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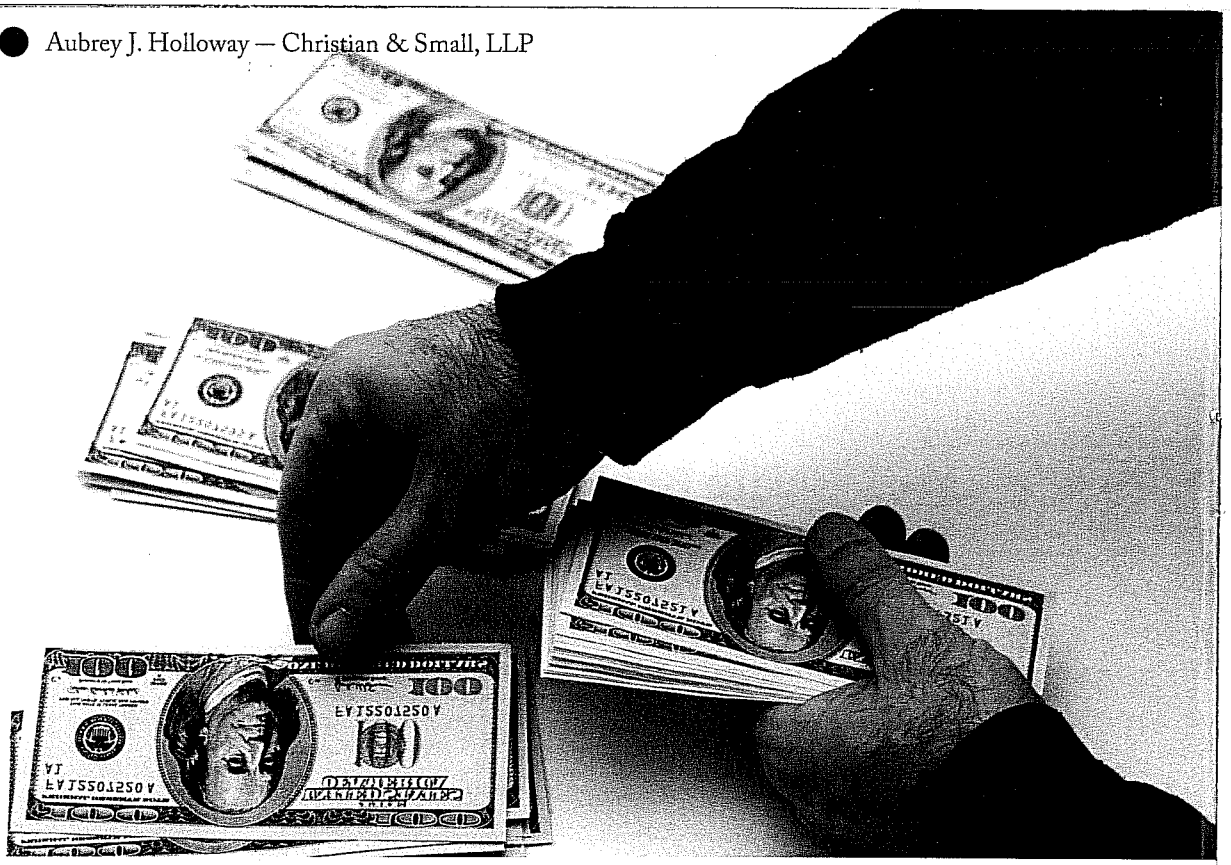


Admission in Trial of Collateral Source Payments of Plaintiffs' Medical Expenses Upheld *(Again)*

Since 1987, a battle has been waging between the plaintiffs' and defendants' bar over the ability of defendants to introduce at trial in personal injury cases that a third-party (most frequently a health insurer or governmental entity) has paid some or all of a plaintiff's medical expenses. The latest episode in that ongoing contest occurred before the Alabama Court of Civil Appeals in Crocker v. Grammer, __So.3d__ 2011 WL 3963008 (Ala. Civ. App. September 9, 2011) wherein the court reaffirmed the validity of Ala. Code 1975 § 12-21-45 allowing such evidence to be admitted at trial as an exception to the common law collateral source rule.

HISTORY OF THE ALABAMA COLLATERAL SOURCE RULE

In 1910, Alabama adopted the common law "collateral source rule," which applied the general exclusionary rule that precluded the admission of evidence in the trial of a personal injury lawsuit that a plaintiff had insurance coverage (e.g., health insurance) to indemnify the plaintiff for some or all of his damages. Long v. Kansas City, Memphis and Birmingham R.R., 170 Ala. 635, 54 So. 62 (1910). For decades, the Alabama Supreme Court upheld the collateral source rule. Gribble v. Cox, 349 So.2d. 1141, 1143 (Ala. 1977); Carlisle v. Miller, 275 Ala. 440, 444, 155 So.2d 689, 691 (1963); Vest v. Gay, 275 Ala. 286, 289, 154 So.2d 297, 299-300 (1963); Sturdivant v. Crawford, 240 Ala. 383, 385, 199 So. 537, 538 (1940). In 1987, the Alabama Legislature, in response to perceived abuses of the state's civil litigation system, passed ten acts which were collectively referred to as "Alabama Tort Reform." Ala. Code 1975 §§ 6-3-21.1, 6-5-430, 6-5-540 to 552, 6-11-1 to 7, 6-11-20 to 30, 12-19-270 to 276, 12-21-12, 12-21-45, 12-22-72, 12-22-73. One of those statutes, Ala. Code 1975 § 12-21-45(a), alters the collateral source rule to allow into evidence

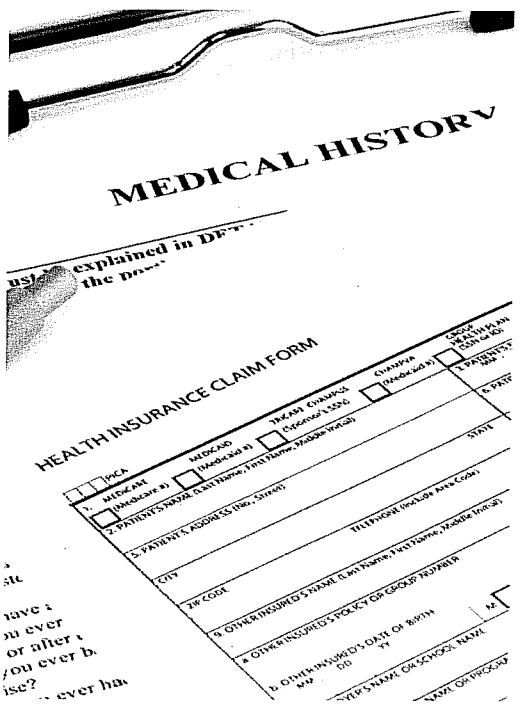
the fact that a plaintiff's medical expenses had been paid by insurance. The statute also allows for the pretrial discovery of health insurance and payments, § 12-21-45(b), and provided for the admission of a plaintiff's obligation to repay the benefits paid by the health carrier. § 12-21-45 (c).

In 1996, the Alabama Supreme Court, in American Legion Post Number 57 v. Leahey, 681 So.2d 1337, 1347 (Ala. 1996), ruled § 12-21-45 unconstitutional on three bases:1) the statute attempted to change the law of evidence without expressing the effect on the law of damages; 2) the statute had a prejudicial effect on the subrogation rights of a plaintiff's insurer; and 3) the statute allowed the admission into evidence the fact that a plaintiff is insured without a concomitant admission of evidence that the defendant is insured.

Four years later, the Alabama Supreme Court reversed the Leahey holding as it related to § 12-21-45 because the three bases upon which the Leahey court relied dealt "...with the wisdom of the legislative policy rather than constitutional issues. Matters of policy are for the legislature and, whether wise or unwise, legislative policies are of no concern to the courts." Marsh v. Green, 782 So.2d 223, 231 (Ala. 2000). (Marsh actually addressed the validity of Ala. Code 1975 § 6-5-545, a statutory companion to ' 12-21-45 dealing specifically with medical-malpractice cases. Recognizing the Leahy court's holding that § 12-21-45 was unconstitutional was an impediment to its contrary ruling regarding § 6-5-545, the Marsh court explicitly reversed Leahy.)

POST MARSH ATTACKS ON § 12-21-45

The past few years have seen persistent attempts by plaintiffs to avoid the effects of § 12-21-45. The first organized effort involved a motion in limine which did not ask §12-21-45 to be ruled invalid, but rather asked the court to limit the information defendants could introduce at trial concerning collateral source payments by third-parties. Specifically, these motions argued: 1) the Alabama Legislature purposely did not authorize the admissibility of the amount of the collateral



source payment in order to avoid direct conflict with long-standing Alabama law regarding "reasonable and necessary" medical charges; and 2) because it does not specifically abolish the common law collateral source rule, § 12-21-45 should be deemed only a modification of the collateral source rule. The first known adoption of this argument occurred in the Circuit Court of Jefferson County, Alabama in Escott v. Alsayyad, CV2007-582 (Ala. Cir.Ct. Jefferson County), which resulted in the entry of an order by Judge Michael Graffeo which has been commonly referred to as the "Graffeo Order." Judge Graffeo ruled the existence of a collateral source was admissible, but the amount paid by that collateral source was inadmissible.

The Graffeo Order has fallen out of favor after the ruling by the Alabama Court of Civil Appeals in Melvin v. Loats, 23 So.3d 666 (Ala. Civ. App. 2009). In that case, a jury returned a verdict in favor of Loats for $5,100.00. Judge Graffeo granted the plaintiff's motion for a new trial after a post-trial determination that Loats' uncontradicted special damages were $16,413.36 (i.e., the amount of medical expenses billed to him without regard to the actual amount paid by his health insurer). The Melvin court did not specifically address the Graffeo Order, but reversed Judge Graffeo's granting of a motion for new trial because of his failure to apply § 12-21-45: "However, in determining that Loats proved uncontradicted special damages of $16,413.36 that, in effect, were required to be included in the jury's verdict as a matter of law, the trial court erroneously ignored the effect of Alabama Code 1975 § 12-21-45." Id. at 671. Moreover, relying on Marsh, the Melvin court rejected Loats' argument that § 12-21-45 is unconstitutional on equal-protection or due-process principles.

Shortly after Melvin, a new legal attack on § 12-21-45 began to surface. Motions in limine began to appear asking trial courts to do away with the statute entirely rather than merely limiting its effect. Instead of attacking the constitutionality of the statute, the new argument developed a theory that § 12-21-45 no longer applies because it was superseded by the Alabama Rules of Evidence. This argument was first accepted in Baker v. Kimbrough, CV2008-902275 (Ala.Cir. Ct. Jefferson County), by Judge Robert S. Vance and, predictably, became known as the "Vance Order."

CROCKER V. GRAMMER

The Vance Order was followed by Judge Graffeo in Crocker v. Grammer which was appealed by the defendant. The plaintiff, Grammer, filed a complaint in Jefferson County against Crocker and Grammer's uninsured/underinsured motorist carrier, Allstate' for injuries received in an automobile accident. Allstate opted out of the case which went to trial on March 9, 2010. Grammer made an oral motion prior to trial requesting the court preclude any evidence a third party paid any of Grammer's medical expenses. The trial court granted the motion in a written order which ruled, in summary, § 12-21-45 " no longer applies, having been superseded by the Alabama Rules of Evidence, and that the collateral source rule is accordingly revived to govern a plaintiff's medical damages in a general personal injury case such as this one." After a jury verdict of $36,500.00 was rendered in favor of Grammer and judgment issued, Crocker filed an appeal contending the trial court erred in failing to comply with § 12-21-45.

After first recognizing that its review of the trial court's ruling is de novo because a trial court's interpretation of a statute presents only a question of law (see Madaloni v. City of Mobile, 37 So.3d 739, 742 (Ala. 2009)), the Alabama Court of Civil Appeals analyzed the trial court's finding that § 12-21-45 is inconsistent with Rules 401, 402 and 403 of the Alabama Rules of Evidence. Rule 401 states:

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 states:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Crocker court cited Schoenvogel v. Venator Group Retail, Inc., 895 So.2d 225 (Ala.2004), which ruled Ala. R. Evid. 601 superseded Alabama's Dead Man's Statute, as authority for the standard for determining when a provision of the Alabama Rules of Evidence supersede prior Alabama evidentiary law: " 'when [the Supreme] Court adopted the Alabama Rules of Evidence effective January 1, 1996, those rules supplanted and superseded any provisions of Title 12 of the Code of Alabama 1975 inconsistent with those rules....' 895 So.2d at 235 (emphasis added)." 2011 WL 3963008 at *2. The Crocker court found that while § 12-21-45 does modify the substantive component of the collateral source rule, it "... does not dictate any particular outcome, but, rather, it allows a jury to make its own informed decision as to the effect of third-party payments of medical and hospital expenses on a plaintiff's recovery." Id. at *3. The Crocker court found that not only was § 12-21-45 consistent with Rules 401 and 402, it actually "...conforms to those rules by making evidence relating to a matter of consequence in every personal-injury action—the measure of damages—per se admissible." Id.

The Crocker court also ruled § 12-21-45 did not conflict with Ala. R. Evid. 403. It noted § 12-21-45(a) allows a plaintiff to introduce evidence of the cost to the plaintiff of obtaining reimbursement or payment of medical or hospital expenses, and § 12-21-45(c) permits plaintiffs to introduce evidence they will have to reimburse a third party who has paid their medical or hospital expenses from any damages award. "Through introduction of that evidence, a plaintiff can ameliorate any prejudice from the introduction by the defendant of third-party payments of medical and hospital expenses. The statute therefore provides its own mechanism for assuring that a plaintiff is not unduly prejudiced by admission of evidence of third-party payments of medical and hospital expenses." Id.

Finding that no rule of evidence expressly supersedes § 12-21-45 and that no rule directly conflicts with the statute, the Crocker court concluded the adoption of the Alabama Rules of Evidence "did not in any way diminish the effect of § 12-21-45." Id. at 4. The Crocker court seemed to find it more preferable that a jury be given a broader scope of information to make its decision concerning damages rather than having their access to the facts limited. Apparently, it believed a jury having all the facts concerning what medical expenses were paid by whom outweighs the potential for prejudice or a jury's confusion. The Crocker court reversed the trial court and remanded the case, stating Crocker should be allowed to introduce evidence of third party medical payments and be allowed to argue Grammer's damages should be reduced by virtue of those payments. The battle is not over, however, as the Alabama Supreme Court is currently considering Grammer's Petition for Writ of Certiorari. Ex parte Grammer, Case No. 1101517 (Ala. September 23, 2011).