

Succeeding Under Florida Tort Reform's Section 768.0427
Article #9 – The Minority view that Subsection (2)(b) Evidence is a New
Element of the Prima Facie Case is Waining (but Not Yet Dead)

This is the ninth article in a series that lights the way to success under Florida Tort Reform's Section 768.0427. This article updates Article 7 and focuses on the conflicting trial court orders that address the question of whether subsection (2)(b) evidence is actually a new element of the prima facie case.

The conflicting orders center on the heart of the statute – Subsection (2)(b) – which states:

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.

Four subsections within subsection (2)(b) describe the admissible evidence applicable to the various scenarios regarding the availability and use of commercial health insurance, Medicare, Medicaid, and sales of medical bills. The fifth subsection is a catchall for any other evidence tending to establish reasonableness.

The majority view is that the statute is evidentiary only and that the “shall” means that the court must admit the subsection (2)(b) evidence that is presented – not that the plaintiff must present all the subsection (2)(b) evidence. The minority view intermixes three slightly different concepts: (1) subsection (2)(b) evidence is a new element to the prima facie case – i.e. that Section 768.0427 is a “cause-of-action” statute, (2) presentation of the subsection (2)(b) evidence is a condition precedent to “boarding” the bills, and (3) the plaintiff bears the burden of introducing the subsection (2)(b) evidence. Because a plaintiff's failure to comply with any of these types of minority orders would likely lead to a directed verdict, the minority view is best construed as “subsection (2)(b) evidence is a new element to the prima facie case.”

The majority orders present a plethora of reasons that each independently support the view. These include: (1) the statute is titled “admissibility of evidence” and all sections discuss admissibility and discovery, (2) the Legislature uses certain express language in “cause-of-action” statutes and did not do so here, (3) nothing in the statute alters the common law that the prima facie case is satisfied by a plaintiff's own testimony that the bills are reasonable, (4) the minority view is unconstitutional because it is in derogation of this common law and the statute does not meet the procedural requirements required to abrogate common law, (5) the “shall” followed by “but not limited to” means the statute is a directive of admissibility to the courts to admit what is introduced – not a list of all the things that a plaintiff must introduce, (6) if the subsection (2)(b)(5) catchall of “any evidence of reasonable amounts” does not satisfy the “shall,” then that subsection has no field of operation, (7) the minority view renders the statute absurd because it requires a plaintiff to

present unobtainable evidence (what “health care coverage is obligated to pay”) and unknowable evidence (the amount at which future bills “could be satisfied”), and (8) the minority view renders the statute absurd because one of the items a plaintiff “shall” present is the subsection (2)(b)(5) catchall of “any evidence of reasonable amounts,” which means a plaintiff must present every conceivable piece of evidence both establishing and contradicting the reasonableness of the bill.

The minority orders provide little more reasoning than to say that a plaintiff always has the burden to establish reasonableness of bills and thus, the “shall” means that the plaintiff must submit all the subsection (2)(b) evidence in order to meet that burden.

As of March 13, 2026, the “score” is 53 to 33 in favor of the majority view that the statute is merely evidentiary and does not create a new element to the prima facie case. Fortunately, the majority is trending – in 2026, the “score” is 14-3. In your motions in limine, make all the arguments discussed in the majority orders summarized above.