DIVISION CV-E GUIDELINES FOR RULE 1.202 CONFERRAL PRIOR TO FILING MOTION TO DETERMINE ADMISSIBLE EVIDENCE OF MEDICAL TREATMENT OR SERVICE EXPENSES PURSUANT TO SECTION 768.0427, FLORIDA STATUTES ("768.0427 MOTION"), AND DIVISION CV-E REQUIRED CONFERRAL PRIOR TO SCHEDULING HEARING ON 768.0427 MOTION

Since January 1, 2020, Division CV-E Policies and Procedures[1] published on the Fourth Judicial Circuit's website[2] established a mandatory meet and confer process to occur ***before*** scheduling the hearing on all motions except for the following motions: injunctive relief without notice; judgment on the pleadings; or to permit class action. Effective January 1, 2025, Florida Rule of Civil Procedure 1.202 titled "Conferral Prior to Filing Motions" requires parties to meet and confer before filing a motion in a civil case. The rule is intended to help with case management. Since January 1, 2025, the *Division CV-E Procedures for Scheduling and Hearing Motions Requiring Evidentiary Hearing* published on the Fourth Judicial Circuit's website require counsel for the parties to discuss during such required conferral whether there are factual issue(s) within such motion(s) the Court will be required to resolve with an evidentiary hearing.

As of the publication of these Guidelines, this Court has heard and ruled on one 768.0427 Motion. *See* ***Exhibit A*** *Order Denying Defendants' Motion in Limine Regarding Past Medical Bills and Defendants' Motion to Strike Plaintiff's Life Care Plan* in *Hourihan v. Mona*, Fourth Judicial Circuit, Case No. 2023-CA-10388. Generally, as of the publication of these Guidelines, several 768.0427 Motions have been scheduled for hearing in the past, however, it has been this Court's experience that such defense motions have been boilerplate recitations of section 768.0427, Florida Statutes, lacking any case specific allegations or assertions of relevant background facts with no response from the Plaintiff or a "Notice of Filing" various trial court orders – many of which summarily granting or denying a 768.0427 Motion without explanation or any recitation of the relevant facts or procedural history. Generally, in such cases no legal briefing was provided and the *ore tenus* initial discussions with the Court revealed a lack of conferral between the parties' respective counsel, no case specific arguments or, alternatively, abstract arguments that would require the Court to make findings of fact based on attorney arguments (which are not evidence) rather than proffering pincites to admissible evidence, including, but not limited to stipulation(s) of fact(s), affidavits or declarations, prior sworn deposition testimony, interrogatory answers, response(s) to Requests for Admissions, and live testimony either in person or by communication technology. When counsel for the parties agree or concede during the hearing that the 768.0427 Motion requires an evidentiary hearing including fact and expert testimony, for the Court to make findings of fact, the existence of additional case specific legal arguments not referenced in the Motion or Response (or the failure to file a Response altogether), the failure to adequately prepare for the hearing or otherwise fully inform the Court, or secure appellate counsel to argue the 768.0427 Motion, the hearing must be continued and rescheduled – delaying resolution of the motion for weeks or months, depending on the amount of hearing time needed to present all relevant fact and expert witness testimony, proffered evidence, and comprehensive legal arguments for the Court to consider in making its ruling, whether limited pre-hearing discovery relevant to the Motion will be necessary, and whether a *Daubert* or any other evidentiary Motions(s) will be necessary to determine the admissibility of any testimony or evidence in support of or opposition to the 768.0427 Motion. In sum, the failure of counsel to confer comprehensively or otherwise recognize everything necessary to fully inform the Court can unnecessarily delay the litigation and prevent timely completion of the case pursuant to Fla. R. Gen. Prac. & Jud. Admin. 2.250.

[1] *See* Sections III. L and M.
[2] See website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges

Paragraph 20 of the Court's current template order setting actual trial period for Division CV-E cases published on the Fourth Judicial Circuit's website[3] imposes strict deadlines for filing and hearing 768.0427 Motions, and generally requires compliance with *Division CV-E Procedures for Scheduling and Hearing Motions Requiring Evidentiary Hearing* published on the Court's website and utilization of the Court's template for *Order Scheduling Motion for Evidentiary Hearing and Pre-Evidentiary Hearing Case Management Conference* published in Word format on the Court's website[3] to facilitate the meet and confer process. As such the Court finds it necessary to impose more specific requirements for counsel to discuss and consider during the pre-768.0427 Motion hearing conferral to reduce inefficiency, encourage timely resolution, and prevent trial continuances based on unresolved 768.0427 Motions.

The following guidelines are not intended to be exclusive conferral issues for 768.0427 Motions as there may be other legal, procedural, and evidentiary issues not covered by these guidelines. In any event, at a ***minimum***, counsel for the parties must consider and discuss the following during the conferral process prior to filing 768.0427 Motion and scheduling 768.0427 Motion hearings:

A. Collateral Source Rule History

Under Florida common law, the collateral source rule governed both the admissibility and impact of collateral source benefits at trial. *Joerg v. State Farm Mut. Auto Ins. Co.*, 176 So. 3d 1249, 1249 (Fla. 2015). Historically, the "evidentiary" component of the collateral source rule prohibited the admission of evidence of collateral source benefits because the "introduction of collateral source evidence misleads the jury on the issue of liability and, thus, subverts the jury process." *Id.* (quoting *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991)). At the same time, historically, the "damages" component "prevented the reduction of damages by collateral sources available to the plaintiff" based "on the principle that a tortfeaser should not benefit" from the plaintiff's benefits. *Id.* (citing *Gormley*, 587 So. 2d at 457).

History changed in 1986 when the Florida legislature enacted section 768.76 to modify the damages component of the collateral source rule "to reduce insurance costs and prevent plaintiffs from receiving windfalls." *Id.* However, Section 768.76 did not modify the evidentiary component of the collateral source rule, therefore, evidence of payments from collateral source benefits continued to be inadmissible at trial. *Id.*; *see also Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 200 (Fla. 2001) ("Upon proper objection, the collateral source rule prohibits the introduction of any evidence of payments from collateral sources."). Section 768.76 created a new procedure whereby the court, not the jury, reduced the jury's damages award by the amount of any collateral source benefits in a post-verdict evidentiary hearing. Section 768.76(1), Fla. Stat. (2024); *see, e.g. Caruso v. Baumle*, 880 So. 2d 540, 544 (Fla. 2004) (emphasizing that "the *court* reduces the jury award by the amount of collateral source benefits," not the jury, under section 768.76(1)). Under this post-section 768.76 procedure, it is generally considered reversible error to allow the jury to hear evidence of collateral sources during a jury trial due to the high possibility of prejudice. *See Sheffield*, 800 So. 2d at 200 & nn. 2, 3.

B. Collateral Source Rule Post-Section 768.0427

1. Does section 768.0427 abolish or alter the post-verdict evidentiary hearing procedure established by section 768.76 for the court to reduce the jury's damages award by the amount of any collateral source benefits?

[3] See Division CV-E website: https://www.jud4.org/ex-parte-dates-judge-s-procedures/duval-judges

2. Does section 768.0427 permit evidence of collateral source benefits to be presented to trial juries?

3. To the extent section 768.0427 could be construed to permit a trial jury to consider evidence of collateral source benefits how can this be reconciled with the "inherently prejudicial effect of evidence of collateral source benefits" in jury trials *Joerg*, 176 So. 3d at 1255 (citing *Eichel v. N.Y. Cent. R.R. Co.*, 375 U.S. 253, 255 (1963))?

4. Does section 768.0427, like the common law and statutory collateral source rule, contain both an "evidentiary" component and a "damages" component?

5. Can section 768.0427(2) be construed as the "evidentiary" component because it provides that evidence of medical expenses "is admissible as provided in this subsection," that evidence of past, paid expenses "is limited to evidence of the amount actually paid," and that evidence of unpaid or future medical expenses "shall include, but is not limited to, evidence" of the share of expenses borne by the plaintiff's health care provider (section 768.0427(2)(a)-(c), Fla. Stat. (2024)?

6. Does subsection (2) titled "Admissible Evidence of Medical Treatment or Service Expenses" that begins with an introductory sentence providing that "[e]vidence 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" followed by subsections (2)(b) and (2)(c) allow parties to introduce "[a]ny evidence" of unpaid and future medical expenses, impose a **burden of production** on Plaintiff to introduce the enumerated categories of evidence found in those subsections? In sum, is the effect of subsection (2) to create a burden of production on the plaintiff or does it concern admissibility of evidence.

7. Does the use of "is admissible" and "shall include, but is not limited to" combined with catchall clauses allowing "[a]ny evidence" of reasonable expenses indicate that subsections (2)(b) and (2)(c) provide a non-exhaustive list of admissible evidence of unpaid past and future medical expenses while allowing for other evidence of reasonable expenses – together with the phrase "is admissible" and the title "Admissible Evidence of Medical Treatment or Service Expenses" – frame the statute as an evidentiary rule of inclusion not exclusion? Can these provisions of this statute be placed in the same types of statutes using the word "shall" to signify that a court must admit such evidence when it is proffered, produced, or presented by a party (e.g. §772.15, Fla. Stat. providing that a verdict or adjudication of not guilty "shall be admissible in evidence") – not to signify that a party must proffer, produce, or present such evidence. Do you agree that "[t]he word 'any' is defined as 'one, no matter what one: every' or 'all.'" *McNeil v. State*, 215 So. 3d 55, 59 (Fla. 2017) (citation omitted). If paragraphs (2)(b) and (2)(c) create a burden of production – is the plaintiff required to introduce every possible form of evidence of reasonable amounts under your interpretation of the statute? If so, would that create an absurd result? *Hardee County v. FINR, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017). Does the proposed interpretation of the catchall clauses of (2)(b)5 and (2)(c)3 require the Court to rewrite the statute to "read into the statute a concept or words that the legislature itself did not include"? *E.g., State v. Geiss*, 70 So. 3d 642, 647-48 (Fla. 5th DCA 2011).

8. Can section 768.0427(4) be construed as the "damages" component because it caps recoverable medical expenses by the amounts established under section 768.0427(2) and by the sum of the amounts "actually paid," incurred but "not yet satisfied," and necessary for future treatment?

9. When considering sections 768.0427(2) and 768.0427(4) together, is there any reasonable reading of the text of subsection (2) as requiring that the trial jury reduce a damages award based on insurance benefits, whether those benefits be payments in the form of contractual discounts or direct cash payments (*see Goble v. Frohman*, 901 So. 2d 830, 833 (Fla. 2005) (holding that when a health care provider enters into a contract with an insurer that requires it to discount its services to those insured by the carrier, that discount constitutes the "payment" of a collateral source benefit even though no money changes hands)?

10. Under section 768.0427 do the billed amounts of medical expenses remain the maximum, so long as those amounts are reasonable, before applying health insurance benefits?

11. Although section 768.0427 provides that evidence of collateral sources is "admissible," does the plain text of the statute mention "juries" anywhere, state that such collateral source evidence is admissible before "juries," or require juries to offset a plaintiff's damages by his or her collateral source benefits?

12. When the legislature enacted section 768.0427, did it modify or repeal section 768.76 (*compare* 768.76, Fla. Stat. (2022) *with* section 768.76, Fla. Stat. (2024))?

13. If you agree that the legislature did not modify or repeal section 768.76 when it enacted section 768.0427, does this suggest that post-verdict reductions for collateral source benefits under section 768.76(1) remain the procedure for setting off collateral source benefits?

14. If you agree post-verdict reductions for collateral source benefits under section 768.76(1) remain the proper procedure for setting off collateral source benefits, can the plain text of section 768.0427, to be read consistently with section 768.76(1) be construed to govern the admissibly of evidence and the calculations of damages during that post-verdict proceeding?

15. If you interpret section 768.0427 as providing that juries must reduce medical expense damages based on collateral sources, then did section 768.0427 implicitly repeal section 768.76(1) by removing the requirement for the court to make post-verdict reductions – if so, is this construction permissible if the two statutes can be read consistently with each other (*see Newell v. Fla. Dep't of Corr.*, 214 So. 3d 721, 725 (Fla. 1st DCA 2017) ("There is a general presumption that later statutes are passed with knowledge of prior existing laws, and a construction is favored which gives each one a field of operation, rather than have the former repealed by implication." (quoting *Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978)); *Saridakis v. State*, 936 So. 2d 33, 35 (Fla. 4th DCA 2006) ("Under Florida law, the legislature is presumed not to have intended to write a statute that renders void in its application another statute that has not been amended or repealed"))?

16. In an effort to read sections 768.76 and 768.0427 consistently with each other should the court hold a ***pre-trial*** evidentiary hearing to calculate and determine the amount of reasonable past and future medical expenses the plaintiff can present to the jury after making appropriate reductions pursuant to ***both*** statutes?

17. Would interpreting section 768.0427 to allow juries to hear evidence about collateral sources derogate the common law collateral source rule (*see Joerg*, 176 So. 3d at 1249)?

18. Is section 768.0427 designed to change the common law collateral source rule in "clear, unequivocal terms" – does the statute clearly and unequivocally indicate that such evidence is admissible before juries (*see Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1048 (Fla. 2008) (quoting *Carlile v. Game & Fresh Water Fish Comm'n* 354 So. 2d 362, 364 (Fla. 1977)))?

19. If section 768.76 was not modified or repealed when the legislature enacted section 798.0427 and section 768.76 provides an existing evidentiary procedure to account for collateral sources without derogatory or otherwise undermining the common law rule or potentially confusing the jury, how would such collateral source evidence be relevant at a jury trial if courts are still required to determine collateral source reductions separately post-verdict (see sections 90.401, 90.402, and 90.403, Fla. Stat. (2024))?

20. If section 768.0427 is read as clarifying the evidence the Court must consider when reducing a damages award post-verdict, does this interpretation undermine the intent of the legislature when enacting the statute (*see* Fla. H.R. Staff Analysis of HB 837 (Feb. 17, 2023); *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 298 (Fla. 2007) ("legislature intent is determined primarily from the statute's text," not what any given legislator may have preferred) (citing *Maggio v. Fla. Dep't of Labor & Emp't Sec.*, 899 So. 2d 1074, 1076-77 (Fla. 2005)); *see also Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts*, 386 (2012) ("Even if the members of each house wish to do so, they cannot assign responsibility for making law – or the details of law – to one of their number, or to one of their committees"))?

21. Does the plain text of 768.0427 and "traditional canons of statutory interpretation" suggest that section 768.0427 does not alter the collateral source rule or permit trial juries to learn about or evaluate collateral source benefits (*see Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) (recognizing that "the traditional canons of statutory interpretation can aid the interpretive process from beginning to end" and rejecting the notion that "there is no occasion for resorting to the rules of statutory interpretation and construction" when the language is clear and unambiguous)?

22. Does the proposed interpretation of the statute require the Court to rely on "legislative history" or "legislative intent"? If so, how does the Court reconcile this argument with the "supremacy-of-the-text principle?" *Taylor v. Nicholson-Williams, Inc.*, 368 So. 3d 1007, 1015 n. 3 (Fla. 5th DCA 2023) (citation omitted).

C. Constitutionality

1. Will there be any arguments made that section 768.0427(2) is unconstitutional, to the extent it is procedural, if it is interpreted as allowing evidence related to the plaintiff's private insurance benefits or (with respect to future benefits) from Medicare (*see Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1249-50, 1255 (Fla. 2015) (Medicare benefits); *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 200-03 (Fla. 2001) (group health insurance benefits); *Gormley v. GTE Products Corp.*, 587 So. 2d 455, 457-58 (Fla. 1991) (property insurance); *Dial v. Calusa Palms Master Ass'n, Inc.*, 337 So. 3d 1229, 1230-31 (Fla. 2022) (held that the holding in *Joerg* prohibiting admission of Medicare benefits at trial applied only to future benefits and not to benefits already extended))?

2. Do any of section 768.0427(2) subsections (a-e) require either party to prove anything to increase or decrease the damage awards or otherwise change substantive law on damages?

3. Do these subsections of section 768.0427(2) merely address what collateral source evidence is admissible or inadmissible? If so, would these subsections of section 768.0427(2) be procedural – controlling only the conduct of the litigants in court and not creating, modifying or eliminating any substantive rights (*see DeLisle v. Crane Co.*, 258 So. 3d 1219, 1229; *Glendening v. State*, 536 So. 2d 212, 215 (Fla. 1998))?

4. Would the only constitutional interpretation of section 768.0427(2), consistent with Florida Supreme Court precedent on the evidentiary aspect of the collateral source rule be an interpretation that the evidence of insurance, Medicare, or Medicaid benefits is admissible at the post-trial set off hearing, but not at the jury trial determining the amount of damages before application of setoffs?

D. Facts

1. Are there facts that the parties will be asking the Court to find or rely on in ruling on the 768.0427 Motion that will require the development of an evidentiary record during the hearing on the 768.0427 Motion?

2. A non-exhaustive list of such facts may include, but not be limited to the following:

- Whether any of Plaintiff's past medical expenses were submitted to a health insurance provider (government or private).
- Plaintiff's health care coverage status (past, present, or future).
- Liens and letters of protection for past satisfied medical expenses.
- The cost of Plaintiff's health care coverage incurred by the Plaintiff that may be considered a set-off to the set-off for collateral source calculations.
- The ability, or impossibility, of plaintiff to obtain contract rates of payment for in-network medical providers for the Court to consider within the collateral source (damages) rule.
- The contractual medical provider write-offs for Plaintiff's past, present, and future medical expenses.
- Any facts related to a reasonable projection of Plaintiff's health insurance coverage through the end of life expectancy, the cost of such coverage(s) to Plaintiff personally, and the viability of such sources of coverage (private health insurance, government entitlements, etc.) during the relevant future life expectancy of Plaintiff.