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Discounted Medical Bills and Conflicting Applications of Florida Statutes Sec. 786.76 as a Rule of Evidence

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NOTES

COLLATERAL DAMAGE: DISCOUNTED MEDICAL BILLS AND CONFLICTING APPLICATIONS OF FLORIDA STATUTES § 768.76 AS A RULE OF EVIDENCE

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I. INTRODUCTION

Marcie was a loving mother and a hard worker. But all of this was stripped away in an instant. Marcie lost both her daughter and her ability to work after being struck while walking home from school by a negligent driver. The resulting injuries have required several surgeries. With more operations necessary in the future, Marcie will likely require a lifetime of medical care. Marcie's employer provided her health insurance coverage. Unfortunately, when she lost her job because of the injuries, she lost her insurance as well. Due to her present condition and dearth of income, she is unable to afford the high premiums of private insurance.

Marcie lives in West Palm Beach, Florida. She hired a lawyer to sue the driver. Her complaint demands the cost of her past and future medical care. While insured, Marcie enjoyed the benefit of discounted medical costs stemming from an agreement between her HMO and her health care provider.[1] Now, without insurance, the costs of future medical care will not be discounted and Marcie will face larger, retail[2] costs for the same care. Her attorney wants to present evidence at trial of the retail cost of her past care to establish the "reasonable value" of care in the future.[3] However, he is concerned that the jury may never see these retail costs because some judges across the state are allowing the costs to be admitted into evidence while others are not.[4] If the jury does not see the retail costs, Marcie may not see them reflected in her recovery. She may, in effect, be penalized for past benefits she no longer enjoys.

Marcie is a hypothetical plaintiff and her attorney is a hypothetical attorney. However, there are many real "Marcies" currently facing this problem. There are also many real attorneys who share the concerns of Marcie's attorney.[5] These concerns have led attorneys to establish an e-mail list manager to share information about exactly what evidence a

1. As an example, her first surgery was billed to her insurance carrier for $10,000, but the doctor accepted $3,000 from the carrier in full satisfaction of the debt.

2. For the purpose of this Note, retail is synonymous with pre-discount, billed costs of care.

3. *See, e.g.*, Goble v. Frohman, 901 So. 2d 830, 835 (Fla. 2005) (Lewis, J., concurring in result only); Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956, 958 (Fla. 2d DCA 2004).

4. *See infra* Part V.

5. *See, e.g.*, Interview with Mariano Garcia, Partner, Gonzalez & Garcia (Jan. 15, 2010) (on file with author); Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Jan. 19, 2010) (on file with author); Interview with Nancy La Vista, Attorney, Lytal, Reiter Clark Fountain & Williams (Jan. 15, 2010) (on file with author); Interview with William H. Pincus, Law Offices of William H. Pincus (Jan. 18, 2010) (on file with author); Interview with Jeffrey R. Rollins, Attorney, Steinger, Iscoe & Greene, P.A. (Jan. 16, 2010) (on file with author).

particular judge will allow.[6] Prior to entering a courtroom, they will use the listserv to ask, "I am in front of Judge X. Does he follow *Goble* or *Thyssenkrupp*?"[7] The question refers to the Second District Court of Appeal's decision in *Goble v. Frohman*[8] and the Fourth District Court of Appeal's decision in *Thyssenkrupp Elevator Corp. v. Lasky*.[9]

Both *Goble* and *Thyssenkrupp* addressed the value of negotiated discounts between health care providers and insurance providers as "collateral source contributions" under Florida Statutes § 768.76.[10] The statute both defines "collateral sources" and mandates that the value of such contributions be reduced from a damage award[11] to prevent excess recovery, or "double recovery," by plaintiffs.[12] Both courts held that these discounts were properly set off from plaintiff awards.[13] Both courts agreed that the statute operates as both a rule of law and a rule of evidence.[14]

However, the courts conflict regarding how to apply the statute as a rule of evidence. In *Goble*, the court held that the jury should see evidence of the undiscounted, billed costs.[15] In *Thyssenkrupp*, the court held that the jury should not see evidence of the undiscounted, billed costs.[16] The key difference in the two cases is that *Goble* addressed the issue in a claim involving HMO coverage[17] and *Thyssenkrupp* in a claim involving Medicare coverage.[18] This distinction renders each case correct based on the plain reading of Florida Statute § 768.76, as discussed below. However, the misapplication and extension of *Thyssenkrupp* outside the

6. Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Dec. 8, 2009) (on file with author).

7. *Id.*

8. Goble v. Frohman, 848 So. 2d 406 (Fla. 2d DCA 2003).

9. Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547 (Fla. 4th DCA 2003).

10. FLA. STAT. § 768.76 (2010); *Thyssenkrupp*, 868 So. 2d at 549–50; *Goble*, 848 So. 2d at 408–10.

11. FLA. STAT. § 768.76(1), (2)(a) (2010).

12. *See, e.g.*, Pollo Operations, Inc. v. Tripp, 906 So. 2d 1101, 1104 (Fla. 3d DCA 2005); *Goble*, 848 So. 2d at 408–09 (establishing that the statute was created to "'ensure that injured persons recover reasonable damages,'" "'to encourage the settlement of civil actions prior to trial'" and to prevent plaintiffs from a "double recovery."(quoting Tort Reform and Insurance Act, ch. 86–160, 1986 Fla. Laws 699)). It is important to note that the *Tripp* court explained Medicare's exclusion under the statute because Florida's collateral source rule is preempted by the supremacy of the federal Medicare statute. The court also pointed out that "any judgment the plaintiff receive[d] which included the amounts paid by Medicare would still be subject to a lien." *Tripp*, 906 So. 2d at 1104 n.4.

13. *Thyssenkrupp*, 868 So. 2d at 550; *Goble*, 848 So. 2d at 410.

14. *Thyssenkrupp*, 868 So. 2d at 550–51 (Farmer, C.J., *reh'g denied*); *Goble*, 848 So. 2d at 410 (citing Gormley v. GTE Prods. Corp., 587 So. 2d 455, 457 (Fla.1991)).

15. *Goble*, 848 So. 2d at 410 (affirming the trial court's exclusion of evidence regarding collateral source benefits).

16. *Thyssenkrupp*, 868 So. 2d at 550.

17. *Goble*, 848 So. 2d at 407.

18. *Thyssenkrupp*, 868 So. 2d at 548.

Medicare context has resulted in a clear conflict among the courts.[19]

Once an individual has Medicare, she will never lose it. Thus, an injured plaintiff receiving Medicare will forever enjoy the benefit of discounts in future costs of care.[20] The same cannot be said of private insurance.[21] An injured plaintiff like Marcie who has lost her private insurance will face higher costs of care in the future without the benefit of discounts.[22] Thus, § 768.76 rightfully results in a discounted award for future medical damages where future aid is guaranteed, such as Medicare, but not where future aid is not guaranteed, such as in private insurance. In cases like Marcie's, the proper application of § 768.76 post-trial results in no risk at all of a "double recovery" because Marcie will no longer receive an undiscounted, future damage award while only paying a discounted future medical rates via her insurer since, after all, she has lost her health insurance.[23]

Moreover, precluding Marcie from presenting the undiscounted, billed costs of past care to the jury may create a bias against her when the jury is asked to determine her future costs of care in a damage award.[24] Simply put, although able to introduce expert testimony and other relevant evidence to establish the reasonable value of future care,[25] when Marcie's attorney asks the jury to award $60,000 for her next surgery, the response may be, "Why $60,000 when the bill for her last surgery was only $6,000?"

Florida's longstanding law is that *future* damage awards are not to be reduced due to collateral source contributions.[26] This principle has been

19. *Id.* at 551 n.1 (Farmer, C.J., *reh'g denied*) ("One could argue there is no conflict with *Goble* . . . which involved HMO benefits rather than Medicare. To the extent that HMO benefits and Medicare benefits are interchangeable for this subject, however, we certify conflict.").

20. *See* Medicare.gov, Medicare Eligibility Tool (General Enrollment), http://www.medicare.gov/MedicareEligibility/Home.asp?dest=NAV|Home|GeneralEnrollment#TabTop (last visited Sept. 22, 2010).

21. *See generally* NAYLA KAZZI, CTR. FOR AM. PROGRESS, MORE AMERICANS ARE LOSING HEALTH INSURANCE EVERY DAY: AN ANALYSIS OF HEALTH COVERAGE LOSSES DURING THE RECESSION (2009), *available at* http://www.americanprogress.org/issues/2009/05/pdf/healthinsurancelosses.pdf (discussing the markedly high number of employees who lost private health insurance when they lost their jobs).

22. *See generally* Alan T. Sorensen, *Insurer-Hospital Bargaining: Negotiated Discounts in Post-Deregulation Connecticut*, 51 J. INDUS. ECON. 469, 469 (2003).

23. Pollo Operations, Inc. v. Tripp, 906 So. 2d 1101, 1104 (Fla. 3d DCA. 2005).

24. *See generally* Interview with Mariano Garcia, Partner, Gonzalez & Garcia (Jan. 15, 2010) (on file with author); Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Jan. 19, 2010) (on file with author); Interview with Nancy La Vista, Attorney, Lytal, Reiter Clark Fountain and Williams (Jan. 15, 2010) (on file with author); Interview with William H. Pincus, Law Offices of William H. Pincus (Jan. 18, 2010) (on file with author); Interview with Jeffrey R. Rollins, Attorney, Steinger, Iscoe & Greene, P.A. (Jan. 16, 2010) (on file with author).

25. FLA. STAT. §§ 90.401–.402 (2010) (establishing relevance of evidence).

26. *See* Allstate Ins. Co. v. Rudnick, 706 So. 2d 389, 390–91 (Fla.4th DCA 1998) ("[I]n order to have collateral source benefits set off against an award, those benefits must either be

applied to cases involving private insurance,[27] workers' compensation insurance,[28] personal injury protection (PIP) insurance,[29] and even Medicare[30] and Medicaid.[31] As stated by the Fifth District Court of Appeal, "The statute does not purport to benefit the tortfeasor by deducting collateral sources to which the insured may be entitled in the future."[32] Plaintiff attorneys facing this issue believe that courts improperly applying *Thyssenkrupp* in non-Medicare cases are endorsing de facto reductions in future damages by preventing the jury from properly evaluating the reasonable value of future care.[33]

This issue remains unsettled by the Florida Supreme Court.[34] Without such guidance from the supreme court, lower courts are misapplying the holdings of *Thyssenkrupp* to non-Medicare cases.[35] As the *Thyssenkrupp* court properly found, Medicare benefits are specifically excluded as collateral sources.[36] In light of that, it is improper to apply the *Thyssenkrupp* standard to those collateral sources that *are* statutorily defined by and fall within the post-trial restrictions of § 768.76, such as non-Medicare sources of assistance. Nonetheless, attorneys are seizing on the confusion and absorbing the courts' time with motions arguing each side.[37] The result is that where *Goble* is not controlling,[38] lower courts are choosing, ad hoc, whether to follow *Goble* and admit the undiscounted, billed amount or to follow *Thyssenkrupp* and admit only the discounted amount into evidence.[39] Across the state, some courts are applying the

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already paid . . . or presently earned and currently due and owing . . . ." (citing White v. Westlund, 624 So. 2d 1148, 1153 (Fla. 4th DCA 1993))); Measom v. Rainbow Connection Preschool, Inc., 568 So. 2d 123, 124 (Fla.5th DCA 1990).

27. *Rudnick*, 706 So. 2d at 390–91.

28. USAA Cas. Ins. Co. v. McDermott, 929 So. 2d 1114, 1117–18 (Fla. 2d DCA 2006).

29. Pizzarelli v. Rollins, 704 So. 2d 630, 633 (Fla. 4th DCA 1997).

30. Grell v. Bank of Am. Corp., No. 3:05-cv-1237-J-32HTS, 2007 WL 1362728, at *3 (M.D. Fla. May 7, 2007) (citing *Rudnick*, 761 So. 2d at 390).

31. Bravo v. United States, 403 F. Supp. 2d 1182, 1199 n.13 (S.D. Fla. 2005) (noting that no set off for future Medicaid payments is permitted under Florida law).

32. Measom v. Rainbow Connection Preschool, Inc., 568 So. 2d 123, 124 (Fla. 5th DCA 1990).

33. Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Dec. 8, 2009) (on file with author).

34. Goble v. Frohman, 901 So. 2d 830, 833 (Fla. 2005) (limiting the holding to whether discounts qualify as "collateral sources" and not ruling on the statute as a rule of evidence).

35. *See infra* Part V.

36. FLA. STAT. § 768.76(2)(b) (2010).

37. *See infra* Part VI.B.

38. That area includes anywhere outside of the Second Judicial District of Florida.

39. *Compare* Order Granting Defendants' Motion in Limine to Limit Medical Expenses Introduced Into Evidence at 1, Stone v. Univ. of Fla. Bd. of Trs., No. 01-05-CA-4098 K (Fla. 8th Cir. Ct. Oct. 16, 2009), *and* Omnibus Order on Motions in Limine at 5, Slavin v. Mount Sinai Med. Ctr., No. 06-954 CA 11 (Fla. 11th Cir. Ct. Feb. 23, 2009) (excluding billed costs), *and* Order on Defendant's Motions in Limine at 1, Young v. Gray, No. 03-CA 8295 A (Fla. 13th Cir. Ct. Nov. 14,

latter, without distinguishing Medicare from private insurance.[40]

To resolve the confusion, clarification of Florida Statutes § 768.76 as a rule of evidence is necessary. Part II of this Note will provide a history of the collateral source doctrine, including some of the ways it has been abrogated by courts and state legislatures. Part III will discuss Florida's abrogation of the common law rule with the enactment of § 768.76. This will include a plain reading of the language most applicable to this topic. Part IV will analyze the decisions in *Goble I*, *Thyssenkrupp*, and *Goble II* to set the background for why there are different evidentiary standards being applied in the lower courts. Part V will provide accounts from practitioners who are seeing this issue play out in the courts. These accounts offer unique insight into the issue. This Part will also analyze the orders and thoughts of judges who have given salient justifications for following *Goble* and nonetheless apply *Thyssenkrupp*. Part VI will contrast whether clarification would be better provided by the Florida Legislature amending the statute or the Florida Supreme Court clarifying the application of the present statutory language. Part VII will discuss Florida's status as a "reasonable value" jurisdiction, its history of refusing to reduce awards of future damages, and other evidentiary issues pertinent to the present conflict. Finally, Part VIII analyzes and distinguishes two recent decisions from the supreme courts of Ohio and Kansas which pose a different solution than that found in either *Goble* or *Thyssenkrupp*.

This Note will argue that where no other statute conflicts,[41] the plain language of Florida Statutes § 786.76 clearly vests exclusive power in "the court"[42] to set off the contributions from collateral sources, *post-award*.[43] Therefore, the correct evidentiary standard in cases involving statutorily defined "collateral sources" is that endorsed by the *Goble* court: excluding such evidence until after a jury determination of damages.[44] Without allowing the billed costs into evidence, there will be no need for "the court" to reduce awards and the statutory text will be meaningless, lacking form *and* substance. Marcie's jury should see the retail, undiscounted, billed costs of her past care as evidence of the "reasonable value" of her future care.

2005) (excluding billed costs), *with* Order on Defendants' First Motion in Limine, Stratton v. Comcast of Greater Fla./Ga., Inc., No. 16-2007-CA-007154 (Fla. 4th Cir. Ct. Feb. 9, 2009) (allowing billed costs), *and* Order on Plaintiff's Motion in Limine Regarding Admission of Medical Bills Into Evidence, Muentes v. Auerbach, No. 2003-CA-004105-AJ (Fla. 15th Cir. Ct. Aug. 2, 2005) (allowing billed costs), *and* Order on KLI's Motion in Limine Relating to Medical Bills, Wood v. KLI, Inc., No. 03-923 CA (Fla. 19th Cir. Ct. May 1, 2005) (allowing billed costs).

40. *See supra* note 39.

41. *See infra* Part III.A.

42. *See infra* Part III.C.

43. *See infra* Part III.B.

44. Goble v. Frohman, 848 So. 2d 406, 410 (Fla. 2d DCA 2003).

II. THE COMMON LAW COLLATERAL SOURCE DOCTRINE: FROM INCEPTION TO ABROGATION

Some of the most renowned legal economists regard the collateral source doctrine as an efficient element of the common law.[45] Although not the first case on record addressing the concept, many consider *Propeller Monticello v. Mollison*[46] to be the "seminal" case on the topic.[47] In *Mollison*, the U.S. Supreme Court held that no defense may be founded on the fact that insurers had already paid for damages incurred by the plaintiff.[48] The *Mollison* Court stated that this was a "doctrine well established at common law."[49] This doctrine placed a bar on any evidence of contributions or reimbursements to the plaintiff being introduced to reduce the liability of a tortfeasor.[50] For more than a century, this rule was consistently applied in the lower courts across the nation.[51] Justifications for maintaining the rule included: (1) not providing a tortfeasor with the benefit of the plaintiff's bargain with an insurer,[52] (2) not punishing a responsible plaintiff for carrying insurance,[53] (3) providing a deterrence mechanism,[54] and (4) promoting a public policy against a windfall to a tortfeasor.[55]

As a creature of common law,[56] the doctrine was subject to modification at the discretion of state legislatures. It remained almost universally unaltered until the 1980s, when many states began abrogating the doctrine through legislation aimed at combating a trend of rising damage awards, specifically in medical malpractice claims.[57] These awards

45. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 199–200 (7th ed. 2007) (stating that the possibility of double recovery is secondary to the need for the full cost of negligent behavior be imposed on tortfeasors to encourage the proper level of care to be taken).

46. 58 U.S. 152 (1854).

47. Guillermo Gabriel Zorogastua, Comment, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-offs*, 55 U. KAN. L. REV. 463, 475–76 (2007) (citing Douglas H. Schwartz, Comment, *The Tortured Path of Ohio's Collateral Source Rule*, 65 U. CIN. L. REV. 643, 643 (1997)).

48. *Mollison*, 58 U.S. at 155.

49. *Id.*

50. *See, e.g.*, Urbanak v. Hinde, 497 So. 2d 276, 277 (Fla. 3d DCA 1986).

51. Deborah Van Meter, Comment, *Louisiana's Collateral Source Rule: Time for a Change?*, 32 LOY. L. REV. 978, 980–82 (1987).

52. Amwest Sav. Ass'n v. Statewide Capital, Inc., 144 F.3d 885, 889 (5th Cir. 1998).

53. Green v. Denver & Rio Grande W. R.R. Co., 59 F.3d 1029, 1032 (10th Cir. 1995) (citing Quinones v. Pa. Gen. Ins. Co., 804 F.2d 1167, 1171 (10th Cir. 1986)).

54. Bozeman v. State, 879 So. 2d 692, 700 (La. 2004).

55. *Green*, 59 F.3d at 1032 (citing FDIC v. United Pac. Ins. Co., 20 F.3d 1070, 1083 (10th Cir. 1994)).

56. *See generally* Zorogastua, *supra* note 47 (discussing the common law roots of the collateral source rule).

57. *See In re* E. & S. Dists. Asbestos Litig., 772 F. Supp. 1380, 1384 (E.D.N.Y. & S.D.N.Y. 1991) (commenting on the statutory reform which swept the country in the 1980s); *see also* Jennifer

were viewed as creating a "crisis" in the health care and health insurance industries.[58] Litigants have raised equal protection challenges to legislation mandating different rules based on different collateral sources in different types of cases.[59] These challenges have been generally unsuccessful with courts largely justifying their rulings based on deference to the legislature.[60]

Another method of abrogation allows for evidence of collateral sources based on the subrogation rights, or right to reimbursement, of the source.[61] By allowing evidence of these collateral source contributions into evidence and not reducing their value from a plaintiff's award, the plaintiff will be able to recover an amount sufficient to satisfy any existing liens.[62] At the same time, where the plaintiff is under no obligation to remit any portion of her recovery, a large award may create a windfall for the plaintiff.[63]

Based on the same "windfall" logic, other methods of abrogation have included establishing "benefit of the bargain" or "actual amount paid" standards.[64] Under the "benefit of the bargain" approach, courts "allow plaintiffs who have private insurance to recover the full amount of their medical expenses because they have bargained for the benefits they received."[65] Under the less plaintiff-friendly "actual amount paid" approach, responsible plaintiffs who carry insurance may not recover any

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Howard, *Alabama's New Collateral Source Rule: Observations from the Plaintiff's Perspective*, 32 CUMB. L. REV. 573, 573, 575 (2002) (discussing Alabama as an example); Chandler Gregg, Comment, *The Medical Malpractice Crisis: A Problem with No Answer*, 70 MO. L. REV. 307, 307–12 (2005); Zorogastua, *supra* note 47, at 478 (discussing Kansas as an example).

58. *See* L. Timothy Perrin, Comment, *The Collateral Source Rule in Texas: Its Impending Demise and a Proposed Modification*, 18 TEX. TECH L. REV. 961, 961 (1987); Julie A. Schafer, Note, *The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45*, 53 OHIO ST. L.J. 587, 587 (1992).

59. *See, e.g.*, Marsh v. Green. 782 So. 2d 223, 231–33 (Ala. 2000) (holding the challenged Alabama abrogation statute constitutional); Smith v. Dep't of Ins., 507 So. 2d 1080, 1095 (Fla.1987) (holding some portions of Florida's Tort Reform and Insurance Act constitutional and others unconstitutional).

60. *See, e.g.*, *Green*, 782 So. 2d at 231.

61. *See, e.g.*, ALASKA STAT. § 9.17.070 (2010); CONN. GEN. STAT. § 52-225a (2010); FLA. STAT. § 768.76 (2010); IDAHO CODE ANN. § 6-1606 (2010); 735 ILL. COMP. STAT. 5/2-1205 (2009); ME. REV. STAT. ANN. tit. 24, § 2906 (2009); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-06 (West 2010); MICH. COMP. LAWS § 600.6303 (2010); MINN. STAT. § 548.251 (2010); MONT. CODE ANN. § 27-1-308 (2009); N.Y. C.P.L.R. 4545 (McKinney 2009); N.D. CENT. CODE § 32-03.2-06 (2009); S.D. CODIFIED LAWS § 21-3-12 (2010); UTAH CODE ANN. § 78B-3-405 (2010).

62. *See supra* note 61.

63. Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547, 550 (Fla. 4th DCA 2003) ("Allowing the admission of evidence of the excess discharged . . . has the effect of 'provid[ing] an undeserved and unnecessary windfall to the plaintiff.'" (quoting Fla. Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514, 515 (Fla.1984))).

64. *See* Wills v. Foster, 892 N.E.2d 1018, 1025–29 (Ill. 2008) (providing in-depth discussion of the different standards of recovery across many jurisdictions).

65. *Id.* at 1026.

amounts "written off" by the health care provider from negotiated or contractual discounts.[66] Both of these approaches have been criticized for "using the plaintiff's relationship with a third party to measure the tortfeasor's liability."[67]

Florida, like the majority of states,[68] follows a "reasonable value" approach under which the plaintiff may recover the reasonable value of medical services.[69] Many jurisdictions apply this standard without regard to whether the contributions were made by private insurance or a government-sponsored program, e.g., Medicare.[70] Florida, however, has chosen to limit the reasonable value to the actual amount paid when a government-sponsored program such as Medicare is at issue.[71]

The Florida Legislature codified the state's abrogation of the common law doctrine[72] in Florida Statutes § 768.76.[73] The statute established the standard by which collateral source contributions are to be set off from damage awards.[74] The question which remains unclear is how the statute should operate as a rule of evidence—i.e., how, when, and by whom an award will be reduced.

III. FLORIDA STATUTES § 768.76: A PLAIN READING

The Florida Legislature enacted Florida Statutes § 768.76 in 1986 "'to cure the current crisis'" in liability insurance.[75] The statute reads as follows:

> (1) In any action *to which this part applies* in which liability is admitted or is determined by the trier of fact and *in which damages are awarded* to compensate the claimant for losses

66. *Id.* at 1025.

67. *Id.* at 1027.

68. *Id.* at 1028.

69. Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956, 958 (Fla. 2d DCA 2004).

70. *See, e.g.*, *Wills*, 892 N.E.2d at 1029–31 (noting that Illinois follows the reasonable-value approach, under which all plaintiffs are entitled to recover the full reasonable value of their medical expenses, regardless of whether they have private insurance or are covered by a government program).

71. FLA. STAT. § 768.76(2)(b) (2010) (defining Medicare and other public programs as outside the collateral source statute); *see also Coop. Leasing, Inc.*, 872 So. 2d at 960 (holding Medicare discounted benefits are not recoverable in a damage award); Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547, 550 (Fla. 4th DCA 2003) (holding Medicare discounts not recoverable in damages).

72. Goble v. Frohman, 901 So. 2d 830, 836 (Fla. 2005) (Lewis, J., concurring in result only) ("Section 768.76 of the Florida Statutes abrogated the common law collateral source rule and replaced it with a statutory provision . . . .").

73. FLA. STAT. § 768.76 (2010).

74. *Id.*

75. Goble v. Frohman, 848 So. 2d 406, 408–09 (Fla. 2d DCA 2003) (quoting Tort Reform and Insurance Act, ch. 86–160, 1986 Fla. Laws 699)).

> sustained, *the court shall* reduce the amount of such award by the total of all amounts which *have been paid* for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources. . . .[76]

It is axiomatic that "statutory language must be accorded its plain meaning."[77] Therefore, any answer to the present question begins with a plain reading and clear understanding of the following four phrases in the first section of the statute: (1) "to which this part applies," (2) "in which damages are awarded," (3) "the court shall," and (4) "have been paid."[78]

A. *"To Which This Part Applies"*

The beginning of the statute establishes both the scope of the statute and its limitations. The statement "to which this part applies" is a reference to Part II of Chapter 768, which encompasses §§ 768.71–.81.[79] The first section of Part II establishes that the Part is applicable "'[e]xcept as otherwise specifically provided . . . to any action for

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76. FLA. STAT. § 768.76(1) (2010) (emphasis added). The statute also reads:

> (2) For purposes of this section:
>
> (a) "Collateral sources" means any payments made to the claimant, or made on the claimant's behalf, by or pursuant to:
>
> . . . .
>
> 2. Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, ...
>
> 3. Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.
>
> . . . .
>
> (b) Notwithstanding any other provision of this section, benefits received under Medicare, . . . the Medicaid program . . . or from any medical services program administered by the Department of Health *shall not be considered a collateral source*.

Id. § 768.76(2) (emphasis added).

77. Pizzarelli v. Rollins, 704 So. 2d 630, 633 (Fla. 4th DCA 1997) ("The law clearly holds that unambiguous statutory language must be accorded its plain meaning." (citing Carson v. Miller, 370 So. 2d 10, 11 (Fla. 1979))).

78. FLA. STAT. § 768.76(1) (2010).

79. *Id.*; *see also* Caruso v. Baumle, 880 So. 2d 540, 544 (Fla. 2004) (interpreting this portion of the statute).

damages, whether in tort or in contract.'"[80] However, the statute goes on to state that "'[i]f a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply.'"[81] Therefore, the application of § 768.76 as either a rule of law or a rule of evidence will only arise in the event that no other statute establishes a different rule.

The Florida Supreme Court adopted this reasoning in *Caruso v. Baumle*.[82] The court interpreted this portion of the statute only to differentiate it from another statute, § 627.736.[83] The latter is part of the Florida Motor Vehicle No-Fault Law,[84] which "governs suits arising out of motor vehicle accidents."[85] The court explained that § 627.736(3) was an example of a statute in conflict with § 768.76 in regards to the admissibility of collateral source contributions.[86] It stated that § 627.736(3) placed the responsibility for set off in the hands of the jury and not in the court as in § 768.76.[87] However, as *Caruso* dealt solely with § 627.736, the court's analysis of § 768.76 is purely dicta.

In the *Caruso* court's analysis, Marcie's case would be governed by § 768.76 and the judge, not the jury, would be exclusively responsible for any reduction of a jury award.

B. *"In Which Damages Are Awarded"*

A plain reading of this statutory phrase suggests that any set off is not to be applied until *after* damages have been awarded. The preceding portion of the statute, "in which liability is admitted or is determined by the trier of fact,"[88] supports such a reading. By affirming the trial court's post-verdict set off of the discounts, the Second District Court of Appeal in *Goble* seemed to agree with this interpretation.[89] In *Thyssenkrupp*, the Fourth District Court of Appeal vitiated the need for a post-trial set off by holding that Medicare benefits were not collateral sources under the statute.[90] Therefore, the court held that the plaintiff could not present to the trier of fact the undiscounted, billed medical costs as damages incurred by the plaintiff, effectively and preemptively setting off—or discounting—a jury's damage award.

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80. *Caruso*, 880 So. 2d at 544 (quoting FLA. STAT. § 768.71(1) (2001)) (alterations in original).

81. *Id.* (quoting FLA. STAT. § 768.71(3) (2001)) (alterations in original).

82. *Id.*

83. *Id.* at 543–46.

84. FLA. STAT §§ 627.730–.7405 (2010).

85. *Caruso*, 880 So. 2d at 544.

86. *Id.*

87. *Id.*

88. FLA. STAT. § 768.76(1) (2010).

89. Goble v. Frohman, 848 So. 2d 406, 410 (Fla. 2d DCA 2003).

90. Thyssenkrupp Elevator Corp. v. Lasky, 868 So. 2d 547, 550 (Fla. 4th DCA 2003).

When constrained to the facts of each case, both holdings appear correct under the statute. However, courts outside of the Second District Court of Appeal are incorrectly applying *Thyssenkrupp* to cases involving statutory collateral source contributions, e.g., non-Medicare sources.[91] Based on the holding of *Thyssenkrupp*, they argue that the undiscounted billed costs represent no damage to the plaintiff and should not be presented to the jury.[92] Such an interpretation conflicts with the plain language of the statute, which mandates that statutory collateral source contributions are to be set off only after "liability is admitted or is determined by the trier of fact and in which damages are awarded."[93]

C. *"The Court Shall"*

Florida Statutes § 768.76 mandates that "the court shall" be charged with applying any set offs from collateral source contributions.[94] This obligation is the exclusive province of the court and not the fact-finder.[95] The Florida Supreme Court endorsed this interpretation in *Caruso*. It stated, "Thus, under section 768.76(1), the *court* reduces the jury award by the amount of collateral source benefits."[96] In comparing § 768.76 with § 627.736, it also stated, "[I]n contrast to the procedure under section 768.76(1), in which the *court* offsets the collateral source amount, under section 627.736(3), the trier of fact—whether judge *or* jury—is to offset the amount."[97]

In effect, courts expanding the holding of *Thyssenkrupp* to non-Medicare discounts are selectively applying § 768.76. However, statutes are not meant to be read or applied only in part.[98] These pre-award evidentiary rulings violate both the letter and spirit of the statute.

D. *"Have Been Paid"*

This portion of the statute has been the subject of review in many cases.[99] It was also at the heart of the certified question from the Second

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91. *See supra* note 39.

92. *See, e.g.*, Transcript of Hearing at 2–6, Favazzi v. Am. Retirement Corp. (No. 50-2003CA-12992) (Fla. 15th Cir. Ct. June 28, 2005) (hearing on defense motion in limine to exclude billed amounts).

93. FLA. STAT. § 768.76(1) (2010).

94. *Id.*

95. Caruso v. Baumle, 880 So. 2d 540, 544 (Fla. 2004).

96. *Id.*

97. *Id.* (first emphasis added).

98. *See* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273, 1287 (Fla. 2000) ("[S]tatute should be construed in its entirety and as a harmonious whole." (citing Sun Ins. Off., Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961))); Fleischman v. Dep't of Prof'l Reg., 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983) ("Every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.").

99. *See, e.g.*, Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956, 959–60 (Fla. 2d DCA 2004); Goble v. Frohman, 848 So. 2d 406, 409 (Fla. 2d DCA 2003); Allstate Ins. Co. v. Rudnick, 706 So.

District Court of Appeal to the Florida Supreme Court in *Goble*.[100] The court's answer made clear that these types of negotiated discounts do qualify as benefits paid on behalf of the plaintiff and therefore are properly set off under § 768.76, post-trial and by the judge.[101] Most importantly, the statute's term "have been paid" is in the *past tense*. This is essential to understanding and properly applying the statute. Set offs are only to be applied for benefits already received, or "earned,"[102] and not based on potential future benefits.[103] Therefore, because possible future discounts have not yet been paid or earned (and may never be), courts must allow evidence of undiscounted, billed costs of past care to establish the reasonable costs of future care. To do otherwise would nullify this statutory language.

Based on a plain reading of Florida Statutes § 768.76, (1) where no other statute conflicts, (2) post-verdict, (3) the judge shall (4) reduce the jury award by the amount of collateral source contribution already received by the plaintiff. Therefore, to effectuate the statute's language and purpose, it should preclude the finder of fact from considering the value of these collateral source contributions in determining the reasonable value of care and a tortfeasor's liability.

IV. THE CURRENT CONFLICT—*GOBLE I*, *THYSSENKRUPP*, AND *GOBLE II*

A. *The Second District Court of Appeal's Decision in* Goble—"Goble I"

In 2003, the Second District Court of Appeal heard *Goble v. Frohman*.[104] Albert Goble was riding his motorcycle[105] when he was hit by Mark Frohman's vehicle.[106] Goble had insurance through an HMO,[107] and the undiscounted, billed cost of his medical care amounted to

2d 389, 390–91 (Fla. 4th DCA 1998).

100. Goble v. Frohman, 901 So. 2d 830, 831 (Fla. 2005) (answering certified question, "Under section 768.76 . . . is it appropriate to setoff against the damages portion of an award the amounts of reasonable and necessary medical bills that were written off by medical providers pursuant to their contracts with a health maintenance organization?").

101. *Id.* at 833.

102. Fla. Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514, 515 (Fla.1984) ("We believe that the common-law collateral source rule should be limited to those benefits earned in some way by the plaintiff.").

103. *See supra* notes 26–33 and accompanying text.

104. 848 So. 2d 406 (Fla. 2d DCA 2003).

105. Because the Florida No Fault Vehicle Act applies only to vehicles with four or more wheels, Albert Goble did not carry PIP insurance and § 627.736 (mandating a different collateral source rule) was not implicated. *See supra* notes 82–87 and accompanying text.

106. *Goble*, 848 So. 2d at 407.

107. *Id.*

$574,554.31.[108] These undiscounted, billed costs were presented as evidence to the jury who awarded Goble the full amount in damages.[109] Due to a contractual discount between his HMO and his health care provider, the provider accepted only $145,970.76 from the HMO in full satisfaction of the debt.[110] After the jury reached an award of the full billed costs, the trial judge granted a motion from Frohman to "set off" the contractual discount amount under § 768.76.[111]

On appeal, Goble argued that these discounts were not "collateral sources" under § 768.76 and were improperly set off.[112] On cross-appeal, Frohman challenged that he should have been able to present evidence of the discounts to the jury.[113] The Second District Court of Appeal ruled against Goble and held that these types of discounts qualified as collateral sources under the statute and were properly set off by the judge, post-trial.[114] However, more importantly, the court ruled against Frohman and held that evidence of collateral source benefits (specifically, discounts) was inadmissible and that the trial judge was correct in admitting the undiscounted, billed costs of care into evidence.[115]

In reaching this decision, the court cited *Gormley v. GTE Products Corp.*[116] for the proposition that the collateral source doctrine is both a rule of damages and a rule of evidence.[117] As a rule of evidence, it "prohibits the admission of evidence regarding collateral sources in the liability trial because it 'misleads the jury on the issue of liability.'"[118] The court acknowledged Frohman's right to challenge the reasonableness of the costs of care.[119] In support of its holding against the use of collateral source evidence in such a challenge, the court reasoned that "there generally will be other evidence having more probative value and involving *less likelihood of prejudice* than the victim's receipt of insurance type benefits."[120] To further support the lack of value inherent in this evidence of discounts, the court cited its holding in *Hillsborough County Hospital Authority v. Fernandez*.[121] In *Fernandez*, the court held that "evidence of contractual discounts received by managed care providers is

108. *Id.*
109. *Id.*
110. *Id.* at 407–08.
111. *Id.* at 408.
112. *Id.* at 407.
113. *Id.*
114. *Id.* at 410.
115. *Id.*
116. Gormley v. GTE Prods. Corp., 587 So. 2d 455 (Fla.1991).
117. *Goble*, 848 So. 2d at 410 (quoting *Gormley*, 587 So. 2d at 457).
118. *Id.* (quoting *Gormley*, 587 So. 2d at 458).
119. *Id*.
120. *Id.* (quoting *Gormley*, 587 So. 2d at 458) (emphasis added).
121. *Id.* (citing Hillsborough County Hosp. Auth. v. Fernandez, 664 So. 2d 1071 (Fla. 2d DCA 1995)).

insufficient . . . to prove that nondiscounted medical bills were unreasonable."[122]

The *Goble* court determined that this presented a case of "great public importance."[123] It certified a question to the Florida Supreme Court relating only to the holding that these discounts qualified as statutory collateral source contributions.[124] It did not certify a question regarding the court's evidentiary holding—that the discounted billed medical costs were inadmissible evidence for the trier of fact in determining damages. Therefore, the evidentiary question remains unanswered.

B. *The Fourth District Court of Appeal's Holding and Certification of Conflict in* Thyssenkrupp

Later in 2003, the Fourth District Court of Appeal heard *Thyssenkrupp Elevator Corp. v. Lasky*.[125] Beatrice Lasky was injured while a passenger on a Thyssenkrupp elevator[126] and had health insurance provided by Medicare.[127] Thyssenkrupp challenged the trial court's refusal to set off the amount of the discounts between Medicare and the plaintiff's health care provider.[128] On appeal, Thyssenkrupp asserted that the undiscounted, billed costs were neither admissible as evidence of damages nor exempt from a judicial set off, post trial.[129] It reasoned that awarding the undiscounted, billed costs above the negotiated prices actually paid on Lasky's behalf amounted to "unwarranted surplus damage" which would provide a windfall.[130] The Fourth District Court of Appeal agreed and held that the Medicare discounts were inadmissible as damages—thus barring the plaintiff from proffering her undiscounted medical bills as evidence of past or future damages.[131]

The court cited *Florida Physician's Insurance Reciprocal v. Stanley*[132] as "instructive" of the principal that these discounted amounts were inadmissible as damages suffered by the plaintiff and extensively quoted that case.[133] In *Stanley*, the Florida Supreme Court faced the question of

122. *Id.* (citing *Fernandez*, 664 So. 2d at 1072).

123. *Id.*

124. *Id.* ("Under section 768.76 . . . is it appropriate to setoff against the damages portion of an award the amounts of reasonable and necessary medical bills that were written off by medical providers pursuant to their contracts with a health maintenance organization?").

125. 868 So. 2d 547 (Fla. 4th DCA 2003).

126. *Id.* at 548.

127. *Id.*

128. *Id.* at 548–49.

129. *Id.* at 549.

130. *Id.*

131. *Id.* at 550.

132. *Id.* at 549 (citing to Fla. Physcian's Ins. Reciprocal v. Stanley, 452 So. 2d 514 (Fla.1984)).

133. *Id.*

whether evidence of public services for future medical care was outside of the collateral source rule and, therefore, admissible.[134] The *Stanley* court acknowledged that the collateral source rule was a "well settled rule of damages."[135] However, the *Stanley* Court cited extensively to a holding by the Illinois Supreme Court in *Peterson v. Lou Bachrodt Chevrolet Co.*[136] to support *Stanley*'s holding that the rule should not apply and the evidence of discounted medical bills was admissible at trial.[137] The Fourth District Court of Appeal followed the *Stanley* line of reasoning and reversed the damage award based on its belief that "[a]llowing the admission of evidence of the excess discharged by Medicare payment has the effect of 'provid[ing] an undeserved and unnecessary windfall to the plaintiff.'"[138]

Lasky moved for a re-hearing and argued that the court's holding would allow for the set off of Medicare discounts as a collateral source, which they are explicitly not under statute.[139] In denying the motion, the court acknowledged the confusion and clarified any "misapprehension" about the precise holding.[140] It stated that the holding was evidentiary and that the undiscounted, billed amount was inadmissible as "not tend[ing] to prove that the claimant has suffered any loss by reason of the charge."[141] The court certified conflict with *Goble* but noted that, "One could argue there is no conflict with *Goble v. Frohman* . . . which involved HMO benefits rather than Medicare. To the extent that HMO benefits and Medicare benefits are interchangeable for this subject, however, we certify conflict."[142]

With due respect to the court, this Note argues that to no extent are HMO benefits and Medicare benefits interchangeable for this subject. HMO benefits are statutorily defined collateral sources[143] and Medicare benefits are specifically excluded as such.[144] The court could have avoided conflict by expressly limiting its holdings to non-statutory collateral source contributions. By not doing so, the court's certification statement unnecessarily created a potential conflict.

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134. *Stanley*, 452 So. 2d at 515. All of the referenced material noted herein from *Stanley* was quoted in the *Thyssenkrupp* case in support of the latter's holding.

135. *Id.* at 515 (internal quotation marks omitted).

136. *Id.* at 515–16 (citing Peterson v. Lou Bachrodt Chevrolet Co., 392 N.E.2d 1 (Ill. 1979)).

137. *Id.*at 516. ("'In a situation in which the injured party incurs no expense, obligation, or liability, we see no justification for applying the [collateral source] rule.'" (quoting *Peterson*, 392 N.E.2d at 5)).

138. *Thyssenkrupp*, 868 So. 2d at 550 (quoting *Stanley*, 452 So. 2d at 515).

139. *Id.* (Farmer, C.J., *reh'g denied*).

140. *Id.*

141. *Id.* at 551.

142. *Id.* at 551 n.1.

143. *See* FLA. STAT. § 768.76(2)(a)(2) (2010).

144. FLA. STAT. § 768.76(2)(b) (2010).

It is of note that the reliance on *Stanley* is questionable since it was decided prior to the enactment of § 768.76.[145] *Stanley* is also distinguishable because it involved the defendant's ability to challenge the reasonableness of damages and not the plaintiff's right or ability to establish reasonable damages.[146] This is significant because in a situation such as *Stanley*, a defendant will be challenging evidence a plaintiff has put forth; however, in a situation such as *Thyssenkrupp*, a plaintiff will be foreclosed from putting forth the same evidence to begin with. Additionally, in 2008, the Illinois Supreme Court overruled *Peterson*, a case the *Stanley* court heavily relied upon it in holding.[147] It held that *Peterson* was "incompatible with the reasonable-value approach adopted by this court."[148] In fact, it cited both *Goble I* and *Gormley* in support of its holding that in reasonable value jurisdictions, "the evidentiary component [of the collateral source rule] prevents 'defendants from introducing evidence that a plaintiff's losses have been compensated for, even in part, by insurance.'"[149] Despite these questions regarding the authority relied on by the Fourth District Court of Appeal in *Thyssenkrupp,* the holding remains in place.[150]

C. *The Supreme Court's Answer to the Second District Court of Appeal*—Goble II

In 2005, The Florida Supreme Court answered the question certified by the Second District Court of Appeal in *Goble I*.[151] The court held that the discounts fit within the statutory definition of collateral sources.[152] As such, the amount of the discounts was properly set off against the jury's award of compensatory damages post trial.[153] The court reasoned that acceptance of the discounted amounts by the provider "fully discharged" Goble's obligations and were, therefore, "a benefit" falling within the intent of § 768.76.[154]

The certified question dealt only with the issue of whether these discounts qualified as collateral sources to be set off by the court. It did not

145. *Stanley* was decided in 1984 while § 768.76 was not enacted until 1986.

146. *See* Fla. Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984).

147. Wills v. Foster, 892 N.E.2d 1018, 1031 (Ill. 2008).

148. *Id.*

149. *Id.* at 1032–33 (quoting Arthur v. Catour, 833 N.E.2d 847, 852 (Ill. 2005)).

150. This Note does not question the validity of either *Goble I* or *Thyssenkrupp* in holding that these negotiated discounts are properly off-set by the court, post award. The issue is focused on the contrasting applications of § 768.76 as an evidentiary rule and whether the finders of fact should be presented with the undiscounted—or "total cost"—of care (*Goble I*) or the discounted, "actual cost" of care (*Thyssenkrupp*).

151. Goble v. Frohman, 901 So. 2d 830, 831 (Fla. 2005).

152. *Id.* at 833.

153. *Id.*

154. *Id.*

inquire into the evidentiary standard applied by the trial court, which excluded the evidence of the discounted medical bills. The court's answer that "[t]he trial court, therefore, properly applied section 768.76 to reduce Goble's damages by the amount of the discounts,"[155] could be read as an approval of the evidentiary standard employed by the same trial court. However, as this was not the question addressed, any such reading, while logical, would be pure conjecture.

As they stand, the *Goble I* and *Thyseenkrupp* decisions are being read by some courts to be in conflict regarding the application of § 768.76 as a rule of evidence. Thus, they require clarification.

V. THE CURRENT CONFUSION: EXPANDING APPLICATION OF *THYSSENKRUPP*

This Note's author distributed a survey to plaintiff and defense attorneys across the state. The survey asked for first-hand observations of how the conflict is playing out in the lower courts. Additionally, hearing transcripts and judicial orders were analyzed to gain insight into the thoughts of judges who hear these cases and motions. The results of the analysis and the responses from those familiar with this issue were eye-opening.

Respondents confirmed that some circuit courts are expanding the evidentiary holdings of *Thyssenkrupp* to non-Medicare cases and precluding evidence of the undiscounted, billed costs of care.[156] This results in the introduction of evidence of discounted medical bills to the trier of fact—in contravention of §768.76. In the opinion of many plaintiff attorneys who are seeing the current confusion play out across the state, the expansive application is creating a bias against plaintiffs, resulting in an inability to sufficiently prove future damages.[157] Defense attorneys endorsing the application of *Thyssenkrupp* to non-Medicare cases assert that any bias created is vitiated by other evidence (e.g., expert testimony) that the plaintiff may use to establish the reasonable costs of future care.[158] Without clear guidance from the appellate courts, circuit judges are subject

155. *Id.*

156. *See, e.g.*, Interview with Rich Barry, Attorney, Gray Robinson (Jan. 21, 2010) (on file with author); Interview with Sean C. Domnick, Partner, Domnick & Shevin (Jan. 15, 2010) (on file with author); Interview with Mariano Garcia, Partner, Gonzalez & Garcia (Jan. 15, 2010) (on file with author); Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Jan. 19, 2010) (on file with author); Interview with Nancy La Vista, Attorney, Lytal, Reiter Clark Fountain and Williams (Jan. 15, 2010) (on file with author); Interview with William H. Pincus, Law Offices of William H. Pincus (Jan. 18, 2010) (on file with author); Interview with Jeffrey R. Rollins, Attorney, Steinger, Iscoe & Greene, P.A. (Jan. 16, 2010) (on file with author).

157. *See supra* note 5.

158. *See, e.g.*, Interview with Rich Barry, Attorney, Gray Robinson (Jan. 21, 2010) (on file with author).

to attorneys arguing on both sides.[159]

A. *In the Trenches: The Practitioners' View*

Plaintiff attorneys had strong opinions on this issue and, based on the proportion of responses to the survey, were eager to share them.[160] Regarding the perception that courts expanding *Thyssenkrupp* create a bias against plaintiffs, one respondent stated that, "[D]isparity in apparent costs creates confusion and the illusion that the plaintiff is overreaching with regard to future care."[161] Another stated that, "[T]he jury will be left wondering why the past medical bills are so low and the future medical bills are so high."[162] Another stated that, "They [jurors] think the plaintiff is being greedy but in reality the plaintiff probably can't get insurance."[163] Another stated that, "[T]he jury is prevented from on its own deciding what amount of medical bills is reasonable and necessary and sees only a deflated amount of medical expenses incurred."[164]

Regarding the inconsistency among the courts, one respondent stated that, "There is inconsistency from judge-to-judge in every county wherein I practice, from Broward County up to Indian River County, FL."[165] Another respondent put it more bluntly and stated that, "[It's] a crap shoot which judge you are assigned to and it [affects] the likely award not only of past medicals but of other damages as well."[166]

These opinions reflect the concern of Marcie's attorney and each of the plaintiff attorneys who responded to the survey. The consensus is that where benefits may or may not be available to a plaintiff in the future, courts applying *Thyssenkrupp* in cases involving statutorily-defined collateral sources are penalizing plaintiffs and enabling de facto reductions in future damage awards by allowing prior, discounted medical bills to artificially deflate the value of potential undiscounted medical bills in the

159. *See, e.g.*, Transcript of Hearing, *supra* note 92.

160. Responses numbered thirteen from plaintiff attorneys and three from defense attorneys. Initial survey distribution was to an equal number of plaintiff and defense attorneys. However, because the survey was available on an open Internet website and the initial survey recipients were encouraged to share the survey with others, the precise number of total, or proportional, recipients is not available.

161. Interview with Mariano Garcia, Partner, Gonzalez & Garcia (Jan. 15, 2010) (on file with author).

162. Interview with Sean C. Domnick, Partner, Domnick & Shevin (Jan. 15, 2010) (on file with author).

163. Interview with Nancy La Vista, Attorney, Lytal, Reiter Clark Fountain & Williams (Jan. 15, 2010) (on file with author).

164. Interview with Jeffrey R. Rollins, Attorney, Steinger, Iscoe & Greene, P.A. (Jan. 16, 2010) (on file with author).

165. *Id.*

166. Interview with William H. Pincus, Law Offices of William H. Pincus (Jan. 18, 2010) (on file with author).

future.[167] Of those who responded, few disagreed with the holding of *Thyssenkrupp* when restricted to cases involving discounts to Medicare.[168] They do, however, take issue with trial courts who are refusing to admit the billed costs of care in non-Medicare cases based on the holdings in *Thyssenkrupp*.

Much like one would expect in a judicial hearing on this issue, defense attorneys who responded to the survey put forth many reasonable counter arguments. Most commonly, they asserted that any possible bias is nullified by plaintiffs' attorneys using other mechanisms to establish the reasonable costs of care.[169] As one respondent stated, "[Bias] is a possibility, but I doubt it. Plaintiff's [sic] typically have an expert of some sort (or several experts) explain in minute detail all of the future medical expenses the injured party faces."[170] On this point, plaintiff attorneys who responded generally stated that such experts have the possibility of confusing the lay jury.[171] One defense attorney had more faith in the jury and stated, "I don't think that just because a plaintiff has only 'incurred' $145,000 in bills for their [sic] profound injuries [it] will make the jury any less inclined to believe the future damages experts."[172] This is indicative of the pattern of trust that was apparent in the survey responses, with plaintiff attorneys less confident a jury could find their way through the weeds.

The survey confirmed that this is an issue being faced by practitioners throughout the state. With no uniform standard, the result is that court time is being spent hearing motions, countermotions, answers, and answers to answers that would be unnecessary if there were a clear rule. Rules of evidence exist, in part, to prevent exactly this result.[173] Brilliant attorneys on both sides are admirably pursuing their client's interests by persuading judges. Unfortunately, the result is that judges are not only in conflict with each other but often in conflict with themselves.

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167. *See supra* notes 5, 157 and accompanying text.

168. *See, e.g.*, Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Dec. 8, 2010) (on file with author). This Note, too, does not impugn courts restricting *Thyssenkrupp* to Medicare cases.

169. *See, e.g.*, Interview with Rich Barry, Attorney, Gray Robinson (Jan. 21, 2010) (on file with author).

170. *Id.*

171. *See generally* Interview with Sean C. Domnick, Partner, Domnick & Shevin (Jan. 15, 2010) (on file with author); Interview with Mariano Garcia, Partner, Gonzalez & Garcia (Jan. 15, 2010) (on file with author); Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Jan. 19, 2010) (on file with author); Interview with Nancy La Vista, Attorney, Lytal, Reiter Clark Fountain and Williams (Jan. 15, 2010) (on file with author); Interview with William H. Pincus, Law Offices of William H. Pincus (Jan. 18, 2010) (on file with author).

172. Interview with Rich Barry, Attorney, Gray Robinson (Jan. 21, 2010) (on file with author).

173. 1CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:15 (3d ed. 2007) ("The court's time is a public commodity that should not be squandered. Witnesses and jurors have private lives and ought not be asked to give more of their time than is necessary to resolve disputes.").

B. *In the Trenches: A View from the Bench*

The Honorable David F. Crow is a circuit court judge in the Fifteenth Judicial Circuit in and for Palm Beach County.[174] In June 2005, Judge Crow heard arguments from counsel on a defense motion in limine to exclude the undiscounted, billed amounts of plaintiff's past medical care.[175] The case involved a plaintiff who benefitted from discounts between his HMO and his health care provider.[176] Judge Crow justified his denial of the defense's motion, using similar reasoning as this Note, based largely on his plain reading of the statute and his interpretation of *Goble I*, *Thyssenkrupp*, and *Goble II*.

In response to the defense's assertion that the discounts represented "phantom damages,"[177] Judge Crow stated,

> Counsel, I agree with what you are saying, but how do I get around the Supreme Court? If I'm going to do this [apply a set off] post trial as a collateral source, then the total bill has to come in otherwise the Supreme Court decision makes no sense at all, does it?[178]

After defense counsel inferred that the legislature may alter the statute in some way,[179] Judge Crow replied, "I understand. We got one [statute] now, so obviously the legislature intends those matters [collateral sources] to be reduced post trial. I mean, there's no other purpose of that statute."[180] Defense counsel then asserted that contractual discount collateral sources should be distinguished from other collateral sources under the statute.[181] To wit, a seemingly frustrated Judge Crow summarized as follows:

> Whatever, okay. By definition it seems to me the legislature has decided certain benefits, okay? They are not going to allow double recovery for that [discounts], so therefore the Court is to reduce the verdict post trial by those amounts that are to be paid by those collateral sources. If in fact, I'm going to do that *before* trial, then that statute is completely worthless. I mean, why do you got a statute that reduces it post trial if you're going to do it pretrial? . . . Then I have got

174. Judge David F. Crow, 15th Judicial Circuit of Florida, http://15thcircuit.co.palm-beach.fl.us/web/guest/judges/crow (last visited Sept. 23, 2010).

175. Transcript of Hearing, *supra* note 92.

176. *Id.* at 2.

177. *Id.* at 7.

178. *Id.* at 6.

179. *Id.* at 10 ("That's a good question. After this case, we'll see what the legislation [sic] does with the statute.").

180. *Id.*

181. *Id.* ("There's also other collateral sources that come into play, Your Honor. I mean, you know, the disability insurance or other factors that wouldn't necessarily be reduced.").

> a statute there that means nothing. It's worthless.[182]

This reasoning by Judge Crow comports with the plain reading of the statute advanced in this Note.[183] In denying defense's motion, Judge Crow applied the evidentiary standard from the Second District Court of Appeal in *Goble I* and allowed the undiscounted, billed costs into evidence.[184] His ruling was possibly made with personal reluctance based on a closing remark to defense counsel,

> I could argue with you all day about it. *I wouldn't necessarily disagree with you*, but that's the way it should be; but I'm not the legislature and I'm not the Supreme Court; and I think [*Goble II*] makes it very clear that these things, if they are collateral sources under the statute, that I am to make that deduction post trial in accordance with [*Goble II*] and Judge Lewis' concurring opinion.[185]

Nothing in the holdings of *Goble I*, *Thyssenkrupp*, or *Goble II* has changed since that hearing in 2005. However, at least one survey respondent believes that Judge Crow is now a "*Thyssenkrupp* Man."[186] When presented with a motion in limine surrounded by similar facts as those in the above hearing,[187] Judge Crow now disallows the undiscounted, billed costs from being admitted into evidence.[188] The Honorable Judge Crow is just an example of the many judges who are issuing these types of contrasting opinions on this issue. Another judge in the Fifteenth Circuit, the Honorable Kenneth Stern, was presented with this issue in *Wiener v. Miller*.[189] On April 10, 2007, Judge Stern granted a defense motion in limine to preclude the undiscounted, billed amounts from being entered into evidence.[190] Upon hearing a motion for reconsideration filed by the plaintiff, however, the court reversed the prior ruling.[191]

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182. *Id.* at 10–11 (emphasis added).

183. *See supra* Part III.

184. Transcript of Hearing, *supra* note 92, at 12.

185. *Id.* at 11–12 (emphasis added).

186. Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Jan. 19, 2010) (on file with author).

187. Specifically, discounts between an HMO and a health care provider.

188. *Eg.* Order Regarding Medical Bill Amounts Admissible at Trial, Boone v. Morgan Stanley Real Estate Advisor, Inc., No. 50-2009CAU18048XXXXMB AG (Fla. 15th Cir. Ct. Feb. 25, 2010).

189. Order on Plaintiff's Motion for Reconsideration of Defendants Motion in Limine Regarding Medical Bills, Wiener v. Miller, No. 502006CA005313XXXXMB (Fla. 15th Cir. Ct. June 28, 2007).

190. *Id.*

191. *Id.* ("The Court has reviewed its prior ruling 4/10/07 Granting Defendant's Motion in Limine regarding medical bills. It is the ruling of this Court that the Plaintiff shall be permitted to introduce at trial his total medical bills subject to a post-verdict set-off for contractual insurance

Lest it be thought that this inconsistency is limited to the Fifteenth Judicial Circuit of Florida, orders granting similar defense motions in limine have also been found in the Eighth Judicial Circuit,[192] the Eleventh Judicial Circuit,[193] and the Thirteenth Judicial Circuit.[194] In October 2005, the Honorable Judge Brandt Downey III from the Sixth Circuit applied the standard from *Goble* but took the opportunity to articulate his frustration in stating, "We know what the cases are. We know the cases are not giving us as bright lined [of] a direct guidance as we would like, and that's unfortunate, but that's what we have to live with sometimes."[195]

Judges and attorneys alike should not be forced to simply live with it and spend the court's time arguing an issue that could easily be resolved by the Florida Supreme Court or the Florida Legislature.

VI. SOLUTION IN THE LEGISLATURE OR THE COURT?

Both the Florida Legislature and the Florida Supreme Court are capable of resolving the confusion. The Legislature could amend § 768.76 if it felt the statute was not being applied in accordance with the legislative intent.[196] If the court were presented with a case on point, it could issue a clear holding on the same matter. For the reasons set forth above and below, clarification from the Florida Supreme Court would be the more appropriate measure.

A. *Amending Florida Statutes § 768.76: An Unnecessary Solution*

At least one commentator who follows this issue proposes that clarification would be best accomplished by legislative action.[197] This commentator proposes three possible alternatives for amendment of the "defective" statute.[198] The three alternatives are as follows: (1) that Medicare and HMO discounts are to be treated differently as evidence; [199]

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adjustment amounts that were accepted by Plaintiff's medical providers.").

192. Order Granting Defendants' Motion in Limine to Limit Medical Expenses Introduced into Evidence at 1, Stone v. Univ. of Fla. Bd. of Trs., No. 01-05-CA-4098 K (Fla. 8th Cir. Ct. Oct. 16, 2009).

193. Omnibus Order on Motions in Limine at 5, Slavin v. Mount Sinai Med. Ctr., No. 06-954 CA 11 (Fla. 11th Cir. Ct. Feb. 23, 2009).

194. Order on Defendant's Motions in Limine at 1, Young v. Gray, No. 03-CA 8295 A (Fla. 13th Cir. Ct. Nov. 14, 2005).

195. Transcript of Hearing at 74, Saia v. Arrango, No. 02-8175-CI-15 (Fla. 6th Cir. Ct. Oct. 11, 2005).

196. The statute has, in fact, been amended three times—in 1993, 1997, and 1999.

197. Lawrence Scott Kibler, *Regarding Compensation for Past Medical Expenses*, FLA. BAR HEALTH LAW SEC. NEWSLETTER (The Fla. Bar Health Law Section), Oct. 2007, at 4.

198. *Id*. at 17–18.

199. *Id.* at 18. The commentator eschews this solution for fear of equal protection challenges. As previously addressed, such equal protection challenges have been unsuccessful on very similar matters. *American Legion Post No. 57 v. Leahy*, 681 So. 2d 1337 (Ala. 1996), is cited by the

(2) that both should be admissible and subject to set off; and (3) that both should be inadmissible and juries should see only the discounted amounts.[200] Each solution suffers from the same misplaced notion that a lack of clarity of the current statute frustrates its purpose.

While this Note posits that the statute is clear and unambiguous, the above-mentioned commentator believes that "[t]he current version of the set off statute is ambiguous and, at best, defective."[201] He asserts that the evidentiary holding of *Goble* is contrary to the legislative intent of the statute.[202] In support of this assertion, he claims that the statute was intended to provide set off of "traditional collateral sources" and that the drafters did not contemplate "contractual discounts."[203] However, discounts were commonplace at the time the statute was enacted.[204] Even assuming, arguendo, that the Legislature did not contemplate these discounts during drafting, discounts have been a growing practice for the twenty-plus years since.[205] The legislature could have amended the statute if legislators felt it was not being applied in harmony with the intent.[206] It has chosen not to with respect to this issue.

Furthermore, the legislature defined "collateral sources" based on the contribution *source* when it distinguished between public sources such as Medicare and private sources such as HMOs.[207] It could have provided further definition by distinguishing contribution *types* such as negotiated discounts, contractual discounts, non-discounted bills, co-payment amounts, or "write offs." However, these are just a few of the many types of contributions offered by collateral sources.[208] To provide clarity, any amended legislation would first need to identify every contribution type from every contribution source. It would then need to classify whether each type is a collateral source subject to set off. Not only would such exhaustive revision be cumbersome for legislators, it would create a

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commentator as evidence that a statute similar to Florida's was ruled unconstitutional as "violative of the Equal Protection and Due Process guarantees" of Alabama's constitution. Kibler, *supra* note 197, at 17, 19 n.65. However, as mentioned previously, the Alabama Supreme Court overruled *Leahy* in *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000). *See supra* notes 59–60 and accompanying text.

200. Kibler, *supra* note 197, at 18.

201. *Id*. at 17.

202. *Id.*

203. *Id.* at 18.

204. *See* Sorensen, *supra* note 22, at 469.

205. *Id.*

206. *See supra* note 196 and accompanying text.

207. FLA. STAT. § 768.76(2) (2010).

208. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., DEP'T OF HEALTH & HUMAN SERVS., YOUR MEDICARE BENEFITS, *available at* http://www.medicare.gov/Publications/Pubs/pdf/10116.pdf (listing benefits available under the program); *see also* BLUE CROSS BLUE SHIELD OF FLA., BLUEPRINT FOR HEALTH, *available at* http://www.bcbsfl.com/DocumentLibrary/ProductsServices/BlueprintforHealthBrochure_65758B.pdf (detailing a common insurance plan for Florida residents).

logistical nightmare for jurists who are charged with applying these set offs.

In essence, those who agree with this solution would ask the legislature not to clarify the statute but to change it entirely. Whereas courts are now forced to litigate over this one type of contribution (discounts), even the most exhaustive revision would likely engender even more litigation relating to contribution types not identified in any amendment. Such a solution seems drastic when there is a more reasonable method available in the Florida Supreme Court.

B. *Clarification by the Florida Supreme Court: The Proper Solution*

The Florida Supreme Court could provide clarification by specifying an evidentiary standard based on the current statute. The court has analyzed § 768.76 on at least two occasions and has not struggled with interpreting and applying the statutory language.[209] The court in *Goble II* articulated that its "guiding purpose in construing this statute is to give effect to the Legislature's intent."[210] It then stated that in discerning intent, it "first look[s] to the language used in the statute."[211] It concluded its analysis by stating that if terms are not provided a definition, their "plain and ordinary meaning generally can be ascertained by reference to a dictionary."[212]

In concluding that these discounts are collateral sources under the statutory definition,[213] the *Goble II* court needed little more than a Webster's Dictionary to interpret the statute's terms.[214] Similarly, the *Caruso* court confidently interpreted and applied the procedure for set off under § 768.76.[215] It clearly stated that "under section 768.76(1), the *court* reduces the jury award by the amount of collateral source benefits."[216] These two parts of the statute are at the center of the present conflict. Given the court's past interpretation and application of these two parts of § 768.76 individually, doing the same in para materia seems the most efficient solution.

Clarification by the court would also prevent the exhaustiveness problem that statutory revision would present.[217] It would also be less drastic than statutory revision and likely less lecherous of the state's resources to accomplish the goal. Such a clarification by the Florida

209. *See, e.g.*, Goble v. Frohman, 901 So. 2d 830, 831 (Fla. 2005); Caruso v. Baumle, 880 So. 2d 540, 543–44 (Fla. 2004).

210. *Goble*, 901 So. 2d at 832 (citing State v. J.M., 824 So. 2d 105, 109 (Fla. 2002)).

211. *Id.* (citing Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)).

212. *Id.* at 833 (citing Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001)).

213. *Id.*

214. *Id.*

215. Caruso v. Baumle, 880 So. 2d 540, 543–44 (Fla. 2004).

216. *Id*. at 544.

217. *See supra* Part VI.A.

Supreme Court would settle the issue and be binding on all courts who are now spending time and resources on motions and hearings arguing both sides.

VII. LET'S BE "REASONABLE": THE RULES OF EVIDENCE AND FUTURE DAMAGES

Florida is a "reasonable value" jurisdiction where plaintiffs are entitled to recover the reasonable costs of care.[218] This is true even with § 768.76 limiting the ultimate recovery of past damages to the actual amount paid on the plaintiff's behalf.[219] Florida may be in the minority of "reasonable value" jurisdictions that, by statute, limit recovery to the actual amount paid,[220] but this Note takes no issue with set offs under § 768.76 being applied to past damages. However, because of Florida's rules of evidence and longstanding law against setting off future damages,[221] applying the *Thyssenkrupp* standard to statutory collateral sources would threaten Florida's "reasonable value" status.

A. *Florida's Evidence Code and "Reasonableness"*

The Florida Evidence Code mandates the relevant evidence that Marcie's lawyer may introduce to establish the reasonably anticipated costs of future care.[222] This can include, among other mechanisms, expert witnesses.[223] For Marcie, the best expert to establish these reasonable costs would be the same doctor who provided her prior treatment. Marcie may still be able to call upon her doctor to testify as to reasonableness in a court applying *Thyssenkrupp*. However, her attorney fears that any testimony regarding the undiscounted, retail costs of future care from Marcie's doctor would be contradictory to the discounted bills improperly allowed into evidence. The result of which would be either jury confusion, a de facto showing of insurance coverage, or a jury assumption that the doctor is disingenuous about the true costs of future care.

It is the opinion of many practitioners surveyed that such a restriction "handicap[s]"[224] Marcie from the very start by preventing her from establishing reasonableness through the expert most knowledgeable of her condition. Even though Marcie may produce other relevant evidence to

218. *See supra* notes 68–69 and accompanying text.

219. *See supra* note 71 and accompanying text.

220. *See* Robinson v. Bates, 828 N.E.2d 657, 669–70 (Ohio Ct. App. 2005) (discussing recovery jurisdictions and putting Florida in the "minority" (citing Coop. Leasing v. Johnson, 872 So. 2d 956 (Fla. 2d DCA 2004))).

221. *See infra* Part VII.A–B.

222. FLA. STAT. §§ 90.401–.402 (2010).

223. FLA. STAT. §§ 90.702–.705 (2010).

224. *See, e.g.*, Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Dec. 8, 2009) (on file with author).

establish the reasonableness of her for future damages,[225] the figurative "bell has rung" once the *Thyssenkrupp* standard is misapplied in cases involving statutorily defined collateral sources. Not only will the jury be limited to considering the discounted bills, the jurors are likely to be skeptical of Marcie's demand when her own doctor is unable to support the amount being requested for reasonable future damages.

Under Florida law, a defense attorney is precluded from making any mention of the fact that a plaintiff will receive the benefit of insurance when a jury is deciding future damages.[226] Likewise, a plaintiff's attorney is precluded from making any mention of the fact that a plaintiff *will not* receive the benefit of insurance when a jury is deciding future damages. Some of the attorneys surveyed classified the allowance of only discounted bills as an "end run around" the rules, with defense attorneys making de facto showings of insurance coverage.[227] They reason that juries contrasting discounted bills with large requests for future damages will infer that the plaintiff has or had insurance coverage.[228] This de facto showing may make a jury less inclined to award sufficient damages to an already compensated plaintiff. Such a result would be in contravention to the rules of evidence and exactly what the collateral source doctrine was conceived to prevent.[229]

B. *Reductions in Future Damage Awards Are Not Reasonable*

If courts applying *Thyssenkrupp* to statutory collateral sources are effectively endorsing pre-award reductions in future damages, this would be contrary to well established law of the state. In Florida, the courts have established that future damage awards are not to be reduced due to past collateral source contributions.[230] In *Measom v. Rainbow Connection Preschool, Inc.*, the Fifth District Court of Appeal reversed the reduction of future damages by the trial court.[231] It held that §768.76 did not allow for set offs of future medical expenses.[232] The court reasoned that in dealing

225. *Id.*

226. *See* Beta Eta House Corp., Inc. v. Gregory, 237 So. 2d 163, 165 (Fla.1970) (holding existence or amount of insurance has no bearing on the issue of liability and damages and such reference was reversible error); Gold, Vann & White, P.A. v. DeBerry, 639 So. 2d 47, 54 (Fla. 4th DCA 1994) ("It is hornbook law that a jury should not learn of the existence of insurance coverage or insurance limits." (citing Melrose Nursery, Inc. v. Hunt, 443 So. 2d 441 (Fla. 3d DCA 1984); Craft v. Kramer, 571 So. 2d 1337 (Fla. 4th DCA 1990))).

227. *See, e.g.*, Interview with Spencer Kuvin, Partner, Leopold & Kuvin (Dec. 8, 2009) (on file with author).

228. *Id.*

229. *See supra* Part II.

230. *See supra* notes 26–32 and accompanying text.

231. Measom v. Rainbow Connection Preschool, Inc., 568 So. 2d 123, 124 (Fla. 5th DCA 1990).

232. *Id.*

with past damages, it is already known what contributions were made on the plaintiff's behalf.[233] Conversely, availability of these contributions in the future is unknown.[234] The *Measom* court's reasoning is exemplified by a plaintiff, such as Marcie, who benefited from contributions in the past that are no longer available in the future.

Similarly, the Fourth District Court of Appeal in *Allstate Insurance Co. v. Rudnick* held that § 768.76 did not allow for reductions in future damages.[235] It cited its prior decision in *White v. Westlund*[236] to support the conclusion that "benefits 'otherwise available' under section 768.76(1), did not include benefits *potentially payable* in the future."[237] Its holding remained in line with *Westlund* that "in order to have collateral source benefits set off against an award, those benefits must either be already paid . . . or presently earned and currently due and owing. . . ."[238] Based on this reasoning and precedent, the court affirmed the trial court's refusal to reduce the plaintiff's future damage awards.[239]

Based on the statements of the courts, the rules of evidence, and the refusal to allow for reductions in future damage awards, Florida is undoubtedly a "reasonable value" jurisdiction. If Marcie's court applies *Thyssenkrupp* and restricts her ability to establish the reasonable value of future care, it may allow opposing counsel to circumvent the rules of evidence and endorse a de facto reduction in her future damage award. In that circumstance, Florida's status as a "reasonable value" jurisdiction would be questionable, at best.

VIII. THE SOLOMON SOLUTION: THE SUPREME COURTS OF OHIO AND KANSAS

While Solomon himself did not actually "split the baby" for the sake of compromise,[240] the term "splitting the baby" has become a popular idiom used in law to reflect compromise.[241] Reflecting this modern parlance, the "babies" at issue here are the medical bills that plaintiffs and attorneys alike wish to provide to the jury, exclusively.[242] In that sense, the supreme

233. *Id.*

234. *Id.* ("The statute does not purport to benefit the tortfeasor by deducting collateral sources to which the insured may be entitled in the future.").

235. Allstate Ins. Co. v. Rudnick, 706 So. 2d 389, 390–91 (Fla. 4th DCA 1998) ("[I]n order to have collateral source benefits set off against an award, those benefits must either be already paid . . . or presently earned and currently due and owing . . . ." (quoting White v. Westlund, 624 So. 2d 1148, 1153 (Fla. 4th DCA 1993))(internal quotation marks omitted)).

236. 624 So. 2d at 1153.

237. *Rudnick*, 706 So. 2d at 390 (citing *Westlund*, 624 So. 2d at 1148) (emphasis added).

238. *Id.* at 390–91 (quoting *Westlund*, 624 So. 2d at 1153) (internal quotations marks omitted).

239. *Id.* at 391.

240. 1 *Kings* 3:16–28.

241. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 824 (2d ed. 1995).

242. *See supra* Part V.A.

courts of Ohio and Kansas recently split the baby when each decided upon the evidentiary issue presented by discounted medical bills.[243] Sitting in "reasonable value" jurisdictions,[244] those courts similarly held that both the undiscounted medical bills and the discounted medical bills may be admitted to the jury as being relevant to the "reasonable value" of care.[245]

On May 4, 2010, the Ohio Supreme Court handed down its decision in *Jaques v. Manton*.[246] Richard Jaques brought a personal-injury action against Patricia Manton to recover for injuries he sustained in a car accident.[247] Jaques's several medical providers billed his insurance company a total of $21,874.80.[248] These same providers accepted a discounted amount of $7,483.91 as payment in full. [249] After a jury verdict in favor of Jaques, Manton appealed claiming that the trial court erred by not allowing her to present evidence of the discounted amount to the jury. [250] After losing on appeal, Manton took her case to the Ohio Supreme Court.[251] In reversing the lower appellate court, the Ohio Supreme Court opined that, "The reasonable value may not be either the amount billed by medical providers or the amount accepted as full payment."[252] Therefore, the court held that the original medical bills and the discounted medical bills are admissible as evidence of the reasonable cost of care.[253]

One month later, on June 4, 2010, the Kansas Supreme Court handed down its decision in *Martinez v. Milburn Enterprises, Inc*.[254] Karen Martinez filed suit against Milburn Enterprises after she slipped and fell while shopping.[255] After back surgery, Martinez's provider billed her insurance company a total of $70,496.15.[256] The provider accepted a discounted amount of $5,310 as payment in full.[257] Antithetically to the trial court's holding in *Jaques*,[258] here, the trial court granted a defendant's

243. Martinez v. Milburn Enters., Inc., 233 P.3d 205, 208 (Kan. 2010); Jaques v. Manton, 928 N.E.2d 434, 439 (Ohio 2010).

244. *Martinez*, 233 P.3d at 208; *Jaques*, 928 N.E.2d at 438.

245. *Martinez*, 233 P.3d at 208; *Jaques*, 928 N.E.2d at 439.

246. *Jaques*, 928 N.E.2d at 434.

247. *Id.* at 436.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 438 (citing Robinson v. Bates, 857 N.E.2d 1195, 1200 (Ohio 2006)).

253. *Id*. at 439.

254. Martinez v. Milburn Enterprises, Inc., 233 P.3d 205, 205 (Kan. 2010).

255. *Id*. at 208.

256. *Id*.

257. *Id*. (noting that due to contractual discounts with the insurer, the hospital wrote off the balance of $65,186.15).

258. *Jaques*, 928 N.E.2d at 436–37 (holding that the defendant could not admit evidence of the discounted bills).

motion to limit the evidence to the discounted amount.[259] Martinez filed an interlocutory appeal to the Kansas Court of Appeals, which the Kansas Supreme Court transferred to its own docket.[260] The court framed the issue as whether the collateral source rule bars evidence of the undiscounted billed amount *or* the discounted amount.[261] In reversing the decision of the trial court, the Kansas Supreme Court employed similar reasoning to that in *Jaques* and held that, "[T]he rule does not bar either type of evidence; both are relevant to prove the reasonable value of the medical treatment, which is a question for the finder of fact."[262]

The jurisdictional differences between Florida, Ohio, and Kansas make this solution unsuitable for Florida. This is not to say that there are no similarities between the three states in regard to the statutory and common law on this topic. Florida, Ohio, and Kansas are all reasonable value jurisdictions.[263] All three states employ their own versions of the collateral source rule.[264] However, the collateral source rule is founded in statute in Florida and Ohio[265] while the Kansas rule is in the common law.[266] Furthermore, neither Ohio nor Kansas have a post-verdict judicial set off mandate as Florida does in § 768.76.[267] These differences outweigh the similarities and make splitting the baby an inappropriate solution for Florida's current conflict.

First, Florida Statutes § 768.76 clearly designates the judge, not the jury, as the ultimate arbiter of the value of collateral source contributions.[268] Second, this solution may still result in de facto reductions in future damages based on evidence of discounted medical bills, inapposite to the aforementioned history of Florida law protecting the integrity of those awards.[269] Third, this solution would fly in the face of Florida's bar on the jury's knowledge of insurance.[270] Finally, this solution

259. *Martinez*, 233 P.3d at 208.

260. *Id*.

261. *Id*.

262. *Id*.

263. *See supra* notes 68–69, 244 and accompanying text.

264. FLA. STAT. § 768.76 (2010); OHIO REV. CODE ANN. § 2315.20 (West 2010); Thompson v. KFB Ins. Co., 850 P.2d 773, 776–78 (Kan. 1993).

265. FLA. STAT. § 768.76 (2010); OHIO REV. CODE ANN. § 2315.20 (West 2010).

266. *Thompson*, 850 P.2d at 776–78 (holding statutory collateral source abrogation an unconstitutional violation of equal protection and discussing three other attempts by the Kansas legislature to "override or limit the common-law rule").

267. Ohio has statutory set off provisions for certain types of claims but none for general tort claims. *See* OHIO REV. CODE ANN. § 2744.05 (West 2009) (claims against political subdivisions); OHIO REV. CODE ANN. § 4123.54(H)(2) (West 2008) (claims involving worker's compensation). The most recent attempt by the Kansas Legislature to create a statutory set off mandate was struck as unconstitutional by the Kansas Supreme Court in *Thompson*. 850 P.2d at 782.

268. *See supra* Part III.C.

269. *See supra* Part VII.B.

270. *See supra* note 226 and accompanying text.

may still serve to prejudice a plaintiff such as Marcie who will not enjoy the benefit of those discounts in the costs of her future care. For all of these reasons, Florida ought to resist the parlance of the times and follow the true wisdom of Solomon by not splitting this baby.

IX. CONCLUSION

The holdings of the Second District Court of Appeal in *Goble I* and the Fourth District Court of Appeal in *Thyssenkrupp* are both correctly decided under Florida Statutes § 768.76. They are distinguishable in that *Goble* addressed a statutorily defined collateral source (HMO benefits) while *Thyssenkrupp* addressed a statutorily defined non-collateral source (Medicare). This often-overlooked distinction is resulting in many plaintiffs being foreclosed from establishing the reasonable costs of future care without the prejudice of discounts that may no longer be available to them in the future. The impact of this issue is two-fold. First, a confusion in the trial courts stemming from an apparent lack ofclear direction.[271] Second, a concern among the attorneys stemming from the application of differing evidentiary standards among courts within the same jurisdiction.[272]

To resolve the confusion, it is necessary that the Florida Supreme Court accept jurisdiction on a case that asks the question: Does Florida Statutes § 768.76 bar evidence of statutorily-defined collateral source contributions, including discounts, to establish the reasonable costs of care and a tortfeasor's liability? If the answer is yes, *Thyssenkrupp* must be limited to cases of Medicare and other statutory non-collateral source contributions and *Goble* limited to statutory collateral source contributions. If the answer is no, then the set off portion of the statute is rendered meaningless as the judge's job will have been done by the jury during trial. The Florida Supreme Court has stated that "'a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.'"[273] Based on a plain reading of the statute, the relevant holdings of the applicable cases and the desire to hold fast to this basic rule, the only reasonable answer is "yes." This will stay true to the legislative intent, allow the court to prevent a windfall through post-trial set off, and prevent bias against a plaintiff for nothing more than having responsibly carried insurance in the past.

Perhaps Marcie will recover someday. However, if she is fortunate enough to be made whole physically and mentally but not made whole financially as a result of an award based on discounts she no longer receives, it would be bittersweet, indeed.

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271. *See supra* Part V.B.

272. *See supra* Part V.A.

273. Am. Home Assurance Co. v. Plaza Materials Corp., 908 So. 2d 360, 366 (Fla. 2005) (quoting State v. Goode, 830 So. 2d 817, 824 (Fla. 2002)).