, Suite 200
Tampa, Florida 33606
Tel: (813) 223-4300
Fax: (813) 262-0604
eservice@bhappeals.com

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

MAEGEN PEEK LUKA
Florida Bar No. 549851