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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of	)	No. R-24 0004
	)	
PETITION TO PERMANENTLY	)	
ADOPT RULES FOR THE FAST	)	Comment
TRIAL AND ALTERNATIVE	)	
RESOLUTION PROGRAM	)	
("FASTAR")	)	
_____	)	

Undersigned¹ files this Comment pursuant to the Court's August 22, 2024 Order Requesting Comment on Proposed Statewide Rules for the Fast Trial and Alternative Resolution Program ("FASTAR").

Undersigned urges the Court to adopt the amendments as distributed with one modification to FASTAR Rule 117(d)(1) so that it tracks FASTAR Rule 123(d)(1).

¹ Undersigned's institutional title and affiliation are included for identification purposes only.

The Rules, as Modified, Should Be Adopted on a Permanent Basis.

To update the data that had been provided in undersigned's last comment, the Pima County Superior Court is on track to have the highest number of annual FASTAR case filings in the current reporting year, which is set to close on October 31, 2024. The rise is driven by the increase in contract cases. As of September 9, 2024, the Court had received 2,591 new FASTAR cases for this reporting year. That number already exceeds any previous reporting year for the pilot project. For the current reporting period, that data supports a permanent adoption of the program.

- The average time to disposition has dropped to 106 days for all FASTAR cases,
- The court has set but later vacated 61 FASTAR trials, and conducted 6 FASTAR trials with no appeals to the Court of Appeals,
- There have been 41 arbitration awards filed with only 2 *de novo* appeals filed, and
- The court has not held any trials *de novo* on appeal.

Again, undersigned believes that the Pima County Superior Court's civil bench can reasonably handle any increased workload that the proposed amendments which would allow both sides to appeal an arbitration award might cause.

As to the proposed amendments concerning the deadline for service of process, the court has terminated 664 cases (or about 26% of filings) for lack of service. The proposed amendments will help ensure that FASTAR cases are heard on the merits.

Proposed Amendment to Rule 117(d)(1) Should Be Slightly Amended.

The proposed amendment to Rule 117(d)(1) governing the admissibility of certain medical bills should be amended so that it tracks FASTAR Rule 123(d)(1) before the final rules are adopted.

As to the proposed amendment to Rule 117(d)(1), the Court distributed for comment the following proposed amendment:

(d) Evidence. The Arizona Rules of Evidence apply to a Fast Trial. However, and unless there is a specific legal objection in the joint pretrial statement, the following documents are admissible in evidence:

(1) ~~The following medical bills, although admission of any specific medical bill does not relieve the admitting party of its burden of proving that the amount of the bill is reasonable, and the treatment or service described in the bill was medically necessary; the amounts of which are~~ presumed reasonable, although any party may offer evidence to dispute the presumption of reasonableness of a medical bill.

The proposed amendment appears to track in substance Judge Bergin's Reply, p. 6-7, wherein he proposed similar language if "this Court finds it appropriate to alter

the burden of proof.” That suggestion apparently was made in response to comments by Brian Marchetti, David Buechel, William Bacon, Michael Bell, and Richard Biggs, criticizing the requirement for personal injury plaintiffs to have expert testimony establishing the reasonableness of the amount of medical bills incurred for Fast Trials.

Undersigned’s concern about the distributed amendment to Rule 117(d)(1) is that it creates only a rebuttable presumption and does not change the burden of proof as is suggested in Judge Bergin’s comment. As a rebuttable presumption, it shifts the burden of production but does not shift the plaintiffs’ burden of persuasion at trial (a.k.a. burden of proof (*see Nat’l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 115 ¶ 15) (App. 2008))) on the issue of whether the amount of medical bill is reasonable. Rule 301, Ariz. R. Evid. As such, if the Court’s intent is to relieve plaintiffs of the obligation to produce expert testimony on the reasonableness of the amount of the medical bills, the proposed amendment will likely not achieve that purpose.

Presumptions are procedural, not evidentiary, concepts. *State v. Nihiser*, 191 Ariz. 199, 203 (App. 1997). “The role of presumptions in the law is not to supplant the rules of evidence, but rather to provide a framework within which evidence is admitted.” *Id.* As to the specific issue at hand, in the absence of any evidence to the contrary, the proposed amendment would compel the jury to find that the admitted medical bills are reasonable. *Seiler v. Whiting*, 52 Ariz. 542, 548 (1938). However,

if a defendant were to introduce *any* evidence to contradict the presumption of reasonableness, the presumption would “disappear[] entirely, and the triers of fact [would be] bound to follow the usual rules of evidence in reaching their ultimate conclusion of fact.” *Id.*, at 548-49. In other words, the “bubble is burst,” and “the existence or non-existence of the presumed fact must be determined as if the presumption had never operated in the case.” *Golonka v. General Motors Corp.*, 204 Ariz. 575, 589, ¶ 48 (App. 2003) (citation and quotation marks omitted). The plaintiffs would then need to present expert testimony as to reasonableness of the amount of the medical bills in their rebuttal or face a motion under Rule 50, Ariz. R. Civ. P. The circulated amendment, thus, does not relieve plaintiffs of calling experts to give evidence as to the reasonableness of the medical bills, if reasonableness is contested. The same cost, expense, and difficulty about calling experts regarding the reasonableness of medical bills in smaller valued cases still exist.

There is a proven and workable alternative. FASTAR Rule 123(d)(1) governing the admissibility of medical bills in the alternative resolution hearing (“arbitration”) does not rely upon a rebuttable presumption. It provides that the bills are evidence “without further proof.” Of course, defendants may still present evidence and argue that the bills are not reasonable. The difference is the plaintiff can still argue to the trier of fact that the amount of the bills is reasonable and should be awarded without additional proof.

If the admissibility of medical bills without further proof were a problem in tort cases assigned to arbitration, one assumes that there would be a significant number of appeals *de novo* in tort cases. Defendants would put plaintiffs to their burden at trial of proving the reasonableness of their medical expenses with expert testimony. Such is not the case. During the FASTAR pilot program through September 9, 2024, there have been 1,607 tort cases² assigned to the arbitration track with arbitration awards filed in 237 cases (14.7% of total cases). Defendants have only appealed 16 awards or less than 7% of all filed arbitration awards and less than 1% of all tort cases assigned to the arbitration track.

The Court should also consider that the “without further proof” language has been in effect since 1974 and has been a workable rule governing the admissibility of medical bills for 50 years. Similar language to FASTAR Rule 123(d)(1) is currently found in Rule 75(d), Ariz. R. Civ. P., governing the admissibility of evidence at compulsory arbitration hearing. The predecessor rule to Rule 75(d) was Rule 4(e) of the Uniform Rules of Procedure for Arbitration which was adopted in 1974 and provided as follows:

In actions involving personal injury or damage to property, the arbitrators shall allow the bills . . . hereinafter listed to be offered and received into evidence **without further proof as evidence of the value and reasonableness of the charges for services . . . and, where applicable, the necessity for furnishing the same**, provided that a copy of said bill . . . has

² Undersigned recognizes that not all tort cases are personal injury cases, but for FASTAR, it appears that the vast majority of them involve some type of personal injury.

been served upon the adverse party at least twenty days prior to the date of the hearing. The adverse party may not dispute the value or reasonableness of such charges or the necessity thereof, unless he files and serves written objection thereto within ten days after receipt of said copy.

Rule 4(e) of the Uniform Rules of Procedure for Arbitration (1974) (emphasis added). Rule 4(e) went on to list the medical bills that are in FASTAR Rule 123(d)(1) and current Rule 75(d), Ariz. R. Civ. P. In 1987, the Court adopted an amendment that moved the applicable provision to Rule 4(f) of the Uniform Rules of Procedure for Arbitration and implemented the language which is essentially the language used in current Rule 75(d).³

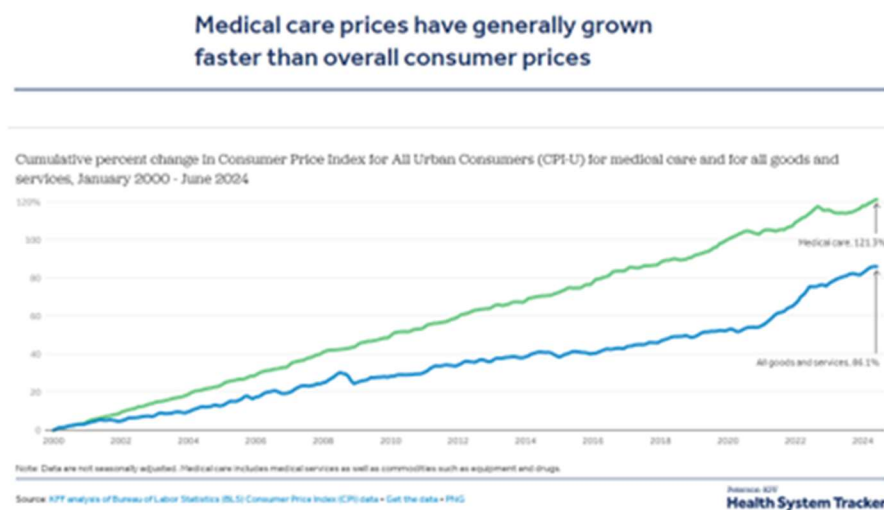
Based upon some available data, the compulsory arbitration rules most often result in fair and final results in smaller cases as evidenced by the fact that more than 70% (or higher) of arbitration awards⁴ are not appealed. Sakall & Pack, *Short Trials: An Appropriate Replacement for Compulsory Arbitration in Arizona?*, 59 Ariz. L. Rev. 485, 506 (2017).

Also, the Court should be mindful that the reality is that our court has been seeing a drop off in tort cases filed subject to the FASTAR pilot program from a high of 685 in the first year ending October 31, 2019, to only 471 in the year ending October 31,

³ The Rule was moved to the Arizona Rules of Civil Procedure in 2000 as part of the consolidation of the various sets of civil rules, and then was restyled effective January 1, 2017.

⁴ Note the data is not broken down between contract and tort cases.

2023. In the current reporting period, plaintiffs have filed only 408 tort cases in the first 313 days. While there has been no study as to why there has been a drop-off of FASTAR tort cases while the total number of FASTAR cases has increased, a plausible explanation is that with high inflation pressures, especially in the medical care,⁵ fewer cases fall within the \$50,000 threshold for the FASTAR pilot program.



Again, if the Court's intent by the proposed amendment is to create merely a rebuttable presumption of reasonableness of the amount of medical expenses, the Court should adopt the circulated amendment. It is preferable to the current language that has caused confusion amongst the bench and bar. However, if the Court's intent is to relieve plaintiffs of the burden to produce expert testimony on the

⁵ [How does medical inflation compare to inflation in the rest of the economy? - Peterson-KFF Health System Tracker](#)

reasonableness of the medical bills, then undersigned proposes that Rule 117(d)(1) be amended as follows:

(d) Evidence. The Arizona Rules of Evidence apply to a Fast Trial. However, ~~and unless there is a specific legal objection in the joint pretrial statement,~~ the following documents are admissible in evidence:

(1) The following medical bills without further proof; ~~although admission of any specific medical bill does not relieve the admitting party of its burden of proving that the amount of the bill is reasonable, and the treatment or service described in the bill was medically necessary:~~

This proposed language would allow the medical bill to come into evidence without further proof of reasonableness. It would allow the jury to determine ultimately whether the billed amount was reasonable and necessary as is required by Personal Injury Damages 1 – Measure of Damages, RAJI (Civil) 7th, instruction. If a plaintiff chooses not to call an expert to give testimony as to reasonableness and necessity of the medical bills, the finder of fact might find against the plaintiff.

Undersigned recognizes this topic has generated much debate during the FASTAR pilot program, and even further back to 2012 when the Court rejected a proposal, [R-12-0029](#), to adopt an evidentiary rule on the topic of medical bills. There are reasonable viewpoints on both sides. Ultimately, undersigned believes that for smaller-value personal injury claims which fall within the FASTAR rules, bills from hospitals, doctors, dentists, nurses, physical therapists, pharmacists, optometrists,

and providers of durable medical equipment should be considered as evidence without additional further proof of their reasonableness in amount.

A similar viewpoint was expressed by a Comment filed by the Advisory Committee on Rules of Evidence in 2012 when that committee urged rejection of a new evidentiary rule that would apply to all cases, but as to the issue of the admissibility of medical bills in smaller personal injury cases, it suggested, “For example Rule 75 (e), Arizona Rules of Civil Procedure, which allows for the automatic introduction of medical bills at an arbitration hearing, might simply be extended to trials of appeals of arbitration awards.” [Comment](#), p. 7. That was a reasonable solution in 2012 to assure that individuals with smaller-valued personal injury claims can access our courts and our juries, and it remains so today.

Conclusion

In closing, the undersigned appreciates this Court’s thoughtful review of the FASTAR program and its rules and urges the Court to adopt the amendments as distributed with the modification of Rule 117(d)(1) as set forth above.

DATED this 1st day of October, 2024.

Hon. Greg Sakall