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Matt Powell: TBTLA Presentation on Collateral Sources 5/17/18

WHAT IS THE COLLATERAL SOURCE RULE: COMMON LAW

- The Florida Supreme Court has defined "collateral source" broadly as "compensation from a source wholly independent of the defendant tortfeasor." *Gormley v. GTE Prods. Corp*., 587 So. 2d 455, 457 n.4 (Fla. 1991).
- At common law the collateral source rule prohibited any consideration of collateral sources available to compensate an injured plaintiff for his or her injury and also prohibited the set-off of collateral source benefits from a damages award.
- Evidence of collateral sources available to an injured plaintiff is inadmissible because it may mislead the jury on the issue of liability or lead them to believe the injured plaintiff is seeking a double recovery or has already been adequately compensated.
- The common law rule was predicated on the principle that a tortfeasor should pay for the damages caused and should not benefit from the injured party's foresight in contracting for or protecting against damages.

COLLATERAL SOURCE RULE: §768.76, Florida Statutes (2017).

- The legislature has abrogated the common-law rule regarding damages in section 768.76, Florida Statutes (2017).
- § 768.76 did not affect the common law principle that evidence of collateral sources may not be presented to the jury. Rather, the court is now required to reduce the damage award by the amount of collateral sources for which no subrogation rights exist.
- The amount reduced "shall be offset" by any amount paid or forfeited by the plaintiff or their immediate family to secure the right to the collateral source.
- The legislative intent is to prevent a "windfall" to the injured party and to reduce insurance costs.

COLLATERAL SOURCES SUBJECT TO SETOFF

The following benefits are "collateral sources" subject to a set-off:

- Social Security Act Benefits (except Medicare and Medicaid); any income disability act; or any other public programs providing medical expenses, disability payments, or similar benefits unless expressly excluded by law.
- Any health, sickness, or income disability insurance, including such benefits contained within an auto insurance policy, and other similar insurance benefits but not life insurance benefits.
- Group agreements to pay or reimburse health care services.

- Any wage continuation plan by employers or others intended to provide wages during disability

No reduction may be made for any collateral source for which a subrogation right exists. The following benefits are not considered "collateral sources" and are not subject to a set-off:

- Benefits pursuant to Title XVIII and Title XIX (Medicare and Medicaid)
- Benefits under workers' compensation law
- Any medical services program administered by the Department of Health.

PAST MEDICAL EXPENSES

- A plaintiff may recover reasonable medical expenses that are the natural and proximate result of a defendant's tortious act. *See Warner v. Ware*, 182 So. 605 (Fla. 1938).
- The expenses must be both necessary and reasonable. *See E.W. Karate Ass'n v. Riquelme*, 638 So. 2d 604 (Fla. 4th DCA 1994).
- Plaintiff bears the burden of proving both the necessity and reasonableness of any claimed medical expenses. *See Albertson's, Inc. v. Brady*, 475 So. 2d 986 (Fla. 2d DCA 1985).
- Courts are split regarding the scope of evidence that a plaintiff must present on necessity and reasonableness. Some courts hold that a plaintiff's bare testimony on the amount of the medical bills and introduction of such bills into evidence is sufficient to send the issue to the jury. *See Irwin v. Blake*, 589 So. 2d 973 (Fla. 4th DCA 1991).
- Other courts hold that a plaintiff must provide a detailed description of the treatment relative to the alleged injury to admit the medical bills into evidence because the amount of the medical bills alone is insufficient. In *Albertson's, Inc. v. Brady* Plaintiff's testimony did not associate each medical bill with injuries resulting from the accident so the court found that the reasonableness and necessity of the medical bills were not adequately established by the testimony. *See Albertson's, Inc. v. Brady*, 475 So.2d 986 (Fla. 2d DCA 1985).

FUTURE MEDICAL EXPENSES

- A plaintiff may recover medical expenses that may be incurred in the future if a reasonable basis exists for computing their amount. *See DeAlmeida v. Graham*, 524 So. 2d 666 (Fla. 4th DCA 1987).
- Recovery for future medical expenses requires more than a mere possibility that future treatment might be obtained. Rather, future medical expenses must be reasonably certain to be incurred. *See Florida Jury Instructions. See Shearon v. Sullivan*, 821 So. 2d 1222 (Fla. 1st DCA 2002).

- Evidence of future Medicare or Medicaid benefits cannot be admitted to try to reduce future damages. Tortfeasors and those who insure against actions of tortfeasors should not enjoy a windfall, under exception to collateral source rule, at expense of taxpayers who fund social legislation benefits. *See* Joerg v. State Farm Mut. Auto. Ins. Co., 176 So. 3d 1247, 1253-57 (Fla. 2015).

HEALTH INSURANCE AND HOW YOU PRESENT IT

- Generally speaking, health insurers maintain a right of subrogation and so, under section 768.76(1), their payments are not subject to collateral source offsets. *State Farm Mut. Auto. Ins. Co. v. Vega*, 753 So. 2d 738, 739-41 (Fla. 3d DCA 2000).
- Medical expense damages must compensate a plaintiff for only actual economic loss. Thus, in accord with Florida's long standing fundamental tenet that the purpose of tort recovery is to compensate, not enrich, an injured party, a plaintiff may recover damages for only those medical expenses actually paid- not those that are written down or off.
- In *Goble v. Frohman*, 901 So. 2d 830, 832-33 (Fla. 2005), the Florida Supreme Court held that a post-trial offset was proper under section 768.76 for the amounts a health insurer reduced the plaintiff's bills. Evidence showed the healthcare providers had billed over $500,000 in medical expenses, but accepted about $145,000 in full payment from the health insurance company. Therefore, the defendant was entitled to a post-trial setoff.
- The 5th DCA recently opined in *Domino's Pizza v. Wiederhold* that where Medicare paid $863,056.55 in medical bills and the Plaintiff's estate satisfied the lien for $51,612.49, the defendant still wasn't entitled to a post-trial setoff. The difference is the Plaintiff settled those claims. The release or waiver of subrogation rights pursuant to a negotiated settlement does not destroy the character of the collateral source. *Domino's Pizza, LLC, v. Wiedherhold* Case No. 5D16-2794.
- The case law consistently holds here that the plaintiff is allowed to "board" the full amount of the bills, and the setoffs occur after verdict. *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084, 1086-87 (Fla. 1st DCA 2010).

MEDICAID AND MEDICARE

- A plaintiff cannot recover the full amount charged by a medical provider when the medical provider accepts a lesser payment from Medicare. Thus, we board the full amount and then do a post-trial setoff.
- Previously, evidence of the full or original bill was not admissible. See *Cooperative Leasing v. Johnson*, 872 So. 2d 956 (Fla. 2d DCA 2004). The original amount was seen as irrelevant because it did not constitute a loss. *See Thyssenkrupp v. Lasky*, 868 So. 2d 547 (Fla. 4th DCA 2003).

- The Florida Supreme Court has now said in *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1253-57 (Fla. 2015), that under the collateral source rule of evidence, evidence of future Medicare or Medicaid benefits could not be admitted to try to reduce future damages.
- *Joerg* reasoned that those benefits come at a cost; evidence of government programs are prejudicial; it would be speculative for a jury to calculate what a plaintiff might receive in the future; and tortfeasors should not receive a windfall due to benefits available to the injured party.

WHAT JOERG MEANS FOR PAST DAMAGES

- We know that *Joerg* expressly ruled that Medicare and Medicaid cannot be admitted to try to reduce future damages, but what about past damages and offsets? The answer is still unclear.
- The *Joerg* court also said, "To affirm the decision below would result in a new trial in which State Farm would be permitted to present confusing, prejudicial, and speculative evidence of Luke Joerg's future entitlement to Medicare benefits, **when State Farm would not otherwise be permitted to seek a reduction of the value of these benefits from any award Joerg might receive**."
- We know that Section 768.76 Florida Statutes excludes Medicaid and Medicare as collateral sources subject to setoffs because a right of subrogation exists. One might reasonably conclude that Section 768.76's exclusion of Medicaid and Medicare's from the definition of "collateral sources" coupled with *Joerg's* holding that State Farm would not have been able to seek a reduction means these benefits have no bearing on damages.
- Here's the potential problem:
    - *Thyssenkrupp Elevator v. Lasky*, 868 So. 2d 547, 549-50 (Fla. 4th DCA 2003)
    - *Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956, 958-60 (Fla. 2d DCA 2004)
    - *Boyd v. Nationwidde Mut. Fire Ins. Co.*, 890 So. 2d 1240, 1241 (Fla. 4th DCA 2005)

  These cases held the plaintiff could only recover as damages the amount the medical providers accepted as payment from Medicare. The court did not allow them to board full damages. The cases relied on *Stanley*, which was overturned by *Joerg*.
  Since the decision in *Joerg* came out in 2015, no case has reconciled these cases and section 768.76 Florida Statutes.
- The question now is can you argue that under *Joerg* that there is no offset, there is no reduction in damages because of the amount Medicare would accept and that you still board your full damages?
- *Joerg* actually cites *Cooperative Leasing*, but doesn't address the issue of how the court handled the reduction issue.

HOW YOU SHOULD USE JOERG FOR PAST DAMAGES

- The following arguments can be made using *Joerg*:
    1. You should not admit evidence of Medicare or Medicaid benefits at all at trial.
    2. You should be allowed to board your full medical bills
        - This argument has been successful in recent trial orders across the state. While the reversal in *Joerg* happened because of the introduction of evidence regarding future medical bills, the trial court in *Joerg* also allowed plaintiff to introduce the full amount of past medical bills rather than only the discounted amount that Medicare paid and the hospital accepted in full satisfaction. The Florida Supreme Court did not reverse this particular trial court ruling and in fact, adopted the analysis by the Illinois Supreme Court in the ***Wills v. Foster*** case which allows plaintiff to introduce the entire amount of the medical bills, regardless of whether they were subsequently discounted.
    3. You might then be able to argue post trial that under the Statute and ***Joerg*** there is no offset for Medicare and Medicaid because the court in *Joerg* specifically said that State Farm wouldn't have been able to seek a reduction and the statute does not include Medicaid and Medicare as collateral sources.

POST TRIAL SETOFFS TIPS

- Board the full amount.
- Remember that PIP is treated differently. Amounts paid by PIP shall not be awarded as damages. Procedurally this means a defendant must preserve its right to a reduction as a defense at trial unless the parties stipulate that the PIP offset will be made after trial.
- If PIP is addressed after trial, then the defendant must prove the jury's verdict duplicates the PIP benefits. (This is usually easy for the defense to do because PIP only pays medical expenses related to the crash, so a jury award of medical expenses is duplicative.)
- Remember that the purpose of a setoff is to avoid duplication of benefits and it is the burden of the party seeking the set-off to prove the existence of an actual duplication of benefits. ***Pate v. Renfroe***, 715 So.2d 1094 (Fla. 1st DCA 1998).
- Keep the two issue rule in mind: under the two issue rule, "when multiple issues are submitted for resolution to the jury in a general verdict form, and one of the issues is without error, then the court must presume that all issues were decided in favor of the prevailing." ***Odom v. Carney***, 625 So. 2d 850, 851 (Fla. 4th DCA 1993).
- Beware of securing reductions or lien releases prior to offsets being determined. Once the lien is released there is no right of subrogation and those become collateral sources and can be subject to setoff. For example if you have a $100,000 hospital bill and you get the hospital to agree to accept $60,000 then the $40,000 can be offset after trial.

WHEN THE DEFENSE ATTACKS THE REASONABLENESS OF THE MEDICAL BILLS

- Defense can call experts on reasonable value of medical expenses. *State Farm Mut. Auto. Ins. Co. v. Bowling*, 81 So. 3d 538 (Fla. App. 2 Dist. 2012).
- Remember to compare apples to apples. If the defense wants to compare the billed amount in your case to the Medicare amount and Medicare is not available in your case then it is not applicable. You can use a Motion in Limine to keep out Medicare rates.
- Reasonableness is mostly an issue with Letters of Protection.
- Take out equitable distribution language in your Letter of Protection/ Security Agreement so the defense cannot talk about post-trial negotiation of bills.