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Case Number 601,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANE L. STAYTON,	*	
	*	**No. 601,2014**
Plaintiff Below,	*	
Appellant,	*	
v.	*	**Court Below: Superior Court**
	*	**of the State of Delaware,**
Delaware Health Corporation, a Delaware	*	**C. A. No.: K12C-04-026 RBY**
Corporation; HARBOR HEALTHCARE	*	
CENTER COMPANY, L.L.C., a Limited	*	
Liability Company; MARY FRANCIS	*	
DRANDORFF, RN, Individually;	*	
RUTHANNE ROBERTS JACOBS, RN,	*	
Individually; and RENEE L. WOZNICKI	*	
EDGE, RN, Individually,	*	
	*	
Defendants Below	*	
Appellees,	*	

APPELLANT'S REPLY BRIEF

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Dated: January 15, 2015

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REPLY ARGUMENT I

DELAWARE'S COMMON LAW COLLATERAL SOURCE RULE PERMITS AN INJURED PARTY TO RECOVER THE FULL REASONABLE VALUE OF MEDICAL SERVICES PROVIDED AS A RESULT OF INJURIES CAUSED BY THE NEGLIGENT CONDUCT OF THE DEFENDANTS. THE LOWER COURT DECISION ERRONEOUSLY IMPEEDS THIS RIGHT OF RECOVERYAND SHOULD BE REVERSED.

In the recent past this Court has reaffirmed the Delaware common law Collateral Source Rule purpose that "A tortfeasor has no interest in, and therefore no right to benefit from monies received by the injured person from sources unconnected with the Defendant.... A tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source." [And,] ... "it is the tortfeasor's responsibility to compensate for the reasonable value of all harm that he (or she) causes (and that responsibility) is not confined to the net loss that the injured party receives," Mitchell v. Haldar, 883 A.2d 32, 37, 38, 39 (2005). This purpose allows an injured party to make a full recovery of the reasonable value of medical expenses related to the medical treatment of injuries caused by a negligent tortfeasor and prevents such a tortfeasor from receiving any financial benefit from the collateral sources benefiting the injured party. Thus, Defendants should not get the benefit of healthcare providers' "write offs" which result from receiving payments which are less than the reasonable value of the provided services. Thus, when a healthcare provider accepts less than the reasonable value of their services, such benefit

belongs to the injured party and not the offending tortfeasor, Mitchell v. Haldar, *supra*, and Onusko v. Kerr, 880 A.2d 1022 (Del. 2005).

Presently, Defendants seek to mitigate their damages because Plaintiff's healthcare providers accepted Medicare payments which resulted in healthcare provider write-offs of the unpaid portions of their billings. Defendants assert that every Medicare recipient in a personal injury claim cannot recover the full reasonable value of medical services provided them but can only recover the amount paid by Medicare for these services. Defendants offer various reasons for this entitlement to mitigation of their damages. First, they assert, without any evidence of record or in the pleadings, that Plaintiffs' healthcare providers, i.e., the hospitals, doctors, rehabilitation centers, all have overcharged or presented illusory charges or billings for their services (Defendants' Brief pg. 10, 34). Defendants further argue that Plaintiff's damages can be no greater than the amounts actually paid or incurred for her medical services since anything more than that does not constitute a loss. Defendants fail to appreciate that these same arguments also can be made where the medical expenses are paid by private insurance coverage. These arguments were not accepted in the Mitchell case where the insurer was Blue Cross and should not be accepted when the insurer is Medicare.

Stayton recognizes that medical expenses recoverable as damages in a personal injury case must be reasonable and necessary. A Plaintiff does have the

burden of proving the medical billings are reasonable for there to be a recovery of them. However, those issues are matters for stipulation by the parties or for trial, but the billings can certainly constitute evidence of what a reasonable charge for the healthcare provider's services is. A defendant would be entitled to present appropriate evidence from competent sources of what the healthcare provider's reasonable charges should be. However, Defendants want a bright line drawn that medical expenses are never greater than what Medicare pays. Again, such an argument was rejected as to Blue Cross payments in the Mitchell decision.

Defendants' arguments fail to provide any decision from a State Supreme Court, which treats healthcare provider write-offs in the manner Defendants seek, i.e., healthcare provider write-offs resulting from private insurer payments are recoverable under the Collateral Source Rule, but healthcare provider write-offs resulting from Medicare payments are not. The only case discussed by Defendants in their Brief regarding the difference between the private and public insurance coverages is Moorehead v. Crozer Chester Med. Ctr., 765 A.2d 786 (Pa. 2001). Moorehead, however, does not support the Defendants' position in this case. The Moorehead ruling prohibits the recovery of healthcare provider write-offs under any circumstances whether the collateral source be public or private. Only a cost actually incurred and paid can be recovered. In Moorehead, the majority opinion ruled that the charges of $108,668.31 could not be recovered but only the amount

of $12,167.40, which was paid by health insurance coverage. The Moorehead ruling prevented a personal injury claimant from recovering the full amount paid by private insurance. *i.e.,* Blue Cross 65 for which the injured party paid premiums. Further, Blue Cross 65 paid twenty percent (20%) of the $12,167.00 payment, Moorehead at pg. 787. Thus the Moorehead decision regarding healthcare provider write-offs for private insurance coverage is in direct conflict with the Mitchell ruling. It is telling that Defendants have failed to provide a full-blown analysis of a State Supreme Court decision which allows recovery of healthcare provider write-offs under the Collateral Source Rule for private healthcare coverage, but not for Medicare, which the Defendants are asking this Court to do. Further, the dissent in Moorehead is consistent with Stayton's position in the present matter and the Mitchell holding.

Defendants contend the difference between private insurance coverage and Medicare insurance coverage for Collateral Source Rule purposes lies in the fact that private health insurance involves a contractual payment by the insured to the insurer whereas Medicare insurance does not have a direct payment for coverage benefits. Defendants rely upon the holding in State Farm Mut. Auto. Ins. Co. v. Nalbone, 569 A.2d 71 (Del. 1989) for the proposition that Delaware's Collateral Source Rule was modified by this decision and now requires payment by the injured party to the collateral source for the Rule to apply. (Defendants' Brief pg.

8). Respectfully, Defendants misread and misapply the Nalbone decision to the present matter. Nalbone, a split 3-2 decision, dealt with the statutory requirements of the Delaware "No-fault" statute, 21 Del. C. § 2118. Since the parties offered arguments about the Collateral Source Rule as a basis for their positions, the majority opinion cited several general features of the Delaware Collateral Source Rule. However, in rendering its decision, the Court made it clear that this was not a Collateral Source Rule case, but rather one of statutory interpretation dealing with first party insurance coverage benefits arising from the use of an automobile. Specifically, the Court stated at page 72 that:

> "The Question before us is essentially one of statutory interpretation since State Farm, like all insurers operating in this State, is required issue policies that extend PIP benefits coextensively with the requirements of 21 Del. C. §2118."

Further, the Court held that:

> "In our view, the policy goals of no-fault insurance can best be served by application of the principles of contract rather than tort law." *Id*, at p. 75.

Thus, tort law, including the Collateral Source Rule, were found not to be the appropriate method for analyzing coverage required by the Delaware "No-Fault" statute. The dissent also focused on the statutory relationship of the parties and not the Collateral Source Rule. For instance, the dissent noted that:

> "The focus of the Collateral Source Rule is upon the transaction between the Plaintiff and the Defendant.... In Nalbone's case, the focus must be on the statutory duty of the No-Fault carrier. The

statute imposes ultimate liability upon the No-Fault carrier to pay for Nalbone's lost wages."

Further, as revealed in the dissent, the Nalbone claim did not even involve an alleged tortfeasor. It was strictly a claim between insured and insurer relative to the parties' rights and obligations under 21 Del. C. §2118. Thus, the footnotes in Mitchell which reference the general features of the Collateral Source Rule outlined in Nalbone, should not be misread to find the Collateral Source Rule requires a contractual payment in order to receive its benefits. In fact, this Court shortly before Mitchell, held that payment by the injured party for the collateral source benefit is not a requirement for application of the Collateral Source Rule. In Onusko v. Kerr, *supra*, this Court held that an injured party's receipt of gratuitous services also are a collateral source benefit, which the Defendant can not utilize to mitigate its damages. This holding clearly contradicts the Defendants' argument that there must be a payment to entitle an injured party to the benefits of the Collateral Source Rule under Delaware common law.

Nowhere in the Mitchell opinion does the Court discuss Mitchell's payment for his Blue Cross coverage, which is odd if Defendants' argument that payment by the insured is the key element for Mitchell being allowed to recover the full reasonable value of the medical expenses and not be limited to the amount paid by Blue Cross. Moreover, if Nalbone were controlling the Mitchell decision, it also would have been also important to determine if Mitchell actually paid separate

consideration for the coverage or was it merely a part of his fringe benefits such as the wage continuation plan in Nalbone. Following Nalbone, if the Blue Cross coverage were merely a fringe benefit for which no specific charge and payment was made by Mr. Mitchell, Mitchell would be limited to recovery of the Blue Cross payment. Again, the absence of any consideration of these issues supports the conclusion the Defendants have misread and misapplied Nalbone in their arguments.

Defendants also fail to offer a persuasive argument for creating different classes of similarly situated injured parties based upon the type of coverage or absence of coverage for the payment of healthcare service expenses. Notwithstanding Defendants' arguments, it is clear that Defendants' position allows an injured party with Blue Cross to make a full recovery of reasonable medical expenses for treatment provided, but a person with Medicare coverage, will be limited to the amounts paid by Medicare though the reasonable value of those expenses is greater than the Medicare payment. This clear shifting of a benefit from the injured party to the tortfeasor lacks a cogent and equitable reason for such an unfair public policy directed to the elderly and disabled.

This Court has noted, "The rationale for the Collateral Source Rule is based upon the quasi-punitive nature of tort law liability." Mitchell at p. 38. In the present matter, shifting the benefit of the healthcare provider write-offs for receipt

of Medicare payments to a Defendant relieves a Defendant of a significant responsibility for payment of damages to an injured party. Not only is it inequitable to allow a defendant to mitigate damages at the expense of the injured party, but every exception, modification, or narrowing of the Collateral Source Rule's application weakens it's quasi-punitive nature and lessens the responsibility of a wrong doer for his tortuous conduct. This is not the type of public policy the Court should endorse.

Defendants cite Rice v. The Chimes, Inc., et al., 2005 Del. Super. LEXIS 476 (Mar. 10, 2005) as support for shifting the benefit of healthcare provider write-offs resulting from acceptance of Medicare payments from the injured party to the tortfeasor. The Rice opinion has little relevance at the present time for two significant reasons. One, it was decided before this Court's Mitchell decision; and two, it relied upon the Moorehead v. Crozer Chester Med. Ctr. decision of the Pennsylvania Supreme Court, which shifts the benefit of healthcare provider's write-offs in all circumstances to the tortfeasor. Write-offs due to acceptance of private insurance coverage are not protected for the injured party's benefit under Pennsylvania decisional law. This ruling is in direct conflict with the Mitchell decision. Thus, Rice, a pre-Mitchell decision has no relevance to healthcare provider write-offs in the post-Mitchell era. On the other hand, the only decision of the Superior Court, before the present matter, decided subsequent to the

Mitchell ruling is Sweiger v. Delaware Park, LLC, 2013 Del. Super. LEXIS 562 (Dec. 13, 2013). The Sweiger Court considered the Mitchell decision and determined that it was applicable to Medicare write-offs since the rule announced in Mitchell would appear to be all-inclusive, Sweiger at pg. 3. The Sweiger Court found nothing in the Mitchell decision nor in it's own analysis of the policy developed in Mitchell to justify treating Medicare insureds differently from private insurance insureds.

Defendants spend considerable time citing hospital billing practices discussed in law review articles and professional journals (Defendants' Brief pg. 12-17). While no one suggests the American healthcare system is completely cost efficient and there is no need to attempt to reduce future costs or at least reduce the increase of future costs of health care services, Plaintiff's personal injury claim and the tort law's Collateral Source Rule are not the forum or instrument to address this societal issue. This is particularly true when recipients of health care services who are privately insured or who have no insurance are not co-participants. Nowhere in the Defendants' Brief is the alleged unreasonable nature of Plaintiff's healthcare providers' billings analyzed by competent testimony. Defendants have not offered any evidence to establish that Plaintiff's healthcare providers' billings are unreasonable or unrelated to the medical treatment Plaintiff required due to the injuries caused by Defendants' negligent conduct. The application of the Collateral

Source Rule should not be limited or impaired because healthcare costs, generally, need some form of containment or regulation for the benefit of society in general.

Defendants also spend considerable time in discussing the issue of subrogation. Plaintiff readily concedes that any recovery made in this matter by way of settlement or jury verdict is subject to the subrogation interest of Medicare as required by federal law. Such an obligation, however, has no bearing on whether healthcare provider write-offs resulting from the receipt of Medicare payments constitute a collateral source, which should benefit the injured party and not the offending tortfeasor. Defendants cite to the statutory subrogation provisions of the Delaware Worker's Compensation laws, 19 Del. C. §2301 et seq., particularly, 19 Del. C. §2363, and cite Harris v. New Castle County, 513 A.2d 1307 (Del. 1986). This argument has no relevance to the present matter. The statute involved in Harris has no involvement in the present matter. More importantly, the Harris decision has not been good law in Delaware since 1993, when the subrogation statute was legislatively modified, see Simendinger v. National Union Fire Insurance Company, 74 A.3d 609 (Del. 2013).

Defendants next cite the Medical Care Recovery Act, 42 U.S.C. §§2651-2653. These statutory provisions are outside of the Medicare statutes, Subchapter XVIII - Health Insurance for Aged and Disabled, 42 §1395 et seq. Contrary to the MCRA, Medicare recipients are legally entitled to pursue the full recovery of their

medical expenses. The portion of their medical expenses paid by Medicare are not a separate and distinct claim only belonging to the Unites States of America as is the case under the MCRA. Further, any entitlement to reimbursement from a recovery by the Plaintiff will take into account the expenses and attorney's fees incurred for the recovery. MCRA disallows any attorney's fees for the amounts claimed by the United States of America. The MCRA has no relationship to the present matter. Moreover, the issue in the present matter is not the amount that was paid by Medicare. The issue is the amount of expenses for medical services provided by the healthcare provider, which is written off by the healthcare provider as a consequence of it accepting Medicare payment. The government has no basis to assert any interest in the recovery of this write-off and has no legal basis to seek the recovery of this write-off on it's own or otherwise since it doesn't constitute any payment made by or on behalf of the United States of America. Apparently, Defendants cite this statute in an attempt to criticize the Restatement (Second) of Torts §920A, Comment (3), which identifies gratuitous services as a collateral source for which the injured party is entitled to their benefit and not the tortfeasor. The Comment provides the example of a veterans' hospital setting. Whether the MCRA would apply to services of a veterans' hospital is of no moment. There are many healthcare providers outside of the Veterans' Administration, which provide gratuitous services to patients. St. Jude's Hospital in Tennessee and the Shriner's

Hospital System are but two commonly known healthcare providers who provide many gratuitous services for which the Restatement Comment would apply, see Degen v. Bayman, 241 N.W.2d 703 (S.D. 1976) which applied the Collateral Source Rule to gratuitous services of the Shriner's Hospital for Crippled Children.

Defendants assert the rationale of Mitchell and the rulings of other Courts which support Stayton's position should not be followed. However, the Illinois Supreme Court decision in Wills v. Foster, 892 NE.2d 1018, is consistent with the Mitchell ruling and the Plaintiff's position. Under Illinois law, it's Collateral Source Rule applies equally to healthcare provider write-offs resulting from private insurance payments as well as such write-offs resulting from Medicare insurance payments. Further, the Illinois Supreme Court noted that other Courts have followed this similar rule where it noted that:

> "The vast majority of Courts to employ a reasonable value approach hold that the Plaintiff may seek to recover the amount originally billed by the medical provider. (Citations omitted) This view is in line with *Sections 924 and 920A of the Restatement*, and Courts often rely on these sections. As explained above, *Section 924* allows an injured Plaintiff to recover reasonable medical expenses (Restatement Second) of Torts Section 924, at 523 (1979)) and *Comment f* explains that this is a recovery for value even if there is no liability or expense to the injured person." *Id.* at p. 1028, 1029

Defendants criticize the Hawaii Supreme Court decision Bynum v. Magno, 101 P.3d 1149 (Haw. 2014) for not being a unanimous decision. Bynum has been the law of Hawaii for the last decade. It has not been overruled or changed by the

Supreme Court of Hawaii. It is cited as precedent in Hawaiian Courts and other Courts considering this collateral source issue. *See*, Gilding v. State, 310 P.3d 1048 (Haw. App. 2012), Reed v. National Counsel of the Boy Scouts of America, Inc., 706 F. Supp. 2.d 180 (D. N. H. 2010) and Lindholm v. Hassan, 369 F. Supp. 2d. 1104 (D. S.D. 2005). Further, other cases reaching the same result as Bynum are found in Parker v. Spartanburg Sanitary Sewer Dist., 607 S.E.2.d 711 (S.C. App. 2005), Walmart Stores, Inc. v. Frierson, 818 So.2.d 1135 (Miss. 2002), Candler Hosp. Inc. v. Dent, 491 S.E.2d 868 (Ga. App. 1997) and Brown v. Vannoy, 879 S.W.2d 667 (Mo. App. W.D. 1994).

The Bynum and Wills decisions of the Supreme Courts of Hawaii and Illinois have thoroughly analyzed and support the reasons offered by Stayton for this Court to follow the Sweiger decision and not the Stayton decision of the Superior Court.

A point of clarification is needed regarding the South Carolina Supreme Court decision in Haselden v. Davis, 579 S.E.2d 293 (S.C. 2003), the actual holding of the Court did not limit a plaintiff's recovery to the billing amount paid by Medicaid. On the contrary, Plaintiff was entitled to recover the reasonable values of services provided even if that value was greater than the Medicaid payment. *Id.* at p. 295. Defendants cite to a statement in the dissent at p. 296.

(Defendants' Answering Brief p. 11, 28) Even the dissent noted private insurance and Medicare could have different results.

Defendants and Amicus Curiae Chamber of Commerce of the United States of America (Chamber) argue in their filings that healthcare provider billings are simply overcharges for the services they provide. They argue this alleged practice will continue to the alleged detriment of the nation's business community if this Court does not uphold the lower court decision. They predict a reversal of the lower court decision "will vastly increase settlement costs and insurance premiums while overcompensating plaintiffs." (Amicus Brief p. 1, 2). The Chamber offers no empirical data to support its assertions. While such claims may have some theoretical appeal, the Court cannot be expected to act upon this in the absence of empirical proof to substantiate it, see State Farm Mut. Auto Ins. v Nalbone, at p. 74. Further, the Chamber fails to address the fact that recovery of healthcare provider write-offs resulting from receipt of Medicare payments under the Collateral Source Rule has been the law in many jurisdictions for many years. Yet, it offers nothing to substantiate it's assertions. Further, the Chamber fails to explain why these alleged consequences are not occurring when plaintiffs using private insurance coverage recover the full value of the medical services they received. As noted by the Supreme Court of Illinois, twelve jurisdictions permit a

plaintiff to seek recovery of the amount originally billed by the medical providers, Wills at p. 1028.

Looking beyond the Chamber's mathematical assertions, it is important to note the type of injury Plaintiff suffered which involved the need for twenty-four hour a day treatment in the early months with Ms. Stayton's institutional treatment lasting more than five full months. For instance, in Rice v. The Chimes, Inc., 2005 Del. Super. LEXIS 476 (Mar. 10, 2005) a burn victim's hospital charges were $883,000.00 but Medicare paid only $59,000.00 of it. Those charges were based on billing rates approximately a decade prior to Ms. Stayton's treatment. Such billings reflect that Ms. Stayton's healthcare providers received only one-fourteenth of the value of their services. It is argued that the alleged tortfeasor should be relieved of the obligation of paying the remaining thirteen-fourteenths of these bills. Of Course, the Defendants will only have to pay those expenses if it is found that their negligent conduct caused the injuries necessitating the treatment evidenced in the medical billings. Such a windfall to a tortfeasor should not be permitted and does great violence to the very concept of the Collateral Source Rule.

It is argued that the reasonable value of Stayton's healthcare provider services is represented in the amounts paid by Medicare. There is no proof of record to support that assertion. Moreover, most Courts do not permit the

admission of the Medicare payments to establish the reasonable value of the written off medical services. In Wills v. Foster, *supra* at p. 1033, the Court held that:

> "Thus, defendants are free to cross examine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of the services. Defendants may not, however, introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the Collateral Source Rule." *See also*, Bynum v. Magno, at p. 1162, Goble v. Frohman, 848 So.2d 406, 410 (Fla. App. 2013)

Thus, there is no basis to conclude that the reasonable value of Plaintiff's medical services is limited to the Medicare payments anymore than there was a basis to believe the value of such services was limited to the amount paid by Blue Cross in the Mitchell case.

Defendants' motion in the lower court specifically sought a ruling on the common law Collateral Source Rule of Delaware. They specifically stated a ruling on their motion does not implicate 18 Del. C. §6862. Plaintiff agreed with Defendants' position and the lower court's decision complied and the statute was not implicated or relied upon by the Superior Court. On appeal, Defendants have remained consistent with this position (Defendants' Answering Brief p. 10). Plaintiff also has remained in agreement. The Superior Court's Stayton decision applies to all personal injury cases where the injured party is a Medicare recipient.

Under the lower court's decision, all plaintiffs' reasonable medical expense claims are limited to the amount paid by Medicare. It is this common law ruling this Court has been requested to review. Unfortunately, the arguments of the Chamber included consideration of 18 Del. C. §6862. (Chamber Brief at p. 12). Since there is no statute applicable to all personal injury plaintiffs, the Chamber's citation to this statute is misplaced. As the parties and the lower court have acted, the present issue does not implicate 18 Del. C. §6862. To what extent, if any, this statute is implicated by Medicare payments payable to third-party healthcare providers remains for another day.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff' Opening Brief, Plaintiff respectfully requests this Court reverse the lower court decision and permit Plaintiff to seek recovery of the full reasonable value of medical services provided her due to Defendants' negligent conduct under Delaware's common law Collateral Source Rule.

Respectfully submitted.

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