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**IN THE SUPREME COURT
STATE OF ARIZONA**

IN THE MATTER OF:	)	Supreme Court No. R-12-0029
	)	
PETITION TO ADOPT RULE 412,	)	Comment of the Advisory Committee on
ARIZONA RULES OF EVIDENCE	)	Rules of Evidence re: Petition to
	)	Promulgate New Arizona Rule of Evidence,
_____	)	Rule 412

For the reasons set forth below, the Advisory Committee on Rules of Evidence recommends against adoption of proposed Rule of Evidence 412, the subject of Petition No. R-12-0029. Please note that while Committee member Carl Piccarreta agrees with the ultimate recommendation against adoption of proposed Rule of Evidence 412, he does not join in the reasons set forth below.

I. BACKGROUND

Petitioner, attorney Jack Levine, provided the Advisory Committee on Rules of Evidence (the “Committee”) with a Memorandum Re: Admission of Medical Bills without

Medical Testimony and a discussion concerning same during the Committee's January 2013 meeting. Mr. Levine asked the Committee to consider recommending the adoption of a proposed new Rule 412 which is identical to Rule 413, Indiana Rules of Evidence, and states:

Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable.

Mr. Levine asked the Committee to consider endorsing the adoption of proposed Rule 412 citing confusion in the trial courts concerning distinctions between evidence of reasonableness and evidence of causation and the proof required for each. Mr. Levine also suggested that the trial courts were adding to the expense of smaller personal injury claims by improperly requiring physician testimony on the issue of the reasonableness of medical bills. Mr. Levine stated that the purpose of his proposed rule change is to ease the burden to plaintiffs presenting low dollar personal injury claims. The Committee, however, notes that proposed Rule 412 contains no language limiting its application to those cases. The Committee has reviewed all of the comments to the proposed addition of Rule 412, including those which have been provided by attorney Richard A. Plattner, the Arizona Association of Defense Counsel ("AADC") and the State Bar of Arizona ("SBA").

II. REASONABLENESS OF CHARGES FOR MEDICAL SERVICES

The primary thrust of Mr. Levine's proposed rule change is the creation of a presumption in all cases involving medical expenses occasioned by an injury, that medical bills, in all cases would be automatically admissible and would be prima facie evidence that the charges reflected in those bills are reasonable. This proposed presumption raises questions concerning the shifting of a plaintiff's burden of proof in a personal injury action. More importantly, it directly addresses an emerging dispute concerning what are reasonable expenses

of necessary medical care. Plaintiffs argue that the full amount of the “billed” charge is “reasonable.” Defendants counter that health care providers never expect nor do they receive full payment for the billed charge but accept a lower charge agreed to in advance with insurers or governmental entities. Defendants contend that the amount actually paid is the “reasonable” expense of medical care. This issue has been the subject of recent legislation and case law. It is not addressed in the Petition or in Mr. Levine’s Memorandum but adoption of his proposed Rule would have the effect of acknowledging that an amount “billed” for medical care amount is presumed to be a “reasonable” charge for that care.

A. Burden of Proof

As the comments of the SBA and the AADC discuss, the creation of a presumption of the reasonableness of medical bills may shift a burden which is currently on the plaintiff to the defendant in a personal injury action. Presently, the plaintiff has the burden of proving his or her damages in a personal injury action. *See* Personal Injury Damages 1, Measure of Damages, RAJI (Civil) 4th. In a personal injury action, a plaintiff has the burden of proving his or her reasonable expenses of necessary medical care, treatment, and services rendered, and reasonably probable to be incurred in the future. This reflects the current state of Arizona law. The adoption of a presumption of reasonableness may improperly shift the burden to the defendant to prove that charges for medical care are unreasonable in all personal injury actions. *See* Ariz. R. Evid. 301.

B. Actual Charges vs. Accepted/Paid Charges

The issue of the reasonableness of medical charges in personal injury actions is one that is currently evolving. A good discussion of the current state of the law is set out in the comment filed by the AADC. Neither that discussion nor the discussion that follows, however,

is exhaustive. In virtually every jurisdiction, statutes, rules and case law are in the process of being created to address this issue. There is clearly a split of opinion on the issue in the various states.

As noted in the AADC comment, there is generally a significant difference between the amount of charges reflected on a medical bill and the amount of charges actually paid to a health care provider and/or contracted to be accepted by that provider. Currently pending in the Arizona Legislature is House Bill 2238, which has passed two committee votes. It defines “reasonable medical expenses” to be “the expenses for which monies were *actually paid by the claimant, the claimant’s health insurance company or any other collateral source* in full satisfaction of the services rendered, including any amount owed by the claimant for coinsurance or a copayment or deductible.” (emphasis added).

The intent of House Bill 2238 is similar to that of other statutes, rules or court decisions across the United States. In North Carolina, for example, N.C. Gen. Stat. § 8-58.1(b) allows a Plaintiff in a personal injury action or any other civil proceeding to submit evidence regarding the amount paid or required to be paid. After doing so, a rebuttable presumption of the reasonableness of the amount paid is created. That same statute, however then allows a Defendant to submit evidence of a health care provider’s acceptance of payment in a lesser amount and a rebuttable presumption is then established that the lesser amount is the reasonable amount of the charges for that provider’s services.

North Carolina, through its legislature, adopted a new North Carolina Rule of Evidence 414, which states, in part, “[e]vidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied,

regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied.”

In California, a plaintiff may recover reimbursement for medical expenses for no more than the amount *actually paid* by the plaintiff or plaintiff’s insurer for the medical services received. *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541, 257 P.3d 1130 (2011). Although it appears that a majority of jurisdictions continue to allow a plaintiff to recover the billed amounts of medical care, the cases and treatises cited in the AADC comment attest to the evolving nature of exactly what is considered a “reasonable” medical expense or bill.

The proposed change may have the effect of establishing substantive law that may soon be addressed by the legislature and most likely will ultimately be before the Supreme Court of Arizona. The Committee believes it would be presumptuous to weigh in on any side of the substantive issue and that an endorsement of the proposed change would be just that.

III. CAUSATION

As noted in the Petition to add Rule 412, the case of *Larsen v. Decker*, 196 Ariz. 239, 995 P.2d 281 (App. 2000) dealt with the issue of causation in determining whether certain medical bills were to be admitted into evidence. In *Larsen*, the court required testimony of a causal connection between the treatment for which medical expenses were incurred and the injury causing event before the bills would be allowed into evidence. The requirement of proof of such a causal connection is acknowledged by Mr. Levine.

Proposed Rule 412 includes language that “statements of charges for medical, hospital or other healthcare expenses for diagnosis or treatment *occasioned by* an injury are admissible into evidence.” (emphasis added). The Committee believes that the proposed Rule

needs to better address the issue of causation and at least use that term within the Rule to avoid any confusion.

N.C. Gen. Stat. § 8-58.1(c), referred to above, includes language acknowledging that even if a presumption is created that services are reasonably necessary under the provisions of that statute, “*no presumption is established that the services provided were necessary because of injuries caused by the acts or omissions of an alleged tortfeasor.*” (emphasis added). The Committee recommends that, if the new Rule is to be adopted, a similar provision be included in order to acknowledge that a presumption of reasonableness does not create a presumption of causation and that proof of causation is still required in order to support any claim for damages.

IV. FOUNDATION

The presentation by Mr. Levine to the Committee was premised in large part on his stated desire to minimize the expense of plaintiffs in presenting evidence for smaller personal injury claims. The language of the proposed Rule, however, does not limit the Rule to smaller claims. No evidence has been presented to the Committee concerning the expense associated with obtaining foundation testimony to establish the authenticity of medical bills or the reasonableness of those bills. Indeed, in those smaller cases subject to arbitration, medical bills are automatically admitted. *See* Ariz. R. Civ. P. 75(e).

Those members of the Committee engaged in personal injury practice routinely stipulate to the authenticity of medical bills. In those rare occasions when such stipulations are not obtained, there are methods to shift the costs of those depositions made necessary by a refusal to stipulate. *See* Ariz. R. Civ. P. 36. In addition, courts have wide latitude regarding foundation issues involving a document’s authenticity. *See, e.g., Sheppard v. Crow-Barker-Paul No. 1 Limited Partnership*, 192 Ariz. 539, 968 P.2d 612 (App. 1998) (rejecting foundation

objections citing “gamesmanship,” noting “[f]oundational objections serve a useful purpose when there is a legitimate foundation question to explore. To make such objections, however, merely to force one’s adversary to ‘do it the hard way’ wastes court time and client dollars”).

With respect to the reasonableness of medical bills, in those cases that do go to trial a medical expert is routinely required to address issues of causation and, therefore, there should be no added cost to a plaintiff to obtain testimony from that expert as to the reasonableness of charges. It would appear to be a rare case when a plaintiff would be required to hire a separate medical expert to address the issue of reasonableness of medical bills.

IV. POSSIBLE UNINTENDED CONSEQUENCES

As noted above, and in the comment by the SBA, proposed Rule 412 is not limited to smaller personal injury cases championed in the Petition to create that Rule. It would apply to all personal injury cases. In addition, at least theoretically, it might apply to contractual disputes between insurers and health care providers. Because of the possible broad reach of the changes occasioned by proposed Rule 412, the Committee is wary of endorsing it as now proposed. There are clearly options which would effectuate the intent of proposed Rule 412. 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.

V. RECOMMENDATION

In evaluating proposed Rule 412, the Committee applied the rebuttable presumption upon which the Committee operates, i.e., in the absence of compelling circumstances, Arizona should follow the federal rules. There is no comparable federal rule.

The Committee appreciates the intent of proposed Rule 412 but cannot recommend its adoption by the Court. Proposed Rule 412 would create a presumption of reasonableness of bills for medical services which might alter a Plaintiff's burden of proof. It would recognize that amounts billed by providers, and not actually accepted by them, are reasonable—a matter which is in dispute and is currently before the legislature. Proposed Rule 412 is vague on the issue of causation. Finally, the proposed Rule may have limited applicability to those cases for which it is intended as well as unintended consequences not yet appreciated. The intent of proposed Rule 412 could easily and directly be effectuated by a minor change to the Arizona Rules of Civil Procedure. The Committee recommends against adoption of proposed Rule 412.

RESPECTFULLY SUBMITTED this _____ day of May, 2013.

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Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of May, 2013.

by: _____