IN THE SUPREME COURT OF IOWA

No. 19-1066

ROSALINDA VALLES, individually, and On behalf of F.L., her minor child,

Plaintiff-Appellant,

vs.

ANDREW MUETING, D.O., JOSEPH LIEWER, M.D., NORTHWEST IOWA EMERGENCY PHYSICIANS, P.C., AMY WINGERT, M.D., KELLY RYDER, M.D., et al.,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HON. JEFFREY L. POULSON

APPELLANT'S FINAL REPLY BRIEF

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REPLY TO ARGUMENT

This Reply Brief addresses a number of discrete points raised in the Defendants' principal briefs. The Plaintiff otherwise rests on the arguments in her principal brief.

Appellate Jurisdiction. The district court entered a Final Judgment that finally disposed of all claims against all parties on May 29, 2019. Although the Plaintiff appealed the Final Judgment on June 24, 2019, the Defendants rely on the trial court's order dated November 21, 2018, to claim this appeal is untimely.

This is the second time this case has come before the Court. Previously, by order dated March 13, 2019, in Sup. Ct. Case No. 19–0055, this Court determined that the November 21, 2018 order was not final or appealable as a matter of right and otherwise reviewable by means of a discretionary interlocutory appeal.

In a desperate attempt to thwart appellate review, Defendants claim the November 21, 2018 order was in fact final and the present appeal is therefore untimely. (Dr. Mueting, Dr. Liewer, and Northwest Iowa Emergency Physicians, P.C.'s Brief at 20-26; Dr. Wingert and Dr. Ryder's Brief at 13-19). As outlined below, the Defendants' arguments fail for two reasons. First,

as a matter of law the trial court's November 21, 2018 order was not final for appeal purposes. Second, the law of the case doctrine prevents this issue from being reconsidered.

Summary Judgment for Drs. Wingert and Ryder. These Defendants claim not only that the existence of a physician-patient is sufficient to give rise to a cognizable duty of care in a negligence case involving a health care professional, but also that it is strictly necessary or a "prerequisite" in all such cases. Plaintiff disagrees, arguing that a special contractual relationship is not strictly required under the circumstances of this case involving the dereliction of duties by on-call family practice residents responsible for the care of a critically ill minor on a hospital pediatrics unit, when contacted by nursing staff about the patient's serious medical needs.

Standard of Care Jury Instruction. The Plaintiff contends that the trial court's standard of care instruction was not an accurate statement of the law and it was reversible error to instruct the jury to apply a nonspecialist standard of care as opposed to the reasonable "specialist" standard of care. As outlined below, it is the specialty of the particular defendant physician that determines which standard of care instruction is to be submitted to the jury in medical negligence cases.

Interpretation and Application of Iowa Code §147.136. In essence, Defendants claim that §147.136 removes their legal liability to pay for past and future medical expenses because Texas Medicaid is available to foot the bill. As outlined below, this argument disregards the function of federal preemption and attempts to shift primary payer responsibility to Medicaid, contrary to congressional intent in the Medicaid statutes.

1. Defendants' challenge to this Court's appellate jurisdiction is without merit.

a. Relevant procedural history

On November 21, 2018, the jury's verdict was returned and a judgment was entered. (Amended Appendix. v. 1 p. 4088) (Amended Appendix herein after referred to as "App."). At the time, several defendants had settled but were not yet dismissed. On December 20, 2018, the Plaintiff filed a Motion for Entry of Order Nunc Pro Tunc, requesting the district court to clarify that the jury's verdict was in favor of Dr. Mueting, Dr. Liewer, and Northwest Iowa Emergency Physicians, P.C. only, and that the order did not constitute an entry of judgment in favor of the settling defendants,[1] who were also listed

[1] Prior to trial, the Plaintiff reached a proposed settlement of the claims asserted against Dr. Jesse Nieuwenhuis, Dr. Aruntha Swampillai, Dr. Thomas Morgan, Dr. Leah Johnson, Dr. Said Sana, Siouxland Medical Education Foundation, and Mercy Medical Center. Those proposed settlements were

in the caption of the November 21st order as "Defendants." (App. v. 1 p. 4091). On January 24, 2019, Dr. Mueting, Dr. Liewer, and Northwest Iowa Emergency Physicians, P.C. filed a response to the Plaintiff's motion, stating that they "do not object to an Order Nunc Pro Tunc to clarify the November 21, 2018, Order…." (App. v. 1 p. 4095).

The district court subsequently entered an amended order regarding judgment and costs, clarifying its original order. The Nunc Pro Tunc Order made clear that the entry of judgment was in favor of Dr. Mueting, Dr. Liewer, and Northwest Iowa Emergency Physicians, P.C. only. (App. v. 1 p. 4098). As such, the district court's order was merely a partial disposition relating to fewer than all the issues and parties to the underlying action. It was not an order or judgment that finally disposed of the case in its entirety, from which an appeal could be taken as a matter of right.

Significantly, at the time there hadn't been any judgment or order for dismissal of the claims against any of the settling defendants, nor had any stipulation or motion for voluntary dismissal of such claims been filed in the underlying action when the November 21, 2018 order was issued. This is

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subject to probate court approval and thus did not result in final disposition of Plaintiff's claims against the settling defendants until March through April of 2019.

because the proposed settlement of claims involving a minor was subject to probate court approval that had not yet been obtained, and further district court proceedings could have become necessary in the event the proposed settlement was not approved or else warranted judicial enforcement / specific performance as against the settling defendants.

Nevertheless, anticipating that this exact issue might arise, Plaintiff filed a "protective" notice of appeal, stating:

> Plaintiff does not believe that this case is ripe for an appeal because stipulations and orders of dismissal have not yet been entered with respect to several of the settling defendants, including Dr. Jesse Nieuwenhuis, Dr. Aruntha Swampillai, Dr. Thomas Morgan, Dr. Leah Johnson, Dr. Said Sana, Siouxland Medical Education Foundation, and Mercy Medical Center. Therefore, the order and judgment entered on the 21st day of November, 2018, was not actually dispositive of the entire case.

(App. v. 1 p. 196).

In response, this Court ordered that the Plaintiff file a statement concerning appellate jurisdiction. On February 19, 2019, the Plaintiff

complied and filed a Position Statement Concerning Appellate Jurisdiction (App. v. 1 p. 4069), therein stating her position that the district court orders "are not yet appealable as a matter of right" and further explaining that "this case [does not] fit the criteria for interlocutory review." (App. v. 1 p. 4077). Defendants did not controvert the Plaintiff's position concerning the lack of appellate jurisdiction with respect to Sup. Ct. Case No. 19–0055, nor did they affirmatively argue that the November 21, 2018 order was in fact a final appealable order or even subject to interlocutory appellate review. (App. v. 1 p. 4106).

This Court subsequently issued an Order Denying Application for Appeal on March 13, 2019. (App. v. 1 p. 4109). The Order stated that "the appellant acknowledges the applicable district court orders were not final or appealable as a matter of right" and that "this court may proceed as though the proper form of review has been requested, Iowa R. App. P. 6.108, and treats the appellant's filing as an application for interlocutory appeal." Thus, the first time this case came before the Court, it found, at least implicitly, that the appeal was premature and had not yet ripened into an effective appeal, in that the applicable district court orders at the time were not final or appealable as a matter of right.

After issuance of the procedendo, the district court ultimately entered a Final Judgment that finally disposed of all issues raised and claims asserted by Rosalinda Valles, individually and on behalf of F.L., against all parties, on May 29, 2019. (App. v. 1 p. 4057).

b. Plaintiff's June 24, 2019 appeal was timely.

This Court has jurisdiction over appeals filed within thirty days of a district court's final order. *Ahls v. Sherwood/Div. of Harsco Corp*., 473 N.W.2d 619, 621 (Iowa 1991).

Here, as indicated above, the district court entered a Final Judgment that finally disposed of all the issues and claims against all parties on May 29, 2019. Plaintiff appealed the Final Judgment on June 24, 2019—26 days after the final judgment was entered. (App. v. 1 p. 4057). Accordingly, Plaintiff's appeal is timely and this Court has appellate jurisdiction.

In their principal response briefs, the Defendants disregard that the appeal in the case now before the Court concerns the May 29, 2019 Final Judgment. Instead, they attempt to mislead the Court by arguing that the district court's November 21, 2018 order was the final judgment. Defendants' arguments do not concern the present appeal, but rather, relate to the first appeal in Sup. Ct. Case No. 19–0055, which this Court dismissed for lack of

jurisdiction. Regardless, the Defendants' arguments are inconsequential because the November 21, 2018 order inheres in the May 29, 2019 Final Judgment. *See Doonan v. City of Winterset*, 275 N.W. 640 (Iowa 1937) (interlocutory ruling on pleadings, although separately appealable, was reviewable on appeal from final judgment because it "inhered in the judgment"); *Palmer v. Rodgers*, 30 N.W. 645 (1886) (holding that although plaintiff did not appeal from an order setting aside defendant's default, the order was reviewable on appeal from the final judgment, since that appeal brought up for review intermediate rulings).

c. The district court's November 21, 2018 order was not final as a matter of law.

Rule 6.101(1)(b) of the Iowa Rules of Appellate Procedure sets forth the final judgment rule: "A notice of appeal must be filed within 30 days after the filing of the final order or judgment." An order is not final unless it conclusively adjudicates all of the rights of the parties and places it beyond the power of the court to return the parties to their original positions. *Ahls*, 473 N.W.2d at 621. Accordingly, "a ruling is interlocutory unless it disposes

of all the issues and parties." *Matter of Troester's Estate,* 331 N.W.2d 123, 125-26 (Iowa 1983).[2]

In *Ahls*, a district court's order reciting that the parties had settled the case was not a final order for appeal purposes. 473 N.W.2d at 621. Although the order was the district court's last, this Court determined that "the ministerial act of the clerk in filing the dismissals . . . cannot be considered to be an order, judgment, or decree." *Id*. at 622.

Furthermore, this Court has held that dismissals filed by parties are not final orders for appeal purposes. *Estate of Countryman v. Farmers Co-op. Ass'n*, 679 N.W.2d 598, 601 (Iowa 2004); *Ahls*, 473 N.W.2d at 622; *see also*, *Stockton Realty Co. v. Muscatine Cty. Solid Waste Mgmt. Agency*, 690 N.W.2d 698 (Iowa Ct. App. 2004) ("We hesitate to apply a standard that requires appellate courts to judge the intent or motivation of the parties seeking a dismissal without prejudice, or to judge the effects of consent to the dismissal by the opposing party.").

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[2] Notably, this Court may look for additional guidance to federal authorities construing the final judgment rule in federal court litigation and appeals. There, as in Iowa, a final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Riley v. Kennedy*, 553 U.S. 406, 419 (2008); *see Utah v. Norton*, 396 F.3d 1281, 1286 (10th Cir. 2005) ("A final judgment is one that terminates all matters as to all parties and causes of action." (internal quotation marks omitted)).

Likewise, here, the time to appeal did not effectively begin to run until the district court entered the Final Judgment—i.e., the one that finally disposed of all the issues and parties to the underlying action. The district court's November 21, 2018 order, which was subsequently amended and clarified by virtue of the order filed on January 25, 2019, nunc pro tunc, November 21, 2018, did not dismiss all the parties to the action, but rather, only disposed of the Plaintiff's claims against the three nonsettling defendants. Before the entry of an order or judgment that finally disposed of all the issues and parties, these orders were interlocutory at best and not yet appealable as a matter of right. *Countryman*, 679 N.W.2d at 602 ("The key event in [a finality] inquiry is the date the last remaining claim against a party was dismissed.").

Iowa R. App. P. 6.101(1)(d) specifies an additional means of appealing partial determinations made by trial courts. It provides:

> A final order dismissing some, but not all, of the parties or disposing of some, but not all, of the issues in an action may be appealed within the time for appealing from the judgment that finally disposes of all remaining parties and

> issues to an action, even if the parties' interests or the issues are severable.

As might be expected from the classic definition of a final judgment, as well as the policy behind the final judgment rule which is to avoid piecemeal appeals, this rule establishes that partial determinations, including those "dismissing some, but not all, of the parties" and intermediate rulings "disposing of some, but not all of the issues in an action" may be appealed within 30 days after entry of "the judgment that finally disposes of all remaining parties and issues to an action." The district court's May 29th Order Entering Final Judgment expressly states that it is "the final disposition by [the district court] of all the remaining issues and parties in this case" (App. v. 1 p. 4058), leaving no room for doubt as to the district court's intention to render an appealable Final Judgment as of that date.

d. The Law of the Case Doctrine prevents reconsideration

"Under the law of the case doctrine, an appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case." *Bahl v. City of Asbury*, 725 N.W.2d 317, 321 (Iowa 2006) (citation and internal quotation marks omitted). The doctrine extends to "matters necessarily involved in the determination of a question" settled in a

prior appeal for purposes of subsequent appeals. *In re Lone Tree Cmty. Sch. Dist.*, 159 N.W.2d 522, 526 (Iowa 1968) (quoting *Des Moines Bank & Trust Co. v. Iowa S. Utilities Co. of Del.*, 245 Iowa 186, 189, 61 N.W.2d 724, 726 (1953)). The doctrine is derived from a public policy against reopening decided matters and applies regardless of whether the appellate decision was correct. *Id.*; *Lawson v. Fordyce*, 237 Iowa 28, 34, 21 N.W.2d 69, 74 (1945). Thus, issues decided by an appellate court cannot be reheard, reconsidered, or relitigated. *United Fire & Cas. Co. v. Iowa Dist. Court for Sioux Cty.*, 612 N.W.2d 101, 103 (Iowa 2000).

This Court should reject Defendants' argument by applying the law of the case doctrine. When this case first came before the Court in Sup. Ct. Case No. 19–0055, the Court conclusively resolved the issues of whether the November 21, 2018 order was an appealable final order as a matter of right and, if not, whether that order was reviewable by means of a discretionary interlocutory appeal. In raising their lack-of-jurisdiction argument in the present appeal, Defendants attempt to reopen the previously decided issue of whether the district court's November 21, 2018 order was an appealable final order, and to render this Court's Order Denying Application for Appeal on March 13, 2019 meaningless and ineffective. The Court should decline the

Defendants' invitation to disregard and nullify the law of the case on the previously decided issues.

2. The trial court erred in granting summary judgment in favor of Dr. Wingert and Dr. Ryder.

Contrary to the Defendants' argument, Dr. Wingert and Dr. Ryder owed a duty of care to F.L. based on a proper application of the factors outlined in *Leonard v. State*, 491 N.W.2d 508, 509-12 (Iowa 1992). Proof of the existence of an express or implied physician-patient relationship to F.L. wasn't strictly necessary or a "prerequisite" to the determination of a legal duty on the part of the on-call residents responsible for addressing the serious medical needs of critically ill minor patients on the hospital's pediatrics unit.

Regarding the first factor, Drs. Wingert and Ryder were aware of F.L.'s medical condition. Dr. Wingert asserts she was never involved in the care and treatment of F.L.; however, the same day Dr. Wingert failed to respond while on-call, she reviewed F.L.'s electronic medical records. If Dr. Wingert had no responsibility to F.L., she would have had no need to review his medical records. Conversely, after reviewing his medical records, Dr. Wingert was aware or should have been aware of his significantly deteriorating medical condition and had a responsibility to ensure measures were taken to address his serious medical needs and to assist in efforts to stabilize F.L.'s condition.

Likewise, Dr. Ryder was involved in F.L.'s care once Nurse Lang communicated F.L.'s medical emergency.

Regarding the second factor, it was reasonably foreseeable, if not inevitable, that F.L. would suffer additional and enhanced harm after Dr. Wingert and Dr. Ryder chose to disregard their on-call duties during a medical crisis or emergency. *See Plowman v. Fort Madison Community Hospital*, 896 N.W.2d 393, 413 (Iowa 2017) (despite lack physician-patient relationship in father's wrongful birth action, defendant physician nonetheless owed father a duty where the resulting harm was readily foreseeable).

Finally, public policy considerations support imposing a duty upon Dr. Wingert and Dr. Ryder. In *Millard v. Corrado*, 14 S.W.3d 42, 53 (Mo. App. 1999), the Missouri Court of Appeals held that a negligence claim against a physician could be maintained absent a physician-patient relationship. There, the defendant physician scheduled to be on-call was out of town and did not respond to a page concerning a patient with a medical emergency. *Id*. at 45. The defendant did not arrange for a suitably qualified physician to cover for him during his absence. *Id*. Without a qualified physician available, the plaintiff was taken to another hospital and eventually treated four hours after her medical crisis or emergency arose. *Id*. The court noted that "unless

obligated by law or contract, physicians are not required to accept 'on call' assignments," but determined that a "duty is created by the physician who agrees to be available to treat emergency patients." *Id*. at 48. The court went on to hold that "on call physicians owe a duty to reasonably foreseeable emergency patients to provide reasonable notice to appropriate hospital personnel when they will be unavailable to respond to call." *Id*. Further, and relevant to the third *Leonard* factor, the court emphasized that public interest is not furthered by permitting on-call physicians to make themselves unavailable without providing adequate notice that they will be unable to respond to calls. *Id*.

Even assuming arguendo that Dr. Wingert and Dr. Ryder did not have a physician-patient relationship with F.L., they are nevertheless liable for F.L.'s injuries and losses due to negligence. Public policy considerations weigh heavily in favor of imposing a legal duty to F.L. Such considerations include ensuring that minor patients who have serious medical needs receive adequate care and treatment, especially after they have been admitted to a hospital pediatrics unit because of a life-threatening condition. There is nothing unreasonable in requiring physicians who are on-call and contacted for the purpose of providing medical assistance to exercise due care.

Moreover, like the defendant in *Millard*, the fact that Dr. Wingert did not arrange for another physician to provide care for critically ill minor hospital patients on the pediatrics unit during her unavailability is alarming. It should be anticipated that a medical crisis or emergency such as F.L.'s could arise. Dr. Wingert's failure to anticipate, ensure against, or address F.L.'s serious medical needs was unreasonable and demonstrates a lack of due care.[3] Lack of due care and responsibility under circumstances such as these demands recognizing and imposing a duty on on-call physicians to hospital patients, either with or without a pre-existing physician-patient relationship.

Furthermore, a reasonable juror could conclude that at least Dr. Wingert was obligated to provide care and treatment for F.L. because of her contractual relationship with Mercy Hospital.

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[3] *See also, e.g., Brown v. Bailey*, 210 S.W.3d 397 (Mo. Ct. App. 2006) (Neurosurgeon who was on-call to provide emergency care at hospital owed a duty to hospital patient to provide reasonable notice to hospital personnel that he would be unavailable to respond to calls, allowing a finding of liability under negligence claim asserted by patient's survivors in wrongful death action, despite neurosurgeon's delegation of his on-call responsibilities to a substitute surgeon; hospital patient was a reasonably foreseeable emergency patient, and neurosurgeon's delegation was ineffective and exposed patient to a foreseeable risk of harm, as neurosurgeon knew that the substitute lacked staff privileges at the hospital).

In *Hiser v. Randolph*, 617 P.2d 774, 778 (Ariz. App. 1980), the plaintiff suffered injuries after the on-call defendant physician refused to treat the plaintiff's medical condition. *Id.* The defendant assented to the hospital's bylaws, requiring him "to insure that all patients admitted to the hospital or treated in the emergency room receive the best possible care." *Id*. Relying on that language, the Arizona Court of Appeals held that a duty to treat arose contractually before formation of a physician-patient relationship. *Id*.

Here, Dr. Wingert's assumed contractual duty to treat F.L. is even more evident. The very first responsibility she assumed pursuant to Mercy's bylaws included "providing daily care and supervision for Hospital inpatients who are under [her] care, and providing coverage at all time for [her] Patients who are in the Hospital." Moreover, the bylaws stated that "it is the responsibility of the on-call physician . . . to appear, when requested, within a reasonable amount of time after notification." As the primary on-call physician, Dr. Wingert had a duty to ensure F.L.'s serious medical needs did not go unattended or untreated while he was confined to a hospital bed.

Finally, Dr. Wingert and Dr. Ryder apparently concede that the existence of a physician-patient relationship is a question of fact, the relationship may be express or implied, and can be proven by direct or

circumstantial evidence. As demonstrated above and in the Plaintiff's principal brief, genuine disputes of material fact exist in this case regarding the existence of a physician-patient relationship, at least between Dr. Wingert and F.L. Accordingly, summary judgment in favor of Dr. Wingert was inappropriate.

3. The trial court reversibly erred in failing to properly instruct the jury on the respective specialist standards of care owed to F.L. by Dr. Mueting and Dr. Liewer.

Following the presentation of evidence, the trial court instructed the jury. Relevant here, the trial court gave the following instruction, over the Plaintiff's objection, relative to the standard of care required of the emergency physician, Dr. Liewer, and of the family practice physician, Dr. Mueting:

> A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances. A violation of this duty is negligence.

(App. v. 1 p. 3950). After deliberations, the jury returned a verdict in favor of Dr. Mueting and Dr. Liewer, finding that neither defendant deviated from the applicable standard of care in their examinations and treatment of F.L.

The trial court erred when it gave a nonspecialist physician standard of care jury instruction as opposed to the "specialist" standard of care. The Iowa Civil Jury Instructions articulate separate standards for specialist and

nonspecialist physicians. Compare 1600.3 ("Negligence – Duty of Specialist") with 1600.2 ("Negligence – Duty of Physician"). By giving the nonspecialist instruction and not the Plaintiff's proposed specialist instruction, the trial court confused and misled the jury as to an essential element of liability, resulting in both presumed and actual prejudice to the Plaintiff.

Here, because Plaintiff's expert witness testified that the standard of care for diagnosing and treating suspected bacterial meningitis is the same across the specialties of emergency medicine and family practice, Defendants assert the nonspecialist instruction was appropriate. In essence, Defendants argue that it is the nature of the treatment that determines which instruction is to be given, not the specialty or specialties of the respective defendant physicians. Therefore, Defendants conclude that a specialist instruction would have given the jury the impression that Dr. Liewer and Dr. Mueting's specialties were critical to their choice of treatment. Plaintiff disagrees.

Iowa case law unequivocally holds that "[a] physician . . . who is held out as a specialist is required to exercise that degree of skill and care ordinarily used by similar specialists in like circumstances…." *McGulpin v. Bessmer*, 43 N.W.2d 121, 128 (Iowa 1950) (citations omitted); *see also Schroeder v. Albaghdadi*, 744 N.W.2d 651, 655-56 (Iowa 2008)("We have established [in

McGulpin] the standard of care a specialist must use when treating a patient."). This is a clear and easily applicable rule which properly guides jurors to consider and weigh the testimony of expert witnesses who share the same specialty as the defendant and are substantially familiar with the standard of care applicable to physicians practicing within that specialty. Because it is undisputed that Dr. Liewer is a board-certified emergency physician, the trial court was required to give the specialist instruction for physicians who hold themselves out as specialists in emergency medicine. And because it is undisputed that Dr. Mueting is a family practice physician, the trial court was required to give the specialist instruction for physicians who hold themselves out as specialists in family practice.

Finally, contrary to Defendants' belief, there is no serious question but that the claimed instructional errors were adequately preserved by means of Plaintiffs' submissions of proposed instructions patterned on Iowa Civil Jury Instruction 1600.3, and by specific objections made before and after trial. (Am. App. Vol. 1 pp. 3261, 3528, 3772, 3985-3986; Am. App. Vol. 2 pp. 2940:5-9, 3205:4-3206:4).

4. The trial court erred in its interpretation and application of Iowa Code §147.136

a. Overview of Medicaid

In *Cox v. Iowa Department of Human Services*, 920 N.W.2d 545, 550-51 (Iowa 2018), this Court provided the following relevant "overview of Medicaid":

> The Medicaid program, established in 1965 and codified at 42 U.S.C. §§1396–1396w-5 (the Medicaid Act), "was designed to serve individuals and families lacking adequate funds for basic health services, and it was designed to be a payer of last resort." *In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014); *see also Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275, 126 S.Ct. 1752, 1758, 164 L.Ed.2d 459 (2006) (stating that Medicaid "provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs"). "To be eligible for Medicaid, a person must have income and resources less than thresholds set by the Secretary." *Ctr. for Special Needs Tr. Admin., Inc. v. Olson*, 676 F.3d 688, 695 (8th Cir. 2012); *see also* 42 U.S.C. §1396a(a)(17). "[T]he program contemplates that families will spend

> available resources first, and when those resources are completely depleted, Medicaid may provide payment." *In re Estate of Melby*, 841 N.W.2d at 875.
>
> The Secretary of Health and Human Services administers the Medicaid program and "exercises his authority through the Centers for Medicare and Medicaid Services (CMS)." *Ahlborn*, 547 U.S. at 275, 126 S.Ct. at 1758. State participation in the Medicaid program is voluntary, but states choosing to participate "must comply with all federal statutory and regulatory requirements." *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006)….

As a condition of Medicaid participation, federal law requires states to seek reimbursement from liable third parties for care and services provided. *See* 42 U.S.C. §§1396a(a)(25), 1396k; 42 C.F.R. §§433.138 to .140. Once a state has identified a legally liable third party, it must seek reimbursement for medical assistance provided "to the extent of such legal liability." 42 U.S.C. §1396a(a)(25)(B); *see also* 42 U.S.C. §1396a(a)(25)(H) (mandating that states have laws establishing their right to reimbursement).

b. *Ahlborn*—Medicaid Lien on Settlements

Moreover, in *Ahlborn*, the Supreme Court held that a state's Medicaid lien is limited to the portion of the recipient's third-party settlement "designated as payments for medical care." 547 U.S. at 284-85. The parties in *Ahlborn* had stipulated to the portion of the settlement constituting compensation for medical care, *id.* at 275, but "[t]he Court nonetheless anticipated the concern that some settlements would not include an itemized allocation." *See Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1397 (2013) (discussing *Ahlborn*). The *Ahlborn* Court thus acknowledged the risk that parties to a tort suit might try to "allocate away the State's interest." 547 U.S. at 288. At the same time, the Court also noted the "countervailing concern" that a rule giving absolute priority to payment of the full amount of a Medicaid lien "might preclude settlement in a large number of cases, and be unfair to the recipient in others." *Ahlborn*, 547 U.S. at 288; *see also Burtsell v. Toumpas*, No. 1:08-cv-455-JL, 2012 WL 1656303, at *14-15 (D.N.H. May 10, 2012) ("The very nature of a negotiated settlement of a lawsuit is that nobody gets everything he or she would have gotten if the case had proceeded to trial and resolved in his or her favor.").

However, the Court noted that such problems could "be avoided either by obtaining the State's advance agreement to an allocation or, if necessary, by submitting the matter to a court for decision." *Id*.

Here, while Defendants acknowledge that there were a number of settlements with the settling defendants, they appear to be untroubled by the fact that Texas Medicaid continues to assert a sizeable Medicaid lien against the settlement proceeds.

c. *Hixson* is inapposite and does not support Defendants' argument.

Defendants argue, nevertheless, that for Texas Medicaid to have a lien against F.L.'s recovery, it must have paid for medical expenses for which a third party is liable. Furthermore, Defendants argue that no third party may be liable and a lien cannot attach to any recovery by Plaintiff in this case because Iowa law does not permit recovery of medical expenses from defendant health care providers in medical malpractice cases. Defendants rely on *United States ex rel. Hixson et al. v. Health Management Systems Inc.*, 657 F.Supp.2d 1039, 1055-56 (S.D. Iowa, Central Division 2009), *aff'd on other grounds*, 613 F.3d 1186 (8th Cir. 2010).

In *Hixson*, the U.S. District Court examined whether the State of Iowa violated federal law by not seeking reimbursement for expenses paid by Iowa

Medicaid. *Id.* at 1044-45. The *Hixson* Court determined that Iowa's Medicaid program constituted a collateral source under §147.136 and precluded recovery of payments made by the state program. *Id.* at 1054. In response to *Hixson*, Iowa legislatively recognized the danger of federal preemption and amended §147.136 to grant an exemption for expenses paid by its own Medicaid program. *See* Iowa Code §147.136(2)(a); *see also* 2011 Iowa Legis. Serv. Ch. 129 (H.F. 649) (West).

This present case concerns another state's ability to carry out its statutory mandate by repaying federal funds that it has a legal obligation to collect. That was not the case in *Hixson*. If Iowa Code §147.136 is interpreted to preclude Texas from recovering Medicaid payments, the State's ability to comply with federal regulations is jeopardized. An Iowa law that permits Iowa's Medicaid program to recover Medicaid payments, but prevents all other states from doing so raises different concerns and requires new analysis.

Texas's obligation to repay federal dollars under the Medicaid program derives from federal law and, despite Defendants' contention otherwise, cannot be eliminated by §147.136. State courts have rejected the notion that the repayment of Medicaid funds is determined solely by state law. *See, e.g.*, *Harlow v. Chin*, 545 N.E.2d 602, 610-11 (Mass. 1989) ("The fact that

technically a State statute provides for the subrogation is irrelevant. Because the Commonwealth's pursuit of reimbursement is required by Federal law, the right of subrogation is based in Federal law.") (internal quotation marks omitted).

Likewise, federal courts have rejected the notion that a state statute controls the repayment of federal *Medicare* funds. *See United States v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 623 (1st Cir. 1996) (finding federal law preempted Rhode Island statute that shifted primary payer responsibility to Medicare); *Varacalli v. State Farm Mut. Auto. Ins. Co.*, 763 F. Supp. 205, 209 (E.D. Mich. 1990) (explaining that "Congress intended to override any contrary state law" that makes Medicare primarily liable for payments); *Smith v. Travelers Indem. Co.*, 763 F. Supp. 554, 557-58 (M.D. Fla. 1989) (preempting Florida's collateral source rule because it conflicted with Congress' intention that Medicare be the secondary payer).

In *United States v. Rhode Island Insurers' Insolvency Fund*, the First Circuit examined whether section 1395y(b)(2)(A) of the Medicare Secondary-Payer Act, 42 U.S.C. §1395y(b)(2)(A) (the "MSP provision") preempted a state law designed to alleviate automobile insurance providers. *Id.* at 617-18. The Fund argued that the state statute was compatible with federal law

because "the [Medicare] provision permits the United States to seek reimbursement only if . . . such payment can reasonably expected to be made." *Id.* at 622 (internal quotation marks omitted). The Fund asserted that "it would be *unreasonable* for any Medicare beneficiary to expect reimbursement from the Fund, because the [state law] requires claimants to exhaust all governmental insurance before Fund payments." *Id.* at 622-23. The First Circuit rejected the Fund's argument as "fatally circular" because it "disregard[ed] the function of federal preemption." *Id.* at 623. Accordingly, the Court held that the state law impermissibly shifted "primary payer" responsibility onto Medicare. *Id.* at 617, 622-23.

As indicated above, Defendants maintain that because 42 U.S.C. §1396a(a)(25)(B) only requires Texas Medicaid to ascertain the legal liability of third parties and Iowa Code §147.136 eliminates Defendants' liability for medical expenses paid by Texas Medicaid, there can be no legal liability for Texas Medicaid to ascertain. In essence, Defendants claim that §147.136 removes their legal liability to pay for past and future medical expenses because Texas Medicaid is available to foot the bill. This "fatally circular" argument both "disregards the function of federal preemption" and shifts "primary payer" responsibility to Medicaid, contrary to congressional intent.

Defendants' proffered reading and the trial court's interpretation of 42 U.S.C. §1396a(a)(25) and Iowa Code §147.136 also neglects basic tenets of statutory construction. While clear, unambiguous statutory language should be given its plain and rational meaning, the meaning of discrete statutory language must be gleaned from the statute in its entirety, including its overall purpose and policy. *See Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996); *see also Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 610 (1st Cir. 1995) ("[T]he meaning, or 'plainness,' of discrete statutory language is to be gleaned from the statute as a whole, including its overall policy and purpose.") (internal citations omitted). "The ultimate goal of statutory construction is to give effect to the intent of the legislature." *Carolan*, 553 N.W.2d at 887 (citing *Citizens' Aide/Ombudsman v. Miller*, 543 N.W.2d 899 (Iowa 1996)). Courts must not "construe a statute in a way that would produce impractical or absurd results." *Id.* (citing *United Fire & Cas. Co. v. Acker*, 541 N.W.2d 517, 518 (Iowa 1995)).

If Iowa law makes Texas Medicaid the payer of *first resort* when it comes to medical malpractice cases in Iowa, §147.136 stands as an obstacle to Congress' intent that the federal government be repaid. To find otherwise would allow an "impractical" and "absurd" scenario where Iowa, and any

other state, could pass a no fault automobile law that precludes recovery of medical expenses when they are paid by Medicaid. Federal dollars could then be used to reduce private automobile insurance premiums on the backs of federal taxpayers. Further, all other states could follow Iowa's lead and enact similar legislation requiring federal taxpayers to subsidize private medical malpractice premiums across the country.

Congress clearly did not intend to allow such a situation when it enacted Medicaid. Likewise, it could not have been the intent of Congress to permit Iowa law to shift "primary payer" responsibility from responsible parties to Medicaid. Because Defendants' proffered reading and the trial court's interpretation of §147.136 shifts the primary payer burden from negligent health care providers to States administering Medicaid, it directly conflicts with the intent of Congress that Medicaid be the payer of <u>last resort</u>. Therefore, Iowa Code §147.136 as interpreted by the trial court is preempted by federal law.

d. <u>The plain language of Iowa Code §147.136 does not apply to any payments Texas Medicaid made in the past or will make in the future.</u>

Iowa Code §147.136 provides that damages awarded in medical malpractice cases do not include economic losses "replaced or are

indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source." Recovery is, however, permitted for "losses replaced or indemnified" by the "*assets* of the claimant or of the members of the claimant's immediate family." Iowa Code §147.136(2)(b) (emphasis added).

The State of Texas has a legal obligation to recover the money that Texas Medicaid has spent on F.L.'s health care. These repayments fall outside the scope of §147.136 because the debt they create would ultimately be repaid from the claimant's (i.e. Plaintiff's) assets. *See* Iowa Code §147.136(2)(b); TEX. HUM. RES. CODE §32.033. Texas Medicaid has been assigned F.L.'s rights to recover medical expenses. *See* §1396a(a)(25)(H); TEX. HUM. RES. CODE ANN. §32.033(a), (d) (stating that "the filing of an application for or receipt of medical assistance constitutes an assignment of the applicant's or recipient's right of recovery from: (1) personal insurance; (2) other sources; or (3) another person for personal injury caused by the other person's negligence or wrong." "A separate and distinct cause of action in favor of the state is hereby created, and the department may, without written consent, take direct civil action in any court of competent jurisdiction."). Therefore, an exception in §1396p(a)(1) applies. *See* 42 U.S.C. §1396p(a)(1)(A)(ii).

Under Iowa Code §147.136, F.L. may recover past and future expenses covered by Medicaid because Texas' statutory lien creates a "debt" that must be repaid out of F.L.'s "assets." Assets are "[a]ll the property of a person . . . available for paying debts." *Asset*, BLACK'S LAW DICTIONARY (10th ed. 2014). Likewise, a "lien" is a charge on property that secures a "debt or obligation." *Fed. Land Bank of Omaha v. Boese*, 373 N.W.2d 118, 120 (Iowa 1985); *see also Lien*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied."). By definition, the statutory lien established by TEX. HUM. RES. CODE §32.033 is intended to secure a Medicaid "debt" owed by the recipient.

Thus, contrary to Defendants' belief, Iowa Code §147.136 does not, cannot, and will not in the event of a new trial prevent the finder of fact from awarding F.L. damages for expenses Medicaid has paid in the past on F.L.'s behalf. The trial court's interpretation of §147.136 is wrong to the extent it bars recovery of amounts paid by Texas Medicaid on F.L.'s behalf, and this Court, after review, should so hold.

CONCLUSION

As a matter of law the trial court's November 21, 2019 order was not final for appeal purposes, and the law of the case doctrine prevents this issue from being reconsidered. Because the Plaintiff timely appealed the trial court's May 29, 2019 Order Entering Final Judgment, this Court has appellate jurisdiction in this case.

For the reasons set forth above and in her principal brief, Plaintiff-Appellant Rosalinda Valles requests that the Court reverse the trial court's final judgment in favor of Defendants, Andrew Mueting, D.O., Joseph Liewer, M.D. and Northwest Iowa Emergency Physicians, P.C., and remand the case for a new trial against these Defendants, with directions (1) to submit jury instructions on the specialist standards of care applicable to physicians practicing with the medical specialties of family practice (Dr. Mueting) and emergency medicine (Dr. Liewer); (2) to strike the Defendants' defense of comparative fault of Mercy Medical Center—Sioux City Hospital; and (3) to preclude the Defendants and Dr. Joel Meyer from presenting expert evidence that was not contained in his expert disclosure.

Furthermore, Plaintiff-Appellant requests that this Court reverse the trial court's orders granting summary judgment in favor of Defendants, Dr.

Kelly Ryder and Dr. Amy Wingert, with directions to reinstate the claims against these Defendants.

Lastly, Plaintiff-Appellant requests that this Court review the trial court's orders joining of the Texas Health and Human Services Commission as an indispensable party and determining as a matter of law that Iowa Code section 147.136 precludes the Defendants' liability for damages for past medical expenses that have been paid by Texas Medicaid.

After such review, Plaintiff-Appellant respectfully requests that this Court hold that the Plaintiff is not precluded from recovering as damages any medical expenses that have been provided for F.L. under the Texas Medicaid program, with respect to which the State of Texas or its Medicaid agency may have a medical assistance lien pursuant to federal and Texas law.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This Reply Brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1), (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 6,960 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)

s/Benjamin I. Sachs	2/27/20
SIGNATURE	DATE

DATED this 27th day of February, 2020.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

The undersigned hereby certifies on this 27th day of February, 2020, that the foregoing Appellant's Final Reply Brief was filed with the Clerk of Court using the electronic filing system, which will send notification of such filing to the following:

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