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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	)	
	)	Supreme Court No. R-____-_____
PETITION TO AMEND	)	
FASTAR RULES 101 – 119,	)	**Petition to Amend and Delete Certain**
and, DELETE 120 - 126	)	**FASTAR Rules**
	)	
	)	
_____	)	

Pursuant to Rule 28, Rules of the Arizona Supreme Court, Petitioner James E. Abraham respectfully petitions this Court to adopt amendments to the civil FASTAR Rules, a pilot program for civil procedure rules that have been in effect for over two years in the Superior Court, in and for the County of Pima.

Petitioner requests that those parts of the FASTAR rules that created and govern "Alternative Resolution" (FASTAR Rules 120 through 126) be deleted, and that FASTAR (Trial) Rule 117(d)(1), be amended, so that the Medical bills of licensed or authorized providers submitted by Plaintiff are presumed reasonable in amount, but allowing any other party to offer evidence to rebut and dispute the presumed reasonableness of submitted medical bills.

I. Background and Purpose of the Proposed Rule Amendments

OVERVIEW

The FASTAR pilot program needs surgery to remove a terminal cancer that is killing the program's goals of: 1) reducing the diversion of cases away from juries and judges, 2) reducing the likelihood that cases will be decided by randomly assigned, involuntary lawyers, who have little to no knowledge about the legal issues in a case, 3) avoiding the inefficiencies and potential unfairness of an arbitration process, and 4) reversing the "vanishing trial" culture in which some lawyers avoid trials because they do not know how to competently try a case. (*Arizona Attorney*, February 2018, "Pilot FASTAR Program Aims for Improved Civil Justice", the excellent article authored by the Honorable Judge Jeffrey T. Bergin, with the ideas and quote taken from p. 29, second column, 4th paragraph, lines 1-7, 3rd paragraph, line 1, third column, 3rd paragraph, lines 1-11)

(Petitioner argues below that another major reason why some lawyers avoid trying cases is because they have a justified fear of not being reimbursed for significant costs expended while conducting discovery, including the hiring experts, to prove the reasonableness of the amounts of medical bills.)

The surgery that needs to be performed on the FASTAR Rules program includes: 1) the removal of the arbitration process ("Alternative Resolution"), and 2) the insertion of a rebuttable presumption that the Plaintiff's submitted medical

bills are reasonable in amount but allowing any party to offer evidence challenging the reasonableness of any submitted medical bill. (The Plaintiff should retain the burden of proving that medical bills were necessary, since proving causation is much easier and less costly than the difficult, sometimes impossible, task of marshalling evidence to prove that a medical bill is reasonable.)

The Evidence Relied Upon by the Petitioner

Since November 2017, while attending hearings at Superior Court, the Petitioner has had discussions with judges and counsel about whether or not the FASTAR program was successful. Apparently, there was a recognized suspicion by bench and bar that a large amount of debt-collection lawsuits, which are frequently ignored by defaulted defendants, were skewing the understanding of the effect of the new FASTAR rules. There was no group of *contested* cases, where the Plaintiffs could reasonably expect that a judgment would be paid, that could provide information or data to decide whether the goals of the pilot program were being achieved.

The Integrity of the Data Used:

The Petitioner works for the third largest auto insurance company and has had the privilege of representing fifty-four (54) insured defendants whose auto injury actions were resolved under the FASTAR pilot program, between November 2017 through December 2019. These 54 cases represent over 50% of the total

cases resolved by Petitioner in the past 26 months. Petitioner presented herein an accurate and complete picture of his *entire* resolved FASTAR case load, for a true and fair analysis of the FASTAR program. The Pima County Superior Court Clerk's case numbers for all cases cited herein have been provided in the attached Appendix A. All information cited in this petition is contained in the public record for these cases, for independent verification.

The Criteria Used for the Analysis of the Fifty-four (54) Resolved FASTAR cases:

The specific facts garnered from each of the 54 resolved FASTAR case were: 1) the Superior Court case number (to allow independent verification of information), 2) a) whether a "Choice Certificate" was filed by Plaintiff pursuant to FASTAR Rule 104(a), and if so, b) whether the Plaintiff chose the "Alternative Resolution" (hereinafter "AR"), or c) chose a FASTAR jury trial, or d) whether the Plaintiff failed to file a Choice Certificate, causing the Clerk to default the case to a FASTAR trial option, and 3) whether the case ultimately was resolved by settlement, AR hearing, or a two-day FASTAR jury trial.

The Facts of the Resolved 54 FASTAR cases:

Six (6) of the fifty-four (54) FASTAR Plaintiffs chose a two-day jury trial. Of those six (6) cases, five settled before trial, and one (1) case voluntarily went to jury trial, with a result of a defense verdict.

Eleven (11) of the Plaintiffs failed to file a Choice Certificate, so the Clerk automatically set them for a FASTAR trial, pursuant to FASTAR Rule 103(c). Of these eleven (11) cases, ten (10) cases settled before trial, and one (1) case "involuntarily" (no choice was made to go to trial) went to trial, with a result of a defense verdict.

Thirty-seven (37) of the fifty-four (54) FASTAR Plaintiffs chose AR, and thirty (30) settled before trial, and seven (7) cases were resolved through the AR arbitration process, with no appeals by the defense.

Summary

Two (2) of the 54 cases went to a jury trial (3.7% of the 54 cases)

Seven (7) of the 54 cases went through the AR process (12.9% of the 54 cases)

Forty-five (45) of the 54 cases settled (83.3% of the 54 cases)

(The Petitioner has over twenty-five (25) pending FASTAR cases, and the criteria trends for the above *resolved* cases are the same as for the *pending* cases.)

Suggested Changes to Help the FASTAR pilot program meet its goals:

Only two (2) of the fifty-four (54) FASTAR cases were resolved through jury trial. The FASTAR process failed to meet its goal of encouraging jury trials. Why? There are at least two reasons to explain this unfortunate and unintended failure.

Eliminate AR:

First, the AR process continues to exist, despite all of its well-known, negative attributes. The elimination of the negatively-viewed AR process will increase the amount of jury trials, since the removal of AR would leave only two choices available to the parties for case resolution. These two choices would be a either a settlement or have a two day jury trial.

(The elimination of AR will also save a great deal of time for many people. The "involuntary" arbitrator lawyers will no longer have to be bothered by scheduling and then conducting arbitrations, when *most* of them do not even practice *any* civil litigation. Also, the elimination of AR will allow lawyers for both sides to have to prepare for a contested matter only once, for the trial. Now, with AR in place, for those cases that are appealed, the lawyers have to prepare and attend the arbitration, and if the award is appealed, then a few months later, the lawyers have to go back to the case, and re-learn all the facts that they have already forgotten.

More importantly, in an appeal of an arbitration award all of the witnesses and parties will have to have their lives interrupted, again, to attend the jury trial. Any expert's report is usually not understood by the non-litigator arbitrator, and thus given no weight, and ignored. The FASTAR Rules have eliminated the hiring of experts after the award, but since experts cannot be hired after the award, they are frequently hired and disclosed as a safety net in case the award needs to be appealed.

The data shows that 83.3% of the cases settle, so all of that money spent on unused experts is wasted, too.)

Medical bills should be subject to a rebuttable presumption that the bill are reasonable

Second, to be fair, the Plaintiff lawyers and their clients need some relief from the burden of being required to prove that submitted medical bills are reasonable. (Plaintiff should retain the burden to prove that the medical care was caused by the Defendant's negligence.) For the past several decades, the practice in injury jury trials in Arizona was to admit all of the medical bills into evidence. The parties agreed to dispute the causation (the necessity) of the medical bills, but the parties rarely disputed the amount (the reasonableness) of the medical bills.

However, the spike in the cost of medical care over at least the past 8-9 years has placed the counsel for the defense in the position where the reasonableness of the amount of a medical bill no longer may be *un*disputed at trial. Petitioner requests that the FASTAR Rules be changed so that the rules provide for a rebuttable presumption that the Plaintiff's submitted medical bills are reasonable in amount, but still allowing any party to offer evidence challenging the reasonableness of any submitted medical bill.

The shifting of this burden of proof to the defense is fair. Typically, a collision-injured Plaintiff will see at least four health care providers, such as an

ER/Urgent Care provider, a PCP/chiropractor, a radiology provider, and often a specialist, such as an orthopedist or a neurologist. At trial, under the current trend, the Plaintiff would have to call at least four to five fact witnesses from medical providers to explain why their bills are reasonable, or, the Plaintiff would need to hire an expert to review all the medical bills, and then explain their opinions to the jury. These are both time-consuming and expensive processes for all parties.

Auto insurance carriers carefully examine all medical bills. Anecdotally, based on 24 years of insurance defense work in auto collisions, for five (5) large auto insurance carriers, the undersigned Petitioner knows that the carriers usually only challenge the amount of a medical bill when the charge seems to be *grossly* unreasonable. Usually, medical bills are disputed with expert testimony when thousands of dollars are at stake, rather than hundreds of dollars.

The only practical way to dispute the amount of a medical bill is with expert testimony. If a medical bill appears to be is *grossly* overpriced, then it is likely to be disputed by the carrier, no matter who has the burden of proof for the reasonableness of that particular bill. The burden of proof should be on the industry, as that's it's business, not the Plaintiff, who did not choose to be in an auto accident, and often was carted away by ambulance to the nearest hospital.

II. Contents of the Proposed Rule Amendment

Petitioner requests that the FASTAR rules that create and govern "Alternative Resolution" (FASTAR Rules 120 through 126) be deleted, and that FASTAR (Trial) Rule 117(d)(1), be amended so that the Medical bills of licensed or authorized providers submitted by Plaintiff are presumed reasonable in amount, but allowing any other party to offer evidence to rebut and dispute the presumed reasonableness of submitted medical bills. Such change may be made, by changing FASTAR Rule 117(d)(1), by deleting the language "… the amount of the bill is reasonable and…", and then inserting language at the end of FASTAR Rule 117(d)(1) that says "…the amounts of all medical bills shall be presumed reasonable, but any party may offer evidence to dispute the presumption of reasonableness of any medical bill."

These two changes should be viewed as *inseparable*. If the AR process was eliminated without making a rebuttable presumption of reasonableness for the medical bills, then the Plaintiff would be snatched out of the frying pan and dropped into the fire, where the money spent proving the reasonableness of medical bills could exceed the total damages awarded by the jury. If the bills were presumed reasonable within the AR process, then Plaintiff counsel would further retreat from the courtroom, and the vanishing trial culture will finally fade away behind the closed doors of the arbitrator's conference room.

(The FASTAR Rules have been in effect since November 2017, and it does not appear that anyone else has asked for these rule changes.)

Conclusion:

These changes are needed to save the civil jury system in Arizona.

RESPECTFULLY SUBMITTED this 10th day of January 2020.

By_____
James E. Abraham – Bar #006752