A Theory to Revive O.C.G.A. § 51-12-1(b) to Allow Juries to Consider Amounts Paid to Medical Providers When Determining Reasonable Medical Expense Damages

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There is pervasive concern within the defense bar that, under existing Georgia law, damages on account of medical expenses for the treatment of injuries at issue in litigation are distorted by operation of Georgia's common law collateral source rule.[1] These damages generally are established by proof of reasonable amounts *charged* by providers of medical services, not the often-discounted amounts *actually paid to and accepted as payment in full* by providers.[2] In other words, special damages for medical expenses often do not reflect economic reality, but the law withstands this situation based on the rationale that any "windfall" created by it should not be for the benefit of a wrongdoing tortfeasor.[3]

Because the collateral source rule is a creature of the common law, the Georgia General Assembly is free to alter it within constitutional limits.[4] And the state legislature did just that when it enacted O.C.G.A. § 51-12-1(b) as part of an early "tort reform" effort. This statutory provision reads, in relevant part:

> In any civil action … for the recovery of damages arising from a tortious injury in which special damages [including medical expenses][5] are sought to be recovered …, *evidence of all compensation, indemnity, insurance (other than life insurance), wage loss replacement, income replacement, or disability benefits or payments* available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments *shall be admissible for consideration by the trier of fact*. The trier of fact, in its discretion, *may consider such available benefits or payments* and the cost thereof but shall not be directed to reduce an award of damages accordingly.

(Emphasis added). Thus, insofar as damages for medical treatment are concerned, § 51-12-1(b) was designed (1) to allow defendants to present evidence regarding third-party medical expense payments to or on behalf of an injured plaintiff; but (2) to preclude trial courts from instructing juries to reduce medical expense damages awards by the amounts of such payments.

It is not entirely clear whether, notwithstanding its prohibition on *jury instructions* to this effect, O.C.G.A. § 51-12-1(b) permitted defense counsel to *argue* for a reduction in medical expense damages commensurate with third-party payments that offset a plaintiff's expenses for medical services. Nevertheless, at a minimum, § 51-12-1(b) almost certainly allowed a defendant to contend—and allowed a jury to find—that the calculation of reasonable medical expenses for damages purposes should be keyed to amounts *disbursed and accepted as payment in full* by medical providers for their treatment of a plaintiff, rather than the often fantastical amounts *charged* by these providers for the treatment.[6]

The meaning of O.C.G.A. § 51-12-1(b), however, temporarily became irrelevant in 1991, when the Supreme Court of Georgia declared the statute unconstitutional, in violation of the equal protection clause of the Georgia Constitution.[7] *Denton v. Con-Way S. Exp., Inc.*, 261 Ga. 41 (1991). The precise nature of the equal protection analysis undertaken by the plurality in *Denton* is difficult to discern, but it seems to relate to the fact that § 51-12-1(b) allowed for the presentation of evidence of a plaintiff's insurance benefits, but not those of a defendant:

> The [equal protection clause of the] Georgia Constitution requires statutes to be "impartial and complete." The amended code section that has been challenged, O.C.G.A. § 51-12-1(b), allows a jury to consider inherently prejudicial evidence which could be misused. There can be no equal justice where the

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> kind of trial or the damages a man gets depends on the amount of money he has. Because inherently prejudicial evidence is allowed *only to show the plaintiff's sources*, juries will be misled. If for example, both the plaintiff and the defendant are insured, but the jury is only informed of the plaintiff's coverage, it may assume that only the plaintiff has insurance and the plaintiff's insurance should pay for the loss caused by the tortfeasor. * * * [W]e hold that O.C.G.A. § 51-12-1(b) violates that provision of the Georgia Constitution which mandates that the paramount duty of government is the protection of person and property and that the protection shall be impartial and complete. It is, therefore, our duty to declare it void.

Denton, 261 Ga. at 45-46 (emphasis added; citations, brackets, and footnotes omitted).

However, in *Grissom v. Gleason*, 262 Ga. 374 (1992)— an equal protection challenge to the then-extant Georgia direct action statute— the Supreme Court of Georgia abandoned the equal protection analysis that the plurality had just applied the year before in *Denton*:

> We disapprove of *Denton v. Con Way* to the extent that it suggests a new equal protection analysis…. [T]he *Denton* decision is an *aberration in this court's interpretation of the equal protection provision*. A fundamental problem with the *Denton* opinion, … is its failure to provide a standard for applying the 'impartial and complete' provision [of the equal protection clause]. The opinion does not explain what the provision means, to whom it applies, or how it offers more protection than the explicit guarantee of equal protection immediately following it.

Grissom, 262 Ga. at 376 (1992) (emphasis added). Although the Court in *Grissom* gutted the underlying rationale for *Denton*, it did not expressly overrule the holding in *Denton*. And, indeed, the Supreme Court noted in a later, post-*Grissom* opinion that *Denton* remains good law insofar as it held that O.C.G.A. § 51-12-1(b)—which has never been repealed—is unconstitutional.[8]

Nevertheless, in light of *Grissom*, there is a strong argument that the Supreme Court of Georgia should take the next step and expressly overrule its declaration in *Denton* that O.C.G.A. § 51-12-1(b) is unconstitutional. To lay the groundwork in a case for an eventual argument in the Supreme Court of Georgia that O.C.G.A. § 51-12-1(b) is constitutional, the defendant should advance the argument in the trial court[9]—while acknowledging the full history outlined by *Denton*, *Grissom*, and *Roberts*. This likely would take the form of a motion *in limine* to admit evidence of third party disbursements to medical providers accepted by them as payment in full.[10] The defendant also should be sure to obtain a definitive ruling from the trial court on this point.[11] In any subsequent appeal, the trial court's almost-certain denial of the defendant's effort to breathe life back into O.C.G.A. § 51-12-1(b) should be the subject of an enumeration of error to preserve the issue for later consideration by the Supreme Court of Georgia.

It is worth noting that there is some question as to whether a never-repealed statutory provision, like O.C.G.A. § 51-12-1(b), which is declared to be unconstitutional but later ruled to be constitutional, is "revived" after its constitutionality is affirmed.[12] There being no apparent Georgia case law on this issue, it likely would become an issue in any litigation in which the matter of the revivification of O.C.G.A. § 51-12-1(b) is in question.

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