Online Reference: FLWSUPP 3103SAPP

Torts -- Negligence -- Motor vehicle accident -- Damages -- Past and future medical expenses -- Evidence -- Retroactive application of statute -- Section 768.0427, which limits admissible evidence of past and future medical expenses, is applicable to case pending at time statute was enacted -- No merit to argument that statute impairs plaintiffs' right to contract under letters of protection given to medical providers

SHARON M. SAPP and STACY M. CHANEY, et al., Plaintiffs, v. JAMES BROOKS and J.B. COACHLINE, INC., Defendants. Circuit Court, 13th Judicial Circuit in and for Hillsborough County, General Civil Division. Case No. 17-CA-5664. Division E. May 19, 2023. Anne-Leigh Gaylord Moe, Judge. Counsel: David G. Henry, Christopher Borzell, and Nick T. Smith, Morgan & Morgan Tampa, P.A., Lakeland, for Plaintiffs. Heather L. Stover and Justin T. Saar, Odgen, Sullivan, Stover & Saar, P.A., Tampa, for Defendants.

AMENDED ORDER GRANTING

DEFENDANTS' MOTION IN LIMINE

THIS CAUSE came before the Court at a hearing on Defendants' Motions in Limine Regarding Evidence of Past and Future Medical Treatment or Services Expenses (the "**Motion**"). The hearing occurred on April 21, 2023 and April 24, 2023. David Henry, Esq. and Christopher Borzell, Esq. of Morgan & Morgan represented Plaintiffs Sharon M. Sapp and Stacy M. Chaney. Heather Stover, Esq. and Susan Wilson, Esq. of Ogden & Sullivan represented Defendants James Brooks and J.B. Coachline, Inc.

I. Introduction

A. The Question Presented

The Motion presents a question about the temporal reach of recently-enacted section 768.0427, Florida Statutes (the "**Statute**"). At the time of the April 2023 hearing on the Motion, both sides agreed that no trial court in Florida has ruled on the applicability of the Statute to pending cases.

Temporal reach of a new statute is an area covered with some frequency in Florida Supreme Court jurisprudence. So much so that, with the limited time trial courts have available to consider issues like this, it can be challenging to reach an unshakeable conviction that no controlling case could have been overlooked. But no one has produced a case that squarely addresses and disposes of the question raised in the Motion.

The question is this: if a new statute is (1) procedural in nature, (2) and the Legislature has provided direction on temporal reach, (3) does the judicial branch follow its precedent on temporal reach of procedural statutes or (4) does it defer to the Legislature's direction?

B. The Arguments

Plaintiffs have the easier argument to digest. So easy that, at first blush, it seems that extensive discussion is unwarranted. Plaintiffs argue that the Statute itself is substantive. The temporal reach of substantive statutes is not a difficult part of the law to understand. When a statute is substantive in nature, there are two questions to ask. First, was there clear evidence of legislative intent to apply it retroactively? If the answer is yes, then the second question is this: is retroactive application constitutionally permissible?

The Statute has an effective date of March 24, 2023. And the enacting legislation says "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." The precedent on retroactivity favors Plaintiffs on this being "game over."

But Defendants contend that the statute is *not* substantive. And the analysis is different with procedural statutes. The judicial branch has shown the Legislature an answer key how it interprets the temporal reach of statutes. The Legislature legislates against that background.

The answer key is this:

There is a core assumption that the Legislature makes law for the future.

If a case comes before the court in which one side asks that a new law apply to past conduct or a pending case, then the court will first consider whether the new law is substantive or something else (the "something else" is procedural, remedial, or some combination of the two).

If it is substantive, there are constitutional reasons why the judicial branch must tread carefully when asked to apply a new law to past conduct or a pending case. For that reason, Florida courts will examine the text and identify whether the Legislature expressed a clear intent that the law be applied retroactively. If the statute is substantive and there is no clear intent expressed by the Legislature, then the basic assumption that the Legislature was making law for the future will apply. If the statute is substantive and there *is* a clear expression from the Legislature that retroactive application was intended, then the court will examine whether the Florida Constitution prohibits retroactive application.

If the statute is *not* substantive, and instead is either procedural remedial (or a combination of both), then the constitutional reasons for caution in applying the new law to pending cases does not apply. If it makes sense to apply the new statute to pending cases, the court will do so.

C. The Facts

This case involves a motor vehicle accident that occurred on June 9, 2014, on northbound I-275 in Tampa, Florida. When the accident occurred, Plaintiffs Sharon Sapp and Stacy Chaney were passengers on a shuttle bus operated by Defendant James Brooks and owned by Defendant JB Coachline.

At that time, Plaintiffs were covered by Medicare and/or Medicaid health insurance. That insurance would have covered certain of Plaintiffs' medical costs arising from the accident. Rather than rely on Medicare and/or Medicaid, Plaintiffs executed various agreements to pay providers who did not bill insurance, subject to the outcome of this litigation (the "**Letters of Protection**"). Defendants allege that third-party or factoring companies have since purchased the right to receive payments under the letters of protection, including Cash 4 Crash, LLC, Momentum Fundings, LLC, Certified Legal Funding, Inc., and Oasis Legal Finance, LLC.

D. The Act

The Statute took effect on March 24, 2023 when Governor DeSantis signed a tort reform bill called HB 837. HB 837 was enacted as Chapter 2023-15, Florida Laws (the "**Act**"). The Act includes the Statute[1] in Section 6 and provides that, in pertinent part, the Statute will read as follows.

> (2) ADMISSIBLE EVIDENCE OF MEDICAL TREATMENT OR SERVICE EXPENSES. -- Evidence offered to prove the amount of damages for past or future medical treatment or services in a personal injury or wrongful death action is admissible as provided in this subsection.
>
> (a) Evidence offered to prove the amount of damages for past medical treatment or services that have been satisfied is limited to evidence of the amount actually paid, regardless of the source of payment.
>
> (b) Evidence offered to prove the amount necessary to satisfy unpaid charges for incurred medical treatment or services shall include, but is not limited to, evidence as provided in this paragraph.
>
> 1. If the claimant has health care coverage other than Medicare or Medicaid, evidence of the amount which such health care coverage is obligated to pay the health care provider to satisfy the charges for the claimant's incurred medical treatment or services, plus the claimant's share of medical expenses under the insurance contract or regulation.

2. If the claimant has health care coverage but obtains treatment under a letter of protection or otherwise does not submit charges for any health care provider's medical treatment or services to health care coverage, evidence of the amount the claimant's health care coverage would pay the health care provider to satisfy the past unpaid medical charges under the insurance contract or regulation, plus the claimant's share of medical expenses under the insurance contract or regulation, had the claimant obtained medical services or treatment pursuant to the health care coverage.

3. If the claimant does not have health care coverage or has health care coverage through Medicare or Medicaid, evidence of 120 percent of the Medicare reimbursement rate in effect on the date of the claimant's incurred medical treatment or services, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.

4. If the claimant obtains medical treatment or services under a letter of protection and the health care provider subsequently transfers the right to receive payment under the letter of protection to a third party, evidence of the amount the third party paid or agreed to pay the health care provider in exchange for the right to receive payment pursuant to the letter of protection.

5. Any evidence of reasonable amounts billed to the claimant for medically necessary treatment or medically necessary services provided to the claimant.

(c) Evidence offered to prove the amount of damages for any future medical treatment or services the claimant will receive shall include, but is not limited to, evidence as provided in this paragraph.

1. If the claimant has health care coverage other than Medicare or Medicaid, or is eligible for any such health care coverage, evidence of the amount for which the future charges of health care providers could be satisfied if submitted to such health care coverage, plus the claimant's share of medical expenses under the insurance contract or regulation.

2. If the claimant does not have health care coverage or has health care coverage through Medicare or Medicaid, or is eligible for such health care coverage, evidence of 120 percent of the Medicare reimbursement rate in effect at the time of trial for the medical treatment or services the claimant will receive, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.

3. Any evidence of reasonable future amounts to be billed to the claimant for medically necessary treatment or medically necessary services.

The Act included a provision in Section 30 that "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." In Section 31, the Act provides that "[t]his act shall take effect upon becoming law."

E. The Relief Requested in the Motion

The ink had not dried on the Governor's signature before this case presented the question whether the Statute applies to pending cases like this one. The Motion seeks to:

(1) allow Plaintiffs to offer only evidence of the amount actually paid by any payer, pursuant to section 768.0427(2), for past medical expenses already paid;

(2) allow Defendants to offer any evidence specifically permitted by section 768.0427(2)(b) regarding unpaid past medical expenses, including evidence of the amount any third-party loan services were paid in return for the right to receive payment under any letters of protection; and

(3) allow Defendants to offer any evidence specifically permitted by section 768.0427(2)(c) for future medical expenses.

F. The Present Posture of the Case

This order is rendered in May 2023, during the period that this case was scheduled to be tried. At the same pre-trial hearing where the Motion was argued, other motions in limine were granted in rulings from the bench. Citing a need for additional discovery due to those rulings, Plaintiffs moved for and were granted a continuance of the May 2023 trial.

II. Analysis

Whether it comes about by a change in decisional law, a statute, or administrative regulation, a question frequently arises over whether a new or amended law applies to certain case. Nuances abound in the analysis of that question.

A. What Do the Words Mean?

1. Temporal Reach

"Temporal reach" is a term of art that refers to an analysis that governs to which period of time (and therefore, to which cases) a new law applies.

2. Prospective, Retrospective, and Retroactive

The three words used to categorize temporal reach are prospective, retrospective, and retroactive. They are bandied about enough that it is easy to overlook the importance of understanding what they really mean. Defining the terms and appreciating the fact that the meaning of them may change in the context of different types of proceedings is an important first step.

a. Definitions

The word "prospective" means "foresighted, forward-looking" and "concerned with or relating to the future: effective in the future." *Webster's Third New Int'l Dictionary* 1821 (2002). Black's Law Dictionary defines a "prospective law" as "[o]ne applicable only to cases which shall arise after its enactment." *Black's Law Dictionary* 1100 (5th ed. 1979).

The word "retroactive" means "operative, finding, and taking effect prior to enactment, promulgation, or imposition." *Webster's Third New Int'l Dictionary* 1940. A "retroactive law" is defined as "those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past." *Black's Law Dictionary* 1184; *see also Webster's Third New Int'l Dictionary* 1940 (defining "retroactive law" as "a law that operates to make criminal or punishable or in any way expressly affects an act done prior to the passing of the law.").

The word "retrospective" means "contemplative of or relative to past events" or "affecting things past." *Webster's Third New Int'l Dictionary* 1941. A "retrospective law" is one

> which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred.

Black's Law Dictionary 1184.

b. Meaning in Context

Even once the definitions are understood, it is important to appreciate that meaning of the words prospective, retroactive, and retrospective will vary based on whether they are discussed in the context of statutory law or decisional law.

i. Statutory Law

"As a general, almost invariable rule, a legislature makes law for the future, not the past." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 261 (2012); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union,* 62-63 (1868) (words in a statute should operate prospectively only "unless the words employed show a clear intention that it should have a retrospective effect.").

While in general, the Legislature makes law for the future, so long as it meets a constitutional test, the Legislature can also make law retroactive. A statute is considered "retroactive" if "it would impair rights a party possessed when he acted, increase a party's liability of past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 280 (1997). Retroactive legislation is often enacted in an effort to "readjust[ ] rights and burdens imposed in the past" or "impose a new duty or liability based on past acts." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729-30 (1984). So long as it does not "offend due process" because it is "particularly 'harsh and oppressive,' " retroactive legislation is lawful. *Id.* at 733.

As an example of explicitly retroactive legislation, in 1980 an ERISA bill was enacted with an effective date five months before it was signed into law. *Id.* The purpose of the retroactive effective date was to prevent "opportunistic employers" from withdrawing from plans while Congress was considering the legislation. *Id.* at 723-24.

While not explicitly retroactive, federal legislation meant to compensate disabled coal miners was considered to have retroactive *effect* when it required employers to compensate former employees who left their work in the industry before the act was passed. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 14-15 (1976) ("To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect . . . And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability on past acts.").

ii. Decisional Law

In the context of a decisional change in the law, there is a spectrum of prospective application. In *Linkletter v. Walker,* the United States Supreme Court acknowledged that even within the terminology of "prospective" rulings in court cases, there is a range of meaning. 381 U.S. 618, 621-22 (1965) (recognizing that a "purely prospective" decision "does not apply even to the parties before the court."). A purely prospective application is one so future-looking that it will not even apply to the case before the court. *Id.* The more common use of the term prospective in decisional law, though, means that the decision will apply to the case before the court and will also apply to future cases.

In Florida, the terms "retrospective" and "retroactive" are generally used interchangeably. *Love v. State*, 286 So. 3d 177, 187 n.5 (Fla. 2019) [44 Fla. L. Weekly S293a]. No clear distinction seems to be drawn between those terms in the federal analysis, either.

But a "retrospective" or "retroactive" application of decisional law will often involve disturbing a settled outcome. For example, in *Linkletter,* the Supreme Court considered whether its prior decision in *Mapp v. Ohio* operated retrospectively upon cases finally decided in the period prior to *Mapp. Id. Mapp* held that exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment was required of the States by the Due Process Clause of the Fourteenth Amendment. *Id.* at 619. Victor Linkletter was convicted of

simple burglary in 1959. *Id.* at 621. At the time of his arrest, officers took his keys and used them to enter his home and business, where various items were seized without a warrant. *Id.* Linkletter lost his various appeals, and the Supreme Court of Louisiana affirmed his conviction in February of 1960. *Id.* Months later, *Mapp* was announced and Linkletter filed an application for *habeas corpus*, which was denied, and then sought the same relief in federal court, where it, too, was denied by the trial court. *Id.* On appeal, the federal appellate court found that the searches were too remote from Linkletter's arrest to be constitutional but *Mapp* was not retrospective; as a result, the trial court's denial of habeas corpus was affirmed. *Id.* In making that determination, the Supreme Court noted that retrospective application of *Mapp* would result in "the wholesale release" of previously convicted defendants. *Id.* at 637.

3. Substantive, Procedural, and Remedial

A matter is considered substantive if it "defines, creates, or regulates rights -- 'those existing for their own sake and constituting the normal legal order of society, i.e., the rights of life, liberty, property, and reputation'." *DeLisle v. Crane Co.,* 258 So. 3d 1219, 1224 (Fla. 2018) [43 Fla. L. Weekly S459a] (citing *Allen v. Butterworth,* 756 So. 2d 52, 59 (Fla. 2000) [25 Fla. L. Weekly S277a]).

A matter is considered procedural if it relates to "the form, manner, or means by which substantive law is implemented." *Id.* (citing *In re Fla. Rules of Criminal Procedure,* 272 So. 2d 65, 65 (Fla. 1972)); *see also Kenz v. Miami-Dade Cnty.,* 116 So. 3d 461, 466 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D922c] (change in section 768.0755, which required plaintiff to produce evidence of defendant's actual or constructive knowledge, was procedural and not substantive); *Litvin v. St. Lucie Cnty. Sheriff's Dep't,* 599 So. 2d 1353, 1355 (Fla. 1st DCA 1992) (statutory amendment that imposed an "actual knowledge" threshold in a workers' compensation claim was procedural); *Stuart L. Stein, P.A. v. Miller Indus., Inc.,* 564 So. 2d 539, 540 (Fla. 4th DCA 1990) ("increasing the burden of proof to a 'clear and convincing' standard did not amount to a substantive change in the statutory scheme" and may be applied retroactively); *Larocca v. State,* 289 So. 3d 492, 493 (Fla. 4th DCA 2020) [45 Fla. L. Weekly D99a] ("We apply *Daubert* to the facts of this case because the amendment implementing *Daubert* is procedural and so the change applies retroactively."). "Stated differently, procedural law 'includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution." *Id.* at 1225 (citing *Allen,* 756 So. 2d at 60); *see also id.* (citing *Haven Federal Savings & Loan Ass'n v. Kirian,* 579 So. 2d 730, 732 (Fla. 1991)) ("It is the method of conducting litigation involving rights and corresponding defenses."); *Bionetics Corp. v. Kenniasty,* 69 So. 3d 943, 948 (Fla. 2011) [36 Fla. L. Weekly S69a] (quoting *Massey v. David,* 979 So. 2d 931, 936-37 (Fla. 2008) [33 Fla. L. Weekly S264a]) (" 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof. It is the method of conducting litigation involving rights and corresponding defenses.") (internal quotations omitted). A new procedural statute is "generally held applicable to all pending cases," *Young v. Altenhaus,* 472 So. 2d 1152, 1154 (Fla. 1985), in part because "no one has a vested interest in any given mode of procedure." *State v. Kelly,* 588 So. 2d 595, 597 (Fla. 1st DCA 1991).

It possible for a statute to have qualities that are a blend of more than one of the substantive, remedial, or procedural categories. *Bionetics Corp.,* 69 So. 3d at 948 ("The distinction between substantive and procedural law, however, is not always clear.") And when this is so[2], the court must identify what aspect dominates. *Id.* (citing *State v. Raymond,* 906 So. 2d 1045, 1049 (Fla. 2005) [30 Fla. L. Weekly S500a]) ("[W]hen procedural aspects overwhelm substantive ones, the law may no longer be considered substantive.").

B. Florida Has Its Own Analytical Framework, Distinct From the Federal One

Although Florida courts have begun to trend toward the federal courts in many respects, Florida utilizes an analytical framework of temporal reach that is not identical to the federal analysis. At times, Florida decisions cite to the federal precedents without (a) necessarily adopting them wholesale or (b) flagging the differences between the overall approaches. The analysis was already nuanced to begin with for the reasons identified *supra*; the undistinguished differences between the federal and Florida standards could be a reason why this area continues to be challenging in the Florida system. *See, e.g., Federal Express Corp. v. Sabbah,* 357 So. 3d 1283 (Fla. 3d DCA 2023) [48 Fla. L. Weekly D611a] (Gordo, J., concurring in result only) ("express[ing] concern"

that “predictability in application of newly amended rules and statutes remains elusive -- if not imprecise under our current precedent.”).

1. The Federal Analysis

Many of the federal cases analyze the issue of temporal reach of a new law in the context of an appellate case. That is yet another nuance that must be teased out. In the case at bar, we are analyzing a new statute that applies to a case that has not yet been tried and in which no final judgment has been entered. This is unlike the question discussed in many of the federal cases, which ask whether to apply a new law passed during an appellate proceeding, after the entry of a final judgment below. With that distinction identified, a cursory review of the cases is still helpful.

In the context of an appeal, the general rule is that a court “is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Bradley v. School Bd. of Richmond,* 416 U.S. 696, 711 (1974); *Thorpe v. Housing Auth. of City of Durham,* 393 U.S. 268, 281 (1969) (“The general rule, however, is that that an appellate court must apply the law in effect at the time it renders its decision.”). “The same reasoning has been applied where the change was constitutional, statutory, or judicial.” *Thorpe v. Housing Auth. of City of Durham,* 393 U.S. 268, 282 (1969).

Bradley involved an award of attorneys' fees in a protracted school desegregation case. The suit was initiated as a class action in 1961, and in 1964 the trial court approved a “freedom of choice” plan and awarded nominal attorneys' fees of $75. *Id.* at 701. The plan was affirmed, the appellate court found no error in the nominal fee award, but the Supreme Court vacated the plan and remanded the case. *Id.* On remand, the trial court approved a revised “freedom of choice” plan that was agreed to by the petitioners. *Id.* That revised plan was in operation for about four years. *Id.* In 1968, while the plan was in effect, in a different case called *Green v. County School Board of New Kent County,* the Supreme Court held that the type of plan established in *Bradley* could not stand. *Id.* In 1970, the *Bradley* petitioners then moved for relief in the trial court in light of *Green. Id.* In addition to seeking a new plan, the petitioners also sought an award of reasonable attorneys' fees. *Id.* The trial court awarded counsel over $43,000 in fees between the date of the 1970 motion for fees and the date of the order, noting the absence of any explicit statutory authorization for fees in school desegregation cases but rooting its decision in its general equity power. *Id.* at 706. While the case was again before the appellate court and prior to its decision, Congress passed the Education Amendments of 1972, which granted federal courts the authority to award reasonable attorneys' fees in school desegregation cases. *Id.* at 709. The appellate court determined that the new law did not sustain the allowance of fees because there were no orders pending or appealable when the trial court initially made its fee award or when the new statute became effective. *Id.* at 710.

The Supreme Court began its analysis by “anchor[ing] [its] holding on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Id.* at 711. It then considered concerns raised in prior cases about the application of an intervening change in the law to a pending action, which it found countered on (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Id.* at 719-20. Finding that the nature and identity of the parties and the rights involved weighed in favor of application of the new law to the pending case, the court turned to the nature of the impact of the change in the law on those rights. *Id.* at 720-21. Concluding that the intervening change in the law did not alter the impact of the law on the parties' rights, the Court found (1) that the new statute did not create any new substantive obligation on the school board and (2) there was no indication that the Board would have changed its conduct so as to render the litigation unnecessary, if it could have foreseen the change in the law. *Id.* at 720-21.

Citing *Goldstein v. California,* 412 U.S. 546, 551-52 (1983) as an example, the *Bradley* Court acknowledged that the Legislature can expressly provide that a law has only prospective effect, and when it does so the courts follow that lead. *Id.* at 715 n.21. In *Goldstein,* the Court considered federal copyright statutes that were amended by Congress while a case was pending in state courts. *Goldstein,* 412 U.S. at 552. The Court rejected application of the amendment because the statute specifically provided that it was “to be available only to sound recordings ‘fixed, published, and copyrighted' on and after February 15, 1972, and before January 1, 1975, and that nothing

in Title 17, as amended is to 'be applied retroactively or (to) be construed as affecting in any way any rights with respect to sound recordings fixed before' February 15, 1972." *Id.* at 552.

After *Bradley,* the Supreme Court decided *Landgraf v. USI Film Products,* which established a two-step analysis for considering the temporal reach of a new statute. 511 U.S. 244 (1994). Then, in *Lindh v. Murphy,* 521 U.S. 320 (1997), the court added an additional step. Shortly after *Lindh* was decided, the Third Circuit summarized the *Landgraf* / *Lindh* framework in *Matthews v. Kidder, Peabody & Co., Inc.* as follows:

> First, we must look for an "unambiguous directive" from Congress as to the temporal reach of a statute. If one is found, we must follow it and our inquiry is done.
>
> In the absence of a clear statement from Congress, we must use normal statutory construction rules to determine if Congress manifested an intent to only apply a statute to future cases. Again, if we find an intent to not apply a statute retrospectively, our inquiry is done.
>
> If neither an express command in either direction nor an intent to apply a statute prospectively is found, we look at the effect that the statute will have. Does it have "retrospective effect," i.e., does it "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed?" Or, conversely, does the statute affect only prospective relief, or change procedural rules, or simply allocate jurisdiction among fora?
>
> If the statute does not have retroactive effect, we apply the usual statutory construction rules to determine whether it should be applied to pending cases.
>
> However, if the statute does have retroactive effect, we employ the strong presumption against applying a statute with retroactive effect to pending cases: At this point, only Congress's clear intent to apply the statute retrospectively will overcome the presumption.

161 F.3d 156, 161 (3d Cir. 1998) (Becker, C.J.) (internal citations and emphasis omitted).

Notably, the first step in the federal approach is to look for an "unambiguous directive" in the enactment. It is only after doing that that the federal courts consider the character of the new law. The case at bar highlights this as a material distinction in the analysis.

2. The Florida Approach

In Florida, the test is different. How the test has been articulated has, at times, created some uncertainty.

In *Arrow Air, Inc. v. Walsh,* the Supreme Court considered whether the private sector Whistle-Blower's Act, which became effective on June 7, 1991, could be applied retroactively to impose liability for an employee termination that occurred before the effective date. 645 So. 2d 422, 423 (Fla. 1994). Walsh, the terminated employee, alleged that he was fired on May 15, 1989, in retaliation for reporting safety violations and delaying a flight. *Id.* The trial court granted a motion to dismiss for failure to state a claim on the basis that Florida recognized no cause of action for retaliatory discharge at the time. *Id.* Walsh appealed and the Third District affirmed, but while it considered a motion for rehearing the private sector Whistle-Blower's Act took effect. *Id.* at 423-24. After asking for supplemental briefing, the Third District vacated its decision, reversed the dismissal of Walsh's complaint, and held that because the act was remedial it should be applied to Walsh's pending case on remand. *Id.* at 424.

On review of the Third District's ruling, the Supreme Court acknowledged that there is no presumption in favor of prospective application for remedial statutes; however, it held that the Whistle-Blower's Act was not properly characterized as remedial because it created a new cause of action. *Id.* In the absence of an express statement of legislative intent, the court underscored as a "well-established rule of statutory construction" that there is a "presumption against retroactive application of a law that affects substantive rights, liabilities, or duties." *Id.* at

425. It also underscored that the presumption against retroactivity cannot be overcome by the "mere fact that 'retroactive application of a new statute would vindicate its purpose more fully.' " *Id*.

In *State Farm Mutual Auto Insurance Company v. Laforet,* the Supreme Court held that the Legislature does not have the last word on characterization of a statute as procedural or remedial. 658 So. 2d 55, 59 (Fla. 1995) [20 Fla. L. Weekly S173a]. More importantly, it held that courts may override even a clear expression of intent about temporal reach if it would violate constitutional protections to give effect to that intent. *Id.* In that case, the Court considered whether newly created section 627.727(10), Florida Statutes, was a remedial statute that should be applied retroactively. *Id.* The enacting legislation provided that:

> [t]he purpose of subsection (10) of section 627.727, Florida Statutes, relating to damages, is to reaffirm existing legislative intent, and as such is remedial rather than substantive. This section and section 627.727(10), Florida Statutes shall take effect upon this act becoming a law and, as it serves only to reaffirm the original legislative intent, section 627.727(10), Florida Statutes, shall apply to all causes of action accruing after the effective date of section 624.155, Florida Statutes.

Id.at 60 (quoting Ch. 92-318, § 80, Laws of Fla.). Because section 624.155 was originally enacted in 1982 and the amendment passed in 1992, the implementing language was interpreted as a clear intent to apply the statute retroactively. *Id.* at 61.

Though the "general rule [is] that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, [and a] procedural or remedial statute is to operate retrospectively," and despite its recognition that the Legislature labeled the statute as remedial and clearly intended to apply the statute retroactively, the Court nevertheless held that the statute could not be applied retroactively. *Id.* In reaching that conclusion, it opined that the statute was, "in substance, a penalty" and "[j]ust because the Legislature labels something as being remedial" that "does not make it so." *Id*.

In *Smiley v. State,* the Supreme Court underscored the importance of constitutional concerns when analyzing temporal reach. 966 So. 2d 330 (2007) [32 Fla. L. Weekly S303b]. It determined that section 776.013, Florida Statutes (2005) did not apply to cases pending at the time the statute became effective. *Id.* at 332. Section 776.013 expanded the right of self-defense by specifically creating "no duty to retreat" in certain situations where deadly force can be used immediately without the need to first retreat. *Id.* at 334. The bill provided that "[t]his act shall take effect October 1, 2005" and the statute carried an effective date of October 1, 2005. 2005 Fla. Sess. Law. Serv. Ch. 2005-27; Fla. Stat. § 776.013.

The defendant, Smiley, was charged with murder in the first degree following a shooting on November 6, 2004. *Smiley,* 996 So. 2d at 332. Smiley claimed self-defense. *Id.* The trial court granted Smiley's request for certain jury instructions based on the new statute, and the State sought review through an emergency petition for writ of certiorari to the Fourth District. *Id.* at 332. The Fourth District held that section 776.013, Florida Statute, does not apply to conduct committed prior to the October 1, 2005 effective date and for that reason, Smiley was not entitled to the jury instructions he requested. *Id.* It further concluded that because the statute was a substantive amendment to Section 775.01, Florida Statutes, it would violate article X, section 9 of the Florida Constitution if it were given retroactive application. *Id.* at 333. Moreover, it found that section 776.013 "was not remedial, which would permit retroactive application" because it created a new right to self-defense with no duty to retreat. *Id*.

The *Smiley* court acknowledged the distinction between changes in statutory law as opposed to decisional law. *Id.* Recognizing that its precedent in *Witt v. State,* 387 So. 2d 922 (Fla. 1980) did not apply because *Witt* only determines when a change in decisional law applies retroactively, the court explained that "a different analysis must be applied to determine the question of whether a change in the *statutory law*, such as section 776.013, should receive retroactive application." *Id.* at 334.

Next, *Smiley* provided that "[i]n the analysis of a change in statutory law, a key determination is whether the statute constitutes a procedural/remedial change or a substantive change in the law." *Id.* Because remedial statutes or statutes relating to modes of procedure[3] "do not create new or take away vested rights" and "only

operate in furtherance of the remedy or confirmation of rights already existing" they "do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes." *Id.* (citing *City of Lakeland v. Catinella,* 129 So. 2d 133, 136 (Fla. 1961)). In the case of a remedial statute, there is no presumption in favor of prospective application and "whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislation's intended purpose." *Id.* Finding that section 776.013 significantly changed the affirmative defense available, the *Smiley* court concluded that the change in the law was substantive. *Id.* at 336.

Because section 776.013 was substantive, a presumption of prospective application arose and led to two interrelated inquiries: (1) was there clear evidence of legislative intent to apply the statute retroactively; and (2) if the legislation clearly expresses an intent that it apply retroactively, whether retroactive application constitutionally permissible. *Id.* at 336. Because article X, section 9 provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed" the *Smiley* court determined that it was not necessary to address whether there was legislative intent to apply the statute retroactively, because it would be "constitutionally impermissible" to do so. *Id.* 336-37.

In *Old Port Holdings, Inc. v. Old Port Cove Condominium Association One, Inc.,* the Supreme Court considered whether a right of first refusal was invalid under the rule against perpetuities. 986 So. 2d 1279 (Fla. 2008) [33 Fla. L. Weekly S478a]. Without addressing the substantive/procedural distinction[4], the court held that because the statute did not evidence an intent that it apply retroactively the statute, it did not operate retroactively. *Id.* 1284.

In *Massey v. David,* the Supreme Court considered the constitutionality of a statute limiting recovery of expert witness fees. 979 So. 2d 931 (Fla. 2008) [33 Fla. L. Weekly S264a]. It recognized its past precedent on whether a matter is substantive or procedural:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their person and property. On the other hand, practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof.' " It is the method of conducting litigation involving rights and corresponding defenses.

Id. at 936-37 (quoting *Haven Fed. Sav. & Loan Ass'n v. Kirian,* 579 So. 2d 730, 732 (Fla. 1991)).

In *Menendez v. Progressive Express Insurance Company, Inc.,* the Supreme Court considered whether a 2001 amendment to the Florida's Motor Vehicle No-Fault Law -- specifically, the personal injury protection ("**PIP**") statute, which created statutory pre-suit provisions -- constituted a substantive change in the statute. 35 So. 3d 873, 874 (Fla. 2010) [35 Fla. L. Weekly S222b]. In that case, Cathy Menendez was injured in a car accident on her way to work. *Id.* at 875. After the date of the accident, the Legislature amended the PIP statute to require the pre-suit notice. *Id.* After a period of negotiation, but without complying with the new pre-suit provision, she sued Progressive when it failed to pay PIP benefits. *Id.* The trial court granted summary judgment in favor of Menendez, but the Third District reversed on appeal because, *inter alia*, Menendez failed to comply with the pre-suit provision. *Id.* at 874.

The Court concluded that the Legislature did intend for the statute to apply retroactively, but "even where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty." *Id.* at 877. Comparing the amended statute to the prior version, the amended version imposed a new penalty, implicated attorneys' fees, granted the insurer additional time to pay benefits, and delayed the insured's right to institute a cause of action. *Id.* The Court determined that because the amended statute allowed an insurer to avoid an award of attorneys' fees and delay payment to the insured were substantive changes to the statute, as was the

postponement of the insured's ability to bring suit for overdue benefits. *Id.* at 879. For those reasons, the Court concluded that the statutory pre-suit notice provision was substantive, not procedural, and should not be given retroactive application. *Id.* at 880.

In *Florida Insurance Guaranty Association, Inc. v. Devon Neighborhood Association, Inc.,* the Florida Supreme Court considered whether a 2005 amendment to section 627.7015, Florida Statutes applied retroactively. 67 So. 3d 187, 193 (Fla. 2011) [36 Fla. L. Weekly S311a]. In that case, Devon Neighborhood Association ("**Devon**") made a claim for hurricane damage under a commercial residential insurance policy issued in 2004. *Id.* at 189. Devon timely filed a claim with its insurer after damage during Hurricane Wilma in 2005. *Id.* at 190. Devon's insurer became insolvent, so the Florida Insurance Guaranty Association ("**FIGA**") stepped in and assumed responsibility for the claim. *Id.* After Devon filed suit against FIGA, FIGA answered and demanded an appraisal. *Id.* Devon objected to being required to participate in the appraisal process because it had not been provided a notice of the availability of mediation, which was a requirement imposed by a 2005 amendment to section 627.7015, Florida Statutes. *Id.* FIGA argued that the 2005 amendments could not be applied retroactively to the claims under Devon's 2004 policy, the trial court agreed with Devon and denied FIGA's motion to compel the appraisal. *Id.* FIGA took an appeal to the Fourth District, which affirmed the trial court. *Id.* at 191.

On review of the Fourth District's ruling, the Florida Supreme Court noted that the amendments to the statute made two important changes that were effective July 1, 2005. *Id.* at 192. First, the amendments applied a mediation alternative and notice requirement that, prior to the amendments, had not applied to commercial residential insurance policies. *Id.* Second, the amendments added the requirement that if the insurance company failed to provide notice of mediation, then the insured was not required to participate in the appraisal process. *Id.*

The Supreme Court reversed the Fourth District because it failed to apply the correct two-prong test required by the precedent. *Id.* at 194. In doing so, it elaborated on the proper method for analysis of the temporal reach of a statute that is silent as to retroactivity. First, it considered the fact that the Legislature used differing effective dates for various sections, which "indicat[ed] careful thought by the Legislature as to when the various amendments would be given effect." *Id.* at 196. Despite the inclusion of an effective date, which "is considered to be evidence rebutting intent for retroactive application of a law," the Court found "no 'clearly expressed legislative intent' to apply section 627.7015, as amended, retroactively." *Id.* It further explained that, when there is no express legislative command that the statute be retroactive, it is appropriate to consider both the terms of the statue and its purpose when determining if it should be applied retroactively and "[t]his examination may also include consideration of the language, structure, purpose, and legislative history of the enactment." *Id.* at 196-97. The Court ultimately concluded that neither amounted to a sufficiently clear statement of legislative intent for retroactive application. *Id.* at 197. In reaching that conclusion, it rejected Devon's arguments that (1) the absence of a statement that the amendments were inapplicable to existing contracts constituted clear evidence of retroactive intent and (2) the inclusion of a provision in a separate section that stated that the provisions applied to policies entered into or renewed after October 1, 2005 meant that the Legislature necessarily intended some or all of the other provisions to be retroactive. *Id*.

In *Bionetics Corp. v. Kenniasty,* the Supreme Court considered whether the safe harbor provision of section 57.105(4), Florida Statutes, applied to cases where frivolous claims were filed before the safe harbor provision took effect. 69 So. 3d 943 (Fla. 2011) [36 Fla. L. Weekly S69a]. Concluding that the safe harbor provision did not apply in cases filed before the provision took effect, the Court considered the fact that section 57.105 previously awarded fees when there was "a complete absence of a justiciable issue of either law or fact raised by the losing party." *Id.* at 947. Amended as part of the 1999 Tort Reform Act, section 57.105's purpose was to reduce frivolous litigation and "decrease the cost imposed on the civil justice system by broadening the remedies" available when a claim or defense (but not necessarily the entire action) is meritless. *Id.* The statute was amended again in 2002 to add the safe harbor provision. *Id.* The *Bionetics* case was pending in trial court on July 1, 2002, when the safe harbor provision took effect. *Id*.

Considering the safe harbor provision, the *Bionetics* court determined that because it "does more than require the giving of notice" and "creates an opportunity to avoid the sanction of attorney's fees by creating the safe period for withdrawal or amendment of meritless allegations and claims," the provision was substantive. *Id.* at 948. Because "[s]ubstantive statutes are presumed to apply prospectively absent clear legislative intent to the

contrary," and given that the statute contained no clear expression of retrospective intent, the Court determined that the safe harbor provision should not apply. *Id.*

It explained that when a statute is found to be substantive, the analysis is (1) first, as a matter of statutory construction, whether the Legislature provided clear intent to apply it retroactively; (2) second, if the legislation expresses such a clear intent to be applied retroactively, whether retroactive application is constitutionally permissible. *Id.* (citing *Metro. Dade County v. Chase Fed. Hous. Corp.,* 737 So. 2d 494, 499 (Fla. 1999) [24 Fla. L. Weekly S267a]). "[T]o determine legislative intent as to retroactivity, this Court looks to both the purpose behind the enactment of the statute and the terms of the statute." *Id.* at 949. Finding that the purpose of the safe harbor provision "is 'to give a pleader a last clear chance to withdraw a frivolous claim or defense . . . or to reconsider a tactic taken primarily for the purpose of unreasonable delay,' " the court then turned to the language of the statute and its enacting legislation. *Id.* at 949. Because both were silent on the forward or backward reach of the safe harbor provision and the enacting legislation simply provided that "[t]his act shall take effect July 1, 2002," the court concluded that the provision applied prospectively only. *Id.* Because the statute was substantive and did not retroactively, the court found that it should not have been applied in pending cases. *Id.*

In *Love v. State,* the Supreme Court returned to the issue of temporal limits of a newly enacted statute in the context of Florida's Stand Your Ground Law. 286 So. 3d 177 (Fla. 2019) [44 Fla. L. Weekly S293a]. In that case, the trial court applied an analysis akin to the federal one. The Supreme Court's analysis in comparison to the trial court's highlights Florida's departure from the "text first" federal approach.

The question in *Love* was whether section 776.032(4), Florida Statutes (2017), which altered the burden of proof at pretrial immunity hearings, applied to pending cases involving criminal conduct alleged to have been committed prior to the effective date of the statute. *Id.* at 179. The bill provided that "[t]his act shall take effect upon becoming a law" and the statute carried an effective date of June 9, 2017. 2017 Fla. Sess. Law Serv. Ch. 2017-72; Fla. Stat. § 776.032.

The defendant, Love, was charged with attempted second-degree murder following an altercation on November 26, 2015 at a nightclub. *Id.* at 181. At the end of the altercation, Love shot the victim as he was about to hit her daughter. *Id.* When the State charged Love, she moved for immunity arguing that the newly enacted amendment in section 776.032(4) applied to her. *Id.* The State argued that section 776.032(4) did not have retroactive application and even if it did, application to pending cases was violative of article X, section 9 of Florida's Constitution and violated Florida's separation of powers. *Id.* Citing *Landgraf,* the trial court first looked to whether there was a clear expression of legislative intent regarding retroactivity. *Id.* Finding no such expression of intent, the trial court next looked to whether the statute was procedural/remedial or substantive. *Id.* Because burden of proof standards are normally considered procedural, the trial court applied the presumption that procedural/remedial statutes are applied to pending cases. *Id.* At that juncture, the trial court determined that (1) because section 776.032(4) created no substantive rights and merely changed the procedure by which a defendant enforces the statutory right to immunity, the statute was procedural; (2) the statute was not violative of article X, section 9 of Florida's Constitution; but (3) the statute infringed upon the court's rulemaking powers and therefore violated the separation of powers. *Id.* at 181-82. On that basis, the trial court held the defendant to a preponderance of the evidence burden of proof for the immunity hearing, following a prior Florida Supreme Court decision, *Bretherick v. State,* 170 So. 3d 766 (Fla. 2015) [40 Fla. L. Weekly S411a].[5] *Id.* The trial court determined that the defendant did not meet the *Bretherick* burden of proof and was no entitled to immunity. *Id.* at 182.

Love petitioned the Third District for a writ of prohibition. *Id.* The Third District denied the petition, but rejected the trial court's conclusions about the statute. *Id.* Recognizing that its decision conflicted with a decision from the Second District, the Third District certified conflict on the question whether section 776.032(4) applied to cases that were pending at the time the statute took effect. *Id.*

The Florida Supreme Court began by recognizing the sometimes-blurry line between substantive and procedural law. *Id.* at 183 ("At the outset, we recognize that sometimes '[t]he distinction between substantive and procedural law is neither simple nor certain.' ") (citing *Caple v. Tuttle's Design-Build, Inc.,* 753 So. 2d 49, 53

(Fla. 2000) [25 Fla. L. Weekly S76a]). It also acknowledged that "some of this Court's general pronouncements regarding the retroactivity of procedural law have been less than precise. Indeed, we acknowledge having been unclear about what it means to give retroactive application to procedural law." *Id.* at 184.

It thereafter concluded that "properly understood, the caselaw compels the conclusions that section 776.032(4) is procedural, applies to all immunity hearings on or after the statute's effective date, and does not implicate article X, section 9." *Id.* It also explained why *Smiley* did not control, pointed to *State v. Garcia*'s explanation of the concepts of procedural and substantive law in the criminal context, and recognized that in civil cases a statute is considered "substantive" if it "created a new substantive right or interfered with vested rights." *Id.* at 185. Because the substantive right to assert immunity was established in 2005, section 776.032(4) did not create a new substantive right and instead "merely altered the 'method of conducting litigation involving' that right," the statute was not substantive. *Id.* at 186. Moreover, the burden of proof in other contexts had been considered procedural in nature and the Supreme Court had repeatedly referred to Stand Your Ground immunity determinations as matters of procedure. *Id*.

After analyzing the statute as procedural, the Court turned to the issue of retroactivity and clarified that, "properly understood, whether a new statute applies in a pending case will generally turn on the posture of the case, not the date of the events giving rise to the case." *Id.* at 186-87. Importantly, "if the new procedure does apply, that is not in and of itself a retrospective application of the statute." *Id.* at 187 (citing *Landgraf,* 511 U.S. at 269-70) ("*Landgraf* generally explained the concept of a retrospective statute: 'A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.' "). Because section 776.032(4) "in no way 'attaches new legal consequences to events completed before its enactment,' " the statute was not truly retrospective even if applied to a pending case. *Id.* (citing *Landgraf,* 511 U.S. at 275) ("procedural matters generally -- but not always -- do not 'rais[e] concerns about retroactivity' " because there are diminished reliance interests in matters of procedure and rules of procedure "regulate secondary rather than primary conduct").

The *Love* court then went on to clarify that its holding "does not mean that a new procedure applies in all pending cases. Rather, the 'commonsense' application of a new procedure generally 'depends on the posture of the particular case.' " *Id.* at 187. For example, a new rule that governed the filing of complaints would not apply in a case where the complaint had already been filed. *Id.* at 188 (quoting *Landgraf,* 511 U.S. at 275 n.29). Similarly, a new rule of evidence would not require an appellate remand for a new trial. *Id.* It cited its prior ruling in *Lee v. State,* 174 So. 589, 591 (1937), where it dismissed as untimely an appeal brought outside the period established in a statute that took effect after the alleged date of the crime but before a judgment of conviction was entered, even though the statute was "plainly intended to have a prospective operation only," because the statute was procedural in nature. *Id.* In *Lee,* "prospective operation" meant that the new statutory time limit applied to writs of error rendered after the statute became effective. *Id.* at 188. And its decision in *Pearlstein v. King,* 610 So. 2d 445, 445-46 (Fla. 1992), concluded that a new rule giving a 120-day time limit to serve a defendant after initial filing of the complaint should have "prospective application" because it was a rule of procedure, but that "prospective application" meant that the rule applied to complaints filed before the effective date of the rule, but the 120 days ran from the effective date of the rule rather than the date of filing. *Id*.

C. Constitutional Logic

Although *Love* shows that it does, no one has presented a case that details *why* Florida has a different analysis of temporal reach than the federal system. But one explanation for the difference is that the federal judicial branch looks to the United States Constitution, and not the Florida Constitution.

There is no reason to assume that Florida charted its own course by accident. In fact, it is imminently logical for Florida to have chosen to analyze temporal reach differently: Florida courts are considering the Florida Constitution. United States Supreme Court Justices owe fidelity to the United States Constitution alone; typically, they need not even think of the Florida Constitution when they decide federal cases. Only judges in Florida proclaim fidelity to the Florida Constitution. *See* Clint Bolick, *Principles of State Constitutional Interpretation,* 52 Ariz. St. L. J. 771, 780 (2021); *see also id.* (noting that if state court judges do not enforce the

protections of the state constitution, “who will?” and “if we subordinate state constitutional protections to federal constitutional jurisprudence, we risk sacrificing liberties that were important to our state constitution's framers.”). “By both content and their role in our federalist republic, state constitutions are freedom documents. In addition to containing protections for individual rights and constraints on government power that are similar to the national constitution, they contain additional protections that are completely unknown to the United States Constitution.” *Id.* at 773.

Florida can -- and does -- guarantee greater protections in its Constitution than can be found in the United States Constitution. One example of that is the separation of powers. The United States Constitution separates powers between the three branches of government, of course, but Floridians took separation of powers one step further. In Florida, “no person belonging to one branch shall exercise any powers appertaining to either of the branches unless expressly provided” by the Florida Constitution. *See* art. II, sec. 3.[6] Put simply, in Florida the conception of separation of powers it is not *just* that three branches have different powers and roles in the government. It is also that each branch is *constitutionally prohibited* from exercising powers that belong to the other two.

Article V, section 1 of Florida's Constitution allocates “judicial power” in the judicial branch. Article V, section 2 explains that the judicial power includes the adoption of “rules for the practice and procedure in all courts.” Article II, section 3 then operates as a prohibition on legislative encroachment on those powers. So, as a matter of Florida Constitutional law, the Legislature is *constitutionally prohibited* from trumping the judicial branch on the issue of temporal reach of a statute that is about “practice and procedure in [the] courts.” It is not an act of judicial restraint for a Florida judge to meekly comply with the Legislature's direction on temporal reach of a procedural statute. In a case like this one, it would violate the Florida Constitution to do so. The situation is not the same in the federal system, where it is not so clear that there cannot be two cooks in the kitchen.

That is not to say that this is the reason why Florida has a different framework. Perhaps there is some other explanation. But, whatever the reason, there is constitutional logic to Florida's approach.

D. Application of Florida's Temporal Reach Analysis to This Case

If Plaintiffs were correct that the Statute is substantive (but they are not), the threshold question would have been whether there is clear evidence of legislative intent to apply retroactively. The answer to that question is, of course, no. We know what it looks like when the Legislature gives the court a clear expression of intent for a statute to apply retroactively, and there is nothing like that in the Act. The effective date itself arguably would tell us all we need to know. *See Devon,* 67 So. 3d at 196 (“the Legislature's inclusion of an effective date for an amendment to be considered to be evidence rebutting intent for retroactive intent of a law.”). Add to that the language in the enacting legislation and what more would there be to say?

The problem is that Plaintiffs are wrong about the nature of the Statute. While life was breathed into the Statute by broader tort reform legislation that may have substantive components[7], this is not one of the substantive parts. The Statute is either procedural or a hybrid of procedural/remedial.[8] And the Florida rubric on temporal reach of procedural and remedial statutes is to apply them so long as it makes sense to so do given the case's posture.

A reasonable way to double-check the conclusion that this statute is not substantive is this: If we could give Sharon Sapp and Kristy Chaney a time machine that transports them to the moment in time right after this unfortunate accident occurred, is there some obvious thing that they would have done differently? Plaintiffs have not argued that there is, so this exercise is blind. But if they were injured, they would still get medical care as they in fact did. And they would still ask the jury to award them the cost of their past and future medical care, as they plan to do here. It seems like the only material benefit the time machine would give them is an understanding of the amount and quality of the evidence the jury would have to consider about the reasonableness of the cost of that care. But does the Statute deprive Plaintiffs of an opportunity to address the evidence of medical damages with the jury, and argue to the jury that some evidence should be disregarded or given less weight for one reason or another? Not really. And keep in mind, they have always been required to mitigate their damages.

Further on this effort to double-check the conclusion that the Statute is not substantive, the Statute does not eliminate Plaintiffs' cause of action for negligence. It does not shorten the time for them to file their cause of action. It does not add, delete, or change the core elements of the claim; they are still duty, breach, causation, and harm. It does not prohibit recovery for past medical expenses they have already paid, or prevent them from seeking recovery for unpaid charges for medical treatment or services.

What the Statute really accomplishes is a change in the form, manner, or means by which a plaintiff may prove up their claim for medical expenses, paid and unpaid. And, in a sense, it modifies the form, manner, or means by which the defense can prove up its affirmative defense of failure to mitigate damages. Issues regarding proof are generally procedural. *See*, *e.g.*, *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002) [27 Fla. L. Weekly S710a]. And in this instance, it is quite clear that the statute relates to the means and methods to prove (or disprove) the issue of damages. *See DeLisle v. Crane Co.*, 258 So. 3d at 1224; *Bionetics Corp.*, 69 So. 3d at 948.

If the pertinent parts of the Statute are anything other than procedural, they are part procedural and part remedial. The extent to which they are remedial is to the extent to which they clarify or right-size the means and methods by which an existing claim or defense may be proven. Or, they are remedial to the extent to which the statute prevents the jury from being misled about what it takes to make plaintiffs whole.

Because the Statute is either procedural or procedural/remedial, the concept of retroactivity -- and the general rule against retroactive application -- does not apply, as a matter of law. The precedent tells us that the remaining issue is just whether the posture of the case suggests that it is appropriate to apply the new statute.

The posture of this case is as follows. It was filed on June 15, 2017, just shy of six years before the statute was enacted. The auto accident occurred on June 9, 2014. At the pretrial conference held on April 11, 2023, discovery was complete and the case was ready for trial. However, Plaintiffs moved for a continuance of the trial when the Court granted certain defense motions in limine that also relate to the issue of past medical expenses.[9] The continuance was granted. There is now more time for discovery, if anyone needs it. Because of this posture, common sense weighs in favor of application of the statute. Presentation of evidence consistent with the Statute would not unfairly prejudice either party. And allowing other evidence regarding past medical expenses in the manner allowed by the Statute would not put this case into “reverse” in the manner contemplated by the precedent.

An additional argument made by Plaintiffs must be addressed. They have argued that the Statute impairs their right of contract under the Letters of Protection. They cited to *Manning v. Travelers Ins. Co.* for that proposition. 250 So. 2d 872 (Fla. 1982). There are two reasons why *Manning* does not compel denial of the Motion.

First, the case does not quite stand for the cited proposition. In *Manning,* the Florida Supreme Court said this about the Mannings' argument that a new statute impaired their contractual rights with an insurance company: “[w]e [are not] impressed with appellants' argument that the statute impairs the obligation of the contract between Travelers and appellants. In order for a statute to offend the constitutional prohibition against enactment of laws impairing the obligation of contracts, the statute must have the effect of rewriting antecedent contracts, that is, of changing substantive rights of the parties to existing contract.” *Id.* at 874. It went on to say that “[t]he guaranty of liberty of contract *was never intended to* withdraw from legislative supervision the making of contracts or *deny to the government the power to provide restrictive safeguards.* The instant statute is an example of the Legislature's *legitimate* concern with insurance contracts.” *Id.* (emphasis added). And although Plaintiffs characterize *Manning* as dealing with retroactivity, that may have been a typographical error. *Manning* does not address retroactivity. *See generally id.*

Second, looking at what *Manning does* say -- which is that statutes that impermissibly impair contractual obligations are ones that “change the substantive rights of the parties to an existing contract” -- Plaintiffs have not adequately explained how this statute impairs their substantive contractual rights. And they have not adequately explained how the statute impairs the rights of their providers, either.

A satisfying reality about America's system of laws is that, more often than not, the law is genuinely fair and reasonable when time is taken to really consider it. On temporal reach, that seems to be true. There is constitutional logic behind the exacting analysis of new substantive statutes that simply does not apply to procedural or remedial statutes. Some of that ties to the constitutional prohibition on legislative enactments *ex post facto*. The concept of an *ex post facto* law technically only exists in a criminal context, but we do not shut off our traditional notions of fairness and due process when we consider substantive changes in the civil law. So, though we talk about "retroactive" application of substantive statutes, the law on temporal reach of new substantive civil statutes is the same concept behind the *ex post facto* prohibition in the criminal context.

To illustrate this, let's consider fraud. Fraud is both a civil and criminal construct but we can focus on the civil cause of action. Its elements are generally (1) a representation, (2) made by someone who knows that it's really not true, (3) the representation is intended to induce the listener to rely on the untrue statement, and (4) damages.

Now let's consider a hypothetical. On Monday, when all four elements listed above were required for a cause of action for fraud under Florida law, John has a conversation with Ann and asks Ann to give him money for a friend in need. He tells a very sad story about the friend, and details why the friend desperately needs the money. John knows what he is saying is not true. But Ann does not have any money and, despite her compassion for John's friend, she cannot give John the money he requests. On Tuesday, a new fraud statute takes effect. Under that new statute, proof of damages is no longer required to sustain a cause of action for fraud. Although the statute was enacted on Tuesday, the effective date of the statute is Monday (the day of John's conversation with Ann). And just to be very clear about its intent, the Legislature provides that "this act shall be applied retroactively to any acts of fraud committed on or after Monday." Ann finds out that John's story was false and she brings a claim against John under the new statute, alleging that she was defrauded by his statements on Monday. That is an example of a substantive change in a statute, a clear expression of retroactive intent, and a basis for the Court to refuse to apply the statute retroactively. After all, if Ms. Sapp and Ms. Chaney lent John their time machine, he could have avoided the conversation with Ann. The reason this statute is substantive is that it changes what made John liable for fraud. And the constitutional problem is that people have a right to make decisions knowing what the law is. And if the law of fraud would not have held John liable on Monday, how could he be liable on Tuesday?

Now, let's change the hypothetical. Again, there is a new statute but in this hypothetical the elements of fraud do not change; the new statute modifies what evidence Ann can offer at trial to prove it. John has the very same conversation with Ann on Monday. This time, Ann even gives him the money. On Tuesday, the statute changes. Ann sues John. At trial, the court considers a motion in limine that seeks to apply the new statute. This is an example of a procedural change in a statute, and a situation where the trial court must decide whether it makes sense to apply the statute given the status of the case.

Although imperfect, the hypotheticals demonstrate the difference in substantive and procedural changes. There is a "gotcha" problem in the first hypothetical that does not exist in the second. Perhaps Ann cannot introduce some form evidence that would have assisted in proving up her fraud claim, but she can still use other evidence. It may be frustrating to her, but there is no vested right in procedure.

Because we are not dealing with the same "gotcha" concerns that are the heart of the *ex post facto* prohibition, when we deal with procedural and remedial measures neither the concept of retroactive law nor the rule against retroactive application will apply in those instances.

By definition, a procedural law does not affect rights or behavior that it would be unfair to change after the fact. Because there is not the same specter of unfairness and inconsistency with ordered liberty, when the Legislature passes a law that changes a means or method of procedure, then the court will apply that change to pending cases if the courts decide that it would make sense to do so in the exercise of ordinary common sense.

III. Conclusion

People doubt institutions these days, and one of Plaintiffs' arguments asserted that anything but a ruling in their favor would "do violence" to the law. While Plaintiffs' passion is understandable given the moment we are in,

the significance of these issues, and the relative ease of comprehending their position, for the reasons stated here Plaintiffs are wrong. No "violence" is done here.

The Court cannot make decisions driven by concern over how the parties will feel. However, when the issues are challenging (and, equally critical, time somehow permits) one way the Court can demonstrate respect for everyone involved is to give a fulsome explanation of its thought process. Without it, someone could be left to wonder if the Court is "ignoring the text" or "legislating from the bench." Both of those things would be wrong to do. The analysis here demonstrates that neither happened.

As a constitutional matter, the judicial branch cannot be led by the legislative branch's direction on temporal application of a procedural law. And it is a fundamental principle of statutory construction that "when a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that *preserves* to the meaning that *destroys*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 66 (quoting *Panama Refining Co. v. Ryan,* 293 U.S. 388, 439 (1935) as a preface to the fifth fundamental principle of statutory interpretation)(emphasis added). In the Act, Section 30 is susceptible to the construction that it was the Legislature's effort to make clear that the substantive portions of the Act should not be applied retroactively. After all, the Legislature legislates on the background of judicial branch precedent, which alerts the Legislature that courts will (1) look for direction on retroactivity when the matter is substantive but (2) if the matter is procedural, it will be applied when the court decides it makes sense to do so. This interpretation of the enactment gives it meaning without finding it unconstitutional.

Moreover, this decision is guided by Florida law on temporal reach of a statute. The precedent is replete with examples of the judicial branch saying "not so fast" when the Legislature provides temporal reach direction that, if followed, would be constitutionally violative. Those cases were decided for the same fundamental reason as this one: the Legislature's role in articulating the will of the people is held in check by the judicial branch's role in enforcing constitutional restraints on legislative action.

It is not activism to give the people of the State of Florida the form of government that the Florida Constitution promises them. It is activism to give them anything else.

Accordingly, it is now

ORDERED and **ADJUDGED** that:

1. The Motion is **GRANTED.**

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[1]As of the rendition of this Order, section 768.0427, Fla. Stat. constitutes only *prima facie* evidence of the law. The enrolled act, Chapter 2013-15, stands as the official and primary evidence of the law as enacted by the Legislature. *See generally, Shuman v. State,* 358 So. 2d 1333, 1338 (1978) (discussing the status of legislation enacted by the Legislature and reduced to statutory form by the statutory revision division, prior to adoption by the Legislature).

[2]And dispositive.

[3]In *Cantinella,* the Court equated "procedural" and "remedial" statutes, at least for analytical purposes:

> Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or a general rule against retrospective operation of statutes.

129 So. 2d at 136. *Cantinella* involved a controversy between multiple workman's compensation carriers over which was responsible for a claimant's injuries. *Id.* at 134. A newly amended statute, which took effect after the

claimant's injuries were suffered but before the controversy between carriers arose, was construed to be procedural and applied to the pending case. *Id.* at 136-37. The text of the enacting legislation was not an issue in *Cantinella.*

[4]Perhaps this was a non-issue in that case.

[5]In enacting section 776.032(4), Fla. Stat., the Legislature responded to the rule laid down by the *Bretherick* majority by, in essence, adopting the *Bretherick* dissent but with a "clear and convincing' burden as opposed to the "beyond a reasonable doubt" burden. The *Bretherick* dissent was authored by Justice Canady, who also authored *Love.*

[6]"The cornerstone of American democracy known as separation of powers recognizes three separate branches of government -- the executive, the legislative, and the judicial -- each with its own powers and responsibilities. In Florida, the constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches: 'Branches of Government -- The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.' " *Bush v. Schiavo,* 885 So. 2d 321, 329 (Fla. 2004) [29 Fla. L. Weekly S515a] (quoting the Florida Constitution).

[7]The nature of the entirety of the act -- or any component part of it, other than section 768.0427 -- is not before the Court. The Motion does not call for an analysis of how other various parts of may be characterized, and no effort is made here to do so.

[8]For the purposes of this case, it does not matter whether the Statute is procedural or a hybrid procedural/remedial because the distinction is non-dispositive.

[9]It is important to note something about the posture of this case. In early 2021, the Florida Supreme Court directed all circuit courts to promulgate an administrative order that establishes a plan to differentiate case management for all cases. In compliance with that directive, the Chief Judge of the Thirteenth Circuit entered an Administrative Order that established the Thirteenth Circuit's Differentiated Case Management ("**DCM**") process. For cases like this one that were filed on or before April 30, 2021, counsel were given the choice to either (1) enter into the DCM process by providing an agreed-upon fact discovery deadline that would be used by the court to compute all other deadlines in the case or (2) set the case for trial using the uniform trial order that had been used for quite some time in the Thirteenth Circuit, but was rendered obsolete for cases in the DCM process. The court entered an order directing counsel to set the case for trial or set a case management conference. Counsel set a case management conference and it was held on June 28, 2021. At that case management conference, Plaintiff reported that the case probably required 7-8 days for trial and for that reason, available one-week trial dockets would not accommodate the case. Plaintiff reported, however, that the case could be set for trial in January 2022, which was a longer docket. A trial order for the January 2022 trial docket does not appear in the file, perhaps because Plaintiffs did not submit one. But in any event, in October of 2021, Plaintiffs filed an unopposed motion to continue the trial to September 2022, which was granted. In the December 3, 2021 order granting the continuance, Plaintiffs were directed to upload a new trial order. For whatever reason, Plaintiffs do not appear to have done this until April 2022, and that trial order set the case for trial in May 8, 2022, not September 2022.

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