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Florida Trucking Association
January 21, 2021

Restoring Fairness, Equality and Justice

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Civil Liability for Damages Relating to COVID-19

Restoring Fairness, Equality and Justice

HB 7 – McClure

01/13/21 Favorable by Civil Justice & Property Rights Subcommittee; 11 Yeas, 6 Nays

* **Now in Pandemics & Public Emergencies Committee**

SB 72 – Brandes

On Committee agenda – Judiciary – 01.25.21 @ 2:30 pm

A bill to be entitled

An act relating to civil liability for damages relating to COVID-19; creating s. 768.38, F.S.; providing legislative findings and intent; defining terms; providing requirements for a civil action based on a COVID-19-related claim; providing that the plaintiff has the burden of proof in such action; providing a statute of limitations; providing severability; providing retroactive applicability; providing an effective date.

WHEREAS, on March 9, 2020, Governor Ron DeSantis issued Executive Order Number 20-52 declaring a state of emergency for the State of Florida due to the COVID-19 pandemic, and

WHEREAS, in light of the ongoing nature of the COVID-19 pandemic, the Governor has repeatedly extended the state of emergency, including most recently on December 29, 2020, in Executive Order Number 20-316, and

WHEREAS, the State of Florida continues under a declared state of emergency, and

WHEREAS, throughout the declared state of emergency, the Governor's executive orders included industry-specific restrictions to prevent the spread of COVID-19 based on the best information available at the time, allowing and encouraging certain businesses to continue to safely operate, and

7. A home health aide as defined in s. 400.462(15).

(f) "Religious institution" has the same meaning as provided in s. 496.404.

(3) In a civil action based on a COVID-19-related claim:

(a) The complaint must be pled with particularity.

(b) At the same time the complaint is filed, the plaintiff must submit an affidavit signed by a physician actively licensed in the state which attests to the physician's belief, within a reasonable degree of medical certainty, that the plaintiff's COVID-19-related damages, injury, or death occurred as a result of the defendant's acts or omissions.

(c) The court must determine, as a matter of law, whether:

1. The plaintiff complied with paragraphs (a) and (b). If the plaintiff did not comply with paragraphs (a) and (b), the court must dismiss the action without prejudice.

2. The defendant made a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued.

a. During this stage of the proceeding, admissible evidence is limited to evidence tending to demonstrate whether the defendant made such a good faith effort.

b. If the court determines that the defendant made such a good faith effort, the defendant is immune from civil liability.

c. If the court determines that the defendant did not make

such a good faith effort, the plaintiff may proceed with the action. However, absent at least gross negligence proven by clear and convincing evidence, the defendant is not liable for any act or omission relating to a COVID-19-related claim.

(d) The burden of proof is upon the plaintiff to demonstrate that the defendant did not make a good faith effort under subparagraph (c)2.

(4) A civil action for a COVID-19-related claim must be commenced within 1 year after the cause of action accrues. However, a plaintiff whose cause of action for a COVID-19-related claim accrued before the effective date of this act must commence such action within 1 year of the effective date of this act.

Section 2. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 3. This act shall take effect upon becoming a law and shall apply retroactively. However, the provisions of this act shall not apply in a civil action against a particularly named defendant which is commenced before the effective date of this act.

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Summary Judgment

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Florida's Rule 1.510 should incorporate provisions similar to federal Rule 56(c) and (e), which sets forth a clear standard for how a party may obtain summary judgment. This will discourage any efforts by courts to avoid using the federal summary judgment standard, as Florida courts have in the past indicated that the differing language between the federal and state rules justifies different interpretations. *See, e.g., Nard, Inc. v. DeVito Contracting & Supply, Inc.*, 769 So. 2d 1138, 1140 & n.3 (Fla. 2d DCA 2000) (emphasizing that under Florida's summary judgment standard, courts must deny summary judgment "if the record reflects the existence of any genuine issue of material fact *or the possibility of any issue*, or if the record *raises even the slightest doubt that an issue might exist*" and observing that the standard differs from the federal one in part "because of Florida's failure to adopt the language in federal rule 56(e) regarding the shifting burden of persuasion"); *5G's Car Sales, Inc. v. Fla. Dep't of Law Enforcement*, 581 So. 2d 212, 212 (Fla. 3d DCA 1991) (rejecting party's attempt to rely upon the *Celotex* standard, reasoning that "to the extent that they tend to loosen the restrictions on the use of summary judgment, these cases are based upon language in the federal rule, Federal Rule of Civil Procedure 56, which is not contained in Florida Rule of Civil Procedure 1.510").

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Explain the import of the *Celotex* trilogy. Some public comments should focus on the nuances of the *Celotex* trilogy, and why each of the cases within that trilogy serves as an important guidepost for evaluating summary judgment. For instance, *Matsushita* and *Anderson* helped to illuminate the general concept of what a "genuine issue" is for the purpose of Rule 56, with *Anderson* explicitly linking the "genuine issue" standard to the standard for a directed verdict at trial. *See Anderson*, 477 U.S. at 248 ("[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); *Matsushita*, 475 U.S. at 586-87 ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." (internal quotation marks omitted)). These decisions culminated in *Celotex*, which further clarified the burden for a party moving for summary judgment: the party may discharge that burden by showing "that there is an absence of evidence to support the nonmoving party's case." 477 U.S. at 325.

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The federal summary judgment standard better accounts for the reality of modern technology—which in many cases offers clear, objective, and neutral evidence vindicating or defeating a claim. As demonstrated by numerous cases, including *Lopez v. Wilsonart, LLC*, 275 So. 3d 831 (Fla. 5th DCA 2019), and even the George Floyd case, the constant and readily available use of cameras and other technology allows for the objective capturing of events as they unfold. Florida's current summary judgment standard does not account for this. In *Wilsonart*, notwithstanding the fact that undisputed dashboard camera footage revealed the defendant's truck driver was not at fault in an accident, the Florida appellate court was compelled to deny the defendant's motion for summary judgment because the plaintiff produced conflicting eyewitness testimony. Federal courts using the *Celotex* trilogy, however, cannot ignore irrefutable evidence disproving the nonmovant's version of events. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). Adopting the federal standard in Florida would improve Florida's litigation climate considerably, as businesses would be incentivized to invest in technology like video systems, sensors, and the like to increase the amount of available evidence and help reduce the cost of litigation.

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The federal summary judgment standard is more efficient and provides benefits for movants and nonmovants alike. In federal court, a motion for summary judgment creates a critical "put up or shut up" moment in the litigation, *see Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003), that requires the parties to seriously evaluate the facts learned in discovery and the applicable law before undertaking the substantial expense and delay necessitated by a trial. The standard also better aligns with what a plaintiff must show at trial—it makes little sense to deny summary judgment and send a case to a jury only to have the judge direct a verdict based on the very same set of facts, after undertaking the time and expense of a full-blown trial. The federal standard also has important benefits for non-moving parties. When a nonmovant's claim survives summary judgment, that may spur the movant to settle the case as the settlement value of the case increases. This incentivizes the prudent defendant to file only summary judgment motions that are probable winners to avoid paying that increased settlement value.

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A more effective, less restrictive summary judgment standard—which does not by default send most cases to trial—will help Florida's court system which is already backlogged with jury trials as a result of the COVID-19 pandemic. A significant number of jury trials in both civil and criminal cases has been postponed as a consequence of the pandemic, and even now it is unclear when jury trials will fully resume. When some normalcy returns, courts will undoubtedly struggle to catch up, particularly in criminal trials. The federal summary judgment standard will help ensure only truly material factual disputes in civil cases require lengthy, costly civil trials, allowing courts to better manage their dockets.

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The reality is that even though summary judgment has long existed in Florida and the overall goal of the civil procedure rules is to "secure the just, speedy, and inexpensive determination of every action," Fla. R. Civ. P. 1.010, summary judgment is not a worthwhile tool because it is rarely granted. *See, e.g., Phillips v. Hartford Cas. Ins. Co.*, 373 So. 2d 415, 416 (Fla. 4th DCA 2019) ("The cases are legion to say summary judgments should be granted rarely."). In fact, the existing standard essentially discourages trial courts from seriously considering summary judgment motions, because any in-depth analysis of the merits will provide more fodder for an appellate court to find some disputed issue of fact defeating summary judgment. Adopting the federal standard will change that.

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Motor Vehicle Insurance
SB 54 – Burgess

On Committee agenda:
Banking and Insurance – 01.26.21
@ 3:30 pm.

Restoring Fairness, Equality and Justice

Berges v. Infinity Insurance Company- 896 So. 2d 665, 29 Fla. L. Weekly S787

Florida's current bad faith law allows individuals and their attorneys to target insurers for multi-million dollar damage awards by imposing artificial deadlines within which an insurer must settle a claim before they are found to have acted in bad faith. The law allows plaintiff's attorneys to manipulate the state's bad faith laws and turn low-limits liability insurance policies, like a traditional auto insurance policy, into unlimited insurance coverage. The result is increased insurance premiums for Florida consumers. The case of Berges v. Infinity Insurance Company, 896 So.2d 665 (Fla. 2004) exemplifies the unlevel playing field created by Florida's current bad faith laws. By imposing an arbitrary 25-day settlement deadline the plaintiff's attorney was able to turn a $20,000 claim into a $1.9 million judgment plus an additional $616,200 in attorney fees.

3-30-90
Accident occurs

4-16-90
Victim's attorney contacts Infinity. First notice Infinity has of an accident involving its insured.

4-27-90
Infinity notifies victim's attorney it is reserving rights to deny claim as a result of its insured neglecting to notify them of the accident. Letter sent notifying insured of reservation of rights May 2.

4-30-90
Infinity investigates accident and determines the driver of the Berges car was 100% at fault.

5-2-90
Infinity notified victim no longer has legal representation. Mr. Taylor personally delivers handwritten settlement letter to Infinity. Gives insurer 25 days to settle.

5-11-90
Infinity adjuster calls claimant and offers policy limits.

5-16-90
Infinity retains attorney to handle settlement and highlights "time demand" in retainer letter.

5-24-90
Infinity attorney sends letter to Mr. Taylor confirming that he has begun working on the settlement and payment would be made as soon as the necessary legal procedures and court designations were completed.

6-11-90
Taylor attorney revokes settlement offer, citing Infinity's failure to pay the policy limits within the 25-day timeframe set forth in Mr. Taylor's May 2 letter.

6-20-90
May 24 letter from Infinity attorney delivered to Mr. Taylor. Letter was delayed due to an incorrect zip code.

Final Judgment

Insurer ordered to pay $1.9 million plus $616,200 in attorney fees.

**Case goes to trial. Jury awards Mr. Taylor $911,400 for wrongful death claim and $500,000 verdict for the personal injury claim.*

***Mr. Berges immediately files a bad faith claim for the verdict, which far exceeded his policy limits, case goes to trial and jury finds that Infinity did act in bad faith and amends the final judgment in favor of Berges in the amount of $1.9 million.*

****Initial Berges policy limits: $20,000. Amount paid by insurer: $1.9 million plus $616,200 in attorney fees.*

Aldana v. Progressive American Insurance Co.,

No. 19-12950, 2020 WL 5843711 (11th Cir. Oct. 1, 2020)

12/6/13

Accident occurs

12/9/13

Accident reported

12/18/13

Insurer tenders limits

2/13/14

Insurer tenders limits

3/12/14

Insurer tenders limits

4/21/14

Insurer tenders limits

5/15/14

Insurer tenders limits

6/18/14

Insurer tenders limits

8/14/14

Lawsuit filed

$50 million judgment against the insured now assigned to the 3rd party claimant.

The trial court granted summary judgment of the bad faith action, but the U.S. 11th Circuit reversed, acknowledging that although Progressive did not act in bad faith by offering the full policy limits of $500,000 under a global settlement, a disputed issue of material fact remained. So despite the insurer's efforts, and the insured's and claimants' evasive behavior, a jury was still entitled to decide the merits.

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Inflated Damages

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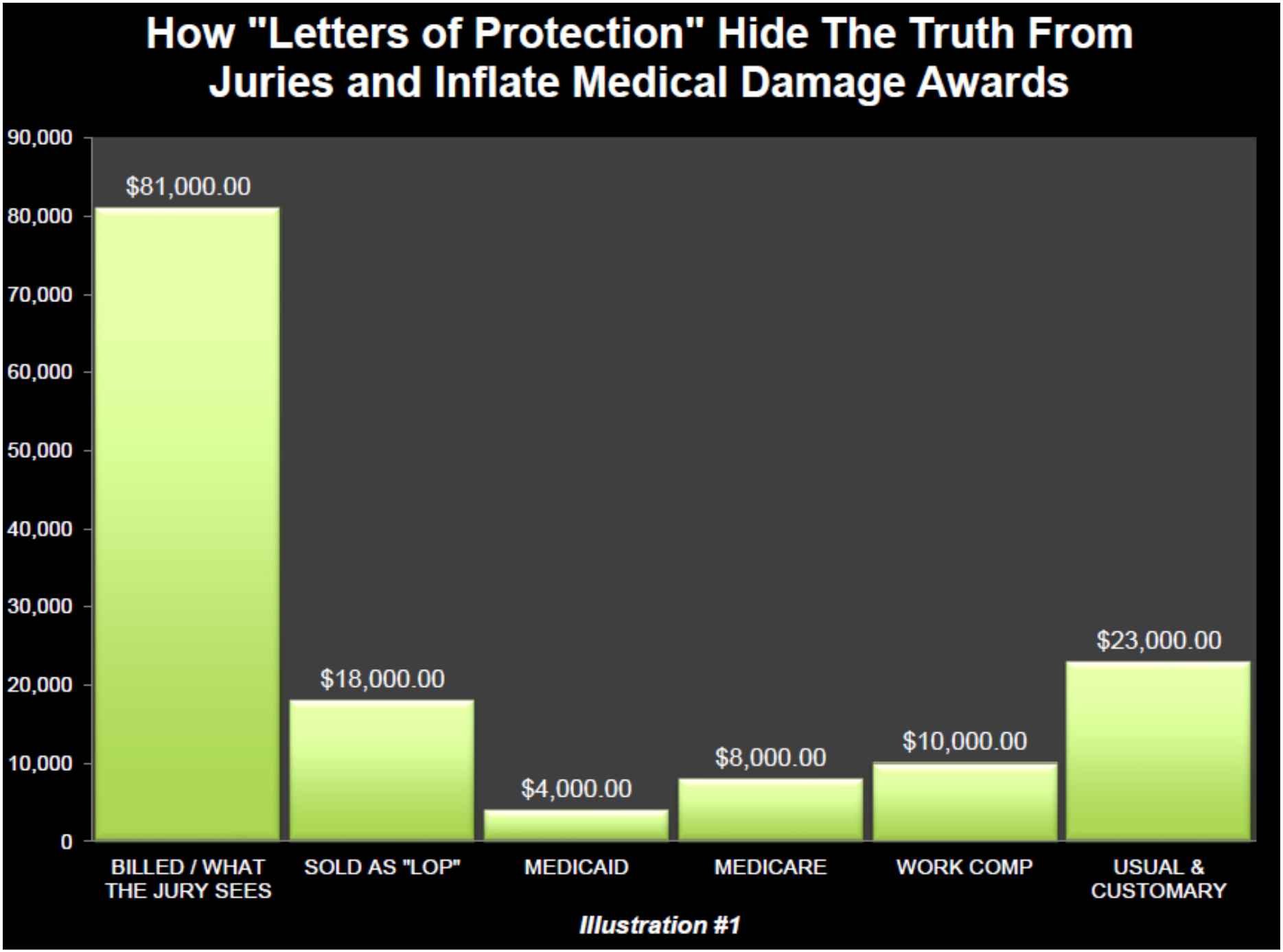
How "Letters of Protection" Hide The Truth From Juries and Inflate Medical Damage Awards
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BILLED / WHAT THE JURY SEES
SOLD AS "LOP"
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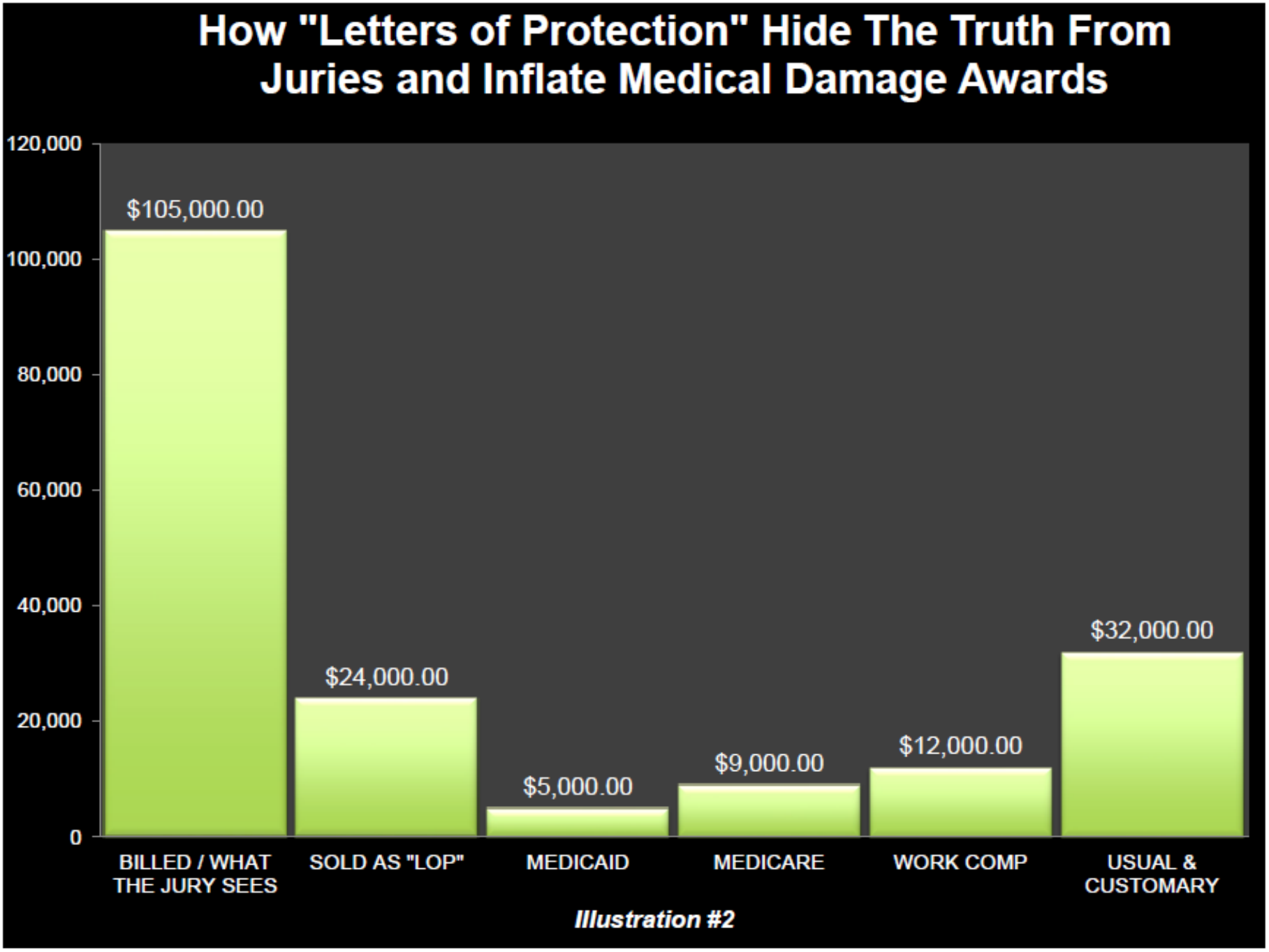
Illustration #1


How "Letters of Protection" Hide The Truth From Juries and Inflate Medical Damage Awards
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BILLED / WHAT THE JURY SEES
SOLD AS "LOP"
MEDICAID
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USUAL & CUSTOMARY
Illustration #2

How "Letters of Protection" Hide The Truth From Juries and Inflate Medical Damage Awards

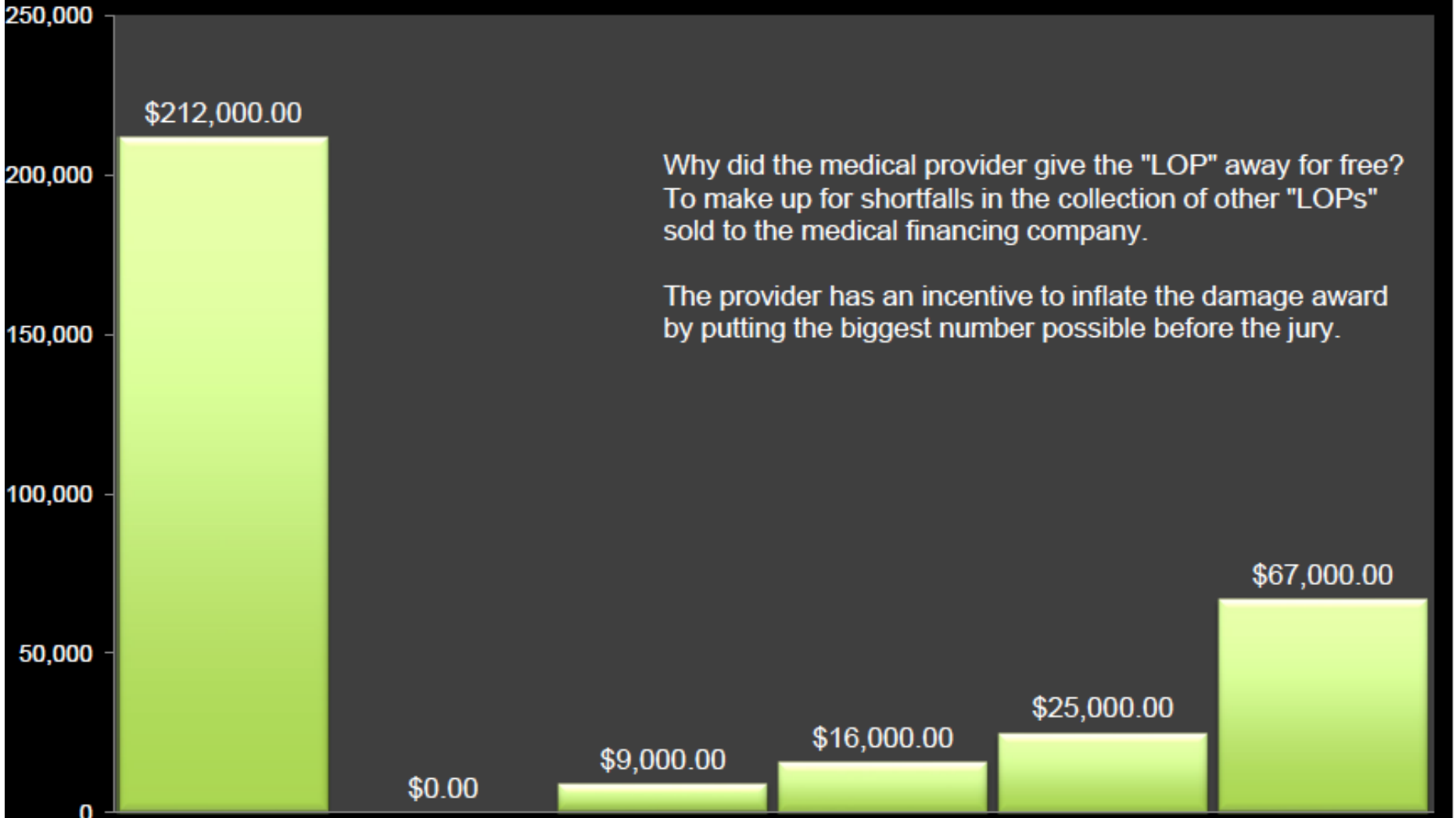

Illustration #3

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Require accuracy in medical damages in personal injury litigation by limiting the evidence that may be offered to prove the reasonable value of medical expenses.

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ISSUE: An injured party may recover their medical expenses (such as hospital bills, diagnostic tests, and doctor visits) as damages in a personal injury lawsuit. What juries most often hear at trial are the "billed" amounts or "sticker prices" of a plaintiff's medical treatment, which typically reflect much higher dollar amounts than what the plaintiff's medical provider would willingly accept as payment. For example, while the "sticker price" of a procedure is $10,000, in reality a medical provider will accept the negotiated amount of $4,000 for that procedure under a contract with the patient's insurance company. Yet the jury hears at trial that the plaintiff's procedure cost $10,000. Consideration of such inflated amounts may mislead juries into awarding excessive amounts for unpaid bills, future damages for anticipated medical expenses, and pain and suffering.

RECOMMENDATIONS: Support reforms that would require that evidence offered to prove past medical expenses be limited to: (1) evidence of the amounts actually paid to satisfy the bills that have been satisfied; and (2) evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied (letters of protection).

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Allow discovery into the relationships between plaintiffs' attorneys and medical providers.

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ISSUE: As noted above, there are strong incentives to inflate medical expenses in order to drive up the amount of all damages in personal injury lawsuits. Given these incentives, plaintiffs' attorneys have built relationships with particular medical providers, often encouraging clients to seek care from these preferred providers instead of the clients' own doctors. The existence of such a referral relationship is highly relevant in litigation as it suggests, for example, that the provider might be biased in opining on the necessity of a medical procedure or in setting the value of that procedure. In the past defendants often issued discovery trying to learn information about the existence and extent of any relationship between a plaintiff's attorney and a medical provider to ferret out such bias. Generally, litigants have had the ability to discover evidence of bias between a party to a lawsuit and the party's retained expert.

RECOMMENDATIONS: Enact reforms to reverse Worley and confirm that the existence of and evidence about any referral relationship between a plaintiff's attorney and a physician is discoverable, admissible at trial, and not protected by the attorney-client privilege.

IN THE SUPREME COURT OF FLORIDA

Case No. SC19-385
L.T. Case No. 5D18-3548

STEVEN YOUNKIN,

Petitioner,

v.

NATHAN BLACKWELDER,

Respondent.

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND FLORIDA JUSTICE REFORM INSTITUTE IN SUPPORT OF PETITIONER

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