IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DOROTHY M. RUSSUM,	:	
	:	C.A. No: K13C-03-022 RBY
Plaintiff,	:	
	:	
v.	:	
	:	
IPM DEVELOPMENT PARTNERSHIP LLC, a Delaware limited liability company, and SILICATO COMMERCIAL REALTY, INC., a Delaware corporation,	:	
	:	
Defendants.	:	

Submitted: July 7, 2015
Decided: July 15, 2015

Upon Consideration of Defendants' Motion in Limine to Limit the Medical Expenses of Plaintiff
GRANTED

ORDER

William D. Fletcher, Jr.,Esquire, Schmittinger & Rodriguez, P.A., Dover, Delaware for Plaintiff.

Christopher T. Logullo, Esquire, Chrissinger & Baumberger, Wilmington, Delaware for Defendants.

Young, J.

Russum v. IPM Development Partnership, LLC, et. al.
C.A. No. K13C-03-022 RBY
July 15, 2015

SUMMARY

Dorothy Russum ("Plaintiff") alleges she was hurt, following a slip and fall incident on a ramp in front of a retail store in Dover, Delaware. The premises were leased from IPM Development Partnership, LLC ("Defendant IPM") and managed by Silicato Commercial Realty, Inc. ("Defendant Silicato," and together with IPM, "Defendants").[1] Plaintiff retained the services of a certified engineering expert, who opined that the dangerous slope of the ramp caused Plaintiff to slip and fall. In addition, Plaintiff presents the expert report of her treating physician, who links the injuries sustained to the alleged incident on Defendants' premises. Thus far, Plaintiff's medical expenses have been covered by her insurer, Medicare.

By Order dated May 21,2015, this Court stayed consideration of Defendants' motion in limine to limit Plaintiff's medical care damages to costs actually incurred by Medicare, rather than the full amount charged. The stay was ordered pending the Delaware Supreme Court's *Stayton* decision,[2] in which dispositive issues of first impression concerning the Defendants' motion were being considered. Chiefly, the question of whether the collateral source rule applies to Medicare write-offs was at issue. On June 12, 2015, the Supreme Court issued its *Stayton* ruling. For the reasons that follow, the Court **GRANTS** Defendants' previously stayed motion in limine.

FACTS AND PROCEDURES

On April 21, 2011, Plaintiff purportedly sustained injuries resulting from a

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[1] Big Lots Stores, Inc. ("Big Lots") was previously a Defendant in this matter. By Order dated May 21, 2015, Big Lots was dismissed as a party to this case.

[2] *Stayton v. Delaware Health Corp.*, 2015 WL 3654325, at *1 (Del. Jun. 12, 2015).

slip and fall accident while on Defendants' business premises. On March 18, 2013, Plaintiff filed a Complaint against Defendants seeking damages. Among the damages sought are medical expenses, which have been covered by Plaintiff's insurer, Medicare.

Plaintiff's medical expert in this case is Dr. Richard P. DuShuttle ("Dr. DuShuttle"). Dr. DuShuttle has been Plaintiff's treating physician, following her alleged accident. Dr. DuShuttle prepared a report, dated November 20, 2014. In it, Dr. DuShuttle diagnoses Plaintiff with lumbosacral strain, sciatica, and lumber spine stenosis, all of which, he opines, was asymptomatic until aggravated by Plaintiff's purported fall. Dr. DuShuttle's report also concludes that Plaintiff is a candidate for surgery, and other continuing, future treatment to remedy her injuries.

On May 21, 2015, this Court stayed consideration of Defendants' motion in limine regarding healthcare expenses above the amounts actually paid by Medicare, pending the Delaware Supreme Court's decision in *Stayton*. Following the Supreme Court's decision in that case, this Court invited the parties to submit supplemental briefing concerning the previously stayed motion.

DISCUSSION

By its May 21, 2015 decision, this Court stayed consideration of Defendants' motion in limine concerning Plaintiff's medical expenses above that which were *actually* paid by, rather than charged to, Plaintiff's insurer, Medicare. By their motion, Defendants sought to limit the expense to only the amount paid, roughly $2,400.00. At the time, pending before the Delaware Supreme Court was the *Stayton*

v. Delaware Health Corp. case, which considered, as a matter of first impression, whether the collateral source rule was applicable to medical expenses that were written-off by Plaintiff's medical provider, as federally mandated by the Medicare program.[3] The Supreme Court found that the collateral source rule did not apply to amounts written-off by Medicare.[4] Defendants reassert their prior position, citing to the Supreme Court's *Stayton* decision as support.

The collateral source rule provides that tortfeasors are forbidden the windfall arising from a third-party covering the expense of the injured party's potential damages.[5] Within the context of medical treatment, the collateral source rule has prevented specified amounts written-off by medical providers from reducing Plaintiffs' awards.[6] That is, Plaintiffs are permitted, in these circumstances, to recover the full amount charged for medical care, rather than the amount actually paid. This approach has been applied to situations where a Plaintiff pays for the medical services himself, and to situations where a Plaintiff is insured by a private entity, covering the cost of medical care.[7]

Following the Supreme Court's decision in *Stayton*, however, the analysis with

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[3] *Id.*

[4] *Id.*

[5] *Id.*, at *4.

[6] *Id.*, at *6.

[7] *Onusko v. Kerr*, 880 A.2d 1022 (Del. 2005)(as applied to plaintiff covering his own medical expenses); *Mitchell v. Haldar*, 883 A.2d 32 (Del. 2006)(as applied to medical expenses covered by private health insurer).

regard to the collateral source rule and medical provider write-offs has been refined. As stated before, with respect to injured parties paying for their own medical expenses, and situations where a private health insurer makes the payment, the Supreme Court has "[applied] the collateral source rule to provider write-offs as [the Court] has to third party payments."[8] In other words, a Plaintiff's damages are not reduced by any amount written-off by an individual medical provider. However, as to write-offs involving Medicare, the Supreme Court, in *Stayton*, has rejected extension of the collateral source rule:

> We conclude that the collateral source rule does not apply to amounts required to be written off by Medicare. Where a healthcare provider has treated a plaintiff covered by Medicare, the amount paid in medical services is the amount recoverable by the plaintiff as medical expense damages.[9]

The Supreme Court's holding is clear. Any amounts not actually paid for by Medicare are not recoverable as damages by the Plaintiff. Therefore, regarding Defendants' present motion in limine, the Court **GRANTS** said motion, limiting Plaintiff's damages to the amount paid by Medicare, rather than the amount charged by Plaintiff's healthcare provider to Medicare in an amount fully understood to be unrecoverable.

In similar fashion, Defendants' motion also seeks to curtail the amount of damages stemming from *future* medical expenses. Defendants contend that, in the

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[8] *Stayton*, 2015 WL 3654325 at *6.

[9] 2015 WL 3654325 at *1.

event Plaintiff wishes to present evidence of future medical expenses,[10] *Stayton*'s ruling requires that these future expenses be reduced by the projected Medicare write-off. Defendants propose that, either Plaintiff retains an expert to make such financial projections, or that the parties may stipulate to what these reduced charges will be. Absent this, Defendants assert that Plaintiff should be precluded from presenting such evidence.

Plaintiff responds to Defendants by arguing that including any projected Medicare write-off reduction would result in impermissibly speculative alterations of damages. Plaintiff compares the situation to the Delaware Supreme Court's handling of the potential reduction of tort damages by projected income tax payments, where it found such a diminution to be "speculation and conjecture."[11] The Court finds the juxtaposition of these two circumstances to be inapposite. To begin, the case to which Plaintiff cites, *Gushen v. Penn. Cent. Transp. Co.*,[12] followed the previous Supreme Court reasoning in *Abele v. Massi*, which prevented the consideration of future income tax payments for fear that "the jury might well increase or decrease [the award] in accordance with its opinion as to taxability."[13]

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[10] Defendants aver that included in Dr. DuShuttle's testimony are future expenses such as "(medication 2-3 weeks per year costing $150-$200; physical therapy, up to 14 sessions per year at $200 per session; periodic office visits, 1-2 per year at $195 per visit), and surgery ($11,500.00 excluding facility fees and anesthesia)..." Defendants' Supplemental Memorandum, at ¶ 6.

[11] *Gushen v. Penn. Cent. Transp. Co.*, 280 A.2d 708, 710 (Del. 1971).

[12] *Id.*

[13] 273 A.2d 260, 261 (Del. 1970).

The Supreme Court in *Stayton*, by contrast, held that "we believe the better course is to treat the amount paid by Medicare as dispositive of the reasonable value of healthcare provider services,"[14] as opposed to finding the reasonableness of damages to be a "jury question."[15] Therefore, the worry of the Supreme Court in *Abele*, of a jury's being prejudicially affected by speculative considerations is, simply, a non-issue concerning any future Medicare write-off.

Plaintiff's position that such a reduction would be speculative is disingenuous. There is nothing about the future that is not speculative. Will the Plaintiff ever sustain any future expenses, and, if so, in what amount, is entirely speculative. Never-the-less, such claims for damages are permitted. It is, if anything, *less* speculative that such money claims will be reduced, just as the actual claims were. Hence, the Supreme Court requires proof of "damages relating to future consequences of a tortious injury" be "established with reasonable probability [as to] the nature and extent of those consequences."[16] Consequently, the expert required to opine on future medical cost must (himself or in concert with another selected by Plaintiff) be able to account for any appropriate Medicare write-off relating to such projected expenses.

Furthermore, the Court does not find that such an expert opinion should be particularly onerous to come by, given the Supreme Court's observation in *Stayton* that, "[b]efore [plaintiff] enter[ed] the hospital, the federal government had set

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[14] 2015 WL 3654325 at *11.

[15] *Id*., at *9.

[16] *Laskowski v. Wallis*, 205 A.2d 825, 826 (Del. 1964) (internal quotations omitted); *see also Stayton*, 2015 WL 3654325 at *11 (same).

Medicare's reimbursement rates for services [plaintiff] would receive and [the medical provider] had agreed to accept those rates for Medicare patients."[17] Medicare write-offs are set, fixed amounts. It is a matter of determining the type of projected care, which Plaintiff's expert appears to have done, and applying the applicable reduction in charge. In the event that the parties cannot agree on the applicable write-offs, and Defendants so choose, they may provide countering expertise. Certainly, the more desirable approach, presumably benefitting the damage presentation by both sides, would suggest prior agreement to avoid the "trial within a trial," but that would be up to the parties.

Accordingly, the Court **GRANTS** Defendants' motion in limine as regards Plaintiff's future health costs, as well.

CONCLUSION

For the foregoing reasons, Defendants' motion in limine is **GRANTED** in its entirety.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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oc: Prothonotary
cc: Counsel
Opinion Distribution

[17] 2015 WL 3654325 at *8.