Online Reference: FLWSUPP 3208STEI

Torts -- Automobile accident -- Damages -- Evidence -- Past and future medical expenses -- Defendant's motion in limine, which asks the court to make factual determination of appropriate amount plaintiff's medical providers should have charged and will charge in the future, and which also seeks an order barring plaintiff from in any manner conveying to jury any evidence or testimony regarding medical charges in excess of statutorily determined amount, is denied -- Defendant's reliance on HB 837, as codified in Section 768.0428, fails -- Pertinent subsections of 768.0427(2), which relates to admissible evidence of medical treatment or service expenses in certain civil trials, are procedural in nature -- Constitution gives Florida Supreme Court authority to "adopt rules for practice and procedure in all courts" -- Plaintiffs are entitled to present evidence of full amount of bills, and defendant may challenge reasonableness of bills through evidence from other medical providers that show charges are in excess of those charged by plaintiff's providers

KAREN P. STEIGER, individually, and as parent and natural guardian of, D.C.P., a minor, Plaintiff, v. NURZOD MURALI, MS EXPRESS, INC., and AKBAR NIZOMOV, Defendants. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 2023-CA-482. November 20, 2024. David Frank, Judge. Counsel: T. Patton Youngblood, Jr., St. Petersburg, for Plaintiff. Brendan Keeley and William M. Blume, III, Jacksonville, for Defendants.

ORDER ON DEFENDANTS' MOTION IN LIMINE

ON HOUSE BILL 837

The Court having reviewed the defendants' amended motion in limine on House Bill 837, plaintiff's initial response and notice of filing authorities, heard argument of counsel at two hearings, and being otherwise fully advised in the premises, finds

The Cause of Action

This is a negligence case for personal injury damages filed by a mother and daughter against the driver and owners of a motor vehicle that collided with their vehicle on November 24, 2019.

Defendants' Motion

Defendants moved in limine to address evidentiary matters regarding the application of House Bill 837 (Florida Statute 768.0427) to medical bills and letters of protection, pointing to the following subsections of the statute:[1]

> (2) ADMISSIBLE EVIDENCE OF MEDICAL TREATMENT OR SERVICE EXPENSES. -- Evidence offered to prove the amount of damages for past or future medical treatment or services in a personal injury or wrongful death action is admissible as provided in this subsection.
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> (a) Evidence offered to prove the amount of damages for past medical treatment or services that have been satisfied is limited to evidence of the amount actually paid, regardless of the source of payment.
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> (b) Evidence offered to prove the amount necessary to satisfy unpaid charges for incurred medical treatment or services shall include, but is not limited to, evidence as provided in this paragraph.

* * *

> 3. If the claimant does not have health care coverage or has health care coverage through Medicare or Medicaid, evidence of 120 percent of the Medicare reimbursement rate in effect on the date of the claimant's incurred medical treatment or services, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.
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> 4. If the claimant obtains medical treatment or services under a letter of protection and the health care provider subsequently transfers the right to receive payment under the letter of protection to a third party, evidence of the amount the third party paid or agreed to pay the health care provider in exchange for the right to receive payment pursuant to the letter of protection.
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> (c) Evidence offered to prove the amount of damages for any future medical treatment or services the claimant will receive shall include, but is not limited to, evidence as provided in this paragraph.
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> 1. If the claimant has health care coverage other than Medicare or Medicaid, or is eligible for any such health care coverage, evidence of the amount for which the future charges of health care providers could be satisfied if submitted to such health care coverage, plus the claimant's share of medical expenses under the insurance contract or regulation.
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> * * *

Motion at 2-3.

The relevant sections of the Act are: "Section 30. Except as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." and "Section 31. This act shall take effect upon becoming a law." The act was approved by the governor and became law on March 24, 2023.

Defendant spends more than four out of nine pages arguing that the Act is constitutional because it applies prospectively and not retroactively. The Court agrees with defendants and approximately 125 circuit courts across Florida, including this Court, who have previously ruled on the that general proposition that the Act cannot be applied retroactively. But that does not answer the questions here.

Defendants simply argue that the provisions apply to cases filed after the effective date of March 24, 2023, and that there is no dispute that this case was filed after that date, and so -- end of discussion.

Plaintiffs contend that there is a "property right" argument to be made regarding causes of action already existing prior to the effective date. Defendants reject the argument with the admonition that plaintiffs could have moved more quickly to file their lawsuit.

The Specific Relief Sought by Defendants

Defendants ask the Court to:

> . . .make a factual determination of the appropriate amount Plaintiff's medical providers should have charged and will charge in the future pursuant to House Bill 837 and enter an Order barring Plaintiffs, their counsel and witnesses, from directly or indirectly mentioning, introducing, referring to, or attempting to convey to the jury in any manner whatsoever, any evidence or testimony regarding any medical charges in excess of the statutorily determined amount.

Motion at 9.

First, and with ease, the Court will deny the defendants' request to "make a factual determination of the appropriate amount Plaintiff's medical providers should have charged and will charge in the future." If the

appropriate procedure for this case requires such a determination, it will be made by the jury or by the Court during post-trial setoffs.

That leaves defendants' request for, "an order barring Plaintiffs...from...attempting to convey to the jury...evidence...regarding medical charges in excess of the statutorily determined amount."

For the second request, the answer will be based on the constitutional sufficiency of the subsections provided above that purport to outline the procedure for determining the amount of past and future medical bills.

Here We Go Again; Is It Substantive or Procedural?

The first step is to determine whether the subject subsections of the statute are substantive or procedural. The Court disagrees with the plaintiffs' contention that the relevant subsections are substantive.

The Third District recently summarized the law on this issue:

> "The Florida Supreme Court's exclusive rulemaking authority is well-established of course, as is the Legislature's exclusive authority to enact substantive laws." *Romero v. Green*, 49 Fla. L. Weekly D1555a (Fla. 3d DCA July 24, 2024). ". . .[T]he distinction between 'substantive' and 'procedural' is often 'neither simple nor certain'. . . ." *Id*. (citation omitted).

The Florida Supreme Court has provided the following guidance:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. Practice and procedure may be described as the machinery of the judicial process as opposed to the product thereof. It is the method of conducting litigation involving rights and corresponding defenses.

Id., quoting *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (citations and internal quotations omitted).

The Court finds that the subject subsections of the statute are procedural.[2] They affect discovery and the admissibility of evidence on medical damages. They do not impose an additional burden on a plaintiff to prove anything. In fact, a close reading of the express words of the statute reveals little more than additional statutory direction on collateral sources.[3]

Authority Over Procedure

It is uncontested that the present case was filed after the effective date of the statute and, thus, there is no temporal concern.[4]

However, Article V, Section 2(a) of the Florida Constitution gives the Florida Supreme Court the authority to "adopt rules for the practice and procedure in all courts."

This authority over procedure has long been strongly upheld by trial and appellate courts of this state. For example, the Second District recently reminded a trial judge that the Florida Rules of Criminal Procedure and related appellate decisions on purely procedural matters could not be overruled by the bail statutes:

> Moreover, to the extent the first appearance judge appeared to reflexively deem statutes that she

> considered pertinent superior to the rules that this court applied and interpreted in Benoit, we remind her that although substantive law is the purview of the legislature, article V, section 2(a), of the Florida Constitution grants the Florida Supreme Court the exclusive authority to adopt rules of judicial practice and procedure. See art. V, § 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts . . . ."); see also art. II, § 3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."); *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005) [30 Fla. L. Weekly S500a] ("It is a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm."); *Kalway v. State*, 730 So. 2d 861, 862 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D1139b] ("If the procedural elements of [a] statute were found to intrude impermissibly upon the procedural practice of the courts, the legislative provisions would have to give way to the court rules and procedures.").

Lindsey v. Gualtieri, 367 So.3d 1255, 1256, FN 1 (Fla. 2d DCA 2023) [48 Fla. L. Weekly D1381a].

There are two caveats. First, the Legislature can repeal a procedural dictate if both houses pass the law by at least two-thirds vote. Art. V, Sec. 2(a), Fla. Const. Second, the Florida Supreme Court can issue an opinion adopting the legislation. Neither has happened here.

The appropriate analysis here is outlined by the Florida Supreme Court in *DeLisle v. Crane Co.*, 258 So.3d 1219, 1229 (Fla. 2018) [43 Fla. L. Weekly S459a]:

> Our consideration of the constitutionality of the amendment does not end with our determination that the provision was procedural. For this Court to determine that the amendment is unconstitutional, it must also conflict with a rule of this Court. (Citations omitted).
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> * * *
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> A procedural rule of this Court may be pronounced in caselaw. *See Sch. Bd. Of Broward Cty. v. Surette*, 281 So.2d 481, 483 (Fla. 1973), receded from on other grounds by *Sch. Bd. Of Broward Cty. v. Price,* 362 So.2d 1337 (Fla. 1978) ("Where rules and construing opinions have been promulgated by this Court relating to the practice and procedure of all courts and a statutory provision provides a contrary practice or procedure . . . the statute must fall.") While the Legislature purports to have pronounced public policy in overturning Marsh, we hold that the rule announced in Stokes and reaffirmed in Marsh was a procedural rule of this Court that the Legislature could not repeal by simple majority.

The Law Applied to the Subject Subsections

The Florida Supreme Court has consistently prohibited the admission of evidence of a plaintiff's entitlement to past or future insurance benefits. *Joerg v. State Farm Mutual Automobile Insurance*, 176 So.3d 1247, 1249-50 (Fla. 2015) [40 Fla. L. Weekly S553a]; *Sheffield v. Superior Ins. Co.*, 800 So.2d 197, 203-04 (Fla. 2001) [26 Fla. L. Weekly S706a]; *Gormley v. GTE Prods. Corp.*, 587 So.2d 455, 457-58 (Fla. 1991). The only exception relates to evidence of government benefits, which are not at issue in this case. *Dial v. Calusa Palms Master Ass'n, Inc.*, 337 So.3d 1229 (Fla. 2022) [47 Fla. L. Weekly S115b].

Applying the evidentiary rule established by the Florida Supreme Court, the Fifth District has held that the plaintiff is entitled to present evidence of the full amount of their medical bills with issues concerning insurance benefits paid or lesser amounts negotiated by an insurance carrier treated as a collateral source set-off to be made by the judge after post-trial pursuant to §768.76, Florida Statutes. See *Nationwide Mut. Fire Ins. Co. v. Darragh*, 95 So.3d 897, 899 (Fla. 5th DCA 2012) [37 Fla. L. Weekly D1355a], citing *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So.3d 1084, 1086-87 (Fla. 1st DCA 2010) [35 Fla. L. Weekly D2873a].

Plaintiffs, therefore, are entitled to present evidence of the full amount of her bills. Defendants, of course, will be permitted to present evidence challenging the reasonable amount of the past or expected future medical bills, but would be prohibited from offering evidence of insurance benefits to do. Instead, they must present evidence from other medical providers that show the charges are in excess of that being charged by plaintiff's doctors. An apple-to-apple comparison.

It makes sense. Mentioning "insurance" to a jury has always been deemed prejudicial. Whether it is the jury believing defendants should pay more because they have liability insurance, or a jury believing plaintiffs should be awarded less because they have health insurance. The proper place to handle "double recoveries" or potential windfalls is *post-trial*.[5]

As procedural legislation, Florida Statute 768.0427 unconstitutionally attempts to change this procedural law.

Moreover, Florida Statute 768.0427 states, "Evidence offered to prove the amount of damages for past medical treatment or services that have been satisfied is limited to evidence of the amount actually paid, regardless of the source of payment. This text does not say that evidence of insurance benefits is admissible at trial. To harmonize the new statute, it must refer to the evidence admitted post-trial during the determination of setoffs.

The argument against the constitutionality of the subsections is even stronger for future medical expenses.

The Florida Supreme Court summarized the concerns and controlling procedural law governing future medical expenses:

> We explained that "it is absolutely speculative to attempt to calculate damage awards based on benefits that a plaintiff has not yet received and may never receive, should either the plaintiff's eligibility or the benefits themselves become insufficient or cease to continue." *Id*. at 1255. Ultimately, we "conclude[d] that the trial court properly excluded evidence of [the plaintiff]'s eligibility for future benefits from Medicare, Medicaid, and other social legislation as collateral sources." *Id*. at 1257

Dial v. Calusa Palms Master Ass'n, Inc., 337 So. 3d 1229, 1231 (Fla. 2022) [47 Fla. L. Weekly S115b], quoting *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So.3d 1247 (Fla. 2015) [40 Fla. L. Weekly S553a].

Imagine for a moment, the extensive sideshow, the "trial within a trial," that would occur if the parties were forced to bring in experts to somehow calculate the incalculable future dollar amounts and contracts and rates and co-pays and other data that would be required to accomplish the dictate of the new statute.

Accordingly, it is ORDERED and ADJUDGED that the motion is DENIED.

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[1]Defendants included the subsections on letters of protection but did not make any request addressing them.

[2]Because plaintiffs' injuries occurred before the effective date of the law, if the subject provisions were deemed substantive, their imposition would result in the type of impediment to a preexisting cause of action is constitutionally impermissible. *See Glaze v. Worley*, 157 So.3d 552, 556 (Fla. 1st DCA 2015) [40 Fla. L. Weekly D555a], *citing Am. Optical Corp. v. Spiewak*, 73 So.3d 120, at 133 (Fla.2011) [36 Fla. L. Weekly S435a].

[3]Moreover, Florida Statutes 768.76 and 627.736(3) have not been repealed and remain the controlling law on

reductions to a plaintiff's medical expense component of damages based on benefits received from insurance, Medicare, or Medicaid. To the extent that the new statute tugs at the existing, controlling statute, ". . .the doctrine of in pari materia, [ ] provides that we should view statutes in a manner that would harmonize the applicable law. *Raik v. Dep't of Legal Affairs, Bureau of Victim Comp*., 344 So.3d 540, 550 (Fla. 1st DCA 2022) (citation omitted).

[4]Although there would be constitutional concern over legislative procedural provisions that conflict with Florida Supreme Court pronouncements, there generally is no concern over legislative direction that procedural statutes apply prospectively. *In re Florida Evidence Code*, 376 So.2d 1161 (Fla. 1979).

[5]Florida's current laws and decisions regulating collateral sources and setoffs strike the appropriate balance between ensuring the plaintiff does not receive a windfall and ensuring defendants do not shift the responsibility for damages they have caused to the plaintiffs or third parties.

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