



IN THE SUPREME COURT FOR THE STATE OF DELAWARE

JENNIFER SMITH,)
)
Plaintiff Below,)
Appellant/Cross-Appellee,) Case Number 642, 2015
)
v.)
)
DELAINE MAHONEY,)
)
Defendant Below,)
Appellee/Cross-Appellant)

APPELLEE/CROSS-APPELLANT DELAINE MAHONEY'S REPLY
BRIEF ON CROSS-APPEAL

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SUMMARY OF THE ARGUMENT

1. Admitted. The collateral source rule should not apply to awards for future damages for Medicaid write-offs unless the plaintiff provides sufficient proof demonstrating that the amount actually paid by Medicaid to the plaintiff's medical provider was not the reasonable value of the medical services. *Stayton v. Delaware Health Corporation* held that the amount actually paid by the public healthcare assistance program is dispositive as to the reasonable value of the medical services provided. Further, as the burden of proving such reasonable value is always vested with the plaintiff, it is the plaintiff's burden to show otherwise. Finally, due to the speculative nature of determining future medical expenses, the amount actually paid by Medicaid should be used to project into the future because that amount is already known and has already been determined to be reasonable.

I. THE SUPERIOR COURT ERRED IN ITS DECISION TO ALLOW MEDICAID WRITE-OFFS INTO THE VALUE OF MEDICAL SERVICES CLAIMED FOR FUTURE MEDICAL DAMAGES.

The Superior Court recognized that Medicaid eligibility “is purely speculative and conjectural.” Court Opinion at 9. The Defendant agrees that predicting the future status of any individual is inherently speculative. However, the question before the Court is how to calculate the reasonable value of future medical services if the plaintiff is a Medicaid enrollee. This raises three issues. First, which party bears the burden of establishing the reasonable value of such future medical services? Second, what is the reasonable value of the medical services provided? Third, what is the proper calculus for measuring future damages for Medicaid enrollees?

Delaware law holds:

When it is alleged that a tortfeasor is responsible for medical services, *the plaintiff* bears the burden of proof on two distinct issues. First, *the plaintiff* must demonstrate the value claimed for those medical services is reasonable. Second, *the plaintiff* must establish that the need for those medical services was proximately caused by the negligence of the alleged tortfeasor.

Mitchell v. Haldar, 883 A.2d 32, 37 (Del. 2005) (emphasis added). This well-settled law establishes that the burden, *at all times*, lies with the plaintiff to establish the reasonable value of medical services (emphasis added). This burden is not just with regard to present damages, but also future damages. Indeed, this Court held “a

plaintiff cannot recover speculative or conjectural damages because the law ‘refuses to allow a plaintiff damages relating to the future consequences of a tortious injury unless the proofs establish with reasonable probability the nature and extent of those consequences.’” *Stayton v. Del. Health Corp.*, 117 A.3d 521, 534 (Del. 2015) (quoting *Laskowski v. Wallis*, 205 A.2d 825, 826 (Del. 1964)).

In *Stayton v. Delaware Health Corporation*, this Court explained the two methods by which to calculate the reasonable value of medical services when the billed amount for the medical service is reduced through public assistance write-offs. *See Id.* at 531–34. There are two approaches “[a]mong states that do not apply the collateral source rule to provider write-offs. . . .” *Id.* at 531. Some states determine reasonable value of medical services by submitting the question to the jury. *Id.* Other states treat the amount actually paid for the medical services “*as dispositive of the reasonable value of the services as a matter of law.*” *Id.* at 531–32 (emphasis added). Delaware has adopted the latter approach. *Id.* at 533. In reaching this decision, this Court explained:

The fact that Stayton’s healthcare providers collectively accepted less than . . . the amount they might have billed, and did so . . . as part of an agreement with a high-volume payer, makes it difficult to conclude that the billed amounts represent the reasonable value of medical services. On the other hand, the fact that Stayton’s providers agreed up front to provide her services to Medicare patients in exchange for the amount Medicare pays for those services suggests that the amount paid might be

in the range of what should be considered reasonable.

Id. at 533.

Plaintiff recognizes her burden in establishing damages and argues that she has satisfied it. However, Plaintiff fails to recognize the extent of her burden. Plaintiff argues “[i]t is the plaintiff’s burden to establish through expert testimony the reasonable value of the future medical services the plaintiff will reasonably require. Plaintiff here met that burden. . . .” Cross-Appellee Ans. Br. at 25. She then asserts that Defendant advocates that Plaintiff must demonstrate that she will not be a Medicaid enrollee at some future point in order to receive the amount billed by her medical provider, Dr. Grossinger. Plaintiff misses the point of Defendant’s argument.

Applying *Stayton* principles, the reasonable value of the medical services provided by Dr. Grossinger was the amount paid by Medicaid to Dr. Grossinger. This amount was dispositive as to the reasonable value of the medical services Dr. Grossinger provided. Dr. Grossinger willingly accepted the payments made by Medicaid, which “suggests that the amount paid might be in the range of what should be considered reasonable.” *Id.* at 553. If Plaintiff seeks a different amount, she must establish that the amount paid by Medicaid to Dr. Grossinger is not the reasonable value of the medical services he provided her. Similarly, if Plaintiff is arguing that what Medicaid paid to Dr. Grossinger will no longer be the reasonable value of those

medical services at a future date, it is her burden to establish such. *Stayton* in fact holds this to be true. *See Id.* at 534 (quoting *Laskowski*, 205 A.2d at 826).

Plaintiff devotes a large portion of her response to Defendant’s “irrelevant proposition that the reasonable value of future expenses must be reduced to present value to take into account inflation.” Cross-Appellee Ans. Br. at 25. Again, Plaintiff misapprehends Defendant’s position, as this point was never argued. Defendant’s discussion of *Thorpe v. Bailey* did not address the issue of inflation and its relationship to future medical damages. Rather, Defendant demonstrated the strong public policy that Delaware has adopted with regard to calculating future damages.

In *Thorpe v. Bailey*, this Court discussed the difficulty of calculating an award for future medical damages due to the element of uncertainty. “Any attempt to read the future is, of course, subject to the human condition and judges and jurors are no better at it than the rest of mankind.” *Thorpe v. Bailey*, 386 A.2d 668, 669 (Del. 1978). The Superior Court in *Russum v. IPM Development Partnership, LLC* acknowledged this challenge as well.¹ In adopting the rule that an award for future medical damages should be based on the present value of the medical expenses

¹ “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, what amount, is entirely speculative.” *Russum v. IPM Dev. P’ship, LLC*, 2015 Del. Super. LEXIS 376, *7–8 (Del. Super. July 15, 2015).

incurred rather than an amount adjusted with some speculative rate for inflation, the *Thorpe* Court noted several reasons for its decision. First, money earns money and an injured plaintiff has the ability to invest money for future damages appropriately to prepare for the future. *Thorpe*, 386 A.2d at 669. Second, by using the present value figure rather than an inflated number, a fact finder could more accurately measure the compensation actually owed to the plaintiff. *Id.* Lastly, basing an award of future damages on the medical service's present value prevented an overpayment to the plaintiff and unnecessary penalty to the defendant. *Id.*

Here, Plaintiff seeks to frame the issue as “a defendant cannot reduce a plaintiff's damages on the basis of speculation or conjecture.” Cross-Appellee Ans. Br. at 27. This is merely the inverse of Defendant's argument that a plaintiff cannot calculate future damages by relying on an assumption that may never occur, *i.e.* a plaintiff becoming ineligible for Medicaid benefits. Plaintiff's position is untenable because it assumes that a particular future, speculative event will occur. Defendant's position relies on the information that is currently known and available. In the present case, Plaintiff has been a Medicaid enrollee since before the 2010 accident and throughout the course of this litigation. Rather than speculation, the amount paid by Medicaid for medical services is a fairly reliable indication of reasonable value when calculating future medical damages.

For these reasons, the trial court’s decision on the calculation of future damages for a Medicaid enrollee should be reversed. The amount previously paid by Medicaid should be used on the basis to calculate the present value of the future medical services claimed.

CONCLUSION

Stayton held that plaintiffs in Delaware are “entitled to compensation sufficient to make [them] whole, but no more.” 117 A.3d at 534 (quoting *Mitchell*, 883 A.2d at 38). As Medicaid write-offs are benefits to taxpayers and not Medicaid enrollees, the collateral source rule should not extend to Medicaid write-offs. This decision would not violate Plaintiff’s constitutional right to a jury trial and due process nor hinder access to the courts.

When calculating future medical damages for Medicaid enrollees, the amount actually paid after write-offs is dispositive of reasonable value. *See Id.* at 533–34. As the plaintiff has the burden of proving reasonable value, the plaintiff would also have the burden on demonstrating the amount actually paid by Medicaid to the provider was not the reasonable value of the medical services. Plaintiff has failed to demonstrate that the amount Medicaid actually paid to the provider is not a reasonable value for such services. Rather, the amount actually paid must be used to calculate the plaintiff’s future medical damages precisely because it represents the

reasonable present value of those services because the medical provider accepted payment in this amount.

For the foregoing reasons, the decision of the trial court regarding past medical expenses should be affirmed, and the trial court's decision regarding future medical expenses should be reversed.

Respectfully submitted,

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