IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1245

ALBERT GOBLE,

Petitioner

v.

MARK E. FROHMAN,

Respondent.

ON A CERTIFIED QUESTION FROM THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

AMICUS BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF POSITION OF THE PLAINTIFF/PETITIONER

(Filed with Consent of All Parties)

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SUMMARY OF THE ARGUMENT

The Amicus Curiae, Academy of Florida Trial Lawyers ("Academy"), agrees with the Plaintiff/Petitioner that the full value of the Plaintiff's medical expenses are recoverable and that the health care providers' reduction of their bills does not constitute a collateral source payment under § 768.76, Fla. Stat., rendering the written-off amounts non-recoverable as damages. The principles of statutory construction applicable to this case and to all cases applying remedial legislation under Florida law require that statutes be construed so as to leave intact all principles of common law and judicial decisions other than those which are necessarily and directly overturned by the legislation in question. There is no indication that the Florida Legislature intended to overturn existing common law and judicial decisions concerning the measure of damages for medical expense, except as expressly provided for under § 768.76 where payments are made.

The Academy in this brief will amplify on Petitioner's position that the amounts of written-off medical bills are compensable damages in a Florida tort case which would be recoverable under the common law collateral source doctrine in the absence of the statutory modifications of § 768.76. Those amounts are recoverable damages because the measure of awardable medical expenses is the reasonable and necessary

value of those services, whether or not those expenses are billed to and paid by an injured plaintiff.

Florida's longstanding common law collateral source doctrine recognizes that the Plaintiff's recovery will not be reduced by the amount of medical expense paid by another. The common law remains viable outside of the specific exceptions to that doctrine enacted by the Legislature. Therefore, this Court should answer the certified question in the negative, because the collateral source statute did not alter the common law's approach whereby the tortfeasor should not benefit from a windfall by reason of the reduction of an injured plaintiff's medical bills by a third party health care provider.

ARGUMENT

I.

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE UNDER THE APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION

A. Applicable Principles of Statutory Construction:

This case is subject to principles of statutory construction applicable to remedial statutes which require courts to apply such statutes in light of the common law and consistent with judicial decisions. In a case where courts have decided a certain

principle of law, a subsequent legislative enactment which is inconsistent with such judicial decisions should not be interpreted to overturn the effect of such prior decisions, except to the extent required to effectuate the legislative intent expressed in the language of the statute.

Legislative acts must be interpreted so as to permit them to co-exist with the common law, except where the statute by its terms renders it impossible for the common law to remain. *See Ellis v. Brown,* 77 So. 2d 845 (Fla. 1955)(statutes are to be construed in reference to the principles of the common law, for it is not presumed that the legislature intended to make any innovation upon the common law other than that which is specified). *See also McGhee v. Volusia County*, 679 So. 2d 729 (Fla. 1996)(recognizing "long-established rule that no change in the common law is intended unless the statute either speaks plainly in this regard or cannot otherwise be given effect"). Where a statute is enacted in a subject area already occupied by judicial precedent, "the legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed" in the statute. *City of Hollywood v. Lombardi,* 770 So. 2d 1196, 1202 (Fla. 2000)(specifically addressing statutory amendment enacted following judicial construction of prior statute).

While the test for judicial construction of a remedial statute such as § 768.76 does not permit a court to read the law "so strictly as to defeat the obvious intention

of the lawmaking body considering the language employed according to its obvious meaning," such a statute, "like all other statutes and constitutions in this country[,] must be read ***in light of the principles of the common law from which our system of jurisprudence comes***." *Nolan v. Moore,* 88 So. 601, 605 (Fla. 1921)(emphasis added). Viewed thusly, the certified question must be answered: "No."

Under the pre-existing common law, the measure of damages recoverable in a tort case included the ***value*** of medical services provided to a plaintiff, whether or not there was any ***charge*** for the services or obligation to pay them. Therefore, the statutory modification of the collateral source rule which only pertains to "payments made" did not overturn pre-existing common law on the subject.

B. General Measure of Recoverable Damages for Medical Services:

The measure of damages for medical expenses recoverable in a Florida personal injury case is stated as the amounts which are "reasonably and necessarily incurred" as a result of the defendant's conduct. *See, e.g., Short v. Grossman*, 245 So. 2d 217 (Fla. 1971). *See also, e.g.,* 17 Fla. Jur. 2d *Damages* § 73 (1997). There is no requirement that the cost of the services provided have been billed to or paid by the plaintiff. Juries are instructed that the measure of such damages is "[t]he reasonable expense of hospitalization and medical care and treatment necessarily or reasonably obtained by [the plaintiff] in the past, or to be so obtained in the future." Fla. Std. Jury

Instr. (Civil) 6.2c.

Use of the term "expense" in the jury instruction and cases does not imply that the value of medical services is not recoverable where no charge for those services has been made. While frequently phrased in terms of the "expense" of those services, the law permits recovery of the "value" of those services, even where no expense is borne by the plaintiff. *See, e.g., Paradis v. Thomas*, 150 So. 2d 457, 458 (Fla. 2d DCA 1963)(recognizing recoverability of value of "services rendered gratuitously to the plaintiff"); *Nuta v. Genders*, 617 So. 2d 329, 330 (Fla. 3d DCA 1993)("reasonable ***value or expense*** of medical treatment necessarily or reasonably obtained")(emphasis added). The measure of medical expense damages in a personal injury case under the common law of Florida has never been tied to a plaintiff's obligation to pay those expenses.[1] The Legislature did not change that measure of damages in enacting § 768.76.

C. Amounts of Written-Off or Reduced Medical Bills Are Recoverable:

1. Insurance Company/HMO Write-Offs and Reductions:

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[1] The law is otherwise in a wrongful death case, where the measure of damages is purely statutory and does not include recovery of written-off medical expenses. *See Dourado v. Ford Motor Co.*, 843 So. 2d 913 (Fla. 4th DCA 2003).

A number of recent cases from courts of various jurisdictions involve the situation of a plaintiff's private insurance company or HMO negotiating with health care providers to accept a reduced sum and "write-off" the difference. Most of those authorities have held that the plaintiff can recover the full amount of the original medical expenses in a tort action, not just the amount which was paid on his behalf by the insurer.

One such decision is the Supreme Court of Wisconsin's case of *Koffman v. Leichtfuss*, 630 N.W.2d 201 (Wis. 2001), which held that a plaintiff whose medical insurer had satisfied the claims of his health care providers by paying them at a reduced contractual amount, still could recover the full value of those medical bills from the tortfeasor. The trial court in *Koffman* had agreed with the defense position that the plaintiff could not recover the amount of medical expenses over and above that amount accepted by his providers from his insurers, and the total amount of their bills, because the difference had been "written-off."

On appeal, the Supreme Court reversed, holding that the full amount of medical bills was recoverable. The court held that full recovery was consistent with the measure of such damages: "the reasonable value of medical services rendered," as opposed to the amount paid by the plaintiff. *Id*. at 209.

The Wisconsin court cited applicable authorities including 22 Am. Jur. 2d *Damages* § 198 (1988)(plaintiff in a personal injury action seeking damages for the cost of medical services provided to him as a result of a tortfeasor's wrongdoing is entitled to recover the reasonable value of those medical services, not necessarily the amount paid)*;* D. Dobbs, Handbook on the Law of Remedies § 8.1, at 543 (1973) ("The measure of recovery is not the cost of services . . . but their reasonable value. . . . Recovery does not depend on whether there is any bill at all, and the tortfeasor is liable for the value of medical services even if they are given without charge, since it is their value and not their cost that counts"); Restatement (Second) of Torts § 924 comment f (1979)("The value of medical services made necessary by the tort can ordinarily be recovered although they have created no liability or expense to injured person, as when a physician donates his services."). *See also Ellsworth v. Schelbrock*, 2000 WI 63, 611 N.W.2d 764, 235 Wis. 2d 678 (Wis. 2000)(noting that test is the reasonable value, not the actual charge).

The *Koffman* court held that to deny recovery would be to provide the defendant tortfeasor with a windfall. Florida's similar measure of recoverable medical damages renders that holding directly on point.

The situation in *Koffman* also was considered recently by the District of Columbia Court of Appeals in *Hardi v. Mezzanote*, 818 A.2d 974 (D.C. App. 2003). There the court held that the full amount of the plaintiff's medical bills could be admitted into evidence and recovered from the defendant, including the amount over and above that which the providers had accepted from the plaintiff's insurers and had "written-off." Applying the principles from the common law collateral source doctrine which permitted recovery of the full value of the medical services provided, the court held "because any write-offs conferred would have been a by-product of the insurance contract secured by appellee, even those amounts should be counted as damages." *Id*.

The Supreme Court of Virginia held the same way in *Acuar v. Letourneau*, 531 S.E.2d 316 (Va. 2000). Noting the policy reasons against permitting the tortfeasor to enjoy the benefit of the fortuitous situation of the write-offs, the Virginia high court held that the principle underlying that state's common law collateral source rule allowed recovery of the written-off sums. *Id.* at 322. In the present case, the common law collateral source rule applicable to written-off medical bills was not replaced by § 768.76, so those amounts are recoverable.

2. The Medicaid/Public Benefit Cases:

Also useful are the cases involving the effect of payments by Medicaid which, when accepted by the health care provider, result in a write-off of the patient's balance. The Supreme Court of South Carolina decided this issue favorably to the plaintiff's position in *Haselden v. Davis*, 579 S.E.2d 293 (S.C. 2003), a case in which the plaintiff introduced his medical bills into evidence totaling $77,905, and the defendant appealed, arguing that the only amount which should have been introduced was the amount paid by Medicaid, or $24,109.

The *Haselden* court affirmed the ruling that the full amount of the medical expenses was recoverable, and stated that "to hold that the plaintiff is limited to damages in the amount actually paid by Medicaid is contrary to the purposes behind the collateral source rule and would result in a windfall to the defendant tortfeasor."

The same issue arose in *Williamson v. Odyssey House, Inc.*, No. 99-561-JD, 2000 U.S. Dist. LEXIS 16396 (D.N.H. Nov. 3, 2000), where the court cited a Supreme Court of New Hampshire decision which established the measure of damages for medical expense as the reasonable value of those services, and cited New Hampshire's collateral source doctrine which did not preclude recovery of medical expenses paid by Medicaid.

The court in Williamson held:

> The defendant relies on decisions from other jurisdictions which hold that a plaintiff's damages are limited to the amount of medical expense actually paid and that amounts that are "written off" should be excluded. *See, e.g.*, *Mitchell v. Hayes*, 72 F. Supp. 2d 635, 637 (W.D. Va. 1999); *Ward-Conde' v. Smith*, 19 F. Supp. 2d 539, 541-42 (E.D. Va. 1998); *McAmis v. Wallace*, 980 F. Supp. 181, 186 (W.D. Va. 1997); *Terrell v. Nanda*, 759 So. 2d 1026, 1031 (La. Ct. App. 2000); *Hanif v. Housing Auth*., 200 Cal. App. 3d 635, 643, 246 Cal. Rptr. 192 (1988). As the plaintiff points out, *Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d 316, 322-23 (Va. 2000), in which the Virginia Supreme Court held that the proper measure of damages included the amounts that had been written off by the plaintiff's health care providers, significantly undermines the decisions by the district courts in Virginia. Other jurisdictions have also concluded that the reasonable value of medical services, rather than the amount actually paid, is the proper measure of damages of personal injury. *See Chapman v. Mazda Motor of Am., Inc.,* 7 F. Supp. 2d 1123, 1125 (D. Mont. 1998); *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295, 304 (S.C. Ct. A*pp. 2000); Ellsworth v. Schelbrock*, 611 N.W.2d 764, 769, 235 Wis. 2d 678 (Wis. 2000). In light of New Hampshire's collateral source rule ***and the standard for the measure of damages for medical costs***, the court concludes that the reasonable value of medical services that Griffin has required and probably will require in the future is the proper measure of damages, regardless of the amount paid for those services by Medicaid.

Id. (Emphasis added). The same standard exists in Florida.

CONCLUSION

Section 768.76 does not address reductions in medical bills by health care providers, so principles of statutory construction require a negative answer to the certified question. The decision below should be quashed.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I HEREBY certify that copies of the foregoing have been served by U.S. Mail upon Timothy R. Prugh and Theodore E. Karatinos, Prugh, Holliday, Deem & Karatinos, Attorneys for Plaintiff/Petitioner, 1009 West Platt Street, Tampa, Florida 33606; Amy S. Farrior, Raymond T. Elligett, Jr., and Charles P. Schropp, Schropp, Buell, & Elligett, P.A., Attorneys for Plaintiff/Petitioner, 3003 West Azeele Street, Suite 100, Tampa, Florida 33609; Daniel P. Mitchell, Gray, Harris, Robinson, P.A., Attorneys for Defendant/Respondent, P.O. Box 3324, Tampa, Florida 33601-3324; Warren B. Kwatnick, Cooney, Mattson, Lance, Blackburn, Richards & O'Connor,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 9.210 (a)(2) in that it has been typed in 14 point Times New Roman.

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