The DRI Defense Library Series

The Collateral Source Rule:
A Compendium of State Law

DRI™
The Voice of the Defense Bar

Chicago, Illinois

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Table of Contents

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DRI is the international membership organization of all lawyers involved in the defense of civil litigation. DRI is committed to: enhancing the skills, effectiveness, and professionalism of defense lawyers; anticipating and addressing issues germane to defense lawyers and the civil justice system; promoting appreciation of the role of the defense lawyer; and improving the civil justice system and preserving the civil jury.

DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation.

Diversity is a core value at DRI. Indeed, diversity is fundamental to the success of the organization, and we seek out and embrace the innumerable benefits and contributions that the perspectives, backgrounds, cultures, and life experiences a diverse membership provides.

Inclusiveness is the chief means to increase the diversity of DRI's membership and leadership positions. DRI's members and potential leaders are often also members and leaders of other defense organizations. Accordingly, DRI encourages all national, state, and local defense organizations to promote diversity and inclusion in their membership and leadership.

Committee Comment

DRI – The Voice of the Defense Bar and its Trial Tactics Committee are deeply committed to the preservation of jury trials and to the fair and reasonable advancement of the law. It is our hope that this book will help serve those goals. Civil practitioners have an obligation to clients and to society as a whole to ensure that economic damages presented at trial are accurate and honest and such numbers should provide juries with meaningful guidance in their efforts to resolve civil disputes. Allowing an injured party to recover economic damages for medical expenses that were never paid is simply unjust. Neither individual defendants nor our society should bear these inflated costs as part of the civil justice system.

It is the Committee's hope that this book will draw attention to differences in state law and provide meaningful knowledge to help bring a just result or reform where it is needed. Please share your comments and criticisms with us as this book evolves so that together we may advance the defense of civil matters.

Respectfully submitted,
John C.S. Pierce
DRI Trial Tactics Committee Vice Chair

Foreword

Thank you for purchasing *The Collateral Source Rule: A Compendium of State Law.*

We have two goals for this Compendium. First, we want to provide a resource for in-house counsel, claims representatives, and especially counsel practicing in American jurisdictions on the law governing monetary awards for past medical expenses in personal injury actions. Second, and equally important, is to provide practitioners with the authority they need from around the country to fight for legal improvements that will compensate only actual medical economic loss, rather than "billed" amounts that bear no resemblance to the actual cost of medical services.

This Compendium arose from a lecture provided at the 2010 DRI Damages Seminar. The lecture challenged attendees to consider new ways to defend increasingly excessive claims for medical damages in litigation.

One of those challenges went to the basic question of how courts ought to value past medical expenses. To an average citizen, that may seem like a trick question—a person's medical expenses obviously mean the amount of money actually spent on their medical care. That common-sense response would certainly explain the tendency of juries to award the full amount of what they believe to be an injured plaintiff's medical expenses, when liability is found. This is probably because such damages are perceived as "real" losses. Their reimbursement is viewed as the minimum that must be done to rescue the plaintiff from possible debt collection and start him or her back on the path toward a normal life.

Of course, trial lawyers know that common sense has very little to do with the way that our court system tends to value medical expenses. In fact, the default rule in most jurisdictions permits plaintiffs to seek the full "billed" value of their medical statements, even though nobody—even self-insured patients—pays anywhere near that rate, and most patients pay a fraction of it. Nonetheless, courts have routinely permitted plaintiffs not only to seek the full "billed" value of their medical expenses, but also barred defendants from pointing out that the plaintiff was not economically "injured" anywhere near that amount. The common result has been plaintiffs—and especially their attorneys—seeking and often receiving enviable profits of over 200 percent[1] on a damages figure that juries mistakenly believe is a simple reimbursement of actual expenses. This trend is neither fair nor sustainable given that, as the Indiana Supreme Court recently remarked, "most [medical] charges have no relation to anything, and certainly not to cost."[2]

How could such an unjust rule take hold in our justice system? The answer, as is often the case, is legal tradition. As is also often the case, the tradition originated during a much different time. Decades ago, when the health insurance system was less complicated and costs were lower, the differences between amounts billed and paid for a medical bill were far smaller. To the extent there was a material difference, courts viewed it as a difference fairly credited to the plaintiff, and permitted recovery of the original billed amount. Perhaps it would be more accurate to say that the courts simply did not view the difference as worthy of extending a trial to resolve.

Unfortunately, many courts mischaracterized this practice as required by the "collateral source rule," a related but distinguishable concept that forbids a plaintiff from having previous payments on his or her behalf subtracted from a judgment against a tortfeasor. The collateral source rule is traditionally justified on both concepts of subrogation (previous payments are usually made by insurance companies who have a priority right of reimbursement) and tortfeasor deterrence. But, the collateral source rule applies by its terms to ***payments*** made on a plaintiff's behalf, not pre-negotiated write-offs or billed amounts that were never paid or expected to be paid. As such, the collateral source should have nothing do with the differential between what is billed versus what is actually paid or collected for a medical expense.[3]

Fortunately, some states have begun to realize the absurdity of using the collateral source rule to justify inflated claims for medical "expenses." Leading the way is California, which recently confirmed that the reasonable value of a claim for past medical expenses is the amount ***actually paid*** for them.[4] Pennsylvania has long been in agreement.[5] This rule is the simplest and most just. It values medical expenses at their actual worth — the amount freely accepted by the provider in exchange for them. It is simple and easy to apply. It preserves the common-law collateral source rule within the scope of its original intent. And, it is exactly what common-sense jurors expect.

A middle-ground option adopted in some jurisdictions allows the plaintiff to seek the full billed value of his or her expenses, but also allows defendants to put in evidence of the actual amount paid and/or or the amount often accepted for those expenses. Both Indiana and Ohio take this approach, which attempts to preserve the idea that "reasonable value" is a jury question while also acknowledging the injustice of allowing a plaintiff to recover billed medical expenses without at least contrary evidence of what those expenses should be. Although an improvement over the status quo, this method is still inferior. Generally speaking, the concept of reasonableness as applied to compensatory damages is intended to function as a means of limitation (e.g., avoiding excessive services or charges), not as a means of inflating what the service actually cost. Absent some claim of overbilling, it makes little sense to lengthen trials with truly collateral discussions of what greater amount might "reasonably" have been charged for a procedure, and there remains no real justification for plaintiff to recover a "value" for expenses that exceeds what was actually paid.

Other jurisdictions have tried to differentiate between private insureds and Medicaid patients (Kansas) or adopted post-trial setoffs by statute (Florida).

Regardless of what method your jurisdiction follows, it is our hope that you will use the authorities in this Compendium to fight for a more just rule. Remember that changes in the common law typically begin with the one lawyer who was willing to demand a better rule, and preserve that issue for appeal. Given the inflationary effect that exorbitant medical expense valuations can have on a case—often serving as a lodestar for further inflation to claimed non-economic losses—the defense bar has a shared interest in raising this issue in any case seeking recovery of past medical expenses, until every one of our nation's courts gets it right.

Acknowledgments

This effort would not have been possible without its many contributors. To all of the individual submitters from jurisdictions across the land, thank you—your efforts are a tremendous service to both your fellow defense practitioners and to DRI. This effort also would never have happened without the persistence and initiative of John C.S. Pierce, Vice Chair of the DRI Trial Tactics Committee, and a tireless advocate of this Compendium.

Finally, I would like to thank the Trial Tactics Committee and the Trial Tactics Seminar, formerly known as "Damages." This Compendium is a classic example of the interdisciplinary value that the Trial Tactics Committee offers to its members. While many of us practice in subject matters addressed substantively by other committees, the Trial Tactics Seminar is a place where trial lawyers go to learn from other trial lawyers how to do a better job of putting substance into practice. We urge you to attend the Trial Tactics Seminar and gain these and other insights, each and every March.

Jonathan Judge
Editor

Endnotes

1 In *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555, the plaintiff's insurance carrier, by previous agreement, had paid only $59,537.78 of the $189,978.63 billed by the plaintiff's medical providers.

2 *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009).

3 *See* Restatement (Second of Torts) § 911, cmt. *h* ("If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him.").

4 *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541.

5 *Moorhead v. Crozer Chester Med. Ctr.*, 564 Pa. 156, 161–65 (Pa. 2001).

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A. Collateral Source Rules

Alabama abrogated the common law collateral source rule by statute. In 1987, the Legislature enacted Code of Alabama §12-21-45 which abrogated the collateral source rule for all actions where the plaintiff seeks damages for medical or hospital expenses. Pursuant to subsection (a) of this section, in civil actions in which damages arising from medical or hospital expenses are claimed and may be awarded, "evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence." Code of Ala. §12-21-45(a). Conversely, subsection (c) of the statute provides that if a plaintiff can demonstrate that he or she "is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed," evidence concerning any such reimbursement or payment "shall be admissible." Code of Ala. §12-21-45(c). Taken together, these provisions operate to "alter the collateral source rule in civil actions by affording defendants the option of introducing evidence that a collateral source has paid or will pay or reimburse a plaintiff for this medical or hospital expenses." *Senn v. Alabama Gas Corp*., 619 So. 2d 1320, 1326 (Ala. 1993); *Melvin v. Loats*, 23 So. 3d 666, 669-70 (Ala. Civ. App. 2009).

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

a. If so, is there a right of subrogation for the insurer?

However, the statute, while determining that evidence of collateral source payment is competent evidence, does not define how this evidence affects the overall ability of a plaintiff to recover his or her damages, leaving the trial courts to interpret the statute. This has led to some confusion in the lower courts. The general rule in Alabama is that a plaintiff can still claim the full amount of medical bills that are charged by a medical provider, including the costs of third-party payments made by insurers or others for medical or psychological treatment. *Melvin*, 619 So. 2d at 1326 (Hornsby, C.J., concurring specially)("a plaintiff is not entitled, necessarily, to fully recover medical or hospital expenses . . . Instead, in such cases a jury must consider all of the evidence introduced at trial regarding payments from collateral sources and determine to what extent the plaintiff is entitled to recover . . ."). However, a defendant may, at its discretion, introduce evidence that the bills have been reduced and/or paid by a collateral source such as insurance, and then be free to argue the true costs of the medical treatment. If the defendant introduces such evidence, the plaintiff is then free to rebut the defendant's evidence of collateral source payment by introducing evidence that the third-party provider maintains a lien on the amounts paid on behalf of the Plaintiff. *But see, Daniels v. Kapoor*, 64 So. 3d 62 (Ala. Civ. App. 2010)(testimony given by injured driver in personal injury case as to her "understanding" of the existence of a subrogation lien was inadmissible hearsay). Insurers and government health care providers generally maintain a right to subrogation as to any payments made on behalf of another.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

a. If so, is there a right of subrogation for the charitable provider?

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

a. If so, what are the differences?

The statute applies to any collateral source payment, whether it be through a government insurance provider such as Medicaid or Medicare, or a charitable, non-insurance related source. Each of these entities can maintain a right of subrogation through either common law or statute.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Because section 12-21-45 speaks in terms of the admissibility of evidence, it has been generally accepted as a rule of evidence. *See, e.g., Craig v. F.W. Woolworth Co.*, 866 F.Supp. 1369 (N.D. Ala.. 1993), *aff'd* 38 F.3d 573; *Killian v. Melser*, 792 F.Supp. 1217 (N.D. Ala. 1992); *Cf., Shelley v. White*, _____ F.Supp.3d _____, 2010 WL 1904043 (M.D. Ala. 2010)(Alabama statute rendering admissible amounts paid by insurance carrier was substantive law and applied in federal diversity matter). Because the statute does not modify the common law of damages, the jury is left to determine the amount owed to the plaintiff based upon the evidence presented by both the plaintiff and the defendant. The jury is free to award the total amount of medical expenses billed to a plaintiff and can freely disregard the evidence of collateral source payments put forth by the defendant. There is no mechanism for offset of a collateral source payment under Alabama law once the jury's verdict is entered beyond an appeal that the award was against the great weight of the evidence.

Despite the language of section 12-21-45, there is still some confusion among the trial courts as to both the applicability and scope of the current collateral source rule in Alabama. Some judges have issued orders that, despite the constitutionality of 12-21-45, the common law collateral source rule is still the law (at least in part). For example, in *Melvin v. Loats*, 23 So. 3d 666, 669-70 (Ala. Civ. App. 2009), the Court of Civil Appeals reversed an order from the trial court which had held that 12-21-45 only permitted the defendant to introduce evidence plaintiff had medical insurance or that their medical bills had been paid. The trial court did not allow the defendant, however, to introduce the actual amount paid by the insurer. The appeals court disagreed and held that 12-21-45 required that the defendant be allowed to introduce evidence of the actual amount paid by the insurer. Other trial courts have held that section 12-21-45 has been repealed by the enactment of the Alabama Rules of Evidence, which were adopted in 1996. According to this line of reasoning, section 12-21-45 is a rule of evidence which was superseded by the adoption of the Rules. As a result, the common law collateral source rule now governs, and evidence of collateral source payments are therefore inadmissible under Alabama Rules of Evidence 402(relevance) and 403(unfairly prejudicial). It is worth noting, however, that this interpretation is generally disfavored by leading legal commentators in Alabama and the appellate courts have yet to address this issue.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The question of damages is generally reserved for the jury. As such, if the jury decides to award the full amount of damages claimed by the plaintiff, then the plaintiff is entitled to keep the full recovery, even if those damages are over and above the actual billed amounts. There is no automatic mechanism for the reduction of such an award. However, a defendant could potentially challenge such an award as being against the greater weight of the evidence.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Alabama generally follows the rule that the plaintiff can recover the reasonable value of medical and hospital expenses that are incurred. *See generally, Hornady Truck Lines, Inc. v. Meadows*, 847 So. 2d 908 (Ala. 2002). In *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000), the Supreme Court of Alabama set out some guidelines as

to what can be discovered and admitted at trial under the statutory scheme described above. The Court opined that, despite the silence of section 12-21-45 as to its effect on the actual law of damages, "[t]his silence can be viewed as a virtue, not a vice, because it leaves to the courts their historical function of determining the limits of recoverable damages, through an evolving common law. *Marsh*, 782 So. 2d at 233, n. 2. As a result, there has been some inconsistency in exactly what a plaintiff can recover. In general, plaintiffs are allowed to claim the *entire* amount billed to them for the cost of medical or psychological treatment. However, as noted above, the defendant can rebut this evidence by offering evidence that the plaintiff's bills have been paid by a collateral source – and the defendant can even introduce evidence (if properly authenticated) that the bills have been reduced or waived by an agreement between the collateral source and the medical provider. Plaintiff, however, can then follow-up this evidentiary showing by the defendant and introduce evidence of the cost of obtaining the collateral source benefits (such as insurance premiums), as well as evidence that the collateral source maintains a right of subrogation that will be perfected if the plaintiff recovers damages in the lawsuit. *But see, Roszell v. Martin*, 591 So. 2d 511 (Ala. Civ. App. 1991)(plaintiff failed to establish that the insurance benefits obtained through her employer were provided at a "cost" to her. Therefore, such evidence was inadmissible).

3. **Do the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?**

4. **Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?**

Damage awards are left up the jury once evidence of a collateral source payment is introduced. In many cases in Alabama, verdicts are general verdicts that only state the total amount of compensatory damages that are awarded to plaintiff. As a result, the verdict does not have a breakdown of medical expenses awarded. Where verdicts are, in fact, broken down by individual damage elements, the jury's verdict must be based on the weight of the evidence. Therefore, defendants are best served by seeking a verdict form that breaks down the amount of medical expenses as an element of the total damage award. Otherwise, the damages awarded can be higher than the actual amounts owed or paid, but not be subjected to challenge due to the subjective elements of pain and suffering and emotional distress being lumped in with the economic damage award. Courts have not addressed the issue of whether or not it is fair for a jury to award the plaintiff amounts that exceeded the value of what was actually paid for treatment. *But see*, *Portis v. Wal-Mart Stores East, L.P.*, _____ F. Supp.2d _____, 2008 WL 2959879 (S.D. Ala. 2008)(holding that "[w]here charges are written off by medical providers pursuant to contracts with health insurers, amounts that were never paid, or owed, by anyone should not be presented to the jury as recoverable damages.")

C. Use of Specials at Trial

1. **Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?**

2. **Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?**

Because section 12-21-45 is widely interpreted as an evidentiary basis for allowing evidence of collateral source payments, courts generally allow plaintiffs to rebut any such evidence by claiming, as damages, the entire amount billed, even if that amount was not paid by the collateral source. Plaintiffs are always free to claim any out of pocket expenses they have incurred. *See, e.g., Melvin v. Loats*, 23 So. 3d 666, 670 (Ala. Civ.

App. 2010). Under the general rule followed by most trial judges, the issue of actual damages is one that is decided by the jury after receiving all of the evidence as to actual billed amounts, collateral source payments, and out-of-pocket expenses.

D. Constitutional Issues

Code of Alabama §12-21-45 was passed as part of a broad "tort reform" package in 1987 by the Alabama Legislature. The statute was challenged almost immediately. However, it was not until the Supreme Court of Alabama issued its opinion in *American Legion Post No. 57 v. Leahey*, *681* So.2d 1337 (Ala. 1996) that the Court weighed in definitely on the Constitutionality of the statute. The Court opined that the statute, which abrogates the common law collateral source rule and allows evidence of third-party payment, violated the due process and equal protection clauses of the Alabama Constitution. However, just four years later, the Court reversed itself and held in *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000) that the statute abrogating the collateral source rule in civil tort cases did not violate the Alabama Constitution. Therefore, section 12-21-45 remains Constitutional under current Alabama law, subject to the above limitations and interpretations.

Alaska

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

a. If so, is there a right of subrogation for the insurer?

Plaintiffs are generally permitted to seek recovery of medical expenses paid by their insurer and the insurer has a right of subrogation. If a plaintiff obtains a recovery for medical costs paid by a subrogated insurer, the plaintiff is entitled to deduct prorated attorney's fees and costs from the recovery before repaying the insurer. *See Cooper v. Argonaut Ins. Cos.,* 556 P.2d 525 (Alaska 1976). However, where a plaintiff's insurer has a subrogation right, that insurer can instruct the plaintiff that they are not authorized to seek recovery of the subrogated amounts in a lawsuit against an alleged tortfeasor. The insurer can retain the right to seek those sums directly from the alleged tortfeasor. *See Ruggles v. Grow,* 984 P.2d 509 (Alaska 1999).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

a. If so, is there a right of subrogation for the charitable provider?

Yes. *See Alaska Native Tribal Health Consortium v. Settlement Funds Held for or to be Paid on Behalf of E.R.*, 84 P.3d 418 (Alaska 2004). In *Alaska Tribal*, the Alaska Supreme Court held that a free or charitable provider has a right to assert a lien against a recovery, whether a judgment or settlement, for the cost of the treatment.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

a. If so, what are the differences?

At this time, this is an undecided issue in Alaska, but probably not.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source matters are governed by statute. *See* AS 09.17.070. Under AS 09.17.070, judges are required to reduce awards to reflect *unsubrogated* payments from collateral sources that do not have to be repaid.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Any windfall would be kept by the plaintiff.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

As a general rule, plaintiffs are entitled to seek recovery of the reasonable value of medical services even if the medical expenses are actually paid by a collateral source. *See Aydlett v. Haynes*, 511 P.2d 1311, 1313-15 (Alaska 1973). However, when the reasonable value of the medical services is different from the amount actually billed or paid, it is unsettled whether plaintiff can seek recovery of the "reasonable value" of the medical services as opposed to the amount actually paid or billed for the services.

There have been several orders entered by different Superior Court judges in cases involving claims for medical costs above what were actually paid with varying results. *See e.g. Schumacher v. Roberts et al.,* Case No. 3PA-06-02056 CI, "Order" (1/31/11) (limiting claim for medical expenses to those actually paid by Medicaid, rather than the amount charged by the provider, but allowing evidence of actual bills "for the purpose of presenting the scope and magnitude of plaintiff's non-economic damages."); *Daugharty v. Chugach Government Services, Inc.*, Case No. 3AN-09-7702 CI, "Order Granting Plaintiffs' Motion to Establish The Law Of The Case Regarding Determination Of Fair Market Value of Medical Services and Use of Evidence of Collateral Source Benefits" (6/9/10) (holding plaintiffs could claim the fair market value of medical care regardless of discounts negotiated by insurers or voluntarily provided by caregiver); *Midwag and Taylor v. Alaska Direct Bus Lines, Inc.*, Case No. 3AN-09-8812 CI, "Order Granting Plaintiff's Rule of Law Motion: Collateral Source Rule" (6/1/10) (holding reduction in sums owed for medical care was a "collateral source" and that plaintiff could seek recovery of the reasonable value or cost of the medical services); *Ferguson v. Mead*, Case No. 3PA-07-1788 CI, "Order Regarding Medicare Evidence" (5/19/09) (holding plaintiff could only seek recovery of the actual amounts paid by Medicare); and *Lucier v. Steiner Corp.*, Case No. 4FA-00-1575 CI, "Memorandum Decision and Order on Rule of Law Regarding Past Medical Expenses" (5/21/03) (holding plaintiff was limited to claiming the actual amounts paid by Medicaid for her medical care)

To date, this issue has not reached the Alaska Supreme Court on appeal. However, there was an interlocutory petition for review that was filed in the *Lucier* case, which was initially granted, but then was dismissed "as improvidently granted." *Lucier v. Steiner Corp.*, 93 P.3d 1052 (Alaska 2004). In the Order dismissing the petition, two Supreme Court Justices (Fabe and Carpeneti) filed a lengthy dissent arguing the court should address the issue, rather than just dismissing the petition. In their dissent, the justices argued the Medicare payments were a "collateral source" and their "value may not be used to reduce" a damages award. *Id.* at 1053. Rather, they indicated a plaintiff was still entitled to seek recovery of the reasonable value of the medical services and, post-trial, the court could make any necessary adjustments via offset in compliance with the collateral source statute. *Id.* at 1054-55. The three justices who decided to dismiss the petition, thereby leaving the trial court's decision in effect, have all retired and have been replaced on the Alaska Supreme Court, so it is unknown whether the views expressed by the two dissenting justices now reflects the view of the majority of the court.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

The reasonable value of medical services is an issue for the jury to decide and is not firmly defined under Alaska law at this juncture. As outlined above, the trial courts in Alaska are divided on whether plaintiffs are entitled to present evidence of the amount billed or only the amount actually paid as evidence of the "reasonable value" of the medical services. The fact that an insurance company has already paid a bill would be considered a collateral source and would not be admissible. *See Tolan v. ERA Helicopters, Inc.*, 699 P.2d 1265, 1267 (Alaska 1985).

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No, although it might based on whether the collateral source paid what the provider charged or paid some reduced amount.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Based on the *Alaska Tribal* decision discussed above, the Alaska Supreme Court seems to have concluded that it is fair to allow a plaintiff to recover more than was actually paid for treatment, at least where treatment was donated or free for other reasons. Certainly, the view of the two dissenting justices in *Lucier* was that it was fair to allow recovery of more than was actually paid for treatment. The court has indicated any inequities created by this rule can be addressed via the procedure for seeking an offset under the collateral source statute.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

The Alaska Supreme Court has not issued any decisions addressing this issue, but probably. As a general rule, there is no fixed measure for the amount of an award for non-economic damages and the determination of how to arrive at an award is left to the good sense and deliberate judgment of the fact finder. *Patrick v. Sedwick*, 413 P.2d 169 (Alaska 1966); *see also Beaulieu v. Elliott*, 434 P.2d 665, 676 (Alaska 1967). The court has held that a per diem formula may be used. *Id*. At least two trial court judges have indicated that such evidence may be relevant to the "magnitude of injury." *See Ferguson v. Mead* and *Schumacher v. Roberts, supra.*

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

While there is no specific decision addressing this subject, if a trial court allows evidence of the "billed value of specials" to be introduced to support a claim for an award of the reasonable value of medical services, then the court likely would permit the plaintiff to use that evidence to argue what an award of non-economic damages should be. In *Schumacher*, *supra,* the trial court specifically allowed such evidence to be used to support an argument regarding what should be awarded for non-economic damages.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Probably not.

Arizona

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Under the traditional collateral source rule, a Defendant may not seek to reduce its liability by introducing evidence that the Plaintiff has received compensation from other sources, such as the Plaintiff's own insurance coverage. For medical malpractice cases in Arizona, evidence of collateral source payments is admissible at trial, and there is a discretionary offset against damages for such payments.

A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

The collateral source rule in Arizona states that if an outside source not connected to the tortfeasor makes payment to or confers benefits on an injured party, these benefits and payments cannot be credited against the tortfeasor's liability. *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 129 P.3d 487 (App. 2006). In other words, compensation from a collateral source does not reduce the amount of damages that a tortfeasor owes the injured party. *Hall v. Olague*, 119 Ariz. 69, 579 P.2d 575 (App. 1978).

Arizona allows Plaintiffs to claim and recover the full amount of reasonable medical expenses, including those amounts adjusted and/or unpaid. A Defendant will be liable to compensate Plaintiff for unreasonable medical expenses billed, regardless of whether those amounts are actually paid. Arizona courts have indicated that the collateral source rules provide that total or partial compensation for an injury which the injured party received from a collateral source wholly independent of the wrongdoing does not operate to reduce the damages recoverable from the wrongdoer.

However, solely in the medical malpractice realm, via statute, Defendants are allowed to introduce evidence of collateral source benefits and allows Plaintiffs to rebut allegations of double recovery by relaying the circumstances surrounding such benefits. *See* A.R.S. §12-565 (2004).

a. If so, is there a right of subrogation for the insurer?

No right of subrogation for the insurer.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Plaintiff is generally permitted to recover the costs of third-party payments for medical treatment, regardless of where payments came from. *See Lopez v. Safeway Stores*, 212 Ariz. 198, 129 P.3d 487 (App. 2006).

a. If so, is there a right of subrogation for the charitable provider?

No right of subrogation.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No.

a. If so, what are the differences?

Not applicable.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Medical malpractice actions are governed by statute; all other civil actions are governed by common law.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

No.

b. Amount actually billed by the third-party provider.

No.

c. "Reasonable value" of medical services provided.

Yes. Arizona's recommended Jury Instructions set forth the list of elements of damage that may be recovered in a negligence action under Arizona law. *See* R.A.J.I. 4th, Personal Injury Damages 1. The instruction indicates that a jury may award an amount to compensate for "reasonable expenses of necessary medical care, treatment, and services rendered and reasonably likely to be incurred in the future." *Id.*

d. Other

When permitted to recover payments for medical or psychological treatment, in Arizona, the stated basis for recovery is the reasonable value of medical services provided. However, Plaintiffs are allowed to "blackboard" the amount actually billed by the third-party provider, rather than that which is ultimately paid by some collateral source. Arizona courts have indicated that when an injured Plaintiff is compensated for his injuries from a source other than a tort defendant, the latter cannot benefit from this recovery. *Michael v. Cole*, 122 Ariz. 450, 595 P.2d 995 (1979). The collateral source rule is designed to avoid a windfall to the tortfeasor, if a choice must be made between the tortfeasor and the injured party. *Id.* Arizona has held that a tortfeasor's insurer is not a collateral source. *Sahadi v. Mid-Century Ins. Co.*, 132 Ariz. 422, 646 P.2d 307 (App. 1982).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Reasonable value is for the determination and judgment of the jury. *See Meyer v. Ricklick*, 99 Ariz. 355, 409 P.2d 280 (1965). A Defendant may call a doctor to opine that the charges were unreasonable, but a party cannot disclose to a jury that a collateral source paid for all of the expenses, some of the expenses, or wrote them off.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

No, unless in a medical malpractice case.

(2) The amount billed for the services?

Yes.

(3) Provider testimony on the value of their services as compared to billed amounts?

Yes.

(4) Expert testimony on accuracy of provider billing rates?

Yes.

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

No, except in medical malpractice cases.

(6) Any other factors?

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Arizona courts have indicated that when an injured Plaintiff is compensated for his injuries from a source other than a tort defendant, the latter cannot benefit from this recovery. *Michael v. Cole*, 122 Ariz. 450, 595 P.2d 995 (1979). The collateral source rule is designed to avoid a windfall to the tortfeasor, if a choice must be made between the tortfeasor and the injured party. *Id.*

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

In Arizona, a Plaintiff is permitted to use the billed value at trial as a basis for a non-economic damages award, even if that was not the amount ultimately paid for the treatment or services.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

In Arizona, a Plaintiff is permitted to use the billed value at trial as a basis for a non-economic damages award, even if that was not the amount ultimately paid for the treatment or services.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Arkansas

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. Under Arkansas law, a defendant is prohibited from presenting evidence of benefits received by a plaintiff from a source wholly independent of the defendant. *Younts v. Baldor Elec. Co., Inc.*, 832 S.W.2d 832, 834 (Ark. 1992); *see also Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135, 142 (Ark. 2009). Evidence of a collateral benefit is admissible only if it is relevant to a purpose other than mitigating the defendant's damages. *Shipp v. Franklin*, 258 S.W.3d 744, 747 (Ark. 2007).

a. If so, is there a right of subrogation for the insurer?

Arkansas recognizes contractual, equitable, and statutory subrogation. *S. Farm Bureau Cas. Ins. Co. v. Tallant*, 207 S.W.3d 468, 471 (Ark. 2005). However, Arkansas employs a strict made-whole doctrine in which the insured must recover his or her total damages before any right to subrogation for medical expenses arises. *Id*. at 472; *Franklin v. Healthsource of Arkansas*, 942 S.W.2d 837, 840 (Ark. 1997). This rule limits the utility of subrogation and dictates in favor of express contractual provisions. *Am. Pioneer Life Ins. Co. v. Rogers*, 753 S.W.2d 530, 533 (Ark. 1988).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. Both discounted and gratuitous medical treatments are within the scope of Arkansas's collateral source rule. *Montgomery Ward & Co., Inc. v. Anderson*, 976 S.W.2d 382, 385 (Ark. 1998).

a. If so, is there a right of subrogation for the charitable provider?

Arkansas courts have not addressed this issue. However, a rule governing the rights of charitable providers would likely mirror the principles governing insurer subrogation rights.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No. All benefits received from collateral sources are treated identically under Arkansas law. *Montgomery Ward*, 976 S.W.2d at 383-84; *McMullin v. United States*, 515 F. Supp. 2d 904, 908 (E.D. Ark. 2007) (holding collateral source rule applies to receipt of Medicaid benefits).

a. If so, what are the differences?

N/A.

4. Are collateral source matters governed by statute, common law, or a combination of both?

The common law collateral source rule represents the current status of Arkansas law. *Johnson*, 308 S.W.3d at 142.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

A windfall recovery benefits the plaintiff. *Bell v. Estate of Bell*, 885 S.W.2d 877, 880 (Ark. 1994).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

A plaintiff is entitled to recover the reasonable expense of necessary medical treatment. Arkansas Model Jury Instructions—Civil, AMI 2204 (2012 ed.). To make this showing, a plaintiff can present evidence of the amount billed by a third-party provider. *Blissett v. Frisby*, 458 S.W.2d 735, 742 (Ark. 1970); *see also* Ark. Code Ann. §16-46-107.

d. Other

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The question of whether the cost of necessary medical treatment represents a reasonable expense is for the jury to decide. *Blissett*, 458 S.W.2d at 742.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

N/A.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

No. This consideration is inconsistent with the collateral source rule. *Montgomery Ward*, 976 S.W.2d at 385.

(2) The amount billed for the services?

Yes. The amount billed for medical services is routinely considered by the jury. *Kay v. Martin*, 777 S.W.2d 859, 861 (Ark. 1989).

(3) Provider testimony on the value of their services as compared to billed amounts?

Treating doctors may testify about the reasonableness and necessity of the amounts billed for medical treatment. Likewise, a defendant has the general right to show the unreasonableness or unnecessary nature of medical expenses incurred by a plaintiff. *Blissett*, 458 S.W.2d at 742.

(4) Expert testimony on accuracy of provider billing rates?

Arkansas courts have not addressed the issue of expert opinion regarding the difference between the billed rate and the actual rate paid. However, medical experts may opine about the reasonableness and necessity of the amounts billed for medical treatment. Likewise, a defendant has the general right to show the unreasonableness or unnecessary nature of medical expenses incurred by a plaintiff. *Blissett*, 458 S.W.2d at 742; *see also Grant v. Meek*, 2002 WL 432881, *1 (Ark. Ct. App. March 20, 2002) (noting jury's consideration of expert testimony that the treatment provided to the plaintiff was unnecessary).

(5) The fact that a third-party payor (a/k/a insurance company) has already paid the bill?

No. This consideration is inconsistent with the collateral source rule. *Patton v. Williams*, 680 S.W.2d 707, 708 (Ark. 1984).

(6) Any other factors?

Under the Arkansas Code, expert testimony is not required to show that medical charges were reasonable and necessary. Ark. Code Ann. §16-46-107.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. Collateral source evidence is generally inadmissible. *Montgomery Ward*, 976 S.W.2d at 385.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. The windfall received by a plaintiff is justified by the rationalization that any double recovery resulting from the payment of benefits by a collateral source should inure to an innocent plaintiff rather than a tortfeasor. *E. Texas Motor Freight Lines, Inc. v. Freeman*, 713 S.W.2d 456, 462 (Ark. 1986).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Arkansas courts have not prohibited the use of the billed value of medical treatment as a basis for non-economic damages. Appellate courts often review the reasonableness of a damages award for pain, suffering, and mental anguish by comparing it to the plaintiff's medical expenses. *See*, *e.g.*, *Vaccaro Lumber v. Fesperman*, 267 S.W.3d 619, 623 (Ark. Ct. App. 2007) (holding jury's award of more than ten times medical expenses and lost wages to be unreasonable). Likewise, the reasonableness of an award of punitive damages is based—*inter alia*—on comparison to the plaintiff's compensatory damages. *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361 (Ark. 2003).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Arkansas courts have not specifically addressed this issue. However, to the extent evidence of the amount paid for medical treatment conflicts with the collateral source rule, evidence that the amount paid was less than the amount billed would be inadmissible.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

Yes. The Arkansas Supreme Court declared the Arkansas legislature's attempt to abrogate the collateral source rule—by limiting a plaintiff's presentation of evidence for medical damages to sums actually paid by or on behalf of the plaintiff—unconstitutional. *Johnson*, 308 S.W.3d at 142. Specifically, the Supreme Court found that the legislative action violated the separation-of-powers doctrine under the Arkansas Constitution by encroaching on the Supreme Court's rulemaking authority. *Id*.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Under Arkansas law, the "spread" is the difference between the reasonable expense of necessary medical treatment and the amount paid. AMI 2204. While a plaintiff can present the billed value of medical treatment, a defendant can present evidence that medical treatment was unnecessary or unreasonably priced. *Blissett*, 458 S.W.2d at 742. The limitation of a plaintiff's recovery to the reasonable expense of necessary medical treatment weighs against a constitutional challenge.

California

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. Under the California collateral source rule, a tortfeasor's liability is not reduced by compensation the plaintiff receives from a source independent of the tortfeasor. Therefore, if an injured party receives some compensation for his or her injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages that the plaintiff would otherwise collect from the tortfeasor. *Hrnjak v. Graymar* (1971) 4 C.3d 725, 729. The California Supreme Court explained the rationale for the rule as follows: "… defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance." *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10.

a. If so, is there a right of subrogation for the insurer?

Depends. An insured's claim for bodily injury or death is "personal" and nonassignable. In personal injury actions, therefore, an insurance company who has paid first party medical, health or death benefits may not assert a subrogation claim per se directly against the third party tortfeasor on its own behalf. *Fifield Manor v. Finston* (1960) 54 C2d 632, 639-640; *21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511, 520. Many health insurance plans or policies, however, obligate the insured to reimburse the insurer for medical benefits to treat injuries caused by a third party out of any tort recovery obtained by the insured from such third party. *West v. State Farm Mut. Ins. Co.* (1973) 30 Cal. App. 3d 562; *Lee v. State Starm Mut. Auto. Ins. Co.* (1976) 129 Cal. Rptr. 271; *Block v. California Physicians' Services* (1966) 244 Cal.App.2d 53. An insurer exercising its right to reimbursement must pay a pro rata share for attorney's fees and costs expended by the insured in procuring recovery from a third party. *Lee v. State Starm Mut. Auto. Ins. Co*, *supra* at 278.

Further, in California, when a hospital provides care for a patient, the hospital has a statutory lien against any judgment, compromise, or settlement received by the patient from a third person responsible for his or her injuries, or the third person's insurer, if the hospital has notified the third person or insurer of the lien. California *Civil Code* §3045.1 (Hospital Lien Act (HLA)). In addition, various government entities may have statutory lien or subrogation rights for government benefits provided (*e.g.,* Medi-Cal Lien *Welf. & Inst.C.* §14009.5; State Restitution Victim Lien *Gov.C.* §13963(a) & (b); County Benefit Lien *Gov.C.* §23004.1)

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. Gratuitous payments or services rendered by third parties are likewise treated as "collateral sources" that are not deducted from plaintiff's recoverable damages. The reasonable value of medical and nursing care, therefore, may be recovered although rendered gratuitously or paid for by a source independent of the wrongdoer. *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 637; *Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, 349. California courts reason that since the third party's intent was to benefit a plaintiff, "reduction in plaintiff's recovery would effectively shift the benefit to defendant and might discourage third persons from helping injured plaintiffs." *Arambula v. Wells* (1999) 72 CA4th 1006.

a. If so, is there a right of subrogation for the charitable provider?

Not likely. Under California law, a mere volunteer who discharges another's debt is not entitled to subrogation. A party is considered a volunteer for purposes of subrogation analysis if, in making a payment, it has no interest of its own to protect, it acts without any obligation, legal or moral, and it acts without being

requested to do so by the person liable on the original obligation. *Morgan Creek Residential v. Kemp* (2007) 63 Cal.Rptr.3d 232.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Depends. In a recent California Supreme Court decision, the Court affirmed the rule that a plaintiff is only entitled to recover the reasonable amount of medical expenses actually paid, regardless if insured by private insurance or Medi-Cal. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 (*Howell*). In so ruling, the Court relied on the reasoning set forth in *Hanif v. Housing Authority* (1988) 200 Cal. App.3d 635 (*Hanif*). In *Hanif,* the court held that a plaintiff struck by an automobile, who had no private medical insurance, was not entitled to recover the full amount of medical expenses billed to a Medi-Cal program. Rather, the plaintiff was only entitled to recover the reasonable amount of medical expenses actually paid. The court reasoned that "when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate." In *Howell*, the California Supreme Court specifically extended the *Hanif* rule to private insurance providers, reasoning that "when the exact amount of expenses have been established by contract and those expenses have been satisfied, there is no longer any issue as to the amount of expenses for which the plaintiff will be liable. In the latter case, the injured party should be limited to recovering the amount paid for the medical services." *Id* at 560.

The California Supreme Court however, acknowledged the possibility of the "gratuitous-service exception" to the *Hanif* rule, which allows plaintiffs in certain jurisdictions to recover the reasonable value of donated services even though he or she did not incur liability or pay that amount. *Howell* at 557, citing *Rest.2d Torts* §911, com. H pp. 476-477, *Hanif* at 643. In such jurisdictions, therefore, it is likely plaintiffs will continue to seek recovery of the reasonable value of donated medical services, even though such services were not paid by plaintiff or plaintiff's insurer. *Howell* at 557. Further, the Supreme Court declined to decide if the *Hanif* rule applies in circumstances where a provider "writes off" part of the plaintiff bill because the plaintiff is unable to pay the full charge. The Court acknowledged that one may argue the "write off" constitutes a gratuitous benefit for which the plaintiff is entitled to recover pursuant to "gratuitous-service exception." *Howell* at 559.

4. Are collateral source matters governed by statute, common law, or a combination of both?

In California, the collateral source rule derives from common law and operates both as a substantive rule of damages and as a rule of evidence. As a rule of damages, the collateral source rule precludes a setoff against recoverable damages for benefits received by plaintiff from sources wholly independent of the defendant. As an evidentiary principle, the collateral rule states that absent special circumstances, defendant cannot introduce the source or fact of such payments into evidence. With few exceptions, the collateral source rule is governed by common law. "A pervasive public policy has been judicially expressed and California remains a firm proponent of the 'collateral source rule." *Hrnjak v. Graymar* (1971) 4 C.3d 725, 729.

The collateral source rule, however, has been abrogated by statute in certain limited situations. For example, judgments against public entities may be reduced under *Government Code* section 985, based on services or benefits the plaintiff has received from certain publicly funded sources and private insurance. *Smock v. State of California* (2006) 138 Cal.App.4th 883, 888. Further, the Medical Injury Compensation Reform Act (MICRA) abrogates the rule in actions for professional negligence against health care providers. Cal *Civ. Code* §3333.1. Under *Civil Code* §3331.1, a medical malpractice defendant may introduce evidence of plaintiff's med-

ical expenses by a "collateral source" (*e.g.*: Social Security, disability, workers' compensation coverage, plaintiff's health or disability insurance, etc.). Once a MICRA defendant introduces evidence of collateral source benefits received by plaintiff, the plaintiff's provider's reimbursement rights against plaintiff and its subrogation rights against defendant are extinguished. The statute, however, does not "require" the jury to deduct collateral source benefits in computing plaintiff's recoverable damages; rather, the statute simply permits defendant to introduce evidence that such benefits were paid. Technically, therefore, it is left up to the jury to decide how such evidence should affect the assessment of damages. *Barme v. Wood* (1984) 37 C3d 174, 179.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Not applicable. A plaintiff is not entitled to recover from the tortfeasor, as economic damages for past medical expenses, more than was actually paid. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. Further, based on statutory law, where a judgment is returned against a public entity in a personal injury or wrongful death action, the entity may request a post-trial hearing to reduce the judgment by the amount of plaintiff's collateral source payments if such payments are over a specified amount. Gov.C. §985(b); *Garcia v. County of Sacramento* (2002) 103 CA4th 67, 72-73.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

A plaintiff in California is entitled to recover the reasonable cost of reasonably necessary medical care that he or she incurred, and the reasonable cost of reasonably necessary medical care that he or she is reasonably certain to need in the future. *California Civil Jury Instruction* 3903A. To be recoverable, a medical expense must be both incurred and reasonable. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555. Any reasonable charges for treatment the plaintiff has paid or, having incurred, still owes the medical providers are recoverable as economic damages. *Howell* at 551, citing *Melone v. Sierra Railway Co*. (1907) 151 Cal. 113, 115. A plaintiff, however, is not entitled to recover the reasonable value of medical services if such amount is more than the amount paid or incurred for same. *Howell* at 555, citing *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 641. A personal injury plaintiff, therefore, may recover *the lesser* of the (1) the amount paid or incurred for medical services, and (b) the reasonable value of the services." *Howell* at 556.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. "When the evidence shows a sum certain to have been paid or incurred for past medical care and services, *whether by the plaintiff or by an independent source,* that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate." *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 549., citing *Hanif v. Housing Auto of Yolo County* (1988) 200 CA3d 635, 641.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. Compensatory damages are aimed at making a plaintiff "whole" and California courts have reasoned that plaintiffs would be entitled to a windfall if permitted to recover more than was actually paid for

treatment. An award exceeding that amount would place plaintiff in a better economic position than if the wrong had not been committed, resulting in impermissible "overcompensation." *Greer v. Buzgheia* (2006) 141 CA4th 1150, 1156-1157; *Hanif,* 200 CA3d at 639-644; *Howell,* 52 Cal.4th 541 at 555. If a jury awards a plaintiff more than was accepted as full payment by medical provider, the defendant may move for a new trial on grounds of excessive damages. *Howell* at 567, citing *California Code of Civil Procedure* §657(5).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Possibly. If a medical provider, by prior agreement, accepted less than the full billed amount, the full billed amount is not relevant or admissible at trial on the issue of *past* medical services. *Howell* at 567. The California Supreme Court in *Howell*, however, declined to express an opinion as to "its relevance or admissibility on other issues, such as noneconomic damages or future medical expenses," reasoning that same was not before the Court. *Id*. A plaintiff in California, therefore, will likely continue to seek to introduce the full amount billed, even though not paid or incurred, to bolster his or her claim for noneconomic damages and future medical expenses.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

California courts have upheld the constitutionality of the Medical Injury Compensation Reform Act (MICRA), which excludes medical malpractice defendants from application of the collateral source rule (see above). The statute does not violate the due process or equal protection rights of malpractice plaintiffs because plaintiffs have no vested right in a particular measure of damages; and the statute is rationally related to the legitimate state interest. "In reducing damages awards by amounts already reimbursed and in redistributing certain costs from the malpractice insurer to other third party indemnitors, the statute contributes to the state's overriding policy goal of limiting malpractice insurance costs. *Barme v. Wood* (1984) 37 C3d 174; *Fein v. Permanentae* (1985) 38 C3d 137, 211 CR 368.

Colorado

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

A plaintiff is generally permitted to recover the costs of third-party payments by insurers for medical and psychological treatment under the contract exception contained in Colorado's collateral source statute. *See* C.R.S. §13-21-111.6. Such payments are recoverable if the payments were paid as a result of an insurance policy that was "entered into and paid for by or on behalf of" the plaintiff. *Id*.

a. If so, is there a right of subrogation for the insurer?

If an insurance policy expressly provides for subrogation, the insurer has a "conventional" right of subrogation. *See Am. Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 323 (Colo. 2009). However, under Colorado law, even if the insurance policy does not contain such a provision, insurers have an equitable right of subrogation when it reimburses a victim for damages under the victim's insurance policy and can stand in the victim's shoes to collect the reimbursed amount from the party responsible for the damages. *See id*. The purpose of subrogation is to curtail the possibility of a double recovery by the insured. *See Levy v. Am. Family Mut. Ins. Co.*, 2011 Colo. App. LEXIS 148 *11 (Colo. App. Feb. 3, 2011).

In 2010, the Colorado General Assembly placed limitations on the insurer's right of subrogation by enacting section 10-1-135. Under that statute, "[r]eimbursement or subrogation pursuant to a provision in an insurance policy, contract, or benefit plan is permitted only if the injured party has first been fully compensated for all damages arising out of the claim." C.R.S. §10-1-135(3)(a)(I). Once the injured party has been fully compensated, the insurer's

> reimbursement or subrogation amount cannot exceed the amount actually paid by the payer of benefits to cover benefits under the policy, contract, or benefit plan or, for health care services provided on a capitated basis, the amount equal to eighty percent of the usual and customary charge for the same services by health care providers that provide health care services on a non-capitated basis in the geographic region in which the services are rendered.

C.R.S. §10-1-135(3)(b).

The statute also provides that the insurer's recovery must be reduced in an amount that represents its proper share of any attorney fees and costs incurred by the injured party in recovering any amount from the tortfeasor. Specifically,

> [t]he amount recoverable, if any, by the payer of benefits for reimbursement or subrogation shall be reduced by an amount equal to the payer of benefits' proportionate share of the attorney fees and expenses incurred by or on behalf of the injured party in making the recovery, based on the ratio of the amount of attorney fees and expenses incurred to the amount of the recovery.

C.R.S. §10-1-135(3)(c).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Under Colorado's collateral source statute, it is unlikely that a plaintiff would be permitted to recover the costs of free or charitable care donated to him or her. Although a plaintiff could recover third-party gifts under the common law collateral source rule, *see Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080, 1083 (Colo. 2010), section 13-21-111.6 modified the common law rule, requiring the court to reduce the amount of the verdict by any third-party payments, unless such payments fall within the statute's con-

tract exception. There is no case law that specifically addresses whether free or charitable care falls within the contract exception; but because a plaintiff has not given any consideration for a free or charitable gift, a court would probably conclude that such payments do not fall within the contract exception.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

There is no specific Colorado case law regarding whether a party's recovery is treated differently under section 13-21-111.6 when the payor is Medicare or Medicaid instead of a private insurer. However, the common law collateral source rule was inapplicable to benefits received by a plaintiff from a governmental source such as Medicaid. *See Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1074 (Colo. 1992); *Gomez v. Black*, 511 P.2d 531, 533 (Colo. App. 1973). A court is unlikely to determine that such payments fall within the contract exception under section 13-21-111.6 because the payments are not paid as a result of a contract paid for by or on behalf of a plaintiff.

4. Are collateral source matters governed by statute, common law, or a combination of both?

In Colorado, collateral source matters are governed by both common law and statute. The collateral source rule consists of two components: (1) a post-verdict set-off rule; and, (2) a pre-verdict evidentiary rule.

Historically under the common law collateral source rule, any third-party payments or benefits received by a plaintiff accrued solely to the plaintiff's benefit and were not deducted from the amount of the tortfeasor's liability, even if it resulted in a windfall to the plaintiff. *See Gardenswartz*, 242 P.3d at 1082-83; *see also Colo. Permanente Med. Grp., P.C. v. Guidot*, 926 P.2d 1218, 1230 (Colo. 1996); *Keelan*, 840 P.2d at 1074. The collateral source rule did not apply if the payments or benefits were attributable to the defendant or if the compensation or benefits had been "gratuitously furnished" to a plaintiff by a governmental body. *See Keelan*, 840 P.2d at 1074; *see also Levy*, 2011 Colo. App. LEXIS 148 at *10 ("Colorado law recognizes that the collateral source rule is inapplicable in situations where the plaintiff's compensation is attributable to the defendant or tortfeasor."). Evidence of such third-party payments or benefits was inadmissible at trial to ensure that the jury would not be misled by the evidence. *See Gardenswartz*, 242 P.3d at 1083.

The post-verdict component of the common law collateral source rule was codified in 1986 by the enactment of the collateral source statute. *See* C.R.S. §13-21-111.6; *Gardenswartz*, 242 P.3d at 1084. "Section 13-21-111.6 sets forth a general rule that damages for which a claimant has been wholly or partially indemnified or compensated by another cannot be recovered in a tort action against the tortfeasor involving the same injury." *Miller v. Brannon*, 207 P.3d 923, 931 (Colo. App. 2009). The statute requires a court to reduce any verdict by deducting the compensation or benefits that a plaintiff has received from collateral sources. *See* C.R.S. §13-21-111.6 ("In any action by any person or his legal representative to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained. . . .").

However, the collateral source statute contains a contract exception that retains the common law collateral source rule for compensation or benefits received by a plaintiff that were "paid as a result of a contract entered into and paid for by or on behalf of such person." *Id.* The contract exception is "broad enough to cover contracts for which a plaintiff gives some form of consideration, whether it be in the form of money

or employment services, with the expectation of receiving future benefits in the event they become payable under the contract." *Keelan*, 840 P.2d at 1079. But if the payor of such compensation or benefits is found liable for the plaintiff's injuries, the contract exception is not applicable. *Guidot*, 926 P.2d at 1231-32 (holding that where the plaintiff's medical insurer pays for the plaintiff's medical expenses and is later found to be partially at fault for the plaintiff's injuries, the court should reduce the plaintiff's damages by the portion of medical expenses paid by the insurer that are attributable to the medical insurer's fault).

The pre-verdict evidentiary component to the collateral source rule was codified in 2010 by the enactment of C.R.S. §13-21-111.6. *See* C.R.S. §13-21-111.6(10)(a). The Colorado Supreme Court recently clarified this issue in three separate rulings. In those rulings, the Colorado Supreme Court held that C.R.S. §13-21-111.6(10)(a) codified the common law pre-verdict collateral source rule that excludes all evidence at trial of amounts paid by a collateral source to cover a plaintiff's medical bills. *See Wal-Mart v. Crossgrove*, 2012 Colo. LEXIS 330 , at 333 (2012) ("The Legislature codified the evidentiary component of the collateral source rule in 2010…"); *Smith v. Jeppsen*, 2012 Colo. LEXIS 331 at 335 (2012) ("Subsection 10-1-135(10)(a) unambiguously codifies the pre-verdict common law principle by excluding from evidence the fact or amount of any collateral source payment of benefits."); *Sunahara v. State Farm Mutual Automobile Insurance*, 2012 Colo. LEXIS 328 (2012).

5. If State law allows Plaintiff to recover more than was paid, who keeps the windfall?

If the contract exception under section 13-21-111.6 applies, the plaintiff is allowed to keep any windfall. *See Gardenswartz*, 242 P.3d at 1083, 1084 (noting that "[s]ection 13-21-111.6 did not sweep away the common law collateral source rule entirely," does not require any offset "if the benefits arise out of a contract entered into on the plaintiff's behalf," and under the collateral source rule, "[i]f either party is to receive a windfall, the rule awards it to the injured plaintiff").

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

In Colorado, a plaintiff may recover the necessary and reasonable value of the services rendered. *Heller v. First National Bank of Denver*, 657 P.2d 992 (Colo. App. 1982). If the contract exception under section 13-21-111.6 applies, any write offs that are applied to the plaintiff's medical bills – that is, discounted medical rates received by the insurance company – may not be used to reduce the tortfeasor's liability. *See Gardenswartz*, 242 P.3d at 1085-86. This result is warranted because if the plaintiff had not been insured, the write offs would not have been applied to his or her medical bills and the tortfeasor would have been responsible for the billed amount. *See id.* ("the discounted medical rates paid by [the plaintiff's] insurance company are a direct result of his health insurance contract, and therefore [the defendant] may not claim these discounts to reduce its liability for the medical care that he received.").

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The jury decides the "reasonable value" of the medical services provided. *See Colo. Comp. Ins. Auth. v. Jorgensen*, 992 P.2d 1156, 1160 (Colo. 2000) ("In the trial of personal injury cases, juries determine the amount of damages to award for various injuries and claims.").

a. Is the jury allowed to consider the following?

(1) The amount actually paid for the services?

In general, the jury may consider the amount actually paid for the services as "some evidence of their reasonable value." *Oliver v. Weaver*, 212 P. 978, 981 (1923) ("the amount paid for services is some evidence as to their reasonable value"). However, this longstanding rule is abrogated if the case involves payment via a collateral source. *See Crossgrove,* 2012 Colo. LEXIS 330 at 334, 335 ("Admitting amounts paid evidence for any purpose, including the purpose of determining reasonable value, in a collateral source case carries with it an unjustifiable risk that the jury will infer the existence of a collateral source… [T]rial courts must exclude evidence of amounts paid by a collateral source even to show the reasonable value of the services rendered.")

(2) The amount billed for the services?

The jury may also consider the amount billed for the services. *See Smith v. Farmers Ins. Exch.*, 9 P.3d 335, 338 n.6 (Colo. 2000) (noting that "the measure of damages was correctly calculated," in part, by adding together the medical bills received by the plaintiff).

(3) Provider testimony on the value of their services as compared to billed amounts?

There is no specific Colorado case law on this issue.

(4) Expert testimony on accuracy of provider billing rates?

There is no Colorado case law that addresses this specific issue; however, in practice, the parties may present expert testimony that the amounts billed represent the reasonable value of the services provided. *See*, *e.g.*, *Gardenswartz*, 242 P.3d at 1082 n.2.

(5) The fact that a third-party payor (a/k/a an insurance company) has already paid the bill?

Evidence of a collateral payment is excluded and may not be included for any purpose. *See Crossgrove, ,* 2012 Colo. LEXIS 330 at 334, 335 ("Admitting amounts paid evidence for any purpose, including the purpose of determining reasonable value, in a collateral source case carries with it an unjustifiable risk that the jury will infer the existence of a collateral source… [T]rial courts must exclude evidence of amounts paid by a collateral source even to show the reasonable value of the services rendered."); *See also* C.R.S §13-21-111.6(10)(a).

(6) Any other factors?

There is no specific Colorado case law on this issue.

3. Do the damages Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

As set forth in more detail in section A.4. above, under the collateral source statute, the damages a plaintiff is permitted to recover for the cost of treatment are reduced by any payments or benefits received by a plaintiff from collateral sources unless the payment or benefit falls within the statute's contract exception. *See* C.R.S. §13-21-111.6.

4. Have your Courts addressed the fairness of allowing Plaintiff to recover more than was actually paid for treatment?

Colorado courts have determined that it would be unfair to allow the tortfeasor to benefit in the form of reduced liability; therefore, "[i]f either party is to receive a windfall, the rule awards it to the injured plaintiff who was wise enough or fortunate enough to secure compensation from an independent source." *Gardenswartz*, 242 P.3d at 1083.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

While there is no case law that specifically addresses this issue, if a jury awards zero non-economic damages after finding that a plaintiff has incurred damages for reasonable and necessary medical treatment and there is undisputed evidence of the plaintiff's pain and suffering and loss of enjoyment of life, then the jury's failure to award any non-economic damages warrants a new trial on damages. *See Peterson v. Tadolini*, 97 P.3d 359, 362 (Colo. App. 2004).

2. Is plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Colorado courts have not specifically addressed this issue.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

There is no Colorado case law that addresses whether the collateral source statute is unconstitutional. Although in *Barnett*, the trial court concluded that section 13-21-111.6 did not violate either the United States or Colorado constitutions, the Colorado Supreme Court and the Colorado Court of Appeals did not reach the issue on appeal. *See Am. Family Ins. Co. v. Barnett*, 821 P.2d 853, 854 (Colo. App. 1991), *cert. granted*, *Barnett v. Am. Family Mut. Ins. Co.*, 843 P.2d 1302, 1304 (Colo. 1993).

There is also no federal case law on this issue. Although the United States District Court for the District of Colorado reserved ruling on a plaintiff's motion challenging the constitutionality of section 13-21-111.6, *see Glasshof v. Benton*, 848 F. Supp. 150, 153 (D. Colo. 1994), there is no later published ruling on this issue.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Connecticut

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Sometimes. In Connecticut, a plaintiff's related medical expenses, called special damages, are reduced by third-party payments by insurers. However, the plaintiff is allowed to recover the costs to obtain that insurance, including personal and employer premium payments, made during the treatment period. Therefore, if premiums are paid monthly, a plaintiff could recover the premium payments for that month up to but not exceeding the amount of the insurance payment reduction under the collateral source rule. The reduction for collateral source payments is made during a post-verdict motion. A plaintiff is allowed to recover voluntary write-downs or write-offs by insurers despite a windfall recovery as voluntary reductions or forgiveness has been found to fall outside of the definition of a collateral source, if included in a verdict. A plaintiff generally may not recover involuntary (e.g. pursuant to a contract between a medical provider and a HMO) write-downs or write-offs by insurers as these are considered collateral sources by the majority opinions. There are some minority opinions that may allow a plaintiff to recover involuntary write-downs or write-offs by insurers if not raised on pretrial motion or at trial as some judges have ruled that involuntary payments fall outside of the collateral source definition for a post-verdict motion for collateral source reduction, although these opinions may not withstand appellate review at this time in light of the current apparent disposition of the courts on this issue. ERISA plans generally assert liens that the plaintiff can recovery as the lien is paid or payable by the plaintiff. A plaintiff may obtain a windfall recovery for voluntary write-downs and write-offs under an ERISA plan. A plaintiff may not obtain involuntary write-downs and write-offs under an ERISA plan.

a. If so, is there a right of subrogation for the insurer?

No. Only ERISA or worker's compensation benefits providers may assert a lien or otherwise seek recovery.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes, if charged and then voluntarily forgiven.

a. If so, is there a right of subrogation for the charitable provider?

Not currently.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No, as the total medical expenses may be offered into evidence, including voluntary and involuntary write-downs.

a. If so, what are the differences?

N/A

4. Are collateral source matters governed by statute, common law, or a combination of both?

Combination of both.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

Reasonable value is the chosen method. See Model Civil Jury Instruction, 3.4-1. However, a windfall judgment can result as indicated above.

d. Other

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

A jury determination of the reasonable value of reasonable and necessary medical treatment. See Model Civil Jury Instruction, 3.4-1.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

A jury can find a verdict on paid or billed, depending on the circumstances as long as a jury finds the charges reasonable.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services? Yes, depending on the judge's ruling on any pre-trial motion or trial objection for admissibility of insurance payments and write-downs/write-offs.

(2) The amount billed for the services? Yes, depending on the judge's ruling on any pretrial motion or trial objection for admissibility of insurance payments and write-downs/write-offs.

(3) Provider testimony on the value of their services as compared to billed amounts? Yes, for possible future medical expenses.

(4) Expert testimony on accuracy of provider billing rates? Yes.

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill? Yes, depending on the judge's ruling on any pretrial motion or trial objection for admissibility of insurance payments and write-downs/write-offs.

(6) Any other factors? Depending on the circumstances, some judges may allow only the billed amount to be admitted into evidence while other judges may allow defendants to offer actual payments, write-downs and write-offs.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Yes, as there may be a collateral source reduction depending on the circumstances.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. The Connecticut Supreme Court has decided that in some circumstances it prefers a windfall to a plaintiff rather than give a credit to a tortfeasor.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Yes, but a defendant may be able to introduce reductions in the billed amounts paid or payable by a plaintiff depending on the circumstances and the judge.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Yes.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

Yes.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Delaware

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. Under Delaware's collateral source rule, a plaintiff's damages may not be reduced because of payments for treatment by medical insurance to which the tortfeasor did not contribute. *Mitchell v. Haldar*, 883 A.2d 32, 38-39 (Del. 2005). The collateral source rule is "predicated on the theory 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." *State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71, 73 (Del. 1989). According to the collateral source rule, "a tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source." *Id*. The rationale for the collateral source rule is based upon the quasi-punitive nature of tort law liability, designed to strike a balance between two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more; and (2) a defendant is liable for all damages that proximately result from his wrong. A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall. Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer. *Mitchell*, 883 A.2d at 37-38.

In a medical malpractice action, Delaware has abrogated by statute the general operation of the collateral source rule: "In any medical negligence action for damages . . . the trier of fact shall consider evidence of 1) Any and all facts available as to any public collateral source or compensation or benefits payable to the person seeking such damages (including all sums which will probably be paid payable to such person in the future) on account of such . . . bodily injury." 18 Del. C. §6862. The purpose of this statute is to prevent a plaintiff from collecting on a loss from a collateral public source and then collecting for the same loss from a defendant. *Davis v. St. Francis Hosp.*, 2002 Del. Super LEXIS 134 *2 (March 8, 2000), citing *Nanticoke Mem. Hosp. v. Uhde*, 498 A.2d 1071 (Del. 1985). Under §6862, the defense may present evidence of Medicaid payments to plaintiff to avoid such a double recovery. The statute is silent as to whether the amount actually paid by Medicaid for the physician's agreed-upon fee-for service is what should be presented to the jury, or whether the physician's usual and customary billing rate for the service at issue should be presented.

a. If so, is there a right of subrogation for the insurer?

It depends. Although there appears to be no right of subrogation for a medical insurer, there does seem to be a right when the collateral source payments are made by a collision carrier in a motor vehicle case, *see Estate of Farrell v. Gordon*, 770 A.2d 517, 520 (Del. 2001) or a worker's compensation carrier. *Adams v. Delmarva Power & Light Co.,* Del. Supr., 575 A.2d 1103 (1990). *See also* Restatement, Second, Torts §885, Comment f.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Under the collateral source rule, a plaintiff could recover from a tortfeasor for the reasonable value of medical services provided even if those services were provided gratuitously. *Mitchell v. Haldar*, 883 A.2d 32, 38 (Del. 2005) (*citing Hueper v. Goodrich*, 314 N.W.2d 828 (Minn. 1982)). However, there seems to be a shift away from this reasoning in the recent opinion of *Shinn v. The Chimes*, CA No. 01-03-260-CLS (New Castle County, 2005) in which the Court did not board Plaintiff's medical expenses which were written off by the hospital. Applying Pennsylvania's reasoning from *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001), the Court explained that an amount written off is an "illusory charge" which will never be paid by plaintiff or any other collateral source, therefore these amounts are not recoverable.

a. If so, is there a right of subrogation for the charitable provider?

This situation appears to be unaddressed but given application of the traditional collateral source rule to charitable care, the right of subrogation would be the same.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Public collateral sources are treated differently than private insurers in medical malpractice actions.

a. If so, what are the differences?

For example, 18 Del. C. §6862 provides, in pertinent part: In any medical negligence action… there may be introduced, and if introduced, the trier of facts shall consider evidence of… any and all facts available as to *any public collateral* source of compensation…." The purpose of this statute is to prevent the collection of a loss from a collateral public source and then the collection for the same loss from the party being sued. *Nanticoke Memorial Hosp., Inc. v. Uhde*, 498 A.2d 1071, 1075 (Del. 1985).

4. Are collateral source matters governed by statute, common law, or a combination of both?

Both. The collateral source rule was first recognized in *Yarrington v. Thornburg,* 205 A.2d 1 (Del. 1964) and is considered firmly embedded in Delaware law. *Miller v. State Farm Mut. Auto. Ins. Co.,* 993 A.2d 1049 (Del. 2010).

Delaware has also enacted 18 Del. C. §6862 for medical negligence actions which pertains to collection from public collateral sources.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff. Under Delaware's collateral source rule, a plaintiff's damages may not be reduced because of payments for treatment by medical insurance to which the tortfeasor did not contribute. *Mitchell v. Haldar,* 883 A.2d 32, 38-39 (Del. 2005). In Delaware, a plaintiff who is risk averse may contract for private medical insurance and receive a double recovery. *Id*. The tortfeasor is required to bear the cost for the full value of his or her negligent conduct even if it results in a windfall for the innocent plaintiff. *Id*. Double recovery is only allowed in Delaware by certain non-public collateral sources, wholly independent from the tortfeasor, but not from a public source and not from a defendant who has already provided a benefit to the plaintiff.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

No.

b. Amount actually billed by the third-party provider.

No.

c. "Reasonable value" of medical services provided.

Yes, except in medical malpractice actions. ** Note however that there is some movement away from recovery of any reasonable medical expenses to the amount actually paid by the third party provider based on the reasoning that plaintiff should not be able to recover for illusory charges.

d. Other

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

The reasonable value of services, which has been found in some cases to be the full amount billed for the services. *See Onusko v. Kerr,* 880 A.2d 1022 (Del. 2005) (citing Restatement (Second) of Torts, §920A (1979)); But see *Shinn v. The Chimes,* CA No. 01-03-260-CLS (New Castle County, 2005).

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

Yes. *See Onusko v. Kerr*, 880 A.2d 1022 (Del. 2005); But see *Shinn v. The Chimes*, CA No. 01-03-260-CLS (New Castle County, 2005)

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Yes. See Response to A1.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Under the collateral source rule, a plaintiff may recover damages from a tortfeasor for the reasonable value of medical services, even if the plaintiff has received complete recompense for those services from a source other than the tortfeasor. The collateral source rule requires the injured party to be made whole exclusively by the tortfeasor and not by a combination of compensation from the tortfeasor and collateral sources. The benefit conferred on the injured person from the collateral source is not credited against the tortfeasor's liability, even if the plaintiff has received partial or even complete value. *Mitchell v. Haldar*, 883 A.2d 32, 38 (Del. 2005).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Although the type of permanency of injury is evidence of non-economic damages such as pain and suffering, it does not appear that the medical bills themselves may be used to reach a number for non-economic damages. *Monroe v. Bikash*, 1999 Del. Super. LEXIS 303 (Del. Super. Ct. Jan. 13, 1999) (in a medical malpractice case).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

n/a

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

n/a

District of Columbia

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. *Hardi v. Mezzanotte*, 818 A.2d 974 (D.C. 2003); *District of Columbia v. Jackson*, 451 A.2d 867 (1982).

a. If so, is there a right of subrogation for the insurer?

Yes.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. *Albano v. Yee*, 219 A.2d 567 (D.C. 1966); *Hudson v. Lazarus*, 217 F.2d 344 (D.C. Cir. 1954).

a. If so, is there a right of subrogation for the charitable provider?

This question has not yet been decided.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

a. If so, what are the differences?

This question has not been decided. In *Jackson, supra,* the court assumed the collateral source rule would apply when Medicaid is the payor and appeared to suggest it would apply when Medicare is the payor.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source matters are governed by common law.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The Plaintiff keeps the windfall. *Hardi, supra.*

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

The amount recoverable equals the amount billed by the third-party payor. *Hardi, supra.*

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

Medical bills are admissible, without expert testimony, on the plaintiff's testimony that he or she considered them reasonable and necessary. *Albano, supra*; *Giant Food Stores, Inc. v. Bowling*, 202 A.2d 783 (D.C. 1964).

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

This issue has not been addressed in any detail but was mentioned in *Jackson, supra,* where the court stated that it is more just for a windfall to insure to the benefit of the injured party than to accrue to the tortfeasor.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

This question has not been decided.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

This question has not been decided.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Not applicable to the District of Columbia.

Florida

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. Generally speaking, Plaintiff is entitled to recover some measure of costs, however, Florida does not allow a Plaintiff to recover the full amount of his or her medical bills when those bills are reduced due to a contractual discount negotiated by a third party. Pursuant to Florida's Collateral Source Rule, which is codified at §768.76, Florida Statutes, the court shall reduce the amount of damages awarded by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all "collateral sources." The Florida statute recognizes that the reduction shall be offset by any amount paid, contributed, or forfeited by or on behalf of the claimant or members of the claimant's immediate family.

a. If so, is there a right of subrogation for the insurer.

Yes, generally. However, where a right of subrogation or reimbursement exists, there is no reduction or setoff available for collateral sources. The provisions of the Florida Collateral Source Rule also require that the claimant send the provider of any collateral sources notification of the claimant's intent to claim damages from the tortfeasor. That notice must be sent by certified or registered mail and should contain a copy of the complaint if it has already been filed. The notice must also state that the provider of the collateral sources will waive any right to subrogation or reimbursement unless it provides the claimant or claimant's attorney with a statement asserting payment of benefits and right of subrogation or reimbursement within 30 days following receipt of the claimant's notification to the provider. *See* §768.76(2)(b)(6), Fla. Stat.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Unlikely. Following the abrogation of the common law collateral source rule, to date, there have been no Florida decisions which directly address whether a Plaintiff may recover or attempt to recover costs for free or charitable care donated to Plaintiff. Such a recovery would be unlikely where the plaintiff bears no obligation to repay the free or charitable services. Permitting a plaintiff to recover expenses he or she is not obligated to pay provides "an undeserved and unnecessary windfall to the plaintiff." *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So.2d 514, 515 (Fla.1984) (citing *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill.2d 353, 29 Ill.Dec. 444, 392 N.E.2d 1, 5 (1979) (emphasis in original))

However, a tortfeasor may present evidence of the availability of free or low-cost services from governmental or charitable agencies available to everyone with specific disabilities on the issue of future damages. *See Florida Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984).

a. If so, is there a right of subrogation for the charitable provider?

N/A.

3. Does the State treat Plaintiffs differently with respect to the recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source.

Yes.

a. If so, what are the differences?

Under the Florida collateral source statute, Medicare and Medicaid is not considered a "collateral source." *See* §768.76(2)(a)(4)(b), Fla. Stat. Further, any other federal program providing for a Federal Govern-

ment lien on or right of reimbursement from the plaintiff's recovery and states that such benefits shall not be considered a collateral source. This distinction has an effect on evidentiary matters, which will be more specifically analyzed below.

4. Are collateral source matters governed by statute, common law, or a combination of both?

A combination of both. In addition to Section 768.76, Fla. Stat., collateral source matters in Florida are governed by Florida law. For example, the most cited recent cases are *Goble v. Frohman*, 848 So. 2d 406 (Fla. 2d DCA 2003), *approved*, 901 So. 2d 830 (Fla. 2005), and *Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956 (Fla. 2d DCA), *rev. dismissed*, (Fla. June 2, 2005). Both decisions have an impact on a plaintiff's ability to recover for medical services provided.

In *Goble*, the Florida Supreme Court held that contractual discounts, representing the difference between amounts billed by a motorcyclist's medical providers and amounts paid to medical providers pursuant to fee schedules in contracts between the motorcyclist's health maintenance organization and medical providers fit within the statutory definition of "collateral sources", and thus, the amount of contractual discounts, for which no right reimbursement or subrogation existed, was amount that should be set off against award of compensatory damages to motorcyclist.

The issue of Medicare "write-offs" was considered by the Florida Second District Court of Appeal in *Cooperative Leasing*. Plaintiff in this case was injured when she was involved in a motor vehicle accident. A portion of her medical bills were paid by her auto carrier and the medical providers accepted a discounted amount from Medicare as the full and final payment of medical services rendered. At trial, the defendant tortfeasor moved *in limine* to prevent the plaintiff from introducing into evidence the full amount of her medical bills, which was denied by the trial court. The appellate court reversed, holding that the admission of the full amount of the medical bills without reduction for the Medicare "write-offs" was error. As Medicare benefits are specifically excluded in the Florida Statutes as a "collateral source," and under federal law the government's right to reimbursement does not extend to amounts never actually paid to medical providers, permitting plaintiff to present evidence of the full amount would be to permit a windfall.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

N/A. *See Pollo Operations, Inc. v. Tripp*, 906 So.2d 1101, 1104 (Fla. 3d DCA 2005) ("The primary purpose behind the collateral source rule is to avoid double recovery by a plaintiff. The goal should be to make a plaintiff whole, not to bestow a windfall.").

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recover?

a. Amount actually paid to the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

In Florida an injured party is entitled to recover the "reasonable value" of medical care resulting from the defendant's negligence. *See Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956, 958 (Fla. 2d DCA 2004).

2. When permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The issue of "reasonable value" is a question for the jury.

a. If a fixed figure, is it at the amount actually paid or billed?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

It depends on whether the benefit is considered a "collateral source" under the Florida Statutes. With regard to Medicare and Medicaid, or other governmental benefits providing for a Federal Government lien on or right of reimbursement refer to Cooperative *Leasing, Inc. v. Johnson*, 872 So.2d 956 (Fla. 2d DCA 2003), *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So.2d 547, 551 (Fla. 4th DCA 2003) (holding that difference between the medical providers' charged amounts and what Medicare paid was inadmissible as damages suffered by plaintiff.). These authorities effectively eliminate the Plaintiff's ability to "board" or "blackboard" items of damage paid by Medicare/Medicaid for which a plaintiff would never have the obligation to repay, thereby eliminating the risk of windfall.

(2) The amount billed for the services?

Yes, if the benefits are defined as "collateral source" benefits, the jury may be presented evidence of the billed amount at trial. However, following verdict, the amount paid by the third party insurance will be considered by the Court, and set off from the verdict amount. *See* §768.76(1), Fla. Stat.

(3) Provider testimony on the value of their services as compared to billed amounts?

Yes, however this testimony will not be permitted to produce a windfall.

(4) Expert testimony on accuracy of provider billing rates?

Yes.

(5) The fact that a third-party payor (a/k/a insurance company) has already paid the bill?

No. In Florida, under common law, parties shall make no reference to the fact that medical bills have been paid or covered by insurance.

(6) Any other factors?

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

No.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

No.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

There have been no recent challenges to the Florida Collateral Source Statute with regard to the cost or value of treatment. We note that the issue of federal preemption has been examined recently in the context of the plaintiff's notice requirements to the provider of collateral sources. *See Coleman v. Blue Cross and Blue Shield of Alabama, Inc.*, 53 So.3d 1052 (Fla. 1st DCA 2010) (holding that the Florida state collateral sources statute was a law regulating insurance, and, thus, the savings clause of ERISA's preemption provision applied to exempt the state statute from express preemption).

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

None at this time.

Georgia

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Martin A. Levinson has been an associate at Hawkins Parnell Thackston & Young LLP since 2007. Mr. Levinson represents businesses and individuals in various types of matters, including premises liability, product liability, trucking and transportation, and business litigation. He handles matters in all phases of litigation, including advising clients on litigation avoidance, pre-suit liability, coverage analysis, handling matters in active litigation, mediation and settlement, trial, and appeals.

A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

In Georgia, "[t]he collateral source rule bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments." *Kelly v. Purcell*, 301 Ga. App. 88, 91, 686 S.E.2d 879, 882 (Ga. Ct. App. 2009); *Hoeflick v. Bradley*, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006). The oft-cited rationale for the continued application of the collateral source rule in Georgia is that "a tortfeasor is not allowed to benefit by its wrongful conduct or to mitigate its liability by collateral sources provided by others." *Id.*

a. If so, is there a right of subrogation for the insurer?

Yes. Insurers and workers' compensation providers have a right of subrogation against their insured's or employee's recovery in tort, but only to the extent that the insured or employee has been fully compensated for his injuries. *See North Bros. Co. v. Thomas*, 236 Ga. App. 839, 513 S.E.2d 251 (Ga. Ct. App. 1999); O.C.G.A. §34-9-11.1(b).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. Georgia's appellate courts have held repeatedly that the collateral source rule is applicable even where the benefit bestowed is gratuitous. *See Hoeflick*, 282 Ga. App. at 124; 637 S.E.2d at 833 ("The collateral source rule applies to payments made by various sources, including insurance companies, beneficent bosses, or helpful relatives."); *Bennett v. Haley*, 132 Ga. App. 512, 522-25, 208 S.E.2d 302, 310-12 (Ga. Ct. App. 1974); *Cincinnati Ry. Co. v. Hilley*, 121 Ga. App. 196, 201-02, 173 S.E.2d 242, 246 (Ga. Ct. App. 1970); *Nashville Ry. Co. v. Miller*, 120 Ga. 453, 455, 47 S.E. 959, 960 (Ga. 1904).

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No. "Collateral source" has been defined very broadly by Georgia courts and specifically includes payments made by Medicare and Medicaid. *See Bunyon v. Burke County*, 306 F. Supp. 2d 1240, 1263 (S.D. Ga. 2004) (Medicare); *Bennett v. Haley*, 132 Ga. App. 512, 522-25, 208 S.E.2d 302, 310-12 (Ga. Ct. App. 1974) (Medicaid).

4. Are collateral source matters governed by statute, common law, or a combination of both?

In Georgia, the collateral source rule is a creation of common law. *See Olariu v. Marrero*, 248 Ga. App. 824, 549 S.E.2d 121 (Ga. Ct. App. 2001).

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The Plaintiff. See Section B below.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The amount actually billed by the third-party provider.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Not applicable.

3. Does the amount of damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. The Georgia Court of Appeals has expressly held that a defendant "is not entitled to use a third party's write-off of medical expenses as a set-off against [a plaintiff's] recovery of past medical expenses." *Olariu v. Marrero*, 248 Ga. App. 824, 826, 549 S.E.2d 121, 123 (Ga. Ct. App. 2001).

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. The Georgia Court of Appeals has explained its rationale by stating that "the existence of a collateral source will not accrue to [the defendant's] benefit and allow him to avoid these otherwise payable damages. Georgia does not permit a tortfeasor to derive any benefit from a reduction in damages for medical expenses paid by others, whether insurance companies or beneficent boss or helpful relatives." *Olariu*, 248 Ga. App. at 826, 549 S.E.2d at 123, *citing Bennett v. Haley*, 132 Ga. App. 512, 522, 208 S.E.2d 302 (1974).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

The Georgia Court of Appeals has specifically held that a plaintiff is entitled to claim and blackboard at trial the full amount of reasonable medical expenses billed, notwithstanding that portions of the expenses billed have been written off as a result of contractual rate reductions or those required by statute (*e.g.*, Medicare benefits). *Olariu v. Marrero*, 248 Ga. App. 824, 549 S.E.2d 121 (Ga. Ct. App. 2001); *Candler Hosp., Inc. v. Dent*, 228 Ga. App. 421, 491 S.E.2d 868 (Ga. Ct. App. 1997).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Yes. However, a defendant is at least entitled to a post-verdict set-off in the amount of any write-offs, provided that the jury makes a specific award for medical expenses. *See*, *e.g.*, *Candler Hosp. v. Dent*, 491 S.E.2d 868, 869 (Ga. Ct. App. 1997).

3. Exception to the Collateral Source Rule for medical bills discharged in bankruptcy.

An exception to the collateral source rule exists in Georgia where some of the medical bills claimed by the plaintiff have been discharged in bankruptcy. In that instance, the discharged portion of the plaintiff's medical bills is not recoverable. *Olariu*, 248 Ga. App. at 826, 491 S.E.2d at 123.

D. Constitutional Issues

Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

Yes. In 1987, the Georgia General Assembly enacted a statute abrogating the collateral source rule and permitting juries to consider evidence of benefits or payments available with respect to any claimed special damages:

> In any civil action, whether in tort or in contract, for the recovery of damages arising from a tortious injury in which special damages are sought to be recovered or evidence of same is otherwise introduced by the plaintiff, evidence of all compensation, indemnity, insurance (other than life insurance), wage loss replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments shall be admissible for consideration by the trier of fact. The trier of fact, in its discretion, may consider such available benefits or payments and the cost thereof but shall not be directed to reduce an award of damages accordingly.

O.C.G.A. §51-12-1(b).

Just four years later, however, the Georgia Supreme Court declared O.C.G.A. §51-12-1(b) to be an unconstitutional violation of the equal protection clause of the Georgia Constitution. *Denton v. Con-Way S. Express, Inc.*, 261 Ga. 41, 402 S.E.2d 269 (Ga. 1991). Specifically, the Georgia Supreme Court held in *Denton* that:

> O.C.G.A. §51-12-1 (b), allows a jury to consider inherently prejudicial evidence which could be misused. There can be no equal justice where the kind of trial [or the damages] a man gets depends on the amount of money he has. Because inherently prejudicial evidence is allowed only to show the plaintiff's sources, juries will be misled. If for example, both the plaintiff and the defendant are insured, but the jury is only informed of the plaintiff's coverage, it may assume that only the plaintiff has insurance and the plaintiff's insurance should pay for the loss caused by the tortfeasor. Allowing such evidence against the plaintiff, who exercises the statutory right to prove all necessary expenses in the estimate of damages . . . could defeat the plaintiff's statutory right to recover the damages that result from another's tortious acts . . . and also defeat the "prophylactic" factor of preventing future harm.

Denton, 261 Ga. at 45-46; 402 S.E.2d at 272 (internal citations omitted; brackets in original).

Hawaii

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes.

a. If so, is there a right of subrogation for the insurer?

Generally no. However, in workers' compensation cases there is a right of independent action. Under Hawaii Revised Statutes §386-8, "If within nine months after the date of the personal injury the employee has not commenced an action against such third person, the employer, having paid or being liable for compensation under this chapter, shall be subrogated to the rights of the injured employee." In addition, in motor vehicle accidents, recovery of no-fault personal injury payment ("PIP") amounts is governed by Hawaii Revised Statutes §431:10C. Please note that under the no-fault statute for PIP, there is a lien right, but no right of subrogation.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

It appears that Plaintiff can recover the costs of free or charitable care donated to him/her. In *Bynum v. Magno*, 106 Hawaii 81, 87, 101 P.3d 1149, 1155 (2004), the Hawaii Supreme Court acknowledged that the Restatement (Second) of Torts §920A declares that the collateral source rule applies to "gratuities." For example, comment c(3) to the Restatement (Second) of Torts §920A, states that, "the fact that the doctor did not charge for his services or the plaintiff was treated in a veterans hospital does not prevent his recovery for the reasonable value of the services." The Court noted that the collateral source rule applies to both gratuities and social legislation benefits (*i.e.*, social security benefits, welfare payments, pensions under special requirement acts).

a. If so, is there a right of subrogation for the charitable provider?

Probably not.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

It does not appear that the State treats Plaintiffs differently based on who the payor is. For example, In *Bynum v. Magno*, 106 Hawaii 81, 89, 101 P.3d 1149, 1157 (2004), the Hawaii Supreme Court held that the collateral source rule prohibited reducing a patient's damages award to reflect discounted Medicare and Medicaid payments, and further held that the evidence of standard rates was relevant to the reasonable value of medical costs. For Medicare and Medicaid, there are lien rights and rights of independent action that can be brought by both Medicare and Medicaid. As such, those rights must be released as part of any settlement. Otherwise, the defense may be liable.

a. If so, what are the differences?

Not applicable.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Common law.

The Hawaii Supreme Court often relies on the Restatement (Second) of Torts as persuasive authority. In *Bynum v. Magno*, 106 Hawaii 81, 101 P.3d 1149 (2004), the Hawaii Supreme Court makes reference to

the Restatement (Second) of Torts §920A, and states that the "collateral source rule" provides that benefits or payments received on behalf of a plaintiff, from an independent source, will not diminish recovery from the wrongdoer, as a tortfeasor is not entitled to have its liability reduced by benefits received by the plaintiff from a source wholly independent of and collateral to the tortfeasor." Comment d to the Restatement (Second) of Torts §920A, explains that the collateral source rule is of common law origin.

However, there is one statute, Hawaii Revised Statutes §663-10 which relates to the determination of validity and payment of liens prior to judgment. As used in that section, lien refers to a lien arising out of a claim for payments made or indemnified from collateral sources, including health insurance or benefits, for costs and expenses arising out of the injury which is the subject of the civil action in tort.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff. In *Bynum v. Magno*, 106 Hawaii 81, 86, 101 P.3d 1149, 1154 (2004), the Hawaii Supreme Court noted that Comment b to the Restatement (Second) of Torts §920A, explains that although double compensation may result to the plaintiff, such a benefit should redound to the injured party rather than "become a windfall" to the party causing the injury.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

No.

b. Amount actually billed by the third-party provider.

Yes. However, the amount billed is not the *sole* basis for recovery but a factor in determining reasonable value.

c. "Reasonable value" of medical services provided.

Yes.

d. Other

Not applicable.

According to the Court in *Bynum v. Magno*, 106 Hawaii 81, 86-87, 101 P.3d 1149, 1154-55 (2004), "In an action to recover medical expenses caused by a defendant's negligence, a plaintiff must show that the medical services obtained were necessary and the charges were reasonable as required for injuries sustained." The court noted that the "reasonable value" of a plaintiff's medical services may be recovered. The parties in *Bynum* did not dispute that the medical bills introduced at trial reflected medical services necessary for Plaintiff's condition, even though they disagreed on how to calculate the reasonable value of such services. *Id.*

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The concept of "reasonable value" is for the jury to decide. According to Instruction No. 8.9 (Elements of Damages) of the Hawaii Standard Civil Jury Instructions, the jury may consider:

The reasonable value of the medical services provided by physicians, hospitals and other health care providers, including examinations, attention and care, drugs, supplies, and ambulance services, reasonably

required and actually given in the treatment of plaintiff(s) and the reasonable value of all such medical services reasonably probable to be required in the treatment of plaintiff(s) in the future.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

Under *Bynum v. Magno*, 106 Hawaii 81, 101 P.3d 1149 (2004), the Plaintiff may present evidence of amounts billed, even if not paid. Plaintiff's recovery is not a "fixed factor" but amounts billed, as opposed to amounts paid, is the principle factor in determining "reasonable value."

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

No.

(2) The amount billed for the services?

Yes.

(3) Provider testimony on the value of their services as compared to billed amounts?

Probably yes.

(4) Expert testimony on accuracy of provider billing rates?

Yes.

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

No.

(6) Any other factors?

No.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. In *Bynum v. Magno*, 106 Hawaii 81, 89, 101 P.3d 1149, 1157 (2004), the collateral source rule prohibited reducing the plaintiff's special medical damages award, to reflect Medicare and Medicaid payments actually received by patient's health care providers. The Court noted that under the Restatement (Second) of Torts, plaintiffs who sought recovery of medical expenses were not limited to out-of-pocket expenses under the general jury instruction, and allowing plaintiffs to recover the full reasonable value of medical services would lead to a more just result.

C. Use of Specials at Trial

According to Instruction 8.2 (Special Damages Defined) of the Hawaii Standard Civil Jury Instructions, "special damages" are those damages which can be calculated precisely or can be determined by the jury with reasonable certainty from the evidence.

In comparison, non-economic damages are determined pursuant to Instruction No. 8.10 (Pain and Suffering) of the Hawaii Standard Civil Jury Instructions. According to that instruction, the plaintiff(s) is/are not required to present evidence of the monetary value of his/her/their pain or emotional distress. It is only necessary that the plaintiff(s) prove the nature, extent and effect of his/her/their injury, pain, and emotional

distress. The jury instructions are silent as to whether the plaintiff is permitted to use the billed value, thus it appears that the plaintiff cannot use the billed value at trial, as a basis for non-economic damages.

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Probably not.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Probably not.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Idaho

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John J. Burke is an experienced litigation attorney who represents health care, corporate, and insurance clients throughout Idaho. He is a shareholder with Farley Oberrecht West Harwood Burke, P.A., in Boise, and his practice is focused on professional and medical malpractice, product and pharmaceutical litigation, and defense of civil rights (Section 1983) claims. He also advises hospitals and health care providers in health law. Mr. Burke received his J.D. from the University of Utah in 1992. He is admitted to practice before all state and federal courts in the State of Idaho, as well as the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court. Mr. Burke is the Northwest Region Director for DRI (2011–2014). He serves as the board liaison to the DRI ADR Committee and is the state liaison for the DRI Drug and Medical Device Committee. He was a member of the board of directors for the Idaho Association of Defense Counsel (IADC) (2006–2010) and is the immediate past President of the IADC (2010-2011). He is also an active member of the International Association of Defense Counsel.

A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Plaintiffs in Idaho seeking damages for personal injury or property damage are generally not entitled to any form of double recovery due to collateral source contributions. Under I.C. §6-1606, evidence of collateral source contributions is not admissible at trial. Thus, I.C. §6-1606 precludes evidence of collateral source contributions until the fact finder has awarded the plaintiff damages. *Id*. Admission of collateral source payments after the jury's award has been rendered allows the court to reduce the award by the amount of the collateral source contributions that the plaintiff has already received. Under I.C. §6-1606 benefits paid under federal programs which by law must seek subrogation, death benefits paid under life insurance contracts, benefits paid by a service corporation organized under chapter 34, title 41, Idaho Code and benefits paid which are recoverable under subrogation rights created under Idaho law or by contract are *not* collateral sources. Thus, they cannot be considered to reduce a plaintiff's jury award.

a. If so, is there a right of subrogation for the insurer?

Insurers in Idaho, generally speaking, have subrogation rights. These rights are set out in I.C. §41-2505, which provides that "[i]n the event of payment to an insured under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such insured against any person or organization legally responsible for the bodily injury for which such payment is made." I.C. §41-2505.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

a. If so, is there a right of subrogation for the charitable provider?

The terms of Idaho's collateral source statute does not specifically address whether free or charitable care donated to the plaintiff constitutes a collateral source. The provision does expressly state that "[i]n any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage, *whether from private, group or governmental sources.*" I.C. §6-1606 (emphasis added). This language would appear to include free or charitable care; however, no case law exists to clarify whether free or charitable care would be excluded as a collateral source.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

a. If so, what are the differences?

Idaho has very little case law applying its collateral source statute, I.C. §1606. Thus, it is unclear what, if any, difference in application might exist between Medicare, Medicaid and private insurer payments. One of the few cases to discuss Idaho's collateral source statute is *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236, (2003). In *Dyet*, the Idaho Supreme Court unanimously held that, although Medicaid write-offs are not technically a collateral source by the terms of the statutory provision, they are not an item of damages that a plaintiff can recover because the plaintiff has never incurred any liability based on the write-offs. *Id.* at 529, 81 P.3d at 1239. Thus, Medicaid write-offs are treated as though they are a collateral source contribution in Idaho.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source issues in Idaho are governed by both statute and case law. Idaho Code §6-1606, entitled "prohibiting double recoveries from collateral sources," is the foundation of collateral source law in Idaho. The provision, enacted in 1991, marked a departure from Idaho's previous common law. Leading up to the passage of I.C. §6-1606, Idaho courts did not reduce the amount of a plaintiff's recovery due to payments the plaintiff had received from independent sources on account of the plaintiff's injuries. *See Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 766 P.2d 1227 (1988) (where the court held that the amount the plaintiff received from the tortfeasor's insurance could not offset the damages awarded by a jury). Idaho Code §6-1606 altered the common law and provides:

> In any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage, whether from private, group or governmental sources, and whether contributory or noncontributory. For the purposes of this section, collateral sources shall not include benefits paid under federal programs which by law must seek subrogation, death benefits paid under life insurance contracts, benefits paid by a service corporation organized under chapter 34, title 41, Idaho Code, and benefits paid which are recoverable under subrogation rights created under Idaho law or by contract. Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages, which have been compensated independently from collateral sources.

I.C. §6-1606. Although I.C. §6-1606 is a seemingly comprehensive statute, it is clear, as was the case in *Dyet*, that the statute does not address all potential collateral source issues that may arise. In instances where the statute's language does not control, the legislature's statement of purpose has guided the Idaho Supreme Court. *Dyet* at 529, 81 P.3d at 1239. The statement of purpose accompanying I.C. §6-1606 provides that the statute is intended to:

> [M]odify the [common law] collateral source rule of evidence in certain circumstances in which the court determines that a double payment will exist[,] the court is given the authority to modify an award of damages so that the damages would be paid once but not twice.

1990 Idaho Sess. Laws 1452. The Idaho Supreme Court has held that "I.C. §6-1606 is clearly a statute that was designed to prevent double recovery." *Dyet at* 529, 81 P.3d at 1239. It appears that, wherever possible, Idaho Courts will attempt to limit double recovery.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

In the limited circumstances that plaintiffs are able to double recover under I.C. §6-1606, the plaintiff keeps the windfall. *See Dyet* 531, 81 P.3d at 1241 (discussing the meaning of "recoverable" in I.C. §6-1606).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

No Idaho appellate court opinion specifically addresses whether plaintiffs can recover the actual amount paid by their insurer or the actual amount billed by the medical provider.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

The amount of damages that the plaintiff may *seek* at trial is not affected by collateral source payments. Ultimately, however, the amount the plaintiff can *recover* is dependent on whether a collateral source contribution is involved. The distinction between damages sought and damages recovered is a product of the evidentiary rules in I.C. §6-1606. Under I.C. §6-1606, evidence of collateral source payments is only admissible to the court after the fact finder has rendered an award for the plaintiff. Then, the court will reduce the amount awarded by the amount of collateral source contributions that the plaintiff has already received.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

See above.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

See above.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Idaho's case law does not directly address whether a plaintiff can use the billed amount as the basis for an award of non-economic damages. However, when specifically addressing punitive damages, courts calculating damage amounts under I.C. §6-1604 will use the billed amount. Idaho Code §6-1604 provides that punitive damages cannot exceed $250,000 or three times the amount of specials. *See* I.C. §6-1604.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

See above.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No constitutional arguments have been raised regarding the application of Idaho's collateral source statute, I.C. §6-1606.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

As the law stands, there does not appear to be any basis in Idaho's Constitution to challenge the actual paid amount approach to damages that Idaho courts have adopted.

Illinois

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. *See Wills v. Foster*, 892 N.E.2d 1018, 1033 (Ill. 2008).

a. If so, is there a right of subrogation for the insurer?

It depends on the insurance policy. *See Garcia v. Guitierrez*, 770 N.E.2d 1227 (2002) (holding ambiguous terms of insurance policy's subrogation provision precluded insurer from recovering amounts paid from insured's settlement payment).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. *See Wills, supra.*

a. If so, is there a right of subrogation for the charitable provider?

Medicare/Medicaid has an automatic right of subrogation. *See* 42 USC §1396(a)(25)(A)-(C).

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No. *See Wills, supra.*

4. Are collateral source matters governed by statute, common law, or a combination of both?

Common law. *See Wills, supra.*

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff. *See Wills, supra.*

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

It is for the jury to decide. *See Wills, supra*.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

No, a defendant "may not . . . introduce evidence that the plaintiff's bills were settled for a lesser amount." *See Wills,* 892 N.E.2d at 1033.

(2) The amount billed for the services?

Yes. *See Wills,* 892 N.E.2d at 1033.

(3) Provider testimony on the value of their services as compared to billed amounts?

Yes. *See Wills,* 892 N.E.2d at 1033 ("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.")

(4) Expert testimony on accuracy of provider billing rates?

Yes. *See Wills,* 892 N.E.2d at 1033 ("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.")

(5) The fact that a third-party payor (a/k/a insurance company) has already paid the bill?

No. *See Wills,* 892 N.E.2d at 1033 (the collateral source rule "prevents 'defendants from introducing evidence that a plaintiff's losses have been compensated for, even in part, by insurance.'") (quoting *Arthur v. Catour*, 833 N.E.2d 847 (2005)).

(6) Any other factors?

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. *See Wills, supra.*

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. *See Wills, supra.*

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Unclear, but probably. *See Wills, supra*.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Unclear, but probably. *See Wills, supra*.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

None at this time.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

None at this time.

Indiana

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A. Collateral Source Rules

Indiana's collateral source rule is governed by Indiana Code Section 34-44-1-1, *et seq.* Section 34-44-1-2 provides:

> In a personal injury or wrongful death action, the court shall allow the admission into evidence of:
>
> (1) proof of collateral source payments other than:
>
> (A) payments of life insurance or other death benefits;
>
> (B) insurance benefits that the plaintiff or members of the plaintiff's family have paid for directly; or
>
> (C) payments made by:
>
> (i) the state or the United States; or
>
> (ii) any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;
>
> (2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and
>
> (3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

Ind. Code Ann. §34-44-1-2 (Westlaw 2011).

Section 34-44-1-2 abrogates the common law collateral source rule and provides that "evidence of collateral source payments may not be prohibited except for certain specified exceptions." *See Knowles v. Murray*, 712 N.E.2d 1, 2 (Ind. Ct. App. 1999) (noting the rule was originally codified at §34-4-36-1). The statute is used "to enable an accurate assessment of the "prevailing party's pecuniary loss" and to provide "that a prevailing party not recover more than once from all applicable sources for each item of loss sustained."" *Travelers Indem. Co. of Am. v. Jarrells*, 927 N.E.2d 374, 377 (Ind. 2010) (citing Ind. Code §34-44-1-1).

The codified collateral source rule narrows Indiana's earlier common law rule which broadly prohibited evidence of collateral source payments on the grounds that "collateral source payments resulting from the victim's own prudence and foresight should not offset a damage award." *See Shirley v. Russell*, 663 N.E.2d 532, 534-35 (Ind. 1996) (internal quotations omitted). Indiana's modified statutory framework shifts its focus from assuring all torfeasors are "fully accountable for their conduct" to assuring that victims do not "recover more than once for each item of loss sustained." *See* Pendleton *v. Aguilar*, 827 N.E.2d 614, 620 (Ind. Ct. App. 2006).

Section 34-44-1-2(1) continues to exclude evidence of life insurance payments, death benefits, and Social Security payments. The collateral sources excluded in Section 34-44-1-2(1)(A), (B) and (C) are similar in that these collateral sources were—essentially—paid for by the plaintiff or the plaintiff's family (*e.g.* through premiums or taxes). *See Knowles*, 712 N.E.2d at 3; *Shirley*, 663 N.E.2d at 534-36 (monthly survivor annuity benefits paid to teacher's surviving spouse were deemed inadmissible in wrongful death action where the payments were considered "insurance benefits" that the teacher had previously paid). A party seeking admission of collateral source evidence should present evidence showing the victim or the victim's family did not pay for the benefits. *See, e.g., Hagerman Const., Inc. v. Copeland*, 697 N.E.2d 948, 958 (Ind. Ct. App. 1998) (upholding the trial court's exclusion of collateral source payments where "there is no evidence that [the decedent] did not pay for this benefit directly, either by payroll deduction or by reason of his labor."); *Town of Highland v. Zerkel*, 659 N.E.2d 1113, 1117 (Ind. Ct. App. 1995).

The exclusion of insurance payments extends to underinsured motorists benefits paid to an insured by their insurer. *See Peele v. Gillespie*, 658 N.E.2d 954, 958 (Ind. Ct. App. 1995). This is because "[t]he Act clearly states that collateral source payments in the nature of insurance benefits for which the plaintiff or a member of his family have paid for directly are not admissible as evidence." *Id.* at 958. However, if the benefits are not paid for directly by the plaintiff or the plaintiff's family, they will most likely be admissible. *See, e.g.*, *Pendleton*, 827 N.E.2d at 626 (finding a truck driver's uninsured motorist benefits admissible in a personal injury action where the truck driver's employer entered into the insurance policy for the truck driver's benefit and paid the premiums). Therefore, evidence that the plaintiff received free or charitable care will likely be admissible.

The Supreme Court of Indiana recently clarified that if collateral source payments are admissible, such as cases where the plaintiff must repay benefits to its employer or its employer's insurance carrier under the Worker's Compensation Act, the jury should not only consider the payments that the plaintiff must repay but also include that amount that the plaintiff is required to repay in its award to the plaintiff. *Travelers Indem Co.*, 927 N.E.2d at 377 (internal quotations omitted) (noting that "[i]f, however, there is no evidence of an obligation to repay, then the jury should not include the amount of collateral source payments in its award.").

Indiana's Worker's Compensation Act also allows an employer or its carrier to assert a lien against proceeds an employee receives from a compensable injury or death. Ind. Code §22-3-2-13 (Westlaw 2011). Hospitals are similarly entitled to a lien against the proceeds received by the plaintiff after settlement or verdict. *See* Ind. Code Ann. §32-33-4-3 (Westlaw 2011) (extending to "all reasonable and necessary charges for hospital care, treatment, and maintenance of a patient (including emergency ambulance services provided by the hospital) upon any cause of action, suit, or claim accruing to the patient, or in the case of the patient's death, the patient's legal representative, because of the illness or injuries"). *Id.*

Generally, "evidence of an advance payment is not admissible during the trial for any purpose." §34-44-2-2 (Westlaw 2011). *See also* Ind. R. Evid. 409 (Westlaw 2011) (providing "[e]vidence of paying or furnishing, or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury, or damage to property is not admissible to prove liability for such injury or damages."); *Manns v. State Dept. of Highways*, 541 N.E.2d 929, 934 (Ind. 1989) (holding joint tortfeasor's earlier payment to plaintiff should not have been presented to the jury in defendant's case); *Barnes v. Barnes*, 603 N.E.2d 1337, 1346-47 (Ind. 1992) (holding evidence of defendant's advance payment of medical expenses was not admissible as a collateral source evidence). However, such evidence is admissible when a plaintiff is entitled to recovery in a personal injury, wrongful death or property damage claim; in this case "the court shall reduce the award to the plaintiff to the extent that the award includes an amount paid by the advance payment." Ind. Code Ann. §34-44-2-3 (Westlaw 2011). A defendant's advance payment "shall not be construed as an admission of liability by any person."[1] Ind. Code Ann. §34-44-2-2 (Westlaw 2011). This 'advance payment exception' only extends to cases with one defendant. Ind. Code Ann. §34-44-2-1 (Westlaw 2011). *See also Wineinger v. Ellis*, 855 N.E.2d 614, 623 (Ind. Ct. App. 2006).

In cases with multiple defendants or torfeasors, non-settling defendant(s) should name any settling defendants or joint torfeasors as 'non-party defendants' under Indiana's Comparative Fault Act, which allows the jury to assess a percentage of fault to the settling defendant or joint tortfeasor. *See* Ind. Code Ann. §34-51-2-14 (Westlaw 2011); *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140, 144-45 (Ind. 2000). This allocation of fault will be applied to offset damages against the non-settling defendant(s) after the verdict. *Mendenhall*, 728 N.E.2d at 144-45.

B. Value of Recovery

1. Plaintiffs may recover the "reasonable value" of medical services.

"An injured plaintiff is entitled to recover damages for medical expenses that [are] both necessary and reasonable." *Stanley v. Walker*, 906 N.E.2d 852, 855-56 (Ind. 2009) (holding that "the proper measure of medical expenses in Indiana is the reasonable value of such expenses.").

The Supreme Court of Indiana recently explained that defendants can challenge whether plaintiff's expenses were necessary by showing the expenses were not foreseeable *and* proximately caused by defendant's allegedly tortious conduct. *See Sibbing v. Cave*, 922 N.E.2d 594, 602-04 (Ind. 2010).

Similarly, no single factor controls a jury's determination of the "reasonable value" of medical expenses. *See Stanley*, 906 N.E.2d 852 at 858. "Indiana Rule of Evidence 413 provides one method of proving the reasonable value of medical expenses": plaintiffs may use "past actual medical charges to serve as prima facie evidence that the charges are reasonable." [2] *Id.* at 856 (discussing Ind. R. Evid. 413). *See also* Ind. R. Evid. 413 (Westlaw 2011) ("Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable."); *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 273, 278 (Ind. 2003); *Washington Co. Mem. Hosp. v. Hatabaugh*, 717 N.E.2d 929, 933 (Ind. Ct. App. 1999) (reviewing the burden of proof under Rule 413). Defendants, however, may rebut a plaintiff's bills with testimony contradicting or impeaching the reasonableness of such expenses. *See Stanley*, 906 N.E.2d at 858. This includes evidence that shows the "adjustments or accepted charges for medical services," but only to the extent that it may be introduced "without referencing insurance." *See id*.

Cases under Indiana's Adult Wrongful Death Statute does not enjoy the same latitude—the Estate may only recover *actual medical* expenses. *Butler v. Indiana Dep't. of Ins.*, 904 N.E.2d 198, 202 (Ind. 2009) (*citing* Ind. Code §34-23-1-2(c)(3)(A)).

C. Use of 'Specials' at Trial

As discussed in Section B above, the jury will be allowed to consider the original billed amount and the discounted billed amount when deciding the "reasonable value" of the plaintiff's medical services. The jury will use this "reasonable value" figure as a basis for determining a non-economic damages award.

D. Constitutional Issues

The collateral source statute has not been the subject of any state or federal constitutional challenge in Indiana.

In January, 2012, however, a bill was introduced to amend the collateral source statute to exclude evidence of write-offs and discounts, except in medical malpractice actions. *See* S. B. No. 87, 117th Gen. Assembly, 1st Reg. Sess. (Ind. 2012). The proposed legislation would add a fourth exclusion to Section 34-44-1-2 stating: "except in the case of an action brought under IC 34-18 [*i.e.* medical malpractice actions], a write off, discount, or other deduction associated with a collateral source payment." *See id.* This is not the first attempt to add this exclusion. *See* S. B. No. 489, 117th Gen. Assembly, 1st Reg. Sess. (Ind. 2011).

Endnotes

[1] Similarly, "[a]n advance payment made by an insurance company on behalf of an insured does not increase the limits of liability of the insurance company under any existing policy of insurance." Ind. Code Ann. § 34-44-2-4 (Westlaw 2011). "The amount of an advance payment made in respect to any claim shall be credited against any obligation of the insurance company in respect to the claim." *Id.*

[2] Rule 413 "does not allow admissibility of estimates of future charges as prima facie evidence without supporting testimony admissible under the doctrines of hearsay and opinion testimony." *Cook*, 796 N.E.2d at 278.

Iowa

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

In Iowa, the Plaintiff is generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment, except for medical malpractice cases. Generally, a Plaintiff may recover for the reasonable value of medical services rendered or to be rendered. *See* Iowa Uniform Civil Jury Instructions No. 200.6 and 200.7.

In medical malpractice cases, Iowa Code §147.136 precludes recovery of any economic damages, including medical expenses, paid or to be paid by a collateral source, including insurers. Effective July 1, 2011, Iowa Code §147.136 was amended to allow Iowa Medicaid to recover medical payments it makes in a medical malpractice case."

a. If so, is there a right of subrogation for the insurer?

When it comes to subrogation, an insurer may have a contractual right of indemnification or subrogation. An insurer may have a common law right of equitable subrogation. *See generally Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820 (Iowa 2004).

Some payors, such as Medicare, Medicaid, and some other providers have statutory rights of subrogation. In particular, in a claim against a third-party tortfeasor in which a workers' compensation insurer has paid medical expenses, the insurer has a right of subrogation pursuant to Iowa Code §85.22. Further, Iowa Code Chapter 582 (hospital lien) establishes a lien for medical expenses in favor of "[e]very association, corporation, county, municipal corporation or other institution maintaining a hospital in the state," as long as the hospital is a "public or private institution licensed pursuant to [Iowa Code] chapter 135B."

Pursuant to Iowa Code §668.5(3), a third-party payor's right of subrogation may not exceed the portion of the judgment or verdict specifically relating to the subrogated loss. Further, the third-party payor is responsible for a pro rata share of the attorneys' fees and expenses incurred in obtaining the judgment or verdict, or a settlement if reasonable.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

There is no Iowa statute or published decision that addresses whether a Plaintiff is permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Generally, the State does not treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source. Whether Iowa Code §147.136, applicable only in medical malpractice actions, would apply to Medicare or other federal government programs is an open question.

4. Are collateral source matters governed by statute, common law, or a combination of both?

In Iowa, collateral source matters are governed by a combination of statute and common law. Iowa's common law collateral source rule bars evidence of compensation received by an injured party from a col-

lateral source. *See Schonberger v. Roberts*, 456 N.W.2d 201, 202 (Iowa 1990). The common law rule has been modified by Iowa Code §668.14. Section 668.14 provides:

1. In an action brought pursuant to this chapter [Iowa Code Chapter 668 governing comparative fault tort actions] seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family.
2. If evidence and argument regarding previous payments or future rights of payment is permitted pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.
3. If evidence or argument is permitted pursuant to subsection 1 or 2, the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.
4. This section does not apply to actions governed by section 147.136.

In *Schonberger v. Roberts*, 456 N.W.2d 201 (Iowa 1990), the Supreme Court of Iowa concluded that the procedure set forth in Iowa Code §668.14 should not be used when Iowa Code §85.22 governing subrogation by workers' compensation insurers is followed.

In *Le v. Vaknin*, 722 N.W.2d 412, 418 (Iowa 2006), the Supreme Court of Iowa emphasized that a plaintiff is to be protected from a double reduction that could result when a third-party payor has rights of subrogation and that a jury must be required to make a finding on whether a right of subrogation exists.

Iowa Uniform Civil Jury Instruction No. 300.8 sets forth the interrogatories to be asked the jury when Iowa Code §668.14 applies.

The burden of proof as to payment by collateral sources is on the defendant. *See Peters v. Vander Kooi*, 494 N.W.2d 708, 714 (Iowa 1993).

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

When the Plaintiff is allowed to recover more than was paid, the Plaintiff keeps the windfall.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Iowa permits recovery of the "reasonable cost of necessary" past medical services and the "present value of reasonable and necessary" future medical services. *See* Iowa Uniform Jury Instructions No. 200.6 and 200.7.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The jury may determine reasonableness from "the amount charged, the amount actually paid, or any other evidence of what is reasonable and proper for such medical expense." *See* Iowa Uniform Jury Instruction No. 200.6.

The jury is allowed to consider several factors in determining reasonable value including:

a) the amount actually paid for the services

b) the amount billed for the services, only if the billed amount was paid or there is expert testimony that the charges are reasonable. The amount charged, standing alone, is not evidence of reasonable value.

c) provider testimony on the value of their services as compared to billed amounts

d) expert testimony on accuracy of provider billing rates and the amount actually paid and the amount written down by the insurer.

e) the jury may consider any evidence bearing on the issue of reasonable value.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

In medical malpractice cases a Plaintiff is prohibited from recovering any economic losses, including medical expenses, paid or to be paid by a collateral source, except Iowa Medicaid. *See* Iowa Code §147.136.

4. Have Iowa Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Iowa Courts have very briefly addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment

The Court in *Pexa* rejected the argument that the Plaintiff's recovery should be limited to the amount actually paid for medical services. The Court noted that "position is contrary to the long-standing principle that such damages are measured by the reasonable value of medical services, and the amount paid is but one form of probative evidence on this issue." In addition, this argument fails to account for the possibility that medical charges may be compromised for reasons other than the unreasonableness of the billed amount." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 157 (Iowa 2004).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

A Plaintiff may argue from the reasonable cost of medical care as to the amount that should be awarded for non-economic damages. *See Pexa*, 686 N.W.2d at 157. Billed value may be used if paid or if an expert has testified to the reasonableness of the billings.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

There is nothing in Iowa law that would preclude the Plaintiff from using the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services. There must be expert testimony that the billed amount was reasonable.

D. Constitutional Issues

The constitutionality of Iowa Code §668.14 was upheld in *Graber v. City of Ankeny*, 616 N.W.2d 633, 645-46 (Iowa 2000) (equal protection and due process).

The constitutionality of Iowa Code §147.136, which applies to medical malpractice cases, was upheld in *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980) (equal protection), and *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417 (Iowa 1985) (equal protection).

Kansas

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

In Kansas, a plaintiff is generally permitted to recover the reasonable value of medical services provided by insurers for medical or psychological treatment. *Martinez v. Milburn Enter., Inc.*, 233 P.3d 205 (Kan. 2010).

a. If so, is there a right of subrogation for the insurer?

Kansas law bars an insurance company from issuing a contract for insurance that contains a provision for subrogation for reimbursement of medical, surgical, hospital, or funeral expenses. Kan. Admin. Regs. 40-1-20.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

This reasonable value approach applies to free or charitable care donated to the plaintiff for medical or psychological treatment. *Martinez*, at 222; *Zak v. Riffel*, 115 P.3d 165 (2005); *see also Shirley v. Smith*, 933 P.2d 651 (Kan. 1997) (allowing reasonable value of medical services that are self-administered).

a. If so, is there a right of subrogation for the charitable provider?

A charitable provider of medical or psychological treatment is not subject to regulation by the department of insurance and can enforce a contractual right of subrogation. *See Unified School District No. 259 v. Sloan*, 871 P.2d 861 (Kan. Ct. App. 1994). Absent a contractual right, the provider is limited to traditional equitable subrogation principles.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Plaintiffs are treated the same with respect to recovery of the costs of treatment, regardless of whether the payor is Medicare, Medicaid, a private insurer, or some other third-party source. In all instances, the plaintiff is entitled to recover the reasonable value of the medical services. *Martinez*, at 207.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The stated basis for recovery is the reasonable value of the medical services. *Id*.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The reasonable value of the medical services is a fact question for the jury. Amounts actually paid and amounts actually billed are allowed as evidence, although the source of the payments is inadmissible. *Id.* at 222.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

The amount of damages does not vary based on whether a collateral source is involved. *Id*.

4. Have Your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

The Kansas Supreme Court has concluded that the proper approach is the reasonable value of the medical services, and that allowing evidence of amounts billed and amounts paid results in fairness to both the plaintiff and defendant.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

The decisions do not address whether a plaintiff can use the billed value as a basis for a non-economic damages award. But the *Martinez* court specifically recognized the use of a limiting instruction when evidence is offered of the billed and paid amount of medical services. *Id.* at 207. Allowing such evidence as a basis for an award of non-economic value would circumvent the "reasonable value" standard.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

In *Wentling v. Medical Anesthesia Servs,* 701 P.2d 939 (1985), the Kansas Supreme Court held that a legislative limitation on the collateral source rule was unconstitutional because it had the effect of discriminating between indigent and insured plaintiffs, and thus violated equal protection provisions.

Kentucky

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Kentucky courts allow a plaintiff to recover the costs of third-party payments made by insurers for medical treatment. Kentucky caselaw states that the "collateral source rule provides that benefits received by an injured party for his injuries from a source wholly independent of, and collateral to, the tortfeasor will not be deducted from or diminish the damages otherwise recoverable from the tortfeasor." *Schwartz v. Hasty*, 175 S.W.3d 621, 626 (Ky. Ct. App. 2005); *see also Peters v. Wooten*, 297 S.W.3d 55, 62 (Ky. Ct. App. 2009) ("Generally, information regarding collateral source payments may not be introduced to the jury."). The Kentucky Supreme Court has found that it is "convinced" the collateral source rule "is sound" because "there is no logical or legal reason why a wrongdoer should receive the benefit of insurance obtained by the injured party for his own protection." *Taylor v. Jennison*, 335 S.W.2d 902, 903 (Ky. 1960).

Although not specifically addressed by Kentucky courts, this general collateral source rule would likely apply to psychological treatment as well, so long as the collateral source is "wholly independent of the wrongdoer." *Schwartz*, 175 S.W.3d at 627 (referring to this as the "main requirement for qualification as a collateral source"). "A source is wholly independent and therefore collateral when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer." *Id.* (citations omitted).

Kentucky courts do, however, allow two exceptions to the collateral source rule: the malingering exception and the financial hardship exception. First, regarding the malingering exception, when the possibility arises that "a plaintiff may be exaggerating his injury for recovery, evidence relating to a claimant's receipt of compensation may be admissible." *Peters*, 297 S.W.3d at 62. Second, regarding the financial hardship exception, "when the plaintiff has put into issue hardships and financial distress or implies financial distress caused by defendant's actions, the defendant may rebut this by showing that other financial means were available to plaintiff." *Id.*

a. If so, is there a right of subrogation for the insurer?

The Kentucky Supreme Court has recognized "insurers' equitable and contractual right to subrogation." *Schwartz*, 175 S.W.3d at 626. In *Schwartz*, the Kentucky Court of Appeals stated that the collateral source rule and subrogation "work in tandem by ensuring that the tortfeasor bears the ultimate responsibility for payment of damages without diminishment for benefits received by the injured party from collateral sources, while preventing double recovery by the injured party where the party providing the collateral source benefits seeks reimbursement through subrogation." *Id.* at 626-27.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Kentucky courts have not specifically addressed free or charitable care. Kentucky courts, however, have permitted recovery of medical expenses in cases in which the injured party did not pay for the medical services or premiums for medical services. In *Daugherty v. Daugherty*, 609 S.W.2d 127 (Ky. 1980), the Kentucky Supreme Court held that the plaintiff, a dependent of her father who was in the Army, was entitled to recover the full amount of her medical expenses incurred at an Army hospital despite the father not being required to pay premiums for the medical services. *Id.* at 128. Likewise, in *Conley v. Foster*, 335 S.W.2d 904 (1960), the Kentucky Supreme Court awarded full recovery of medical expenses even though the United Mine Workers Welfare Fund reimbursed the plaintiff for his medical bills. *Id.* at 907.

a. If so, is there a right of subrogation for the charitable provider?

No Kentucky law addresses the right of subrogation for a charitable provider.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

As far as the collateral source rule is concerned, Kentucky treats plaintiffs the same with respect to recovery of the costs of treatment. The Kentucky Supreme Court has stated that "Medicare benefits are governed by the collateral source rule and are treated the same as other types of medical insurance." *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 683 (Ky. 2005). In *Baptist Healthcare*, the Kentucky Supreme Court found it "absurd to suggest that the tortfeasor should receive a benefit from a contractual arrangement between Medicare and the health care provider." *Id.* at 684; *see also Our Lady of Mercy Hosp. v. McIntosh*, 461 S.W.2d 377, 379 (Ky. Ct. App. 1970) ("The payments a person makes to be covered by Medicare are analogous to insurance premiums, and a defendant is not entitled to benefit from any medical insurance proceeds received by an injured plaintiff.").

Kentucky courts have extended Baptist Healthcare's holding to the Medicaid context as well. *Lake Cumberland, LLC v. Dishman*, 2007 WL 1229432, at *10 (Ky. Ct. App. April 6, 2007) (acknowledging differences in Medicare and Medicaid but holding that awarding any windfall to plaintiff and deterring tort liability were sufficient justifications for not reducing plaintiff's recovery).

4. Are collateral source matters governed by statute, common law, or a combination of both?

In Kentucky, collateral source matters are almost exclusively governed by common law. *See Baptist Healthcare*, 177 S.W.3d at 682-83 n.17. In 1988, the Kentucky legislature passed a statute permitting collateral source payments (except life insurance) to be admissible. *See* KRS §411.188(3). Seven years later in 1995, however, the Kentucky Supreme Court held the statute unconstitutional upon separation of powers principles. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995).

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The Plaintiff is allowed to keep any windfall under Kentucky law. "[A]s between the injured party and the tortfeasor, any so-called windfall by allowing a double recovery should accrue to the less culpable injured party rather than relieving the tortfeasor of full responsibility for his wrongdoing." *Schwartz*, 175 S.W.3d at 626.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The stated basis for recovery is the "reasonable value" of the medical services provided. *Baptist Healthcare*, 177 S.W.3d at 682. As the Kentucky Supreme Court stated in *Baptist Healthcare*, the "collateral source rule . . . allows the plaintiff to (1) seek recovery for the *reasonable value* of medical services for an injury, and (2) seek recovery for the *reasonable value* of medical services without consideration of insurance payments made by the injured party." *Id.* (emphasis added).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Kentucky law does not provide a specific definition of the "reasonable value" of medical services. *See Rogers v. Counts*, 2008 WL 2219774, at *2 (Ky. Ct. App. May 30, 2008) ("Medical expenses must not only be

reasonable but they must be incurred as a result of the accident and when the evidence is not conclusive, a jury is not required to accept the medical bills submitted by the plaintiff.").

a. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

Although not explicitly stated, the amount actually paid for the medical services provided appears to be an improper basis for the jury's consideration. In *Baptist Healthcare*, the Kentucky Supreme Court affirmed the trial court's award of the reasonable value of the medical expenses based on the amount billed for the services. *Id.* at 683-84. In doing so, the court implicitly rejected the appellant's argument that the amount actually paid should have been the basis for the plaintiff's recovery. *Id.* No Kentucky case, however, explicitly states that that the amount actually paid for the services should not be submitted for the jury's consideration.

(2) The amount billed for the services?

As stated above, a jury may consider the amount billed for the medical services because the Kentucky Supreme Court implicitly deemed the amount billed to be the proper measure of the reasonable value of the services in *Baptist Healthcare*. *Id.* at 683-84. In other words, "the Kentucky Supreme Court specifically concluded that a plaintiff may recover the full amount of medical bills even though the health insurance company negotiated to pay less than the full amount." *See Buda v. Schuler*, 352 S.W.3d 350, 356 (Ky. Ct. App. 2011) (citing *Baptist Healthcare*, 177 S.W.3d 676).

Furthermore, at least in automobile accident cases, a Kentucky statute provides a presumption that all medical bills submitted are reasonable. KRS §304.39-020(5)(a); *see also Daugherty v. Daugherty*, 609 S.W.2d 127, 128 (Ky. 1980) ("On the question of reasonableness, we feel that the medical bill alone was sufficient in light of the statutory presumption that any medical bill submitted is reasonable."). However, in addition to being reasonable, "medical bills . . . must be incurred as a result of the accident and when the evidence is not conclusive, a jury is not required to accept the medical bills submitted by the plaintiff." *See Morgan v. Morgan*, 2006 WL 3040019, at *2 (Ky. Ct. App. Oct. 27, 2006). This statutory presumption therefore "does not remove from the jury the ability to weigh the evidence and testimony and decide whether the medical expenses are reasonable and incurred as a result of the accident." *See Rogers*, 2008 WL 2219774, at *2.

(3) Provider testimony on the value of their services as compared to billed amounts?

A physician may testify as to the reasonableness of the value of a plaintiff's treatment. *See Miller v. Mills*, 257 S.W.2d 520, 523 (Ky. Ct. App. 1953); *Louisville Ry. Co. v. Schwemmer*, 205 S.W. 685 (Ky. Ct. App. 1918).

(4) Expert testimony on accuracy of provider billing rates?

Expert testimony does not appear to be required for the accuracy of medical billing rates. *Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311, 319 (Ky. 2006). In *Samples*, Cincinnati Insurance Co. argued that Samples required expert proof that medical expenses were "necessary for and related to treatment for injuries caused by this accident." *Id.* The Kentucky Supreme Court disagreed, however, citing the statutory presumption of reasonableness and stating that it had "long held that evidence such as that presented in this case is sufficient to establish that the medical bills were reasonable and were related to the accident." *Id.*

(5) The fact that a third-party payor (a/k/a insurance company) has already paid the bill?

The fact that medical bills have been paid can be taken into account for proof of reasonableness. *See Townsend v. Stamper*, 398 S.W.2d 45, 48 (Ky. Ct. App. 1965) (holding medical bills reasonable based in part on appellant presenting "vouchers reflecting payment of various medical expenses"); *Louisville & I.R. Co. v. Frazee*, 200 S.W. 948, 949 (Ky. Ct. App. 1918).

(6) Any other factors?

As stated above, at least in the context of automobile accidents, a Kentucky statute states that all medical bills submitted are presumed reasonable. KRS §304.39-020.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Generally, the amount of recovery does not vary on the presence or absence of a collateral source. *See Peters v. Wooten*, 297 S.W.3d 55, 62 (Ky. Ct. App. 2009) ("Generally, information regarding collateral source payments may not be introduced to the jury."). As provided above, however, Kentucky courts recognize the "malingering exception" and the "financial hardship exception" to the collateral source rule. *Id.* at 62-63.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

The Kentucky Supreme Court has found no inherent unfairness in allowing a plaintiff to recover more than was actually paid for the treatment. In *Baptist Healthcare*, the court upheld a jury award of $34,000 for medical expenses when the amount actually paid was $3,356.38. 177 S.W.3d at 682. The court held that this award of medical expenses was proper, stating that "the wrongdoer should not receive a benefit by being relieved of payment for damages because the injured party had the foresight to obtain insurance." *Id.* at 683. Also, the court found that "as between the injured party and the tortfeasor, any so-called windfall by allowing a double recovery should accrue to the less culpable party rather than relieving the tortfeasor of full responsibility for his wrongdoing." *Id.* Finally, the court pointed to public policy by stating that if the tortfeasor was not required to pay the full extent of damages caused, then tort liability's deterrent purpose would not serve its function. *Id.*

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

In Kentucky, a plaintiff is allowed to use the billed value at trial as a basis for a non-economic damages award. *See Dennis v. Fulkerson*, 343 S.W.3d 633, 638 (Ky. Ct. App. 2011) ("We agree it was proper to allow the introduction of an entire medical bill to aid the jury in determining an appropriate amount of damages for pain and suffering."). In other words, "the injured party may be unduly prejudiced concerning the claim for pain and suffering if the jury hears no evidence of medical expenses." *See Beckner v. Palmore*, 719 S.W.2d 288, 289 (Ky. Ct. App. 1986).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Kentucky courts have not specifically addressed this question. However, in *Dennis v. Fulkerson*, 343 S.W.3d 633 (Ky. Ct. App. 2011), a medical malpractice case, the court found it was proper to introduce the entire medical bill to help the jury in awarding damages for pain and suffering. *Id.* at 638. In that case, the hospital had written off the entire medical bill. *Id.*

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

As mentioned above, the Kentucky Supreme Court struck down a Kentucky statute related to the admissibility of collateral source payments and subrogation rights. In 1988, the Kentucky legislature passed a bill providing that, *inter alia*, "[c]ollateral source payments, except life insurance, the value of any premiums paid by or on behalf of plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial." KRS §411.188(3).

In 1995, however, the Kentucky Supreme Court struck down this statute as violative of the Kentucky Constitution. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995). Kentucky's Constitution "vests exclusive jurisdiction in the Supreme Court to prescribe 'rules of practice and procedure for the Court of Justice.'" *Id.* at 576 (quoting Ky. Const. §116). The Supreme Court held that the Kentucky legislature had unconstitutionally infringed on this power because "responsibility for deciding when evidence is relevant to an issue of fact which must be judicially determined, such as the medical expenses incurred for treatment of personal injuries, falls squarely within the parameters of 'practice and procedure' assigned to the judicial branch." *Id.*

In addition to separation of powers grounds, the Kentucky Supreme Court held that the statute was "constitutionally defective" because it violated Section 54 of the Kentucky Constitution. *Id.* at 578. This section provides the following: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." Ky. Const. §54. Based on this section, the court held that "a substantive law change denying damages for medical expenses and wage loss in a civil action to those plaintiffs who have access to collateral source benefits would violate Section 54." *O'Bryan*, 892 S.W.2d at 578.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

As illustrated in the *O'Bryan* case, the Kentucky Supreme Court has shown resistance to the legislature limiting the amount that can be recovered in wrongful death, personal injury, or damage to personal property cases under Section 54 of the state's Constitution.

Louisiana

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. Louisiana law generally allows plaintiffs to recover the costs of third-party payments made by insurers for medical treatment under the "collateral source" rule. *Bellard v. American Century Ins. Co.*, 2007-1335 (La. 4/18/08); 980 So.2d 654. Under this rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be diminished, because of benefits received by the plaintiff from collateral sources independent of the tortfeasor's procuration or contribution. *Coscino v. Wolfley,* 96-0702, p. 12 (La.App. 4 Cir. 6/4/97); 696 So.2d 257, 264.

a. If so, is there a right of subrogation for the insurer?

Yes. Subrogation is an exception to the collateral source rule in Louisiana. The collateral source rule is inapplicable where the right of subrogation is involved, even if the party subrogated does not appear to assert its subrogation rights and the defendants do not timely object to the non-joinder of the necessary party. Where subrogation is proven, the plaintiff may recover only his remaining interest in the partially subrogated claim. *Southern Farm Bureau Cas. Ins. Co. v. Sonnier*, 406 So.2d 178, 180 (La. 1981). Moreover, subrogation can be assigned to the insured, who then has a right of action to enforce it. *Sutton v. Lambert*, 94-2301 (La. App. 1 Cir. 6/23/95); 657 So.2d 697, 707.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. Care rendered gratuitously does not preclude the injured party from recovering the value of such services if a plaintiff proves the need for the services, the reasonableness of the fee, and the extent and duration of the services. *Tanner v. Fireman's Fund Insurance Companies,* 589 So.2d 507 (La. App. 1 Cir. 1999); *Bordelon v. Aetna Casualty & Surety, Co.,* 494 So.2d 1283 (La.App. 2 Cir.1986).

a. If so, is there a right of subrogation for the charitable provider?

Presumably, yes. Moreover, Louisiana Revised Statute 9:4752 provides that a health care provider, hospital or ambulance that provides services to any injured person has a privilege or lien for the reasonable charges or fees on the net amount payable to the injured person out of the total amount of any recovery or sum collected whether by judgment or settlement. Furthermore, Louisiana Revised Statute 46:8 provides state-supported or veterans administration hospitals in Louisiana with a subrogated right of action for any reasonable charges rendered to the patient in accordance with like charges in other first-class hospitals, including the fees of any physicians or surgeons. Accordingly, charity hospitals in Louisiana will often intervene in lawsuits seeking recovery of their services.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Yes. Where the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the medical benefits he receives, the plaintiff cannot recover the "write-off" amount. For example, Medicaid is a free medical service and no consideration is given by a patient to obtain Medicaid benefits. Therefore, a plaintiff who is a Medicaid recipient is unable to recover the "write off" amounts. *Bozeman v. State*, 2003-1016 (La. 7/2/04); 879 So.2d 692, 705.

a. If so, what are the differences?

In reaching its decision in *Bozeman,* the Louisiana Supreme Court specifically noted that the operative words are "free medical care," which is applicable to plaintiffs who receive Medicaid, not plaintiffs who receive Medicare or private insurance benefits. *Bozeman v. State*, 2003-1016 (La. 7/2/04); 879 So.2d 692, 705. The latter payment methods require contribution from the recipient—namely, the plaintiff. In sum, with respect to Medicare or private insurance, the write-off amount is viewed as a benefit of the plaintiff's contractual bargain with his insurance provider or Medicare and is recoverable.

4. Are collateral source matters governed by statute, common law, or a combination of both?

The collateral source rule is of common law origin, but is well-established in the jurisprudence of Louisiana. *Louisiana Dep't of Transp. and Dev. v. Kansas City Southern Ry. Co.,* 2002-2349, (La.5/20/03); 846 So.2d 734, 739.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The plaintiff keeps the windfall under Louisiana law.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

No.

b. Amount actually billed by the third-party provider.

Yes. Where the plaintiff's testimony that he incurred a medical bill is supported by the bill, absent sufficient contradictory evidence or reasonable suspicion that the bills are unrelated, it is sufficient to support the inclusion of that item in the judgment. The test is whether it is more probable than not that those items result from the accident made the basis of the suit. *See Villetto v. Weilbaecher,* 377 So.2d 132 (La. App. 4 Cir.1979); *Rue v. State, Dept. of Highways,* 376 So.2d 525 (La. App. 3 Cir.1979).

c. "Reasonable value" of medical services provided.

A plaintiff may ordinarily recover reasonable medical expenses that he incurs as a result of an injury. *Rhodes v. State through Dept. of Transp. and Development,* 94-1758 (La.App. 1 Cir. 12/20/96); 684 So.2d 1134, 1148. The medical evidence must show the existence of the claimed injuries and a causal connection between the injuries and the accident. *Wright v. Gen. Aviation Co.,* 04-772 (La. App. 5 Cir. 11/30/04); 889 So.2d 1115, 1120; *Rhodes,* 684 So.2d at 1148. When claims for the accrued medical expenses are supported by medical bills, these expenses should be awarded unless there is contradictory evidence or reasonable suspicion that the bills are unrelated to the accident. *Venissat v. St. Paul Fire & Marine Ins. Co.,* 2006-987 (La. App. 3 Cir. 8/15/07); 968 So.2d 1063, 1071. A jury manifestly errs if the victim has proven his medical expenses by a preponderance of the evidence and it fails to award the full amount of the medical expenses proven. *Id.* Under Louisiana law, a tortfeasor is required to pay for medical treatment of the victim, even over-treatment or unnecessary treatment, unless such treatment was incurred by the victim in bad faith. *Gunn v. Robertson,* 01-347 (La.App. 5 Cir. 11/14/01), 801 So.2d 555, 564, *writs denied,* 02-170, 02-176 (La.3/22/02), 811 So.2d 942.

d. Other

None.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

No.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

The amount actually billed.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

Presumably, no. The collateral source rule should likely bar such evidence.

(2) The amount billed for the services?

Yes.

(3) Provider testimony on the value of their services as compared to billed amounts?

If the context of the testimony is to show that the services were reasonable, necessary and related to the accident or injury at issue, such testimony presumably will be allowed.

(4) Expert testimony on accuracy of provider billing rates?

If the context of the testimony is to show that the services were reasonable, necessary and related to the accident or injury at issue, such testimony presumably will be allowed.

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

Presumably, no.

(6) Any other factors?

None.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. For example, in *Suhor v. Lagasse,* the Louisiana Fourth Circuit Court of Appeal opined that "the main policy reasons for the collateral source rule are grounded in the belief that the tortfeasor should not profit from the victim's prudence in obtaining insurance and that reducing the recovery by the monies paid by a third party would hamper the deterrent effect of the law." 2000-1628 (La. App. 4 Cir. 9/13/00); 770 So.2d 422, 424.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Yes.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Yes.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Given the recent analysis of the collateral source rule by the Louisiana Supreme Court, it is unlikely that a constitutional challenge would be successful. *See Bozeman v. State*, 2003-1016 (La. 7/2/04); 879 So.2d 692.

Maine

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Under Maine law, "if a plaintiff is compensated in whole or in part for his damages by some source independent of the tortfeasor, he is still permitted to have full recovery against him." *Werner v. Lane*, 393 A.2d 1329, 1335 (Me. 1978); *see also Hoitt v. Hall*, 661 A.2d 669, 673-74 (Me. 1995). In *Werner*, the Supreme Judicial Court of Maine addressed whether the foregoing formulation of the collateral source rule applied to medical and nursing services rendered gratuitously and concluded "with the overwhelming judicial opinion . . . that the collateral source rule was applicable." *Id.* at 1336. Consequently, under *Werner*, a plaintiff generally may recover the costs of third-party payments for medical treatment.[1] *See also* Alexander, Donald G., *Maine Jury Instruction Manual* §7-108, Comment (4th ed. 2010) ("Medical expense damages may be recovered for charges paid by or for the plaintiff, charges paid by a collateral source or a third party, or charges actually incurred but later written off or otherwise not collected.").

a. If so, is there a right of subrogation for the insurer?

With respect to the subrogation rights of insurers, Maine courts have held that "equitable subrogation is not available where a person pays a debt in performance of his own obligation, as that person is the primary obligor." *McCain Foods, Inc. v. Gerard*, 489 A.2d 503, 504-05 (Me. 1985) (where insurance plan did not contain a subrogation clause, insurer was not entitled to equitable subrogation of plaintiff's rights to recover against third-parties for medical expenses, because insurer "was a primary obligor and was required under its own contract to pay [plaintiff's] medical expenses"); s*ee also Maine Mun. Employees Health Trust v. Maloney*, 2004 ME 51, ¶¶ 7-8, 846 A.2d 336, 339 (holding that insurer had no right of subrogation where contract did not contain a subrogation provision, and not deciding whether insurer had an equitable subrogation lien because statute of limitations would have barred recovery in any event).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

As noted above, in *Werner*, the Supreme Judicial Court of Maine applied the collateral source rule to medical and nursing services rendered gratuitously and concluded "with the overwhelming judicial opinion . . . that the collateral source rule was applicable." *Werner*, 393A.2d at 1336.

a. If so, is there a right of subrogation for the charitable provider?

In *Werner*, the court did not address whether there is a right of subrogation for a charitable provider of medical treatment. *Werner*, 393 A.2d 1334-35 (noting that the relevant statute, which governed the provision of medical services at state hospitals, was "silent respecting any right of subrogation" and assuming for the purposes of the case that the services were provided "pursuant to an outright free state program").

Under Maine law, however, when benefits are provided to a member of the State's Medicaid program to cover medical costs for injuries caused by a third-party, the State "may recover from that party the cost of the benefits provided." 22 M.R.S.A. §14(1). The statute provides that the State must also be subrogated "to any cause of action or claim that a member has against a 3rd party who is or may be liable for medical costs incurred by or on behalf of the member." *Id.* The State may recover "the cost of the benefits actually paid out." *Id.*

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Maine courts do not appear to apply the collateral source rule differently with respect to the identity of the payor. *See Hoitt v. Hall*, 661 A.2d 669, 673-74 (Me. 1995) (holding plaintiff's survivor's benefit from deceased husband's Air Force pension was a collateral source, as "[t]he law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him.") (quoting *Restatement (Second) of Torts* §920A cmt. b (1979)); *Michaud v. Raceway Government Realty, LLC*, 2008 WL 5770438 at *1 (Me. Super. Ct., Aug. 4, 2008) (applying collateral source rule where plaintiff's medical care was provided by the state's version of Medicaid); *Barday v. Donnelly*, 2006 WL 381876 at *2 (Me. Super. Ct., Jan. 27, 2006) (applying collateral source rule where plaintiff's medical care was provided by Medicare and state equivalent of Medicaid).

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source matters are governed by common law, as articulated in *Werner* above, as well as statutory law. Under statutory law governing actions for medical malpractice, evidence that the plaintiff's medical expenses have been paid by a collateral source is admissible after a verdict for the plaintiff and before a judgment is entered on the verdict. 24 M.R.S.A. §2906(2). After notice and an opportunity for an evidentiary hearing, the court may reduce the plaintiff's damages if it is determined that all or part of the plaintiff's expense has been paid or is payable by a collateral source, and the collateral source has not exercised its right to subrogation. *Id.* The statute requires that the plaintiff notify within 10 days of a verdict any person who may be entitled "by contract or law to a lien against the proceeds of the plaintiff's recovery." *Id.* at §2906(6). A lienholder has 30 days after the receipt of the notice to notify the court of its right to subrogation. *Id.*

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

In adopting the collateral source rule, Maine courts have adopted the rationale of the Ninth Circuit, which provides that "either the injured party or the tortfeasor is going to receive a windfall, if part of the pecuniary loss is paid for by an outside source and that it is more just that the windfall should inure to the benefit of the injured party than that it should accrue to the tortfeasor." *Werner*, 393 A.2d at1335-36 (quoting *Olivas v. United States*, 506 F.2d 1158, 1163-64 (9th Cir. 1974)).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

In recovering payments for medical treatment, a plaintiff is entitled to recover the "reasonable value" of medical services. *Stubbs v. Bartlett*, 478 A.2d 690, 692 (Me. 1984) ("Plaintiff is entitled to be compensated for only those medical expenses which are reasonable and necessary, and are related to the accident and injuries complained of."); *Barday v. Donnelly*, 2006 WL 381876 at *1 (Me. Super. Ct., Jan. 27, 2006) (plaintiff is entitled to recover the "reasonable value of medical services") (quoting *Maine Jury Instruction Manual* §7-108).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Noting that neither the Law Court nor the legislature has defined the "reasonable value" of medical services, the court in *Barday* concluded that determining "reasonable value" is "ultimately a question of fact for the jury to decide." *Barday*, 2006 WL 381876 at *3; *see also Stubbs*, 478 A.2d at 692 ("With regard to medical expenses and the other elements of damage claimed by these plaintiffs, we defer to the jury's determination.").

a. If a question of fact for the jury, what factors is the jury allowed to consider?

In *Barday*, the defendant argued that evidence of the amount received by the plaintiff for medical services should be limited to the amount actually paid by the plaintiff's insurers, rather than the amount billed by the plaintiff's medical providers. The defendant also argued that limiting the evidence to the amount actually paid by the plaintiff's insurers, while not disclosing the fact that the payments were made by a collateral source, did not implicate the collateral source rule. Although the court agreed with the defendant's latter argument, it rejected the defendant's definition of the "reasonable value" of medical services:

> It is for the factfinder to decide, based on evidence not only of the amount of the payments made, but also based on evidence of the amounts billed by the medical service providers and any other relevant evidence not implicating the collateral source rule, what the "reasonable value" of those medical services is.

Barday, 2006 WL 381876 at *3; *see also Michaud v. Raceway Government Realty, LLC*, 2008 WL 5770438 at * 1 (Me. Super. Ct., Aug. 4, 2008) ("Under existing Maine law, it is for the factfinder to decide what the "reasonable value" of plaintiff's medical services is, based on the evidence of the amounts billed by the medical service providers and any other relevant evidence not implicating the collateral source rule.")

However, a trial court may set aside a jury verdict if the verdict bears no rational relationship to the evidence and the court concludes the jury acted under bias or made a mistake of law or fact. *Seabury-Peterson v. Jhamb*, 2011 ME 35, ¶¶ 18-19, 15 A.3d 746, 751-52 (affirming trial court's determination that jury award of $160,000 for past medical costs was excessive, where only evidence was a medical bill for $12,257).

3. Do the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Maine courts appear to have answered this question in the negative. *See Hoitt v. Hall*, 661 A.2d 669, 674 (Me. 1995) (noting that the collateral source rule "say[s] that it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives").

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

As noted above, Maine courts have adopted the rationale of the Ninth Circuit, which provides that "either the injured party or the tortfeasor is going to receive a windfall, if part of the pecuniary loss is paid for by an outside source and that it is more just that the windfall should inure to the benefit of the injured party than that it should accrue to the tortfeasor." *Werner v. Lane*, 393 A.2d 1329, 1335-36 (quoting *Olivas v. United States*, 506 F.2d 1158, 1163-64 (9th Cir. 1974)).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

In general, the billed value of medical expenses may be used as a basis for a non-economic damages award. *See, e.g., Walter v. Wal-Mart Stores, Inc.*, 2000 ME 63, ¶ 31, 748 A.2d 961, 973 (jury award of $550,000 included plaintiff's medical bills and expenses of approximately $71,000 and $479,000 for pain and suffering); *Tracy v. Hannaford Bros. Co.*, 2002 WL 746112 (Me. Super. Ct., Mar. 12, 2002) (jury award of damages that was equal to plaintiff's medical bills, "to the penny," was inadequate for failure to include damages for pain and suffering, where there was uncontroverted evidence that plaintiff suffered some discomfort as result of the injury and the verdict "could only be the result of compromise").

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

This issue does not appear to have been litigated in Maine.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

Maine courts have yet to address constitutional implications following from the collateral source rule.

Endnote

[1] Since *Werner*, Maine courts have extended the collateral source rule to actions other than tort actions, including actions for a breach of contract, *Potvin v. Seven Elms*, 628 A.2d 115, 116 (Me. 1993) (holding that the "collateral source rule prohibits a reduction of the damages awarded to a plaintiff on a claim for the breach of an employment contract by the amount of unemployment compensation benefits received by the plaintiff"), and actions for unlawful discrimination, *Maine Human Rights Comm'n v. Dep't of Corrections*, 474 A.2d 860, 870 (Me. 1984) (holding that the trial court erred in reducing plaintiff's back pay award by the amount of unemployment compensation received; "The rationale for application of the [collateral source] rule in tort actions applies with equal force in employment discrimination cases.").

Maryland

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes, generally. *Kremen v. Maryland Automobile Ins. Fund*, 770 A.2d 170 (Md. 2001); *Plank v. Summers*, 102 A.2d 262 (1954).

However, in medical malpractice cases, a defendant may seek a remittitur or a new trial if a damage award includes medical expenses paid by a third-party payor. Whether to order a remittitur or new trial is in the trial court's discretion. The jury in a new trial is informed of the third-party payments. Md. Ann. Code, Cts. & Jud. Proc. Art. §3-2A-06; *Narayen v. Bailey*, 747 A.2d 195 (Md. App. 2000).

a. If so, is there a right of subrogation for the insurer?

Yes, unless the exception for medical malpractice cases applies. *Meyers v. Meagher*, 352 A.2d 827 (1976). The amount permitted to be recovered is reduced to account for the Plaintiff's attorney's fees. Md. Ann. Code, Cts. & Jud. Proc. Art. §11-112.

There is no right of subrogation if there is a remittitur or new trial in a medical malpractice case. *Narayen, supra*.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. *Kremen, supra; Plank, supra.*

a. If so, is there a right of subrogation for the charitable provider?

This issue has not been decided.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No. *Kremen, supra.*

a. If so, what are the differences?

4. Are collateral source matters governed by statute, common law, or a combination of both?

Common law governs except as to the statutory exception for medical malpractice cases.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The Plaintiff.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b, Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

The amounts incurred must be fair and reasonable, as determined by the jury. Generally, the plaintiff must prove the charges were fair and reasonable; the bills alone do not suffice. *Shpigel v. White*, 741 A.2d 1205 (Md. 1999). However, in cases where the damages claimed are less than $ 30,000, the plaintiff may simply introduce the bills. Md. Ann. Code, Cts. & Jud. Proc. Art. §10-104.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

The amount is based on the bills, provided they are supported by testimony that they are fair and reasonable.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Not in any detail.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

No. Medical bills are not admissible to prove non-economic damages. *Wright v. Hixon,* 400 A.2d 1138 (Md. App. 1979).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

No.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Massachusetts

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

As a general rule, the plaintiff is generally entitled to recover the value of reasonable medical services required to treat an injury, whether or not paid for by a third-party insurer. *Law v. Griffith*, 457 Mass. 349 (2010).

The exception to this rule is in medical malpractice actions. In a medical malpractice action, upon a verdict for the plaintiff that includes an amount to compensate the plaintiff for reasonable medical expenses (which, per G.L. c. 231, §60F must be separately identified by the jury) the defendant may seek a reduction in the verdict for the amount that such expenses were paid by a collateral source. G.L. c. 231, §60G (a) and (b). In such instances the plaintiff is able to introduce evidence to establish the amount that was paid to obtain the collateral source benefits at issue, and such amounts will off-set the reduction that would otherwise be taken. *Id.* In such instances where the recovery is reduced, the collateral source will not have a right of subrogation or a lien on the plaintiff's recovery. G.L. c. 231, §60G (c). Notwithstanding the foregoing, if the collateral source is entitled to subrogation as a matter of federal law, or the collateral source is the department of public welfare, then there will be no reduction in the verdict for amounts that were obtained from a collateral source and the collateral source's right to subrogation or a lien on the recovery will not be effected. G.L. c. 231, §60G (c) and (e).

a. If so, is there a right of subrogation for the insurer?

Generally, there is a right of subrogation, although for private insurance this is largely dependent upon the insurance contract at issue. See above for a discussion of the right of subrogation in cases of medical malpractice actions.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

The plaintiff is entitled to recover the costs of reasonable medical services required to treat an injury, even thought there has not been a charge for that treatment. *Law v. Griffith*, 457 Mass. 349 (2010).

a. If so, is there a right of subrogation for the charitable provider?

As the charitable provider did not make any payment on behalf of the insured, there is generally no right of subrogation.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Generally, no, but see the discussion above with respect to medical malpractice actions.

a. If so, what are the differences?

See the discussion above with respect to medical malpractice actions.

4. Are collateral source matters governed by statute, common law, or a combination of both?

A combination of both.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The Plaintiff.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The reasonable value of the medical services required to treat an injury.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The "reasonable value" of the medical services is left for the jury to decide. By statute, the medical bills that a plaintiff has received from a medical provider are admissible as evidence of the reasonable and necessary value of medical services rendered. G.L. c. 233, §79G ("In any proceeding commenced in any court, … an itemized bill and reports, including hospital medical records, relating to medical, dental, hospital services, prescriptions or orthopedic appliances, rendered to or prescribed for a person injured, or any report of an examination of said injured person … shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments… ."). Recently, the Massachusetts Supreme Judicial Court has held that the defendant may introduce evidence as to the range of payments that the plaintiff's medical providers accept for the types of medical services that the plaintiff received. *Law v. Griffith*, 457 Mass. at 353. In doing so, the defendant is not permitted to introduce evidence that would make the jury aware how much the plaintiff's particular medical providers actually paid for the services. *Id.* at 358. As outlined by the SJC in *Law v. Griffith*, the procedure suggested would allow "a defendant to call a representative of the particular medical provider whose bill the defendant wishes to challenge, and to elicit evidence concerning the provider's stated charges and the range of payments that the provider accepts for the particular type or types of services the plaintiff received. In this context, it would appear appropriate for the witness to acknowledge that the range of payments being testified to reflects amounts paid by both individual, self-paying patients and third-party payors … ." *Id.* at 360. In this regard, the defendant has an opportunity to introduce evidence that the amount accepted by the medical provider is typically less than the amount that was actually billed.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

N/A.

b. If a question of fact for the jury, is the jury allowed to consider the following?

See above.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Generally, no, but see discussion above regarding damages for reasonable medical expenses in malpractice actions.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. The court has commented that the purpose of the collateral source rule is "tort deterrence," and "avoiding a windfall to a tortfeasor is preferable even if a plaintiff thereby receives an excessive recovery in some circumstances." *Law v. Griffith*, 457 Mass. at 355.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Not applicable, as the plaintiff is not permitted to ask for a specific non-economic damages award at trial.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Not applicable, as the plaintiff is not permitted to ask for a specific non-economic damages award at trial.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Michigan

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. This issue is controlled by stature, which has abrogated the common-law Collateral Source Rule. Statutorily, any judgment awarded to Plaintiff, with a few exceptions, must be reduced by any amounts paid or payable to Plaintiff by a collateral source. However, any *future* payments, such as future worker's compensation benefits, are not considered a collateral source. Significantly, the reduction is taken by the Court post-judgment, and collateral source issues are never brought before the jury.

a. If so, is there a right of subrogation for the insurer?

Yes; however, by statute, benefits from a collateral source do not include benefits paid by a person or legal entity entitled by either law or contract to a lien against the proceeds of a recovery, *if the lien has been exercised*. If the lien has not been exercised, however, the amounts paid may be considered a collateral source, with some limited exceptions. The overall statutory purpose of the lien provision is to avoid giving a plaintiff either a double recovery or a double liability (*i.e.* no "double dip").

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

This would be an issue of first impression in Michigan. In 2004, the Michigan Supreme Court held that *Medicaid* payments are not to be considered a collateral source, so it would be expected that charitable medical care would similarly not be considered a collateral source.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Yes.

a. If so, what are the differences?

Under the statute, MCLS §600.6303, benefits from a collateral source include benefits received or receivable from an insurance policy (less the amounts paid for premiums), benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits, social security benefits, worker's compensation benefits,; or Medicare benefits. As noted above, the Michigan Supreme Court has held that Medicaid payments are not to be considered a collateral source.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Both. Michigan has enacted a statute, which has abrogated the common-law Collateral Source Rule; however, the courts have interpreted the statute, with rulings such as the one exempting Medicaid payments as a collateral source.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Not applicable.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Generally, the amounts actually paid (but see C, below).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Not applicable.

3. Do the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

It has been addressed by the Legislature. The overall purpose of the statutory lien provision is to avoid giving a Plaintiff either a double recovery or a double liability (*i.e.* no "double dip").

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Yes, assuming that Plaintiff is not a hospital, doctor, or health care provider. Plaintiff may blackboard the amounts billed, rather than the amounts paid; however, when the collateral source reductions are taken by the Court post-judgment, the amounts billed, rather than the amounts paid, should then be considered the setoff, so that Plaintiff does not obtain a "windfall" of the difference between the two.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

Yes. There have been several constitutional challenges on grounds that the exercise of the Collateral Source Rule (1) constitutes a taking without just compensation; (2) violates the right to a jury trial on the issue of damages; (3) violates due process, and; (4) violates equal protection under the law. It has now long been held by the courts, however, that none of these rights are violated by the exercise of the Collateral Source Rule.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Minnesota

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

In Minnesota, a plaintiff is generally not permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment. *See* Minn. Stat. §548.251 (2010).

In 1986, the Minnesota legislature enacted the collateral source statute to in part, abrogate the common law collateral source rule. *See Swanson*, 784 N.W.2d at 269 (quoting *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990)).

The law was enacted as part of the tort reform movement, in response to the growing cost of insurance. Lawmakers' goal was to prevent plaintiff windfalls and overcompensation. They, therefore, changed the rule so "a plaintiff [under the statute] cannot recover money damages from the defendant if the plaintiff has already received compensation from certain third parties or entities." *Swanson*, 784 N.W.2d at 269.

Procedurally, once damages are awarded to a plaintiff, the statute allows a party to file a motion within 10 days of the verdict's entry, requesting the court determine collateral sources. Once the court makes the appropriate determination, §548.251 instructs the court to:

a) reduce the award by the amounts determined to have come from collateral sources and

b) offset any reduction in the award by the amounts determined to have come from collateral sources Minn. Stat. §548.251, subd. 3 (2010).

In 2010, the Minnesota Supreme Court held that a negotiated discount on a plaintiff's medical bills *is* a collateral source and a plaintiff is not entitled to recover the gap between the amount billed and the amount actually paid by plaintiff's health insurer. *Swanson*, 784 N.W.2d 264 at 266. In particular, the court held that the amount negotiated by the plaintiff's health insurance company for the plaintiff's care – namely discounts or write-offs – was a collateral source as defined by §548.251 and could, therefore, be deducted from the damage award for medical costs to the plaintiff. *Swanson*, 784 N.W.2d at 276.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Minnesota has not yet addressed whether a plaintiff is permitted to recover the costs of free or charitable care donated to the plaintiff for medical or psychological treatment.

Under §548.251, a district court may reduce an award by amounts given to the plaintiff only by or pursuant to four provisions listed in the statute. *Swanson*, 784 N.W.2d at 270.

a) Payments made by a federal, state, or local income disability or Worker's Compensation Act; or other public program providing medical expenses, disability payments or similar benefits are considered collateral sources.

b) Similarly, various forms of insurance coverage are defined as collateral sources in the statute. These include health, accident and sickness or automobile accident insurance or liability insurance that provides health benefits or income disability coverage; except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others, payments made pursuant to the United States Social Security Act, or pension payments.

c) A contract or agreement of a group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care service is also considered a collateral source.

d) Finally, a contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability are also collateral sources under the statute, unless the benefits came from a private disability insurance policy and the premiums were wholly paid for by the plaintiff. Minn. Stat. §548.251, subd. 1 (2010).

In *Swanson*, the supreme court reiterated the collateral source statutory rules, making it clear that a plaintiff cannot recover money damages from the defendant if the plaintiff has already received compensation from certain third parties or entities, adding negotiated discounts to the list of collateral sources. *Swanson*, 784 N.W.2d at 269.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Minnesota does not appear to treat plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source. Each would fall under one of the four collateral source categories outlined in the statute. *See* Minn. Stat. §548.251, subd. 1 (2010).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Under *Swanson*, when permitted to recover payments for medical or psychological treatment, the stated basis for recovery in Minnesota is the amount actually *paid* by the third party provider. The supreme court ruling prevents a windfall double recovery barring plaintiffs from recovering amounts stated on a medical bill that they never actually became obligated to pay. *See Swanson*, 784 N.W.2d 264.

2. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

In Minnesota, the damages a plaintiff is permitted to recover for the cost of treatment varies based on whether a collateral source is involved. Minn. Stat. §548.251 requires the court to reduce the award by the amounts determined to have come from collateral sources and offset any reduction in the award by the amounts determined to have come from collateral sources. Minn. Stat. §548.251, subd. 3 (2010).

3. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Minnesota courts have addressed the fairness of allowing a plaintiff to recover more than what was actually paid for treatment. The Minnesota Supreme Court has concluded that one of the goals of the collateral source rules is to prevent windfalls and overcompensation. *See Swanson*, 784 N.W.2d at 269 (quoting *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990)).

C. Use of Specials at Trial

There is nothing in Minnesota law that suggests a plaintiff cannot use the billed value of medical services at trial as a basis for a non-economic damages award. In determining damages, the jury is permitted to consider factors such as past and future pain, permanent disability, life expectancy, the effect on the

claimant's enjoyment of the amenities of life and the degree of disfigurement. *See Dawydowycz v. Quady*, 220 N.W.2d 478, 481 (1974); 4A Minn. Prac.: Jury Instr. Guides-Civil, CIVJIG 90:10 (5th ed. 2008).

Minnesota courts have concluded that there is no exact yardstick by which damages for pain and suffering can be awarded. *Berg v. Gunderson*, 147 N.W.2d 695, 703 (1966). Per diem arguments may be misleading; however the rule does not bar the use of the mathematical formula for purely illustrative purposes. *Christy v. Saliterman*, 179 N.W.2d 288, 304 (1970); *Boutang v. Twin City Motor Bus Co.*, 80 N.W.2d 30, 39 (1956); 4A Minn. Prac.: Jury Instr. Guides-Civil, CIVJIG 90:10 (5th ed. 2008).

In general in Minnesota, evidence that a plaintiff has received or will receive payments from an insurer or other collateral source related to an injury or disability is not admissible. Minn. Stat. §548.251, subd. 5 (2010).

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

There have been no constitutional challenges to the collateral source rule in Minnesota.

Mississippi

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. The traditional collateral source rule in effect in Mississippi prohibits a tortfeasor from introducing collateral source payments to reduce the plaintiff's recovery. *See Robinson Property Group, L.P. v. Mitchell*, 7 So. 3d 240, 245 (Miss. 2009).

a. If so, is there a right of subrogation for the insurer?

Absent an assignment between the insured and the insurer and a subrogation agreement in the policy, no. *See Hare v. State*, 733 So. 2d 277, 281-83 (Miss. 1999); *Preferred Risk Mut. Ins. Co. v. Courtney*, 393 So. 2d 1328, 1332-33 (Miss. 1981).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. In Mississippi, a plaintiff is allowed to recover the value of medical treatment even when the plaintiff incurred *no* expense. *See Guyote v. Mississippi Valley Gas Co.*, 715 F. Supp. 778, 780 & n.1 (S.D. Miss. 1989); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 618 (Miss. 2001); *Clary v. Global Marine, Inc.*, 369 So. 2d 507, 509 (Miss. 1979).

a. If so, is there a right of subrogation for the charitable provider?

This issue has not been decided, but would likely fall under the same rule as for insurers – that there must be a subrogation agreement between the patient and the charitable provider.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No, all "collateral source" payments are treated the same. *See Wal-Mart Stores, Inc. v. Frierson*, 818 So. 2d 1135, 1140 (Miss. 2002); *Brandon HMA, Inc.*, 809 So. 2d at 619-20.

Note, however, that where the alleged tortfeasor is also the healthcare service provider, amounts "written off" by that defendant-provider are admissible in evidence to reduce the amount of damages (but are admissible to show the extent and seriousness of the injury). *McGee v. River Region Med. Ctr.*, 59 So. 3d 575, 580-81 (Miss. 2011).

a. If so, what are the differences?

N/A

4. Are collateral source matters governed by statute, common law, or a combination of both?

In Mississippi, the collateral source rule arises under common law. *See Geske v. Williamson*, 945 So. 2d 429, 434 (Miss. Ct. App. 2006).

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Any windfall inures to the benefit of the plaintiff. *See Wal-Mart Stores, Inc.*, 818 So. 2d at 1139-40.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

The plaintiff is permitted to recover the necessary and reasonable value. This can be shown by amounts "paid or incurred." Pursuant to Miss. Code Ann. §41-9-119, "[p]roof that medical, hospital, and doctor bills were *paid or incurred* because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable." (Emphasis added). The defendant can rebut the necessity and reasonableness with proper evidence. *See Estate of Bolden ex rel. Bolden v. Williams*, 17 So. 3d 1069, ¶ 10 (Miss. 2009). Thus, the plaintiff may be able to recover amounts *billed* to the plaintiff for services rendered, which in most cases will be the highest amount.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The "reasonable value" can be shown by amounts paid or incurred as these amounts are prima facie evidence of "necessary and reasonable" pursuant to statute. *See* Miss. Code Ann. §41-9-119, *supra*. Where there is evidence presented by the defendant that the amounts paid or billed are not "necessary and reasonable," the issue is for the jury. *Bolden*, 17 So. 3d at ¶ 10.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

Without contrary evidence presented by the defendant, the amount can be fixed at either the amount paid or the amount billed.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

Yes. Plaintiff can show amounts "paid or incurred" pursuant to statute.

(2) The amount billed for the services?

Yes. Plaintiff can show amounts "paid or incurred" pursuant to statute.

(3) Provider testimony on the value of their services as compared to billed amounts?

Likely yes. That said, medical bills are prima facie evidence of necessity and reasonableness, so this testimony is not necessary unless there is rebuttal evidence from the defendant.

(4) Expert testimony on accuracy of provider billing rates?

Yes. *See Walker v. Gunn*, 955 So. 2d 920, 932 (Miss. Ct. App. 2007).

(5) The fact that a third-party payor (a/k/a insurance company) has already paid the bill?

No. This evidence is barred by the collateral source rule.

(6) Any other factors?

No.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. Evidence of collateral source payments cannot be used by the defendant to reduce damages. *See Robinson Property Group*, 7 So. 3d at 245.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. Mississippi courts do not allow the tortfeasor to benefit from the contract made between the insured and insurer. *See Smith v. Indus. Constructors, Inc.*, 783 F.2d 1249, 1255 (5th Cir. 1986) (applying Mississippi law).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

There is no Mississippi case prohibiting submitting this evidence to the jury for its factual determination with respect to the amount of damages. That said, many Mississippi appellate decisions, when examining a verdict for excessiveness, will look at the ratio of the verdict to the special damages, although there is no set ratio that is too high or too low. See *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131, 1150-51 (Miss. 2008) (collecting cases).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Presumably, yes. Per the common-law collateral source rule in effect in Mississippi, see discussion *supra*, the defendant is not entitled to a reduction in the amount of damages as a result of collateral source payments. Plaintiff is allowed to collect the billed amount.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No. If these kinds of rules are overturned, it likely will be based on federal and state case law with respect to windfall damages (amounts received in the lawsuit that are in excess of the plaintiff's actual expenses).

Missouri

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Missouri allows plaintiffs to recover the costs of third-party payments made by insurers for medical treatment. Mo. Rev. Stat. §490.715 (2005); Smith v. Shaw, 159 S.W.3d 830, 832 (Mo. 2005).

a. If so, is there a right of subrogation for the insurer?

Insurers do not have a right a subrogation for the value of medical payments, except for uninsured motorist cases. Waye v. Bankers Multiple Line Ins. Co., 796 S.W.2d 660, 661 (Mo. App. W.D. 1990); see also Mo. Rev. Stat. §379.203 (1991) (subrogation rights of insurer in an uninsured motorist action).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Missouri courts have split on the issue of whether the collateral source rule applies to evidence of gratuitous services rendered to a plaintiff. Compare Kaiser v. St. Louis Transit Co., 84 S.W. 199, 200 (Mo. App.1904) (holding that a plaintiff still was entitled to damages, even though he was nursed gratuitously by his wife and daughter), and Aaron v. Johnston, 794 S.W.2d 724, 726-27 (Mo.App.1990) (holding that gratuitous continuation of wages by plaintiff's employer would be a collateral source), with Morris v. Grand Ave. Ry. Co., 46 S.W. 170 (Mo.1898) (holding that a plaintiff was not permitted to recover for services for which he did not pay), and Gibney v. St. Louis Transit Co., 103 S.W. 43, 48 (Mo. 1907) (holding that an injured mother could not collect damages for daughters' gratuitous nursing services).

a. If so, is there a right of subrogation for the charitable provider?

Presumably, no. See Waye, 796 S.W.2d at 661.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Missouri makes no distinction between payments by private insurers versus payments by Medicare or Medicaid. Deck v. Teasley, 322 S.W.3d 536, 539 (Mo. 2010).

a. If so, what are the differences?

No differences.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source matters are governed by a combination of both.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The plaintiff keeps the windfall. Waye, 796 S.W.2d at 661.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

Missouri provides a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to health care providers represents the value of the medical treatment rendered. Mo. Rev. Stat. §490.715 (2005); Deck, 322 S.W.3d at 539 (Mo. 2010). To rebut the presumption, a party must provide "substantial evidence." Wills v. Townes Cadillac-Oldsmobile, 490 S.W.2d 257, 260 (Mo.1973). On the motion of any party, the court will determine whether other evidence of value is admissible at trial. Deck, 322 S.W.3d at 541. Evidence of the value of the medical services may include, but is not limited to: the medical bills incurred; the amount actually paid for the medical treatment; or, the amount or estimate of the amount not paid that such party is obligated to pay in the event of a recovery. Mo. Rev. Stat. §490.715 (2005).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

After the judge determines whether the presumption has been rebutted, the jury is presented evidence as though no presumption existed. Deck, 322 S.W.3d at 542. In addition to the types of evidence specifically allowed for in §490.715 on the issue of valuation, Missouri courts allow the presentation of testimony by providers on the value of their services, expert testimony on the differences between Medicare reimbursement and the value of medical services and expert testimony on whether the billed value represents a reasonable, customary and fair value for the services. Deck, 322 S.W.3d at 540; Montgomery v. Wilson, 331 S.W.3d 332, 339 (Mo. App. W.D. 2011).

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

Not applicable.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

Yes. Deck, 322 S.W.3d at 540.

(2) The amount billed for the services?

Yes. Deck, 322 S.W.3d at 539.

(3) Provider testimony on the value of their services as compared to billed amounts?

Yes. Deck, 322 S.W.3d at 539.

(4) Expert testimony on accuracy of provider billing rates?

Yes. Deck, 322 S.W.3d at 540.

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

No. No matter what evidence is admitted at trial, that evidence shall not identify any person who paid for the medical treatment. Deck, 322 S.W.3d at 539.

(6) Any other factors?

3. Do the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. Deck, 322 S.W.3d at 539.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. Waye, 796 S.W.2d at 661; Deck, 322 S.W.3d at 541.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Missouri allows a plaintiff to use the billed value at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment of the services. Deck, 322 S.W.3d at 541. As noted above, plaintiffs may use many methods to introduce this evidence, billing specialists, hospital administrators or medical experts. Id. at 540; Montgomery v. Wilson, 331 S.W.3d 332, 340 (Mo. App. W.D. 2011).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Yes. Deck, 322 S.W.3d at 541.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Given the recent analysis of Mo. Rev. Stat. §490.715 by the Missouri Supreme Court in Deck, it is unlikely that a constitutional challenge to the "price spread" rules would be successful. In Deck, the Missouri Supreme Court was confronted with whether to allow a plaintiff that had received reimbursement for medical services from Medicare to present evidence to recover the billed value of the services instead of the paid value. Deck, 322 S.W.3d at 541. The plaintiff had taken no affirmative action to secure the benefits provided by Medicare, but the Missouri Supreme Court allowed the plaintiff to present evidence of the higher billed amount. Accordingly, it is unlikely a more favorable scenario would present itself to allow for a constitutional challenge.

Montana

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

In actions where the total award against all Defendants is $50,000.00 or less, the Plaintiff's recovery may include expenses which were covered by insurers or other collateral sources. *Mont. Code Ann.* §§27-1-307(1) and 27-1-308(1); *see O'Hern v. Pankratz*, 19 P.3d 807, 809 (Mont. 2001) (rejecting reduction of $10,154.56 award). However, where an award exceeds $50,000.00, the Plaintiff's recovery must be reduced by any amount paid/payable by a collateral source that has no subrogation rights if the unreduced recovery fully compensates the Plaintiff for his/her damages (without considering court costs or attorney fees). *Mont. Code Ann.* §§27-1-308(1); *see Shilhanek v. D-2 Trucking, Inc.*, 994 P.2d 1105, 1110 (Mont. 2000) (rejecting reduction of recovery where award was not fulfilled by amounts available from defendants); *see also Haman v. Maco Ins. Co.*, 86 P.3d 34, 36 (Mont. 2004) (due to subrogation rights, amounts paid in workers compensation benefits are exempt from statutory reduction from a Plaintiff's recovery); *Schuff v. A.T. Klemens & Son*, 16 P.3d 1002, 1025 (Mont. 2000) (Social Security survivor benefits are not "collateral sources" for which a Plaintiff's recovery may be reduced). To be entitled to a reduction, however, Defendants must be sure that the jury verdict form provides a line-item breakdown of damages so that the court can ensure that it only reduces those "amounts attributable to losses which are compensated by collateral sources." *Stevens v. Novartis Pharms. Corp.*, 247 P.3d 244, 268 Mont. 2010); *see Busta v. Columbus Hosp. Corp.*, 916 P.2d 122, 141 (Mont. 1996) (refusing offset of Veterans Administration survivor benefits due to general nature of verdict form).

a. If so, is there a right of subrogation for the insurer?

Generally speaking, Montana courts consider subrogation an equitable doctrine which can exist outside of a contractual relationship between the parties. *Youngblood v. Am. States Ins. Co.*, 866 P.2d 203, 205 (Mont. 1993). It is, more or less, a means to prevent the unjust enrichment of the Plaintiff. *Youngblood*, 866 P.2d at 205. However, an insurer's subrogation of medical payment benefits is void as against public policy. *Swanson v. Hartford Ins. Co. of Midwest*, 46 P.3d 584, 589 (Mont. 2002); *Youngblood*, 866 P.2d at 208; *Allstate Ins. Co. v. Reitler*, 628 P.2d 667, 670 (Mont. 1981). Notwithstanding, workers compensation insurers are provided with a statutory right of subrogation. *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 219 P.3d 1249, 1254 (Mont. 2009); *Mont. Code Ann.* §39-71-414. Subrogation is also available for benefits paid through disability policies (which excludes liability policies). *Youngblood*, 866 P.2d at 208; *see Mont. Code Ann.* §§33-22-1601 and 33-22-1602 (outlining subrogation procedures).

Montana common law requires that an insured be totally reimbursed for all losses (including court costs and attorney fees incurred in recovering them), before any insurer can exercise any right of subrogation, regardless of policy provisions to the contrary. *Blue Cross & Blue Shield of Mont., Inc. v. Mont. State Auditor*, 218 P.3d 475, 480 (Mont. 2009); *Oberson v. Federated Mut. Ins. Co.*, 126 P.3d 459, 463 (Mont. 2005). In fact, Montana considers the "made whole" rule to be mandated by Article II, Section 16 of the Montana Constitution. *Oberson*, 126 P.3d at 462-63 ("Based on this provision and the equities flowing therefrom, Montana has rebuked the insurance industry's efforts to garnish an accident victim's third-party recovery.").

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Montana courts do not appear to have addressed this question. However, in an analogous context, a Montana federal court found that amounts of medical expenses written off as uncollectible against Medicaid (and, thus, essentially free) were not recoverable. *Chapman v. Mazda Motor of Am., Inc.*, 7 F. Supp. 2d 1123,

1125 (D. Mont. 1998). Regardless, Montana courts would not likely treat the provision of free or charitable medical care to the Plaintiff as a "collateral source." *See Schuff*, 16 P.3d at 1025 (discussing Social Security survivor benefits); *Mont. Code Ann.* §27-1-307(1) (defining "collateral source" as a "payment").

a. If so, is there a right of subrogation for the charitable provider?

Montana courts do not appear to have addressed this question. However, if any such right is recognized, it would be subject to the "made whole" doctrine, as secured by Article II, Section 16 of the Montana Constitution. *Oberson*, 126 P.3d at 462-63.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Yes, at least two (2) differences are apparent.

a. If so, what are the differences?

The definition of "collateral source" includes both private and public programs. *Mont. Code Ann.* §27-1-307. However, in executing "collateral source" reductions, Montana courts effectively excludes the insurance premiums paid by the Plaintiff for the five (5) years prior to the injury until the date of judgment from any "collateral source" reduction. *Mont. Code Ann.* §27-1-308(2). Montana Courts also exclude from deductions the present value of the premiums the Plaintiff must pay to keep his/her policy in force from the date of judgment until the issue of "collateral source" reductions is resolved by the court. *Mont. Code Ann.* §27-1-308(2)-(3).

Again, insurers' subrogation claims are either void (in the case of medical payment benefits) or subject to the "made whole" doctrine. *See Oberson*, 126 P.3d at 462-63; *Youngblood*, 866 P.2d at 208. However, the statutory liens granted to Medicare and Medicaid are not subject to the "made whole" rule. *Blanton v. Dep't of Pub. Health & Human Services*, 255 P.3d 1229, at ¶ 55 (Mont. 2011); *Mont. Code Ann.* §53-2-612 (establishing statutory lien). Furthermore, insurance benefits themselves are subject to Medicare or Medicaid liens. *See Blanton*, 255 P.3d 1229, at ¶¶ 46-53.

4. Are collateral source matters governed by statute, common law, or a combination of both?

As shown above, "collateral source" matters are governed by both common law and statute, even the Montana Constitution. The admissibility of "collateral source" payments is also governed by both statute and the Montana Rules of Evidence. *See Mont. Code Ann.* §27-1-308 (evidence of payments admissible at post-trial reduction hearing); *Mont. R. Evid.* 409 (evidence of payments not admissible as to liability); *Mont. R. Evid.* 411 (evidence of liability insurance not generally admissible); *see also Fed. R. Evid.* 409 (evidence of payments not admissible as to liability); *Fed. R. Evid.* 411 (evidence of liability insurance not generally admissible).

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Generally speaking, injured Plaintiffs are to be made whole, not realize a profit, as compensatory damages "are designed to compensate the injured party for actual loss or injury-no more, no less." *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1088 (Mont. 2007); *Burk Ranches, Inc. v. State*, 790 P.2d 443, 447 (Mont. 1989). "Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered." *Mont. Code Ann.* §27-1-302. This suggests that a Plaintiff would not be allowed to recover any windfall. *See also Chapman*, 7 F. Supp. 2d at 1125 (federal court rejecting recovery of medical expenses written off by provider).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Outside of contract actions (unless otherwise expressly set by statute), "the measure of damages … is the amount which will compensate [a Plaintiff] for all the detriment proximately caused thereby, whether it could have been anticipated or not." *Mont. Code Ann.* §27-1-317. To that end, successful Plaintiffs are entitled to recover the reasonable value of necessary medical, surgical, hospital and similar expenses, as well as those for supplies. *Johnson v. United States*, 510 F. Supp. 1039, 1045 (D. Mont. 1981) *aff'd in part, rev'd in part*, 704 F.2d 1431 (9th Cir. 1983); *Gobel v. Rinio*, 200 P.2d 700, 704 (Mont. 1948).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

"Reasonable value" is not firmly defined under Montana law, and is left to the fact-finder's discretion. *See Storm v. City of Butte*, 89 P. 726, 728 (Mont. 1907); *partially called into question by Gobel* 200 P.2d at 704; *see generally Beaver v. Montana Dept. of Natural Res. & Conservation*, 78 P.3d 857, 873-74 (Mont. 2003) (reasonableness of damages award rests within "the sound discretion of the trier of fact").

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

The amount paid for medical expenses does not, in and of itself, conclusively establish the amount as reasonable. *Storm*, 89 P. at 728. However, the payment of that amount does establish the prima facie reasonableness of the expenses. *Gobel*, 200 P.2d at 704; *Ball v. Gussenhoven*, 74 P. 871, 875 (Mont. 1904).

(2) The amount billed for the services?

Montana courts do not appear to have directly addressed the use of the billed amount to prove the reasonableness of medical expenses. However, one Montana federal court found that amounts of disallowed medical expenses are not relevant to prove damages for past medical loss, but may be relevant for other purposes. *Chapman*, 7 F. Supp. 2d at 1125. The court appeared to partially base its holding upon Mont. Code Ann. §27–1–201's definition of "detriment" as "loss or harm suffered" and/or Mont. Code Ann. §27-1-317's instruction that an appropriate award of damages is "the amount which will compensate for all the detriment proximately caused thereby." *Chapman*, 7 F. Supp. 2d at 1125; *see Mont. Code Ann.* §§27–1–201 and 27-1-317.

(3) Provider testimony on the value of their services as compared to billed amounts?

Montana courts allow medical providers to offer testimony as to the reasonableness of their charges. *Kelly v. Kelly*, 297 P. 470, 473 (Mont. 1931) (faulting party for not offering testimony of provider to establish reasonableness). There does not appear to be an instance in which the courts have allowed the testimony of a provider as proof that the reasonable value of the charges exceeds the actual amount billed. Given the broad discretion afforded to juries in assessing the reasonableness of damages (*see generally Beaver*, 78 P.3d at 873-74) it is not out of the question that a court would allow such testimony.

(4) Expert testimony on accuracy of provider billing rates?

There does not appear to be an instance in which Montana courts have allowed expert testimony as to the accuracy of a provider's billing rates. However, as with a provider's testimony as to the reasonableness of his/her charges, the potential for acceptance of such testimony exists.

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

An insurance company's payment of a medical bill is not relevant to the valuation of medical expenses. *See Mont. Code Ann.* §27-1-308; *see also Mont. R. Evid.* 411 (evidence of liability insurance not generally admissible); *Fed. R. Evid.* 411 (evidence of liability insurance not generally admissible).

(6) Any other factors?

Montana courts do not appear to have established any list of factors which are relevant to determining the reasonableness of medical expenses.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

The Montana Supreme Court has noted that Mont. Code Ann. §27-1-308 "exists to ensure that a [P]laintiff's eventual recovery has a ceiling no higher than the full amount of the award, minus appropriate collateral offsets … [as] illustrated by the legislature's use of the word 'recovery' as opposed to the word 'award' when referring to reduction for payments made by a collateral source." *Shilhanek*, 994 P.2d at 1111. In other words, Montana's "collateral source" statute does not affect a jury's damage award, only the Plaintiff's ultimate recovery. *See id*. However, in one federal court case, a Plaintiff was not allowed by the trial court to recover the full amount of requested future medical expenses because a portion of those expenses were expected to be provided pursuant to a Veterans' Administration benefits program. *Johnson*, 510 F. Supp. at 1044 *aff'd in part, rev'd in part*, 704 F.2d 1431 (9th Cir. 1983).

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Montana state courts do not appear to have addressed this specific question. Again, however, one Montana federal court found that amounts of disallowed medical expenses are not relevant to prove damages for past medical loss, but may be relevant for other purposes. *Chapman*, 7 F. Supp. 2d at 1125 (citing *Mont. Code Ann.* §27–1–201, but quoting §27-1-317).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Montana courts do not appear to have addressed this specific question. However, given Mont. Code Ann. §27-1-308's instruction that juries are to determine awards without consideration of collateral sources, the use of the full billed value of expenses appears to be a proper base for a non-economic damage award. *Mont. Code Ann.* §27-1-308(3). Moreover, in *Chapman*, the United States District Court for the District of Montana found that evidence of a Plaintiff's full amount of medical expenses, including amounts written off by Medicaid, was admissible to demonstrate, *inter alia*, the nature, extent, and severity of the 's injury. *Chapman*, 7 F. Supp. 2d at 1125.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Montana courts do not appear to have addressed this specific question. However, based upon the authority cited in response to the previous question, that appears to be the case. In addition, as noted in prior sections, Montana juries are given wide discretion in crafting awards. *See Beaver*, 78 P.3d at 873-74. Such a grant of discretion invites, or at minimum appears to allow for, the use of the billed value of specials as a basis for a non-economic damage award.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

The Montana Supreme Court held that Article II, Section 16, of the Montana Constitution did not create a fundamental right to the recovery of attorney's fees that might justify a reduction in Mont. Code Ann. §27-1-308's offset for collateral source payments. *Schuff*, 16 P.3d at 1022. The Court also rejected the notion that an offset of a judgment for uninsured motorist coverage impairs the right to contract as provided by Article II, Section 31, of the Montana Constitution. *Liedle v. State Farm Mut. Auto. Ins. Co.*, 938 P.2d 1379, 1382 (Mont. 1997). Previously, the Court declined to consider whether Mont. Code Ann. §27-1-308's distinction between those Plaintiffs whose awards total $50,000 and those whose awards exceed $50,000 violates right to equal protection secured by Article II, Section 4, of the Montana Constitution and Article XIV of the United States Constitution or the right to due processes under Article II, Section 17, of the Montana Constitution or Article XIV of the United States Constitution. *Knutson v. Barbour*, 879 P.2d 696, 700 (Mont. 1994).

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

The Montana Supreme Court avoids constitutional issues whenever possible. *See In re G.M.,* 186 P.3d 229, 234 (Mont. 2008); *Sunburst School District No. 2,* 165 P.3d at 1093. Accordingly, even where a basis may exist to challenge Mont. Code Ann. §27-1-308, a great likelihood exists that the Court will seek to rule upon other grounds. However, the statute having already survived constitutional challenges, it is unlikely that the Court would find Mont. Code Ann. §27-1-308 unconstitutional on any ground(s).

Nebraska

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. The Nebraska collateral source rule excludes from trial evidence that an injured party has been wholly or partially indemnified by insurance or otherwise. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (Neb. 2007).

The collateral source rule does not apply to benefits paid to the claimant by the tortfeasor or someone identified with the tortfeasor, such benefits stem from the tortfeasor and, therefore, are not collateral.

It should be noted that the Nebraska collateral source rule has been modified, by statute, for medical negligence claims. See Neb.Rev.Stat. 44-2819 (Reissue 2010).

a. If so, is there a right of subrogation for the insurer?

Yes.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Likely. In *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 767, 443 N.W.2d 872, 875 (1989), in order to diagnose a problem with a grain bin, a third party emptied it of grain. The loss suffered included the cost of emptying the bin. Pursuant to the collateral source rule, evidence that the third party emptied the bin without submitting a bill was inadmissible to the issue of damages.

a. If so, is there a right of subrogation for the charitable provider?

Depending upon the facts, a charitable provider could potentially have a equitable claim for those funds.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

The collateral source rule also precludes evidence of social legislation benefits, such as payment by Medicaid and Medicare. *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (Neb. 2007).

a. If so, what are the differences?

N/A

4. Are collateral source matters governed by statute, common law, or a combination of both?

Common Law

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

A plaintiff must prove the reasonable value of medical (hospital, nursing, and similar) care and supplies reasonable needed by and actually provided to the plaintiff. *See* NJI2d Civ. §4.00; §4.01 (2010).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

No

(2) The amount billed for the services?

Yes

(3) Provider testimony on the value of their services as compared to billed amounts?

Yes

(4) Expert testimony on accuracy of provider billing rates?

Yes

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

No

(6) Any other factors?

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

The Nebraska Supreme Court has recognized the potential windfall to the plaintiff in its application of the collateral source rule in stating that Nebraska, like a majority of jurisdictions, has adopted the collateral source rule to prevent tortfeasors "from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice." *Mahoney v. Nebraska Methodist Hosp., Inc.,* 251 Neb. 841, 560 N.W.2d 451 (1997) (internal quotation omitted).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Yes

2. **Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?**

Yes

D. Constitutional Issues

1. **Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?**

No

2. **Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?**

No

Nevada

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A. Collateral Source Rule in Nevada

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes, in Nevada a Plaintiff may recover for costs of third-party payments made by insurers for medical or psychological treatment.

Proctor v. Costelletti 112 Nev. 88, 911 P.2d 853 (1996); *Winchell v. Schiff*, 193 P.3d 946 (2008)

a. If so, is there a right of subrogation for the insurer?

No case law on point in Nevada regarding whether insurers have subrogation rights relating to the collateral source rule.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

There is no case law on point at this time.

a. If so, is there a right of subrogation for the charitable provider?

There is no case law on point in Nevada relating to the charitable provider's right to subrogation.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

There is no case on point in Nevada

a. If so, what are the differences?

4. Are collateral source matters governed by statute, common law, or a combination of both?

The general Collateral Source Rule in Nevada is governed by common law. However, for medical malpractice cases, statute now controls. Awards in medical malpractice cases are offset by payments received from a collateral source, including any prior payment by the defendant health care provider. (Nev. Rev. Stat. §42.021 (2004).)

Moreover, as for a worker's compensation recipient in a third party action, Nevada Revised Statute 616C.215(10) provides:

In any trial of an action by the injured employee against a person other than the employer the jury must receive proof of the amount of all payments made or to be made by the insurer or the administrator. *Cramer v. Peavy*, 116 Nev. 575, 3 P.3d 665 (2000). (Note: While it may not have been the intent of the legislature in enacting a collateral source rule, permitting the jury to learn of payments by the insurer resulted in plaintiff in the Cramer matter recovering nothing.)

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

There is no case on point in Nevada, but in practice, Plaintiff keeps the windfall.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Nevada recognizes the "reasonable and customary expense" of medical services which is recoverable by the Plaintiff.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

No, a jury in Nevada is only asked to determine the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Not generally, but they do for medical malpractice cases.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

No.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Yes.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Yes. Generally, it is difficult for defense counsel in Nevada to learn if plaintiffs' medical providers accepted as full payment less than was billed and how much less. The amounts billed, however, are always the amounts sought by plaintiffs at trial.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No case law on point in Nevada

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

New Hampshire

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. *Carson v. Mauer* and *Moulton v. Groveton Papers Inc.* 114 N.H. 505 (1974), 120 N.H. 925 (1980)

a. If so, is there a right of subrogation for the insurer?

Yes.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Probably.

a. If so, is there a right of subrogation for the charitable provider?

No law on this.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Uncertain. No Supreme Court decisions. Lower courts are divided.

a. If so, what are the differences?

Some lower courts restrict recovery to amounts paid.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Common law.

a. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff, but carrier may subrogate.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

"Reasonable value" of medical services provided. *Clough v. Schurart*, 94 N.H. 138 (1946).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Jury decision.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

No Supreme Court decisions.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?
Unlikely, but split decisions in lower courts.

(2) The amount billed for the services?
Likely, unless unreasonable.

(3) Provider testimony on the value of their services as compared to billed amounts?
Yes, if challenged.

(4) Expert testimony on accuracy of provider billing rates?
Yes, if challenged.

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?
No.

(6) Any other factors?
No. No Supreme Court decisions.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

No Supreme Court ruling.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a noneconomic damages award?

"Billed Value" is generally allowed to prove economic losses.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

"Billed Value" is generally allowed to prove economic losses.

D. Constitutional Issues

1. Have Collateral Source I cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Unlikely.

New Jersey

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

No. In 1987, New Jersey abrogated its common-law collateral source rule by enacting N.J.S.A. 2A:15-97. The collateral source statute permits the court to deduct any duplicative award from a plaintiff's recovery. *See Id.* The collateral source statute, however, is expressly limited in applicability to a "civil action for personal injury or death." *Id.*

N.J.S.A. 2A:15-97 provides:

> In any civil action brought for personal injury or death, except actions brought pursuant to the provisions of P.L.1972, c. 70 (C. 39:6A-1 *et seq.*), if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.

a. If so, is there a right of subrogation for the insurer?

No. New Jersey's collateral source statute, N.J.S.A. §2A:15-97 contains an explicit anti-subrogation rule.

New Jersey's Collateral Source Rule, N.J.S.A. §2A:15-97, eliminates double recoveries by a health insurance beneficiary and requires a court to deduct from any tort judgment any amount received by a plaintiff from a collateral source, other than workers compensation and life insurance. Because beneficiaries cannot recover the medical expenses from the tortfeasor, the health care carrier has no right to subrogation or contract reimbursement. *See County of Bergen Emple. Benefit Plan v. Horizon Blue Cross Blue Shield of N.J.*, 412 N.J. Super. 126, 134-35 (App.Div. 2010).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

No.

a. If so, is there a right of subrogation for the charitable provider?

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Yes. "Benefits" under Section 97 do not include reimbursable benefits paid by Medicaid, in large part due to the conflict between Section 97 and the Medicaid lien and reimbursement statute, N.J.S.A. 30:4D-7.1. *Lusby v. Hitchner*, 273 N.J. Super. 578, 590-92 (App. Div. 1994). In *Lusby*, the court held that because a "state's Medicaid lien and reimbursement provisions are required by federal law, principles of supremacy and preemption would . . . apply." *Id.* at 592. A state statute "could not, even if that were its intent, defeat the federal reimbursement scheme by the simple expedient of making medical expenses already paid by Medicaid deductible from a tort recovery against the tortfeasor." *Ibid*. For this reason, Section 97 yielded to Section 7.1.

a. If so, what are the differences?

The Collateral Source Rule is inapplicable to reimbursable benefits paid by Medicaid, because any recovery in a damages award for the benefits paid by Medicaid were required to be reimbursed to Medicaid. *Lusby v. Hitchner*, 273 N.J. Super. 578 (App. Div. 1994). If the benefits are reimbursable to the provider, such as Medicaid, then the benefits are not reduced from the damages award. If, however, the benefits are not reimbursable, such as social security benefits, then the benefits are reduced from any damages award in order to prevent double recovery by the plaintiff. *See id.*

4. Are collateral source matters governed by statute, common law, or a combination of both?

Statute, N.J.S.A. §2A:15-97

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

n/a

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Amount actually paid by the third-party provider.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

n/a

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Yes. As the statute provides, "if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period." N.J.S.A. 2A:15-97.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. As explained in *Perreira v. Rediger*, 169 N.J. 399, 403 (2001), Section 97's purpose is twofold: "to eliminate the double recovery to plaintiffs that flowed from the common-law collateral source rule and to allocate the benefit of that change to liability carriers."

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

No.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

No.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

There have been no specific rulings on the constitutionality of the collateral source statute itself, however it has been held that where the collateral source conflicts with federal regulations, the statute will be pre-empted. *See Levine v. United Healthcare Corp.,* 402 F.3d 156 (finding that the Employee Retirement Income Security Act of 1974 (ERISA) pre-empted the collateral source statute).

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Not presently.

New Mexico

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A. Collateral Source Rules

1. Is Plaintiff generally permitted the costs of third-party payments made by insurers for medical or psychological treatment?

Pursuant to the collateral source rule, New Mexico allows plaintiff to recover from defendant medical expenses that have been paid by an insurer or other collateral source. The rule is designed to preclude an alleged tortfeasor from setting up in mitigation or reduction of damages that the plaintiff has been compensated by insurance in whole or in part, where such insurance was not procured by the alleged wrongdoer. *Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 762, 906 P.2d 742, 753 (Ct. App. 1995); *See also Jojola v. Baldridge Lumber Co.*, 96 N.M. 761, 765, 635 P.2d 316, 320 (Ct. App. 1981).

However, there are limitations to this rule. The collateral source rule does not apply, and defendant is entitled to an offset, when benefits are shown to derive from defendant or a source identified with him. *Aragon v. Brown*, 93 N.M. 646, 603 P.2d 1103 (Ct. App. 1979), overruled in part on other grounds, *Smith v. Village of Ruidoso,* 128 N.M. 470, 994 P.2d 50 (Ct. App. 1979). The *Aragon* court stated: "where the benefits derive from the defendant himself or a source identified with him, he is entitled to credit for it, since there is no collateral source but only funds provided by the defendant." *Id.* at 648, 603 P.2d at 1105.

a. If so, is there a right of subrogation for the insurer?

New Mexico has recognized a private insurer's right of subrogation against third-party tortfeasors. The doctrine allows an insurer to step into the shoes of the insured to collect what it has paid to the insured from the third-party tortfeasor. *See e.g. Health Plus of New Mexico, Inc. v. Harrell*, 1998-NMCA-064 ¶ 12, 958 P.2d 1239, 1242. However, settlement can affect this right. Generally, when an insured and a third party settle a claim, it will not destroy the insurance company's right of subrogation. *Id.* at ¶ 13, 958 P.2d at 1242. However, if an insured settles with a tortfeasor before an insurer has paid damages to the insured, the insurer's subrogation rights are destroyed and the settlement is a bar to a suit by the insurer against the tortfeasor. *Farmers Ins. Group of Companies v. Martinez*, 107 N.M. 82, 83, 752 P.2d 797, 798 (Ct. App. 1988). It should be noted however, that this does not destroy all subrogation rights of an insurer against other tortfeasors arising from the same incident, who have not been specifically released from liability in settlement. *See Hansen v. Ford Motor Co.*, 120 N.M. 203, 211, 900 P.2d 952, 960 (1995) (where Supreme Court held that only persons specifically designated by name or by some other specific identifying terminology in a release are discharged from liability). Alternatively, if an insured files suit against, and settles with, the tortfeasor after receiving payment from an insurer, and the tortfeasor had no notice or knowledge of that payment or of the insurer's subrogation claim, the settlement will bar an insurer's suit against the tortfeasor. *Id.* at 84, 752 P.2d at 799. Under these circumstances, the insurer is relieved of responsibility to pay damages to the insured, or can file an action against the insured for the destruction of its subrogation rights. *Id.* An insurer's subrogation interest may be subject to a proportionate set-aside of attorneys' fees incurred by the insured in securing settlement. *See Amica Mutual Ins. Co. v. Maloney*, 120 N.M. 523, 903 P.2d 834 (1995).

2. Is a plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

There is no New Mexico case law explicitly allowing for recovery of the cost of donated medical expenses from a tortfeasor. However, New Mexico's policy toward the collateral source rule leans in favor of recovery under these circumstances. *Mobley v. Garcia*, a foundational case for the collateral source rule in New Mexico, states, "The right of redress for wrong is fundamental. Charity cannot be made a substitute for such right, nor can benevolence be made a set-off against the acts of a tortfeasor." *Mobley v. Garcia*, 54 N.M.

175, 177, 217 P.2d 256, 257 (1950) (where Plaintiff's acceptance of state relief payment could not be used to offset defendant's damages). Additionally, the Federal District Court of New Mexico, applying state law, stated, "Where a health care provider gratuitously waives an injured party's financial obligation, the collateral source rule enables that plaintiff to recover the full amount of medical expenses form the tortfeasor." *Pipkins v. TA Operation Corp.*, 466 F.Supp.2d 1255, 1260 (D.N.M. 2006), citing *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 129 P.3d 487 (2006). The Court reasoned that regardless of a plaintiff's lack of financial liability, the collateral source rule applies because the plaintiff has received a benefit from a source collateral to the defendant. Therefore, "gratuitous treatment … constitutes a collateral contribution and triggers application of the collateral source rule." *Id.*

a. If so, is there a right of subrogation for the charitable provider?

New Mexico appellate courts have not addressed the right of subrogation for charitable providers. However, NMSA 1978, section 48-8-1 *et seq.* allows hospitals located in the state to assert a lien upon any judgment, settlement or compromise in favor of a patient who was provided medical treatment by that hospital. The statute states in relevant part,

> Every hospital located within the state that furnishes emergency, medical or other service to any patient injured by reason of an accident not covered by the state workmen's compensation laws is entitled to assert a lien upon that part of the judgment, settlement or compromise going, or belonging to such patient, less the amount paid for attorneys' fees, court costs and other expenses necessary thereto in obtaining the judgment, settlement or compromise, based upon injuries suffered by the patient or a claim maintained by the heirs or personal representatives of the injured party in the case of the patient's death. NMSA 1978, §48-8-1 (A).

A lien filed upon damages as a result of a judgment, settlement or compromise must be for the reasonable, usual and necessary hospital charges for treatment, care and maintenance of the injured party by the hospital up to the date of payment for damages. NMSA 1978, §48-8-1 (B). Additionally, any person, firm or corporation, including insurance carriers, who make payments to a patient, will be liable to the hospital for the amount entitled to be received for up to one year after payment is made to the patient. NMSA 1978, §48-8-3 (A)-(B).

3. Is a plaintiff generally permitted to recover from a tortfeasor the costs of third-party payments made by Medicaid or Medicare for medical or psychological treatment?

The New Mexico appellate courts have not addressed this issue. However, in interpreting state law, the United States District court for the District of New Mexico held, as a matter of first impression, that Medicare write-offs are analogous to a health care provider's gratuitous provision of medical services and therefore, yield a similar result under the collateral source rule. *Pipkins*, 466 F.Supp.2d at 1261. "Medicare write offs would be treated the same as any other benefit a plaintiff may receive from a collateral source." *Id.* at 1262. The fact that Medicare arises from a program of the federal government does not disturb the rationale favoring a plaintiff's, rather than a tortfeastor's, receipt of a windfall. *Id.*

a. If so, is there a right of subrogation for Medicaid or Medicare?

Medicaid's right of subrogation is governed by statute. With regard to public assistance for medical treatment and third-party liability, the relevant statute states, "When the department makes medical assistance payments on behalf of a recipient, the department is subrogated to any right of the recipient against a third party for recovery of medical expenses to the extent that the department has made payment." NMSA 1978, §27-2-23(B). Additionally, section 27-2-28(G) states in relevant part, the following:

By operation of law, an assignment to the department of any and all rights of an applicant for or recipient of medical assistance under the Medicaid program in New Mexico or supplemental security income through the social security administration:

(1) is deemed to be made of: …

(b) any recovery for personal injury, whether by judgment or contract for compromise or settlement. NMSA 1978, §27-2-28(G)(1)(b).

The Court has interpreted "assignment of all rights" as granting broader protection for the right of reimbursement than does the doctrine of subrogation. *Kahrs v. Sanchez*, 1998-NMCA-037 ¶ 27, 956 P.2d 132, 137. First, once a recipient's rights have been assigned they cannot be revoked. *Id.* at ¶ 28, 956 P.2d at 137. Second, third-parties with notice are required to contact the state and will be liable to the state in violation of assignment if Plaintiff has been paid without reimbursement to the state. *Id.* at ¶ 29, 956 P.2d at 137. Despite these broader rights, it does not entitle the state to full reimbursement under all circumstances. *Id.* at ¶¶ 31-35, 956 P.2d at 138. The right of reimbursement is subject to equitable reduction at the discretion of the court. *Id.*

4. Does the State treat plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

The New Mexico appellate courts have not addressed the difference between recovery under Medicaid or Medicare vs. private insurance. However, in *Pipkins v. TA Operating Corp.,* the Court concluded that "the collateral source rule's development in New Mexico case law reflects New Mexico courts' commitment to the rule's policy and legal underpinnings," and strongly suggests that New Mexico courts would apply the collateral source rule to medical expenses written off or adjusted by a health care provider pursuant to an agreement with the federal government under Medicare. *Pipkins,* 466 F.Supp.2d 1255, 1257. This implies that plaintiffs recovering the cost of treatment paid for by Medicare or Medicaid would be treated similarly to a plaintiff recovering the cost of treatment covered by a private insurer.

5. Are collateral source matters governed by statute, common law, or a combination of both?

Common law governs the use of the collateral source rule in New Mexico.

6. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

While unwarranted windfalls are to be avoided, *W.T. Washington v. Atchison, Topeka and Santa Fe Railway Company*, 114 N.M. 56, 61, 834 P.2d 433, 438 (Ct. App. 1992), a plaintiff is permitted to keep the windfall of double recovery under the collateral source rule. *McConal Aviation, Inc. v. Commercial Aviation Ins. Co.*, 110 N.M. 697, 799 P.2d 133 (1990). The *McConal* Court states, "if a collateral source is to benefit a party, it should better benefit the injured party than the wrongdoer." *McConal Aviation,* 110 N.M. at 700, 799 P.2d at 136.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

New Mexico's basis for recovery is the "reasonable expense" of necessary medical care, treatment and services received. *See*, New Mexico Uniform Jury Instructions 13-1804 NMRA 1998. This includes pros-

thetic devices, cosmetic aids, and the present cash value of future medical care, treatment and services. *Id.* New Mexico allows testimony of the treating or expert medical provider to determine the reasonableness and necessity of treatment.

2. If Plaintiff is permitted to recover the "reasonable expense" of the medical services provided, is the concept of "reasonable expense" firmly defined or for the jury to decide?

New Mexico appellate courts have not clearly defined the meaning of "reasonable expense." However, the court has stated that, at the very least, an award for damages must be based on the evidenced adduced at trial, and a party seeking to recover damages has the burden of proving the existence of injuries and resulting damage with reasonable certainty. *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 215 P.3d 791, 798 (N.M.App., 2009). Furthermore, the jury instruction requires that any medical expenses awarded must be reasonable and necessary. UJI 13-1804 NMRA 1998. The Court contends that "the amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and … in the final analysis, each case must be decided on its own facts and circumstances." *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 146 N.M. 853, 215 P.3d 791, 796 (N.M.App., 2009).

a. Is the jury allowed to consider the following:

(1) The amount actually paid for the services?

The New Mexico appellate courts have not addressed this issue.

(2) The amount billed for the services?

The New Mexico appellate courts have not addressed this issue.

(3) Provider testimony on the value of their services as compared to billed amounts?

The New Mexico appellate courts have not addressed this issue.

(4) Expert testimony on accuracy of provider billing rates?

The New Mexico appellate courts have not addressed this issue.

(5) The fact that a third-party payor (a/k/a an insurance company) has already paid the bill?

By virtue of the collateral source rule, evidence of insurance coverage or received payments of insurance benefits are inadmissible with regard to damages. However, this evidence may be allowed when relevant to issues such as a liability or causation. *See Jojola v. Baldridge Lumber Co.*, 96 N.M. 761, 635 P.2d 316 (where evidence of collateral source was admissible when used to test the credibility and impeach the witness); *see also Selgado v. Commercial Warehouse Co.*, 86 N.M. 633, 526 P.2d 430 (Ct. App. 1974) (where evidence of insurance was admissible when it used to prove proximate causation.)

(6) Any other factors?

New Mexico appellate courts have not addressed with any specificity, the admissibility of evidence going toward the amount paid for services, the amount billed, provider testimony on the value of their services as compared to bill amounts, or expert testimony on accuracy of provider billing rates. New Mexico allows testimony of the treating or expert medical provider as to the reasonableness and necessity of the treatment, which can go toward cost.

3. Do the damages Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Again, the New Mexico courts have not addressed this issue directly. However, by the very act of adopting the collateral source rule, involvement of a collateral source should not be used to change or reduce

a plaintiff's recovery. *Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 762, 906 P.2d 742, 753; *See also Jojola v. Baldridge Lumber Co.*, 96 N.M. 761, 765, 635 P.2d 316, 320; and *Pipkins v. TA Operation Corp.*, 466 F.Supp.2d 1255, 1260.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

New Mexico appellate courts have not addressed the fairness of excessive recovery for medical expenses specifically. The courts have addressed the issue of excessive damage awards in total, and utilize the "substantial evidence" and "abuse of discretion" standards to do so, *see e.g. Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 146 N.M. 853, 215 P.3d 791. However, these cases typically involve medical expenses, lost wages, pain and suffering, and loss of future earnings; they do not involve appeals for excessive awards for medical treatment alone. Additionally, New Mexico's policy allows a plaintiff to keep the windfall of double recovery. *McConal Aviation*, 110 N.M. 697, 700, 799 P.2d 133, 136 ("if a collateral source is to benefit a party, it should better benefit the injured party than the wrongdoer.").

C. Use of Specials

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

New Mexico appellate courts have not addressed this issue.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages ward, even if that was not the amount paid for the treatment services?

New Mexico appellate courts have not addressed this issue.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your state?

There have been no cases raising either state or federal constitutional issues regarding the collateral source rule or the cost of treatment.

2. Do you see any basis under your state constitution to challenge "price spread" rules that currently exist?

Such price spread rules could be challenged on equal protection and due process grounds. Additionally, such rules might be challenged under the Constitutional Anti-Donation provision to the extent that Medicaid payments are involved. However, it is likely that such a challenge would fail in New Mexico's current appellant climate.

New York

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

New York's collateral source rule, §4545(c) of New York's Civil Practice Law and Rules ("CPLR"), requires that a plaintiff's award be reduced by "any such cost or expense [that] was or will with reasonable certainty, be replaced or indemnified from any collateral source." CPLR 4545. The rule thus prevents a plaintiff from recovering from the tortfeasors expenses that she has already recovered from a collateral source, such as medical insurance. *Primax Recoveries v. Carey*, 247 F. Supp. 2d 337, 343 (S.D.N.Y. 2002). CPLR 4545 applies to admissibility of evidence at trial and to judgments. Evidence regarding collateral sources is not to be heard by the jury. Rather, after the trial the judge will set the matter down for a collateral source hearing wherein evidence regarding the collateral sources will be submitted and the appropriate modifications to the jury's award will be made.

The statute provides:

§4545. Admissibility of collateral source of payment

(a) Actions for personal injury, injury to property or wrongful death. In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source [fig 1] , except for life insurance [fig 2] and those payments as to which there is a statutory right of reimbursement. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from anysuch collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery.

(b) Voluntary charitable contributions excluded as a collateral source of payment. Voluntary charitable contributions received by an injured party shall not be considered to be a collateral source of payment that is admissible in evidence to reduce the amount of any award, judgment or settlement.

a. If so, is there a right of subrogation for the insurer?

No. An insurer cannot assert a right of subrogation against its insured if the proceeds of insurance plus the insured's recovery from the negligent third party fall short of making the insured whole. See *Niemann v. Luca*, 168 Misc. 2d 1023, 1025-1026 (N.Y. Sup. Ct. 1996); *But see Excellus Health Plan, Inc. v Fed. Express*

Corp., 2003 NY Misc LEXIS 1961 (NY Sup. 2003), *affd* 782 N.Y.S.2d 219 (N.Y. App. Div. 4th Dep't, 2004) (finding that N.Y. C.P.L.R. 4545 was not a bar to an insurer's contractual subrogation action against defendants, a tortfeasor and his employer, to the extent that such action alleged that defendants were the responsible parties and sought to recover the cost of medical expenses it paid on behalf of its insured); *Omiatek v Marine Midland Bank, N.A.* 781 N.Y.S.2d 389 (App Div, 4th Dept 2004) (trial court properly granted motion of an insurer of plaintiff for permission to intervene for the purpose of asserting an equitable subrogation claim).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Charitable contributions are treated differently by virtue of the statute. CPLR 4545(b) provides that:

(b) Voluntary charitable contributions excluded as a collateral source of payment. Voluntary charitable contributions received by an injured party shall not be considered to be a collateral source of payment that is admissible in evidence to reduce the amount of any award, judgment or settlement.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

a. If so, what are the differences?

See *Pryce v. Gilchrist*, 2008 NY Slip Op 4142, 2 (N.Y. App. Div. 1st Dep't 2008) (finding that the trial court erred in reducing the award by $ 96,524 for a Department of Social Services Medicaid lien in that amount (CPLR 4545[c]), and limiting the collateral source offset to the $ 50,000 paid for basic economic loss).

4. Are collateral source matters governed by statute, common law, or a combination of both?

Statute. N.Y. C.P.L.R. §4545.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

N/A. The purpose of CPLR 4545 was to prohibit double recovery. *See Winkelmann v Excelsior Ins. Co.*, 85 N.Y.2d 577, 581 (1995).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

N/A

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

N/A

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. See Response to A1

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

CPLR 4545 requires the court, upon a finding that items of economic loss were or will with reasonable certainty be replaced or indemnified from any collateral source, to then reduce the amount of any award for such. "The fact that the defendant tortfeasor escapes some liability in damages because of this optional basic economic loss coverage, if unfair, is an unfairness which was dismissed by the enactment of CPLR 4545 in favor of avoiding the possibility of a double recovery for the same items of economic loss." *Condon v. Hathaway*, 191 Misc. 2d 235, 240 (N.Y. Sup. Ct. 2002).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

No. See Response to A1.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

No. See Response to A1.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

In *Excellus Health Plan, Inc. v. Federal Express Corp.,* 2003 NY Slip Op 23993, 6 (N.Y. Sup. Ct. 2003), Defendants challenged NY CPLR 4545 stating that a "reduction of recoveries by collateral sources would have some effect upon the subrogation rights of insurers, and the effective date provision which affects existing occurrences would, therefore, impair existing rights, raising constitutional questions." However, the court did not address the constitutional issues because that CPLR 4545 is not a bar to an insurer's contractual subrogation action.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Not presently.

North Carolina

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The North Carolina General Assembly recently passed a new rule of evidence limiting evidence for medical expenses. Under this new rule, "[e]vidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied." 2011 N.C. Sess. Laws 283. This law becomes effective October 1, 2011. *Id.*

The General Assembly also ratified, over the governor's veto, a law limiting noneconomic damages in medical malpractice actions. 2011 N.C. Sess. Laws 400. Under this statute, "the total amount of noneconomic damages for which judgment is entered against all defendants shall not exceed five hundred thousand dollars." *Id.* The statute has an exception for extreme injuries and reckless behavior. *Id.* The act will become effective October 1, 2011. *Id.* The constitutionality of these provisions may be questioned in the near future. *See, e.g.*, Rob Christensen, *Ex Chief Justices Battle over Medical Malpractice*, Under the Dome (Feb. 15, 2011, 2:18 PM), http://projects.newsobserver.com/under_the_dome/ex_chief_justices_battle_over_medical_malpractice.

A. Collateral Source Rules

1. Is the plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. "[T]he plaintiff's recovery will not be reduced by the fact that the medical expenses were paid by some source collateral to the defendant, such as a beneficial society, by members of the plaintiff's family, by the plaintiff's employer, or by an insurance company." *Young v. Baltimore & Ohio R.R. Co.*, 266 N.C. 458, 466, 146 S.E.2d 441, 446 (1966) (quoting 22 Am. Jur. 2d *Damages* §207) (internal quotations marks omitted). The plaintiff is entitled to recover the amount of services rendered to him regardless of who paid the expenses. *Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987). "A tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source." *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981).

a. If so, is there a right of subrogation for the insurer?

Yes. In workers' compensation actions, employers and insurers have a mandatory right of subrogation to an injured worker's recovery from a third-party under N.C. Gen. Stat. §97-10.2(f). *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 88, 484 S.E.2d 566, 568-69 (1997). The employer or insurer's subrogation amount may, however, be reduced in the judge's discretion. N.C. Gen. Stat. §97-10.2(j). There is also a right of subrogation for insurers, whereby the plaintiff-insured "holds the proceeds of the judgment . . . as a trustee for the benefit of the insurance company to the extent of the insurance paid by it." *Nationwide Mut. Ins. Co. v. Spivey*, 259 N.C. 732, 733, 131 S.E.2d 338, 339 (1963).

2. Is the plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. "[T]he plaintiff's recovery will not be reduced by the fact that the medical expenses were paid by some source collateral to the defendant, such as a *beneficial society*, by *members of the plaintiff's family*, by the plaintiff's employer, or by an insurance company." *Young*, 266 N.C. at 466, 146 S.E.2d at 446 (quoting 22 Am. Jur. 2d *Damages* §207) (internal quotations marks omitted) (emphases added). The plaintiff is likewise allowed to recover for medical expenses paid by Medicaid. *Cates*, 321 N.C. at 6, 361 S.E.2d at 737. Furthermore, evidence that future care will be provided at home cannot be used to reduce the plaintiff's damages since *Young* specifically mentioned payments by family members. *Id.* at 9, 361 S.E.2d at 739. "In determining whether a payment is from a collateral source, courts should look at the purpose and nature of the fund and of

the payments, and not merely at their source. [T]he collateral source rule depends less upon the source of the funds than upon the character of the benefits received." *Wilson v. CSX Transp., Inc.*, 194 N.C. App. 338, 343-44, 699 S.E.2d 784, 788 (2008) (internal citations omitted).

a. If so, is there a right of subrogation for the charitable provider?

Generally, yes. Under Section 130A-13 of the North Carolina General Statutes, for example, Medicaid is entitled to recoup the amount of money paid on behalf of the plaintiff up to one-third of the plaintiff's total recovery. "Medicaid recipients are 'deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise to which [the recipient] may be entitled.' " *Andrews v. Haygood*, 362 N.C. 599, 604, 699 S.E.2d 310, 313 (quoting N.C. Gen. Stat. §108A-59(a) (2005)). A Medicaid recipient is "free to negotiate a settlement with the State for a lien amount less than that required by our statutes." *Id.* at 604, 699 S.E.2d at 313. The subrogation rights of Medicare are governed by federal law. *See* 42 U.S.C. §1395y.

3. Does the State treat plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

North Carolina treats Medicaid differently than a private insurer in that Medicaid's recovery is statutorily limited to one-third of the plaintiff's total recovery. *See* N.C. Gen. Stat. §130A-13(a)(3). The employer or insurer in a workers' compensation case is treated differently in that its subrogation amount may be reduced by the judge in her discretion. *See id.* §97-10.2(j). In other respects, the treatment of private and public insurers is generally the same. *See Cates*, 321 N.C. 1, 361 S.E.2d 734.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source matters are governed mostly by case law, although subrogation rights for Medicaid and Medicare and workers' compensation rules are statutory.

5. If State law allows the plaintiff to recover more than was paid, who keeps the windfall?

North Carolina law does not directly discuss a windfall to the plaintiff with regard to the collateral source rule, but generally the collateral source rule is "punitive in nature, and is intended to prevent the tortfeasor from a windfall when a portion of the plaintiff's damages have been paid by a collateral source." *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 639, 627 S.E.2d 249, 257 (2006). Thus, the rules are designed so that the plaintiff should keep the windfall to prevent a windfall to the defendant.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The stated basis of recovery is "for medical expenses actually incurred by or for an injured person." *Young*, 266 N.C. at 466, 146 S.E.2d at 446.

2. If the plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

North Carolina law does not describe the basis for the plaintiff's recovery in terms of "reasonable value."

3. Do the damages the plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. The recovery is the same.

4. Have your Courts addressed the fairness of allowing the plaintiff to recover more than was actually paid for treatment?

No, the North Carolina courts have not addressed this issue.

C, Use of Specials at Trial

1. Is the plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

North Carolina courts have not directly addressed this issue, but the billed value is generally admissible as evidence. Thus, in *Whitney v. Blue Cross & Blue Shield of North Carolina*, the billed value was used to apportion between the medical and mental aspects of treatment for anorexia. No. COA06-1172, 2007 N.C. App. LEXIS 1584 (July 17, 2007).

2. Is the plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

North Carolina courts have not addressed this issue.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your state?

It was not a violation of the Federal or State Constitution for the state to charge all tuberculosis patients the same rate but only collect from those who could pay. *Graham v. Reserve Life Ins. Co.*, 274 N.C. 115, 123-24, 161 S.E.2d 485, 491 (1968). The statutory obligation of a North Carolina employer to pay the medical expenses of an employee is not preempted by federal Medicaid law. *Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 498 S.E.2d 818 (1998).

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

The only foreseeable basis for a constitutional challenge is the law of the land clause in Article One, Section Nineteen of the North Carolina Constitution (the state analog to the Due Process Clause of the Federal Constitution). It provides that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." A challenge under this clause, however, is likely to fail.

North Dakota

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

In North Dakota, the plaintiff is generally not permitted to recover costs of third-party payments made by insurers for medical or psychological treatment. However, there are some exceptions (see below). North Dakota statutory law addresses collateral source payments specifically. N.D. Cent-Code §32-03.2-06 (1996) states as follows:

"After an award of economic damages, the party responsible for the payment thereof is entitled to and may apply to the court for a reduction of the economic damages to the extent that the economic losses presented to the trier of fact are covered by payment from a collateral source." N.D. Cent-Code §32-03.2-06 (1996).

In other words, once a jury has awarded damages to the plaintiff, the defendant can ask the court to reduce the damages total by amounts paid by a collateral source.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

In North Dakota, a collateral source payment is "any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages." *Id*. In addition, under the statute, a collateral source payment does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering the economic damages. *Id*. This means that personal insurance is not considered a collateral source in North Dakota.

Since the North Dakota collateral sources statute is neither long, nor detailed, the courts appear to have decided what constitutes a collateral source on a case by case basis.

For example, in some cases damage awards have been reduced through an offset for federal benefits received. *Anderson v. U.S*. 731 F.Supp. 391 (D.N.D. 1990)(applying North Dakota law). In other cases, government benefits have not affected the damage award. *Nelson v. Trinity Medical*, 419 N.W.2d 866 (N.D. 1988).

The North Dakota Supreme Court has concluded that money given to a plaintiff as a gift is not included in the statutory definition of a collateral source payment. Therefore, a jury award cannot be reduced based on charitable gifts received by the plaintiff for payment of medical services. *Dewitz by Neustel v. Emery*, 508 N.W.2d 334 (N.D. 1993).

3. Are collateral source matters governed by statute, common law, or a combination of both?

In North Dakota, collateral source matters are governed by what appears to be a combination of statutory and common law. N.D. Cent-Code §32-03.2-06 and §32-03.2-10 codify collateral source rules. However, the courts have concluded that some forms of payment do not fall within the statutory scheme – gifts for example – and maintain the common law standard in some instances. *See Dewitz by Neustel*, 508 N.W.2d 334 at 341.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The North Dakota Supreme Court has held that the correct measure of damages for personal injury is the necessary and reasonable value of the medical, hospital and drug services rendered to the plaintiff rather than the actual amount paid or incurred for such services. *Klein v. Harper*, 186 N.W.2d 426 (N.D. 1971).

The court has also held that in establishing the likely cost of future medical care, past drug bills can be introduced at trial. From this evidence the jury can infer the reasonable cost of future drug therapy. *Olmstead v. First Interstate Bank of Fargo, N.A.* 449 N.W.2d 804, 808 (N.D. 1989).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award? Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

When determining the amount of non-economic damages, it appears that North Dakota juries have wide-ranging discretion about what factors they can consider. The North Dakota Supreme Court has concluded that the determination of damages for pain and suffering, and mental anguish is "not susceptible of arithmetical calculation," but is largely dependent on the "common knowledge, good sense and practical judgment of the jury." *Slaubaugh v. Slaubaugh*, 466 N.W.2d 573, 577 (N.D. 1991).

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State? Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

This does not appear to be an issue in North Dakota.

Ohio

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes, if the insurance company has a right of subrogation. *See* O.R.C. 2315.20(A). If there is no right of subrogation, the defendant may introduce evidence of any amount payable as a benefit to the Plaintiff. *Id.* If the defendant introduces this evidence, then the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence. *See* O.R.C. 2315.20(B).

a. If so, is there a right of subrogation for the insurer?

In Ohio, there is no statutory right of subrogation for the insurer. Generally, the contract between the plaintiff and its insurer will include a right of subrogation.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

The Ohio courts have not addressed whether a plaintiff is permitted to recover the costs of free or charitable care donated since the passage of the collateral source statute, O.R.C. 2315.20 in 2005. However, the Ohio Supreme Court has ruled that the written-off amount of a medical bill is not considered a payment of any benefit from a collateral source. *Robinson v. Bates* (2006), 112 Ohio St. 3d 17, 22, 857 N.E.2d 1195, P16.

a. If so, is there a right of subrogation for the charitable provider?

The Ohio courts have not addressed whether a plaintiff is permitted to recover the costs of free or charitable care donated since the passage of the collateral source statute, O.R.C. 2315.20 in 2005. It is unknown whether there is a right of subrogation of the charitable provider.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Yes.

a. If so, what are the differences?

The plaintiff may recover costs of treatment if the benefit bestowed upon him or her comes from a third party source that has a federal, statutory or contractual right of subrogation. *See* O.R.C. 2315.20(A). Thus, if the payor is Medicare, Medicaid or a private insurer with a right of subrogation, the plaintiff will recover the costs of his or her medical treatment. Conversely, if the private insurer does not have a right of subrogation, then the defendant can submit evidence of the insurer's payment of the plaintiff's medical treatment. *See* O.R.C. 2315.20(A). In order to recover damages, the plaintiff could introduce evidence of any amount that he or she has paid or contributed to secure a right to receive the benefits provided by the third party. *See* O.R.C. 2315.20(B).

4. Are collateral source matters governed by statute, common law, or a combination of both?

Statute—Ohio Revised Code §2315.20.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

In Ohio, a jury determines the "reasonable value" of medical services provided to the plaintiff by considering the amount originally billed, the amount the medical provider accepted as payment, or some amount

in between. *See Robinson v. Bates* (2006), 112 Ohio St. 3d, 17, 23, 857 N.E.2d 1195, at P. 18. The Supreme Court stated in a recent decision that "[i]f there is no right of subrogation, then any recovery for expenses paid by a third party that have benefitted the plaintiff would remain with the plaintiff, resulting in a windfall." *Jacques v. Manton* (2010), 125 Ohio St. 3d 342, 345, 2010 Ohio LEXIS 1037, P. 10.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

"Reasonable value" of medical services provided. *See Jacques v. Manton* (2010), 125 Ohio St. 3d 342, 343, 2010 Ohio LEXIS 1037, P5.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

The concept of "reasonable value" is not firmly defined as a fixed figure. Rather, in Ohio, the "reasonable value" is for the jury to decide. *See Jacques v. Manton* (2010), 125 Ohio St. 3d 342, 343, 2010 Ohio LEXIS 1037, P5. *Also see answer to 2(b).*

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

Yes. *See Jacques v. Manton* (2010), 125 Ohio St. 3d 342, 343, 2010 Ohio LEXIS 1037, P5.

(2) The amount billed for the services?

Yes. *See Jacques v. Manton* (2010), 125 Ohio St. 3d 342, 343, 2010 Ohio LEXIS 1037, P5.

(3) Provider testimony on the value of their services as compared to billed amounts?

NA

(4) Expert testimony on accuracy of provider billing rates?

NA

(5) The fact that a third-party payor (a/k/a insurance company) has already paid the bill?

Under O.R.C. 2315.20, evidence of collateral benefits is admissible but there are exceptions, including when the source of the payment has a right of subrogation. *See* O.R.C. 2315.20 and *Jacques v. Manton* (2010), 125 Ohio St. 3d 342, 343, 2010 Ohio LEXIS 1037, P5. The subrogation exception "will generally prevent defendants from offering evidence of insurance coverage for a plaintiff's injury, because insurance agreements generally include a right of subrogation." *Id.*

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Yes. If a collateral source is involved and that payor does not have a right of subrogation, then the defendant may introduce evidence of payments made on the plaintiff's behalf. If those payments are introduced, then the plaintiff may introduce any amount that he or she has paid or contributed to secure a right to receive the benefits provided by the third party. *See* O.R.C. 2315.20(A) & (B).

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. In *Jacques*, the Ohio Supreme Court explained that the purpose of O.R.C. 2315.20 "is to prevent double-payment windfall for the plaintiff," *Jacques v. Manton* (2010), 125 Ohio St. 3d 342, 344, 2010 Ohio LEXIS 1037, P11. "Because different insurance arrangements exist, the fairest approach is to make the defendant liable for the reasonable value of plaintiff's medical treatment. . . . Both the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care." *See Robinson*, *supra,* at P17. A jury may decide the reasonable value of medical care provided to the plaintiff by considering the amount originally billed, the amount the medical provider accepted as payment, or some amount in between. *See Robinson*, *supra* at P. 18.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

There is a dearth of case law addressing whether a Plaintiff is permitted to use the billed value at trial as a basis for non-economic damages. However, O.R.C. 2315.18(A)(2) provides that all expenditures for medical care or treatment are a basis for economic loss. The statute's definition of noneconomic loss does not include expenditures for medical care or treatment. O.R.C. 2315.18(A)(4). Rather, the statute merely states that noneconomic loss is "non-pecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss." O.R.C. 2315.18(A)(4). Additionally, O.R.C. 2315.18(C) provides that in determining "noneconomic loss," the jury may not consider (a) evidence of the defendant's alleged wrongdoing, misconduct or guilt; (b) evidence of the defendant's wealth or financial resources; or (c) all other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

There is a dearth of case law addressing whether a Plaintiff is permitted to use the billed value of specials at trial as a basis for a non-economic damages award. However, O.R.C. 2315.18(A)(2) provides that all expenditures for medical care or treatment are a basis for economic loss. The statute's definition of non-economic loss does not include expenditures for medical care or treatment. O.R.C. 2315.18(A)(4). Rather, the statute merely states that noneconomic loss is "non-pecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss." O.R.C. 2315.18(A)(4). Additionally, O.R.C. 2315.18(C) provides that in determining "noneconomic loss", the jury may not consider (a) evidence of the defendant's alleged wrongdoing, misconduct or guilt; (b) evidence of the defendant's wealth or financial resources; or (c) all other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

Yes. In *Arbino v. Johnson & Johnson* (2007), 116 Ohio St. 3d 468, 485, the Ohio Supreme Court declined to address the constitutionality of O.R.C. 2315.20, Ohio's Collateral Source Statute, because the plaintiff lacked standing to challenge the statute. The Ohio Supreme Court struck down the previous collateral source statutes because they violated the Ohio Constitution's Due Process Clause, Equal Protection Clause and Single Subject Rule. *See Arbino v. Johnson & Johnson* (2007), 116 Ohio St. 3d 468.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

An equal protection argument could be made that O.R.C. 2315.20 discriminates against those who receive a collateral benefit from a non-subrogated source and protects those who receive collateral benefits from a subrogated collateral source.

Oklahoma

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes, a Plaintiff may recover from a tortfeasor the amounts paid by insurers for medical or psychological treatment. "When an injured person receives payment for injuries from a source not connected with the tortfeasor, the tortfeasor is still liable for the full statutory amount, whatever that is determined to be. Payment to the injured party by an independent source does not operate to reduce or mitigate the amount for which the tortfeasor is liable. This is the collateral source rule." *Weatherly v. Flournoy*, 929 P.2d 296, 298 (Okla. App. 1996).

Oklahoma Statute Title 23, section 61 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." In 1951, the Oklahoma Supreme Court for the first time interpreted 23 O.S. §61 as though the collateral source rule is included in its language: "Under our statute upon commission of a tort it is the duty of the wrongdoer to answer for the damages wrought by his wrongful act, and that is measured by the whole loss so caused. Under the statute the receipt of compensation by the injured party from a collateral source wholly independent of the wrongdoer would not operate to lessen the damages recoverable from the person causing the injury." *Denco Bus Lines, Inc. v. Hargis*, 229 P.2d 560, 564 (Okla. 1951).

Oklahoma Statute Title 12, section 3009.1, effective November 1, 2011, generally permits an injured plaintiff to introduce into evidence the actual amount paid, rather than the amount billed, for "any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party." Where a medical provider files a lien in excess of the actual amount paid, an exception is made to admit the full amount of the lien. Where no payment has been made, an exception is made to admit the Medicare reimbursement rates if the medical provider will accept payment at that rate. This statute reads:

> A. Upon the trial of any civil case involving personal injury, the actual amounts paid for any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party shall be the amounts admissible at trial, not the amounts billed for expenses incurred in the treatment of the party. If, in addition to evidence of payment, a signed statement acknowledged by the medical provider or an authorized representative that the provider in consideration of the patient's efforts to collect the funds to pay the provider, will accept the amount paid as full payment of the obligations is also admitted. The statement shall be part of the record as an exhibit but need not be shown to the jury. Provided, if a medical provider has filed a lien in the case for an amount in excess of the amount paid, then bills in excess of the amount paid but not more than the amount of the lien shall be admissible. If no payment has been made, the Medicare reimbursement rates in effect when the personal injury occurred shall be admissible if, in addition to evidence of nonpayment, a signed statement acknowledged by the medical provider or an authorized representative that the provider, in consideration of the patient's efforts to collect the funds to pay the provider, will accept payment at the Medicare reimbursement rate less cost of recovery as provided in Medicare regulations as full payment of the obligation is also admitted. The statement shall be part of the record as an exhibit but need not be shown to the jury. Provided, if a medical provider has filed a lien in the case for an amount in excess of the Medicare rate, then bills in excess of the amount of the Medicare rate but not more than the amount of the lien shall be admissible.

The second sentence of this new statute is ambiguous (and grammatically incorrect). Legislative history suggests that the second sentence was intended to be a part of the third sentence. One interpretation suggested is that the second and third sentences should read: "If, in addition to evidence of payment, a signed statement acknowledged by the medical provider or an authorized representative that the provider in consideration of the patient's efforts to collect the funds to pay the provider, will accept the amount paid as full payment of the obligations is also admitted, the statement shall be part of the record as an exhibit but need not be shown to the jury."

Further, application of this statute may prove difficult. Plaintiffs may argue that 12 O.S. §3009.1's limitation that only paid amounts are admissible and prohibition against admitting the billed amount contradicts the collateral source rule. Before 12 O.S. §3009.1, medical bills were commonly used as exhibits. But, with this new statute, payments are the only admissible records, not the bills. It will be difficult for plaintiffs to admit evidence of medical expenses actually paid without violating the collateral source rule. Practically speaking, payment is not always made by third parties before the time of litigation. If no payment has been made, no liens have been filed, and the medical provider will not accept payment at the Medicare reimbursement rate, plaintiffs may have no ability to prove any damages for medical bills. For at least these reasons, 12 O.S. §3009.1 will likely be the subject of controversy and subsequent judicial interpretation.

Oklahoma Senate Bill 864, introduced in 2011, would require compensation from sources independent of a defendant to be submitted as evidence to the jury and subtracted from the amount of damages recovered from the defendant, effectively abrogating the collateral source rule in Oklahoma. Whether or not this Bill will pass remains uncertain.

In 2003, Oklahoma's collateral source rule was reformed for medical malpractice actions. In a medical liability action, Oklahoma Statute Title 63, section §1-1708.1D provides that payment information may be admissible into evidence:

> A. In every medical liability action, the court shall admit evidence of payments of medical bills made to the injured party, unless the court makes the finding described in paragraph B of this section.
>
> B. In any medical liability action, upon application of a party, the court shall make a determination whether amounts claimed by a health care provider to be a payment of medical bills from a collateral source is subject to subrogation or other right of recovery. If the court makes a determination that any such payment is subject to subrogation or other right of recovery, evidence of the payment from the collateral source and subject to subrogation or other right of recovery shall not be admitted.

a. If so, is there a right of subrogation for the insurer?

Yes. Oklahoma case law recognizes an insurer's right to seek reimbursement from its insured of expenses paid when the parties' contract provided for it. *See e.g. St. Farm Fire & Cas. Ins. Co. v. Farmers Ins. Exch.,* 489 P.2d 480 (Okla. 1971). "Oklahoma also recognizes that subrogation rights of the [injured party's] insurer are not relevant to the tortfeasor." *Weatherly v. Flournoy*, 929 P.2d 296, 299 (Okla. App. 1996). In *Dippel v. Hunt*, the court stated that "when the smoke of controversy clears away much can be said for the notion that it is really none of the tortfeasor's concern what rights might exist between the tortfeasor's victim and the latter's own insurance carrier, save to avoid subjection to more than one judgment-an event not possible under existing decisional law." 517 P.2d 444, 448 (Okla. App. 1973).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

a. If so, is there a right of subrogation for the charitable provider?

The impact of Oklahoma Statute Title 12, section 3009.1, which effectively limits an injured plaintiff's recovery for medical bills to the actual amount paid, rather than the amount billed, on the area of free or charitable care is not yet known. Prior to 12 O.S. §3009.1, Oklahoma appellate courts had not addressed the specific issue of applying the collateral source rule to free or charitable care payments made for the benefit of the plaintiff in a personal injury action against the tortfeasor. However, some trial courts had allowed plaintiffs to introduce evidence of the value of the care received as an element of damages.

Where the United States has furnished hospital or medical care, the United States has a right of recovery against the tortfeasor for the "value of the medical care it has furnished the injured person." 42 U.S.C. §2651; *Cook v. Stuples*, 74 F.R.D. 370, 371 (W.D. Okla. 1976) (Department of Army provided medical and hospital care to the injured party). The United States is "subrogated to any claim of the injured person against the tortfeasor to the extent of the value of the care and treatment it has furnished." *Id.* Further, the "United States is entitled to recover from State Farm [the injured party's insurer] for the reasonable value of those medical services it rendered to [the injured party]. To hold otherwise we must ignore the clear language of the policy, thus granting State Farm a windfall represented by that portion of [the injured party's] premium payments for coverage . . ." *U.S. v. St. Farm Mut. Automobile Ins. Co.*, 455 F.2d 789, 792 (10th Cir. (Okla.) 1972) (The injured party, as a serviceman, received free hospital and medical services pursuant to 10 U.S.C.A. §1074.).

The Indian Health Services Division of the Department of Health and Human Services (IHS) has a distinct right of recovery against a negligent third-party for the reasonable value of medical care provided to the injured person. 25 U.S.C. §1621e(a).

Generally, evidence that the plaintiff is a member of an Indian tribe and had access to free medical care at Indian health clinics is not admissible to show that the plaintiff failed to mitigate her damages when she chose not to use the Indian health clinic. *James v. Midkiff*, 888 P.2d 5 (Okla. App. 1994).

Oklahoma has denied recovery for the value of nursing services of the wife in taking care of her husband. *Muskogee Elec. Traction Co. v. Fore*, 188 P. 327 (Okla. 1920). The Court did not make it clear whether the ruling was based on the fact that there was no evidence as to the reasonable value of the services or the absence of evidence that the husband paid or agreed to pay for the services.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

a. If so, what are the differences?

Oklahoma does not make any such distinction. *See e.g. Simpson v. Saks Fifth Ave., Inc.*, 2008 WL 3388739 (N.D. Okla. 2008). The Court stated: "[t]he weight of authority supports plaintiff's argument that the collateral source rule bars any reference to amounts written off by a hospital under a contract with Medicare." *Id.* at *1 (citations omitted). "Oklahoma decisions generally apply the collateral source rule broadly in favor of a plaintiff and exclude evidence of an alternative or collateral source that would lessen a plaintiff's damages." *Id.* at *2. "In *Mascenti v. Becker*, 237 F.3d 1223 (10th Cir. 2001), the Tenth Circuit erred on the side of caution and interpreted Oklahoma's collateral source broadly to exclude evidence of payments by third-parties when it was unclear how the Oklahoma Supreme Court would resolve the specific application of the collateral source rule. *Id.* at 1240-41. This Court follows the Tenth Circuit approach and holds that the subject medical bills are admissible." *Id.* "Medicare is undoubtedly a collateral source wholly independent of Saks, and the collateral source rule applies with equal force to evidence of Medicare payments." *Id.*

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source matters in Oklahoma are governed both by statute and case law. *See* Oklahoma Statute Title 23, section 61; *Denco Bus Lines, Inc. v. Hargis*, 229 P.2d 560, 564 (Okla. 1951); Oklahoma Statute Title 12, section 3009.1. Enacted in November 2011, Oklahoma Statute Title 12, section 3009.1, effectively limits a plaintiff's recovery for medical bills to the actual amount paid. *See also* Oklahoma Statute Title 63, section §1-1708.1D which is applicable to medical malpractice actions.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Oklahoma Statute Title 12, section 3009.1 generally limits an injured plaintiff's recovery for medical bills to the actual amount paid, rather than the amount billed, with the exception that bills in excess of the amount paid are admissible up to the amount of the lien if the medical provider has filed a lien for services in excess of the amount paid.

Prior to the enactment of 12 O.S. §3009.1 in November 2011, the plaintiff in a personal injury action against the tortfeasor could recover more than was paid to the provider(s) of medical and psychological treatment and the plaintiff kept the windfall. "There is no 'double recovery' when an injured person recoups payments pursuant to the contract with his insurance company and is also awarded a judgment for damages from the tortfeasor." *Weatherly v. Flournoy*, 929 P.2d 296, 300 (Okla. App. 1996). With the enactment of 12 O.S. §3009.1, this prior decisional law seems to be largely abrogated because there must be a lien of the medical provider in excess of the payment made in order to recover more than the payment amount, which excess would presumably go to the medical provider to satisfy the lien.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

Oklahoma Statute Title 12, section 3009.1 effectively limits an injured plaintiff's recovery to the actual amount paid, rather than the amount billed, for "any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party." An exception is made where the medical provider has filed a lien for an amount in excess of the amount paid, in which case bills in excess of the amount paid but not more than the amount of the lien are admissible. If no payment has been made, then the Medicare reimbursement rates in effect at the time the personal injury occurred are admissible provided that the medical provider will accept payment at the Medicare reimbursement rate less cost of recovery as full payment of the obligation. Oklahoma's Jury Instruction Committee is expected to issue new jury instructions to assist with the application of this new statute.

Prior to the enactment of 12 O.S. §3009.1 in November 2011, a jury was instructed to award the plaintiff in a personal injury action "[t]he reasonable expenses of the necessary medical care, treatment, and services, past and future." Oklahoma Uniform Jury Instruction 4.1. The amount a plaintiff in a personal injury action against the tortfeasor could recover for the "reasonable expenses of the necessary medical care, treat-

ment, and services, past and future" was not firmly defined, but was instead a question for the jury to decide. "The analysis and weighing of the evidence with reference to the Necessary expense of alleviating the injuries to plaintiff's auto, as well as the Necessary expense of alleviating the injuries to his body, Due directly to the collision, were the prerogative of the jury under the evidence in this case, just as it is the jury's prerogative to determine the veracity of witnesses, and the credibility of their testimony, when these are amenable to a difference of opinion." *Mo., Kan. & Okla. Transit Lines, Inc. v. Jackson*, 442 P.2d 287, 290 (Okla. 1968) (capitalization in original).

In a contract claim context prior to the enactment of 12 O.S. §3009.1, a Federal District Court in Oklahoma found that under Oklahoma law, an insured cannot recover amounts written-off by providers in suits brought by the insured against his/her own insurance. In *Woodrich v. Farmers Insurance Company, Inc.*, the insured's policy covered "reasonable expenses for necessary medical services." 405 F. Supp. 2d 1276, 1279 (N.D. Okla. 2004). "The plain meaning of the policy is that Mr. Woodrich's recoverable medical 'expense' is no more than the provider actually agreed to accept as full payment." *Id.*

Again, prior to the enactment of 12 O.S. §3009.1, and although not at issue on appeal, the case of *Luetkemeyer v. Magnusson* reported that summary judgment was granted by the trial court in favor of a patient where the doctor filed a lien against the patient for the total amount of his services, rather than for the contractually reduced rate available under the patient's health insurance and which reduced amount had already been paid in full. 162 P.3d 970 (Okla. App. 2007).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

See (B)(1) above.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

Oklahoma Statute Title 12, section 3009.1 effectively limits an injured plaintiff's recovery to the actual amount paid, rather than the amount billed, for "any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party."

Prior to the enactment of 12 O.S. §3009.1 in November 2011, for cases brought by an insured against his/her own insurance for breach of contract, a Federal District Court in Oklahoma held that the insured may recover "no more than the provider actually agreed to accept as full payment." *Woodrich v. Farmers Ins. Co., Inc.*, 405 F. Supp. 2d 1276, 1279 (N.D. Okla. 2004).

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

Oklahoma Statute Title 12, section 3009.1 effectively limits an injured plaintiff's recovery to the actual amount paid, rather than the amount billed, for "any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party."

Prior to the enactment of 12 O.S. §3009.1 in November 2011, a jury was instructed to award the plaintiff in a personal injury action "[t]he reasonable expenses of the necessary medical care, treatment, and

services, past and future." Oklahoma Uniform Jury Instruction 4.1. There were no enumerated factors which an Oklahoma jury was required to or could not consider as that was a question within the province of the jury. *Mo., Kan. & Okla. Transit Lines, Inc. v. Jockson*, 442 P.2d 287, 290 (Okla. 1968) (At the trial, the plaintiff's attending physician testified as to the medical services provided and showed his bill for medical services to plaintiff was $1,229.77). In *Fixico v. Harmon*, the Oklahoma Supreme Court found that the trial court did not err in admitting testimony as to the hospital and doctors' bills submitted to the plaintiff. 70 P.2d 114, 117 (Okla. 1937). "Most of this testimony was given by the plaintiff, and it related to specific amounts which had either been paid or had been presented to her by her doctors and others." *Id.*

3. Do the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

As a general rule, Oklahoma disallows evidence of collateral source payments. *See e.g.* 23 O.S. §61; *Denco Bus Lines, Inc. v. Hargis*, 229 P.2d 560 (Okla. 1951); *Porter v. Manes*, 347 P.2d 201 (Okla. 1959); *Weatherly v. Flournoy*, 929 P.2d 296 (Okla. App. 1996); *Coble v. Shepard*, 190 P.3d 1202 (Okla. App. 2008). However, Oklahoma Statute Title 12, section 3009.1, enacted in November 2011, effectively limits an injured plaintiff's recovery to the actual amount paid, rather than the amount billed, for "any doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the party." An exception is made where the medical provider has filed a lien for an amount in excess of the amount paid, in which case bills in excess of the amount paid but not more than the amount of the lien are admissible. If no payment has been made, then the Medicare reimbursement rates in effect at the time the personal injury occurred are admissible provided that the medical provider will accept payment at the Medicare reimbursement rate less cost of recovery as full payment of the obligation.

Prior to the enactment of 12 O.S. §3009.1 in November 2011, a plaintiff in a personal injury action against the tortfeasor could recover for the "reasonable expenses of the necessary medical care, treatment, and services, past and future" and that amount did not vary based on whether a collateral source was involved, but rather was a question for the jury to decide.

Oklahoma Senate Bill 864, introduced in 2011, would require compensation from sources independent of a defendant to be submitted as evidence to the jury and subtracted from the amount of damages recovered from the defendant, effectively abrogating the collateral source rule in Oklahoma. Whether or not this Bill will pass remains uncertain.

In a medical liability action, Oklahoma Statute Title 63, section §1-1708.1D provides that payment information is admissible into evidence unless the court makes a determination that the amount claimed by a health care provider is subject to subrogation or other right of recovery, in which case such evidence shall not be admitted.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Oklahoma Statute Title 12, section 3009.1 effectively limits an injured plaintiff's recovery for medical bills to the actual amount paid, rather than the amount billed. Prior to the enactment of 12 O.S. §3009.1 in November 2011, the plaintiff in a personal injury action against the tortfeasor could recover more than was paid to the provider(s) of medical and psychological treatment, and the plaintiff kept the windfall. "There is no 'double recovery' when an injured person recoups payments pursuant to the contract with his insurance company and is also awarded a judgment for damages from the tortfeasor." *Weatherly v. Flournoy*, 929 P.2d 296, 300 (Okla. App. 1996). The Federal District Court for the Northern District of Oklahoma, prior to the enactment of 12 O.S. §3009.1, found that Oklahoma's collateral source rule barred admission of Medicare pay-

ments and write-offs in a personal injury case. *Simpson v. Saks Fifth Ave., Inc.*, 2008 WL 3388739 (N.D. Okla. 2008). In reaching its decision, the *Simpson* Court recognized that admission of the Medicare write-offs would reduce a plaintiff's claim for damages. *Id.* at 1 ("This is a significant issue for plaintiff because, if the written-off amounts are excluded, this will significantly limit her damages.")

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

The impact of Oklahoma Statute Title 12, section 3009.1, which effectively limits an injured plaintiff's recovery for medical bills to the actual amount paid, rather than the amount billed, on the area of non-economic damage awards is not yet fully known, though it seems that because only paid bills are generally admissible, there would be no basis upon which a jury could consider billed value as a basis for a non-economic damages award.

Prior to the enactment of 12 O.S. §3009.1 in November 2011, billed medical expenses could be considered in making both economic and non-economic damages award. "There is no fixed rule whereby damages for pain and suffering alone can be measured. Compensation for pain and suffering rests in the sound discretion of the jury, because there is no market where pain and suffering are bought and sold, nor any standard by which compensation for it can be definitely ascertained, or the amount actually endured determined." *Cartwright v. Atlas Chem. Indus., Inc.*, 593 P.2d 104, 118 (Okla. App. 1979) (*quoting Denco Bus Lines v. Hargis*, 229 P.2d 560, 563 (Okla. 1951) (internal quotations omitted)).

Effective November 1, 2011, 23 O.S. §61.2 was amended to cap non-economic damages at $350,000 for claims arising from bodily injury. This cap can be lifted where it is found by clear and convincing evidence that a defendant *in a negligence* case: (1) acted in reckless disregard for the rights of others; (2) was grossly negligent; (3) acted fraudulently; or (4) acted intentionally or with malice, in which case there is no limit on the amount of non-economic damages which may be awarded. A verdict for the plaintiff must be accompanied by answers to interrogatories, which specify among other things: (a) the total compensatory damages recoverable by the plaintiff; (b) that portion of the total compensatory damages representing the plaintiff's economic loss; and (c) that portion of the total compensatory damages representing the plaintiff's non-economic loss. Based on the wording of the statute, there may be an absolute cap on non-economic damages for actions not based on negligence (*i.e.* intentional tort and products liability). This cap does not apply to wrongful death actions (*see* 12 O.S. §1053).

Oklahoma Senate Bill 863, introduced in 2011, would lower the cap on non-economic damages to $250,000, and apply the cap to all claims not arising out of contract. Whether or not this Bill will pass remains uncertain.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

See (C)(1) above.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

There is no known Oklahoma case applying Oklahoma constitutional law or federal constitutional law to collateral source/cost of treatment issues.

Oklahoma Senate Bill 864, introduced in 2011, would require compensation from sources independent of a defendant to be submitted as evidence to the jury and subtracted from the amount of damages recovered from the defendant. Whether or not this Bill will pass remains uncertain.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

The constitutionality of 63 O.S. §1-1708.1D and 12 O.S. §3009.1 have not yet been challenged. If a constitutional challenge is made, the basis for the challenge would likely be along the lines of challenges made in other states: (a) due process ("No person shall be deprived of life, liberty, or property, without due process of law." Okla. Const. Art. 2, §7); (b) equal protection (While the Oklahoma Constitution does not contain a provision identical to the equal protection clause in the federal constitution, it is well established that a like guarantee exists within our state constitution's due process clause. *See Fair Sch. Fin. Council of Okla., Inc. v. Okla.*, 746 P.2d 1135, 1148 (Okla. 1987).); (c) separation of powers (Okla. Const. Art. 4, §1); (d) fundamental right to a jury (Okla. Const. Art. 2, §§7 and 19); and (e) special laws (Okla. Const. Art. 5, §59).

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Oregon's collateral source rule prohibits the introduction of evidence at trial intended to show that the plaintiff's damages were or will be paid by a source other than that which caused the injury. Or. Rev. Stat. §31.580. Thus, evidence regarding third-party insurance payments for medical or psychological treatment is not admissible at trial. *Schmitz v. Sanseri*, 260 P.3d 509, 513 (Or. Ct. App. 2011).

Evidence of collateral source benefits is admissible by affidavit after verdict, and the court may deduct the value of collateral source benefits from the total damages award before entry of judgment. However, there are four categories of collateral source benefits that may not be deducted from the damages award. The court may not reduce the plaintiff's recovery by the value of 1) benefits the party awarded damages, the person injured, or that person's estate is obligated to repay, 2) life insurance or other death benefits, 3) insurance benefits for which the person injured or deceased or members of that person's family paid premiums, and 4) retirement, disability, pension, and federal Social Security benefits. Thus, a plaintiff generally will be permitted to recover the costs of third-party insurance payments for medical or psychological treatment.

a. If so, is there a right of subrogation for the insurer?

In Oregon, an insurer has a right of subrogation to personal injury protection (PIP) benefits paid to the insured if the insurance contract contains a subrogation clause, interinsurer reimbursement benefits are not available, and the insurer has not elected recovery by a lien. Or. Rev. Stat. §742.538. In other words, the statute "subrogates the PIP insurer to the rights of the insured to the extent of the PIP benefits paid." *Gaucin v. Farmers Ins. Co. of Oregon*, 146 P.3d 370, 373 (Or. Ct. App. 2006). However, the PIP insurer is barred from bringing an action for its PIP subrogation interest if the party who received the PIP benefits files a lawsuit against the tortfeasor. *Wynia v. Fick*, 986 P.2d 625 (Or. Ct. App. 1999), *rev. denied*, 994 P.2d 131 (Or. 2000).

A workers' compensation insurer has a right of subrogation for claims against a non-complying employer or a third-party tortfeasor if the worker elects not to proceed against the employer or tortfeasor. Or. Rev. Stat. §656.591. Oregon's workers' compensation law provides the exclusive remedy to a subject worker and the worker's beneficiaries for injuries that arise out of and are sustained in the course of employment. Or. Rev. Stat. §656.018. Instead of damages, the law provides recovery schedules for benefits and compensation. Or. Rev. Stat. §§656.202-656.258. However, a statutory exception exists for workers injured by a third-party not in the same employ as the worker. Or. Rev. Stat. §656.154. Under this exception, a worker who is injured by a third-party may elect to pursue a claim against a third-party, as long as the third-party is not the employer or a subject worker of the employer. If the employee or the employee's beneficiaries elect not to proceed against the third-party, the worker's cause of action is assigned to the paying agency (generally the insurer), and the paying agency may bring action against the third-party in the name of the injured worker or beneficiaries. Or. Rev. Stat. §656.591(1). Likewise, the worker's cause of action against a non-complying employer is assigned to the paying agency if the worker elects not to proceed against the non-complying employer.

Subrogation in other circumstances is governed by the terms of the insurance contract.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

While damages will generally be reduced by the collateral source rule, billed medical costs which are later written off by the provider under an agreement with Medicare or a private insurer are recoverable as eco-

nomic damages. *White v. Jubitz Corp.*, 219 P.3d 566 (Or. 2009). In *White*, the defendant argued that the plaintiff was not entitled to recover sums that Medicare satisfied by requiring treatment providers to accept the Medicare payment as payment in full for the services rendered. The court held that the plaintiff was allowed to recover the billed medical costs which were later written off, noting that the write offs were a benefit of the Medicare program that the plaintiff earned through employment or payment of premiums. Based on *White*, the written off cost of free or charitable care is recoverable by plaintiffs.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Evidence of collateral source benefits is not admissible at trial regardless of the source of the benefits. However, post-verdict treatment of collateral source benefits differs based on the source of the benefit. Under the collateral source statute, the plaintiff's recovery may be reduced by the value of benefits from some third-party sources, but not from Medicare, Medicaid, or private insurance payments (assuming the insurer reimbursement or the premium requirement is satisfied). *See White*, 219 P.3d at 581, n. 14 (stating that there is no distinction between Medicare and private insurance write-offs because Medicare is an insurance program for the elderly that involves a relationship similar to an insured's with its insurer).

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source matters are governed by Or. Rev. Stat. §31.580. The statute was enacted in 1987. Prior to 1987, the collateral source rule was governed by common law. For an in-depth discussion of Oregon's common law collateral source rule and the collateral source statute, see *White*, 219 P.3d 566.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

In Oregon, the plaintiff is entitled to recover the reasonable value of necessary medical or psychological treatment caused by the tortious conduct. *Ellington v. Garrow*, 162 P.3d 328, 330-31 (Or. Ct. App. 2007). Or. Rev. Stat. §31.710[1] provides in relevant part as follows:

> "'Economic damages' means objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing, and rehabilitative services and other health care services . . ."

The uniform civil jury instruction for cases subject to Or. Rev. Stat. §31.710 provides in relevant part as follows:

> "Economic damages are the objectively verifiable monetary losses that the plaintiff has incurred or will probably incur. In determining the amount of economic damages, if any, consider:
>
> [(1) The reasonable value of necessary (medical/hospital/ nursing/rehabilitative/and other health) care and services for treatment of the plaintiff.]"

U.C.J.I. No. 70.03. Recovery may, however, be subject to post-verdict reduction under the collateral source statute.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

In Oregon, "reasonable value" of the medical services is not firmly defined; it is a matter for the jury. In determining the reasonable value of medical services, the jury may consider the following non-exhaustive list of factors:

(1) The amount billed and paid for the services. In Oregon, a plaintiff may testify regarding the amount billed and paid for medical services, but that testimony, without more, does not establish the reasonableness or necessity of the expenses. *Valdin v. Holteen*, 260 P.2d 504, 510 (Or. 1953);

(2) Provider or expert testimony on the value of services and reasonableness of charges. *See Ellington*, 162 P.3d at 331 (the plaintiff's physician testified as to the reasonableness of the plaintiff's physical therapy treatment and costs); and

(3) Evidence of defendant's offer to pay medical bills. Under Oregon Evidence Code Rule 409, codified at Or. Rev. Stat. §40.195, evidence of a defendant's payment or offer to pay the plaintiff's medical bills and other similar expenses is not admissible to prove liability for an injury. However, such evidence may be admissible for another purpose, such as to prove damages. Admission of such evidence for another purpose would be subject to the relevance versus unfair prejudice analysis set forth in Oregon Evidence Code Rule 403.

Evidence of third-party payments is not admissible at trial. Or. Rev. Stat. §31.580.

3. Do the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Receipt of benefits from collateral sources does not affect the measure of damages as far as the jury is concerned in Oregon. Or. Rev. Stat. §31.580. However, collateral source benefits may result in post-verdict reduction of the plaintiff's damages, depending on the source of the benefit received.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Oregon courts have addressed the fairness of allowing a plaintiff to recover more than what was paid for treatment in terms of provider write-offs pursuant to an agreement with Medicare or with private insurance. In *White*, the court held that the plaintiff was entitled to recover amounts a provider wrote off pursuant to a Medicare agreement because write-offs were a benefit of the Medicare program that the plaintiff earned through employment or payment of premiums. 219 P.3d 566. The court stated as follows:

> "Tying a plaintiff's claim to the amount that a third party has paid or satisfied undermines the collateral source rule by effectively linking the tortfeasor's obligation to the plaintiff's relationship with a third-party benefit provider. Moreover, exclusion of 'write-offs' from the amount that a plaintiff may claim creates the anomaly that a defendant will be liable for the full reasonable charges that a medical provider makes to an uninsured person who is injured, but may have more limited liability if the injured person is insured or the beneficiary of other third party benefits"

Id. at 583.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a noneconomic damages award?

U.C.J.I. 70.02, the uniform civil jury instruction for noneconomic damages subject to Or. Rev. Stat. §31.710, provides in relevant part as follows:

"Noneconomic damages are the subjective, nonmonetary losses that a [plaintiff/defendant] has sustained [or probably will sustain in the future].

The law does not furnish you with any fixed standard by which to measure the exact amount of noneconomic damages. However, the law requires that all damages be reasonable. You must apply your own considered judgment, therefore, to determine the amount of noneconomic damages.

In determining the amount of noneconomic damage, if any, consider each of the following:

(1) The [pain/mental suffering/emotional distress/ humiliation] that the [plaintiff/defendant] has sustained from the time [he/she] was injured until the present [and that the (plaintiff/defendant) probably will sustain in the future as a result of (his/her) injuries];

(2) Any inconvenience and interference with the [plaintiff/defendant]'s normal and usual activities apart from gainful occupation that you find have been sustained from the time [he/she] was injured until the present [and that the (plaintiff/defendant) probably will sustain in the future as a result of (his/her) injuries];

(3) Any injury to the (plaintiff/defendant)'s reputation]; and

(4) *Set forth any other subjective, nonmonetary losses or any other not objectively verifiable monetary losses sustained by plaintiff or defendant.*]"

Thus, an Oregon jury is not ordinarily instructed that the billed value of medical expenses may form a basis for a noneconomic damages award. Likewise, the jury is not instructed to avoid considering the billed value of medical expenses as a basis for a noneconomic damages award.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a noneconomic damages award, even if that was not the amount paid for the treatment services?

See the uniform jury instruction for noneconomic damages in claims subject to Or. Rev. Stat. §31.710 above. Oregon juries are not ordinarily instructed regarding the use of medical expenses, billed or paid, as a basis for an award of noneconomic damages. In Oregon, a plaintiff's measure of damages at trial is the reasonable value of necessary medical or psychological treatment caused by the tortious conduct. *Ellington*, 162 P.3d at 330-31. Thus, evidence of billed and/or paid medical expenses may be presented at trial and may, in practice, be the basis of the economic damage award.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

Collateral source and cost of treatment issues have not been the subject of any decisions applying state of federal constitutional law in Oregon. However, there have been several decision regarding the constitutionality of the damages caps in the Oregon Tort Claims Act ("ORCA"), codified at Or. Rev. Stat. §§30.260-30.302. For example, in *Clark v. Oregon Health Sciences University*, 175 P.3d 418 (Or. 2007), the Oregon Supreme Court held that the damages cap did not violate the remedy clause of the Oregon Constitution as applied to the plaintiff's medical malpractice claim against a public hospital, but did violate the remedies clause as to the claim against individually named hospital employees.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Endnote

[1] Or. Rev. Stat. § 31.710 caps non-economic damages at $500,000 in civil actions seeking damages arising out of bodily injury, death, or property damage of any one person. Or. Rev. Stat. § 31.710. The damages cap has been held to violate the remedy clause of the Oregon State Constitution in personal injury cases. *Hughes v. PeaceHealth*, 178 P.3d 225 (Or. 2008). The $500,000 cap is applicable to wrongful death cases and claims for prenatal injury, including injury that occurs during birth. *Klutschkowski v. PeaceHealth*, 263 P.3d 1130 (2011), *rev. allowed*, 2012 Or. LEXIS 116 (2012). The statute excludes tort actions against public bodies and workers' compensation claims from the cap.

Pennsylvania

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes, under Pennsylvania law, the collateral source rule provides that payments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer. *See Nigra v. Walsh*, 797 A.2d 353 (Pa. Super. 2002). This rule was intended to avoid precluding a claimant from obtaining redress for his or her injury merely because coverage for the injury was provided by some collateral source such as an insurance carrier. *See Beechwoods Flying Service, Inc. v. Al Hamilton Contracting Corp.,* 476 A.2d 350 (Pa. 1984).

a. If so, is there a right of subrogation for the insurer?

No, there is no right of subrogation for insurers; however workers' compensation carriers have a right to assert a lien.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

In *Feely v. United States of America*, 337 F.2d 924 (3d Cir. 1964), the Third Circuit, applying Pennsylvania law, held that the plaintiff, who filed a tort claim against United States, could not recover value of *free* medical care furnished by an agency of the defendant.

Though the *Feely* Court limited its holding to the specific facts of that case, truly "free" medical benefits are arguably not be recoverable by a plaintiff because "illusory charges" which are never paid and will never be paid by plaintiff or a collateral source are not recoverable under Pennsylvania law. *Moorhead v. Crozer Chester Medical Center,* 765 A.2d 786 (Pa. 2001).

a. If so, is there a right of subrogation for the charitable provider?

N/A

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No, given that the proper measure of damages for past medical expenses is the amount paid and accepted by plaintiff's health care providers as full payment. It makes no difference whether the collateral source was paid by Medicare, Medicaid, a private insurer or the plaintiffs themselves.

a. If so, what are the differences?

4. Are collateral source matters governed by statute, common law, or a combination of both?

Common law and statute. Although the general principle behind the collateral source doctrine arises from the common law, certain statutes have included sections which provide for limitations on recovery, such as the Motor Vehicle Code, 75 Pa.C.S. §1722 (2010) and the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. §1303.508 (2012).

The Motor Vehicle Act provides:

> In any action for damages against a tortfeasor, or in any uninsured or underinsured motorist proceeding, arising out of the maintenance or use of a motor vehicle, a person who is eligible to

receive benefits under the coverages set forth in this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719 (relating to coordination of benefits) shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers' compensation, or any program, group contract or other arrangement for payment of benefits as defined in section 1719.

75 Pa.C.S. §1722.

The MCARE Act provides:

40 P.S. §1303.508 (2012). Collateral Sources:

(a) GENERAL RULE—Except as set forth in subsection (d), a claimant in a medical professional liability action is precluded from recovering damages for past medical expenses or past lost earnings incurred to the time of trial to the extent that the loss is covered by a private or public benefit or gratuity that the claimant has received prior to trial.

(b) OPTION—The claimant has the option to introduce into evidence at trial the amount of medical expenses actually incurred, but the claimant shall not be permitted to recover for such expenses as part of any verdict except to the extent that the claimant remains legally responsible for such payment.

(c) NO SUBROGATION—Except as set forth in subsection (d), there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to a public or private benefit covered in subsection (a).

(d) EXCEPTIONS—The collateral source provisions set forth in subsection (a) shall not apply to the following:

(1) Life insurance, pension or profit-sharing plans or other deferred compensation plans, including agreements pertaining to the purchase or sale of a business.

(2) Social Security benefits.

(3) Cash or medical assistance benefits which are subject to repayment to the Department of Public Welfare.

(4) Public benefits paid or payable under a program which under Federal statute provides for right of reimbursement which supersedes State law for the amount of benefits paid from a verdict or settlement.

40 P.S. §1303.508 (2012).

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiffs are not entitled to a "windfall" for expenses which are not paid and will never have to be paid. The collateral source rule does not apply to "illusory charges" pursuant the Pennsylvania Supreme Court's holding in *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001). Simply put, in a situation where the injured party incurs no expense, obligation or liability, there is no justification for applying the collateral source rule. *See id*. at 790. In *Moorhead*, the Pennsylvania Supreme Court determined that the plaintiff could only recover the amount actually paid by a third party provider, not the additional amount for the market value of the services rendered. In doing do, the Court reasoned that, "[t]he collateral source rule does not apply to the illusory charge of the [additional market value] since that amount was not paid by any collateral source." *Id*. at 790 (internal quotations omitted). In essence, the Court in *Moorhead* prohibited the plaintiff from alleging past expenses that she had never actually incurred. *See Roberts v. Pennsylvania Hospital*, 2005 Phila. Ct. Com. Pl. LEXIS 587 (Phila. CCP 2006) aff'd 915 A.2d 158 (Pa. Super 2006) (holding that

the plaintiffs' "inclusion of past medical expenses that had not in fact been incurred would have provided Plaintiffs with a double recovery and would have violated [Moorhead]").

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The plaintiff can only recover the amount actually paid by the third party provider. *See Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

N/A

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. As explained in *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001), Plaintiffs are not entitled to recover a "windfall amount."

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

No. In *Martin vs. Soblotney,* 466 A. 2d 1022 (Pa. 1983), plaintiff offered evidence of the cost of medical services to prove non-economic damages. While medical expenses may bear on economic loss, the court opined that "there is no logical or experiential correlation between the monetary value of medical services required to treat a given injury and the quantum of pain and suffering endured as a result of that injury." *Id*. at 1025. Thus, the court concluded that evidence of Plaintiff's medical bills were not probative of non-economic loss and were therefore irrelevant.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

No. *See Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001).

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

In *Germantown Sav. Bank v. Philadelphia*, 512 A.2d 756 (Pa. Commw. Ct. 1986), the Pennsylvania Commonwealth court examined the constitutional validity of Section 8553(d) of the Political Subdivision Tort Claims Act which provided for different treatment of plaintiffs who would receive insurance as opposed to

those who would not. In holding section 8853(d) to be a valid exercise of legislative authority, the court noted that even if the provision conflicted with the judicially created collateral source doctrine, there is nothing to prevent the Legislature from enacting legislation which abrogates a judicial principle as long as the legislation is constitutionally valid. *Id*. at 761, fn. 9.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Rhode Island

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A. Collateral Source Rules

1. Are collateral source matters governed by statute, common law, or a combination of both? If R.I. law allows the Plaintiff to recover more than was paid, who keeps the windfall? Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

In Rhode Island, collateral source payments are governed by a combination of common law and statute. A plaintiff is generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment; however, Rhode Island General Laws §9-19-34.1 abrogates the common law collateral source rule in medical malpractice cases.

"The collateral source rule is a well-established principle of Rhode Island law." *Esposito v. O'Hair*, 886 A.2d 1197, 1199 (R.I. 2005). This common law rule prevents defendants in tort actions from reducing their liability with evidence of payments made to injured parties by independent sources. *Id.* The rationale for permitting plaintiffs to potentially recover in excess of their injuries is that "it is better for the windfall to go to the injured party rather than to the wrongdoer." *Id.* However, the application of the collateral source doctrine is more complex where a tortfeasor employer is entitled to a deduction from the plaintiff's damages by reason of sums or benefits paid by the employer. *Gelsomino v. Mendonca*, 723 A.2d 300 (R.I. 1999).

2. Does R.I. treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source? If so, what are the differences? If so, is there a right of subrogation for the insurer?

In medical malpractice matters §9-19-34.1 permits defendants to introduce evidence of certain types of third-party payments, in order to reduce a plaintiff's damages. Admissible evidence includes "state income disability or workers' compensation, any health, sickness or income disability policy, or other contracts" for reimbursement. *Id.* If the defendant elects to introduce such evidence, the plaintiff may offer evidence of contributions or payments made to secure such benefits. *Id.* The jury must be instructed to reduce the award by the difference between the benefits received and payments made. *Id.*

The statute does not permit introducing evidence of federal social security and Medicare. Moreover, the Rhode Island Supreme Court has held that a plaintiff's recovery cannot be reduced on the basis that the plaintiff received Medicaid because Medicaid is not "state income disability." *Esposito*, 886 A.2d at 1204.

In Rhode Island, "subrogation provisions in health insurance contracts have been held valid and enforceable by the health insurer against its subscribers." *Ditomasso v. Ocean State Physicians Health Plan, Inc.,* 1988 WL 1016798 (R.I. Super. 1988) (citing *Hospital Service v. Corporation Pennsylvania Insurance Co.*, 701 R.I. 708, 227 A.2d 105, 113 (1967)). Moreover, a claim for equitable subrogation "requires (1) the existence of a debt or obligation for which a party other than the subrogee is primarily liable, which (2) the subrogee, who is neither a volunteer nor an intermeddler, pays or discharges in order to protect his own rights and interests." *Credit Union Cent. Falls v. Groff,* 966 A.2d 1262 (R.I. 2009) (citing *Fidelity National Title Insurance Co. of Pennsylvania v. Chicago Title Insurance Co.,* 64 F.3d 656 (4th Cir. 1995)).

One effect of §9-19-34.1 is that, "to the extent a medical malpractice plaintiff is precluded by the statute from recovering sums paid by a collateral source, the collateral source is also prohibited from enforcing a lien against the plaintiff's recovery, or otherwise seeking to enforce as against the plaintiff a legal obligation to reimburse the collateral source." *Drysdale v. South County Hosp. Health Care System,* 2005 WL 373330 (R.I. Super.2005). In *Esposito*, the Rhode Island Supreme Court reserved on the issue of subrogation rights for third

party payors who are precluded from recovering under the statute and stated it "agree[d] that the amendment prohibit[ed] recovery by the collateral source against the plaintiff, [but] this Court does not have before it the effect of the statute on the subrogation right of the third-party payors, and the Court declines to reach that issue at this time." *Esposito*, 886 A.2d at 1202 n 6.

3. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment? And if so, is there a right of subrogation for the charitable provider?

Rhode Island law does not address whether plaintiffs are permitted to recover the costs of free or charitable care donated to a plaintiff for medical or psychological treatment. However, it is unlikely that a charitable provider would have any right of equitable subrogation because of the requirement that the subrogee cannot be a volunteer.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery? If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Rhode Island courts have not addressed whether a plaintiff may recover more in medical damages than the payments that were actually made on the plaintiff's behalf by a third party, usually an insurer. Plaintiffs often introduce evidence regarding the "reasonable value" or "street value" of medical services instead of the negotiated discounted rate that the insurance company actually paid. R.I. Gen. Laws §9-19-27 provides that medical bills may be used to show the fair and reasonable charge for the services. While the difference between the amount charged and the amount actually paid is often "written off" by medical providers, it is arguable that the plaintiff remains liable for the difference and should be able to recover the full amount as billed by the provider.

C. Use of Special Damages at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award? Even if that was not the amount paid for the treatment services?

Generally, medical records, bills, and reports are "subscribed and sworn to under penalties of perjury" by the physician, dentist, or authorized agent and admissible as evidence pursuant to R.I. Gen. Laws §9-19-27. The statute provides that the evidence may be used to show the fair and reasonable charge for the services; the necessity of the services or treatment; the diagnosis of the physician or dentist; the prognosis of the physician or dentist; the opinion of the physician or dentist as to proximate cause of the condition so diagnosed; and the opinion of the physician or dentist as to disability or incapacity, if any, proximately resulting from the condition so diagnosed. R.I. Gen. Laws §9-19-27(a). *Ouellette v. Carde*, 612 A.2d 687 (R.I. 1992), instructs that medical bills may alternatively be admitted through the business records exception to the hearsay rule, R.I. Rules of Evidence 803(6).

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in R.I.?

In *Esposito*, the Rhode Island Supreme Court stated "it [was] unnecessary for us to address whether [the medical malpractice statute abrogating the collateral source doctrine §9-19-34.1] is preempted by federal or is otherwise unconstitutional." *Esposito v. O'Hair*, 886 A.2d 1197, 1199 (R.I. 2005). However, §9-19-34.1 has been subject to Equal Protection challenges in the Superior Court. *See, e.g., Maguire v. Licht*, 2001 WL 1006060 (R.I. Super. 2001) (Hurst, J.) (declaring statute unconstitutional and noting Judge Ronald R. Lagueux "formally declared … in violation of the federal constitution" the predecessor to the statute in question here." *Dorias v.. Yu,* C.A. No. 90-198, Hearing on Motion In Limine (D.R.I. Oct. 7, 1991)); *but see Drysdale v. South County Hosp. Health Care System*, 2005 WL 373330 (R. I. Super. 2005) (Rubine, J.) (declaring statute constitutional).

South Carolina

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. *Covington v. George*, 359 S.C. 100, 597 S.E.2d 142 (2004); *Haselden v. Davis*, 353 S.C. 481, 579 S.E.2d 293 (2003). However, where the medical provider is paid by insurance purchased by the tortfeasor (such as medical payment insurance), the tortfeasor is entitled to a set-off for those funds, as they are "not independent of the wrongdoer." *Mount v. Sea Pines Co., Inc.*, 337 S.C. 355, 523 S.E.2d 464 (Ct.App.1999).

a. If so, is there a right of subrogation for the insurer?

Yes.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009);

a. If so, is there a right of subrogation for the charitable provider?

This has not been addressed in South Carolina courts.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No. *Covington v. George*, 359 S.C. 100, 597 S.E.2d 142 (2004), *Parker v. Spartanburg Sanitary Sewer Dist.,* 362 S.C. 276, 607 S.E.2d 711 (Ct.App. 2005).

4. Are collateral source matters governed by statute, common law, or a combination of both?

Common law.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff. *Haselden, supra.*

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

"Reasonable value" of medical services provided. "A plaintiff in a personal injury action seeking damages for the cost of medical services provided to him as a result of a tortfeasor's wrongdoing is entitled to recover the reasonable value of those medical services, not necessarily the amount paid." *Haselden v. Davis*, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003).

d. Other

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

While a defendant is permitted to attack the necessity and reasonableness of medical care and costs, he cannot do so using evidence of payments made by a collateral source. *Covington v. George*, 359 S.C. 100, 597 S.E.2d 142 (2004).

a.If a fixed figure, is it at the amount actually paid or billed? Something else? Plaintiff can introduce the billed amount, and Defendant may introduce evidence challenging the necessity and reasonableness of that billed amount, but not by reference to the collateral source.

b.If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

No.

(2) The amount billed for the services?

Yes.

(3) Provider testimony on the value of their services as compared to billed amounts?

Possibly. If the provider is a defendant in a medical malpractice case, they may not claim that the true, reasonable value of those services is the lesser amount paid by Medicaid. *Haselden v. Davis*, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003).

(4) Expert testimony on accuracy of provider billing rates?

Yes.

(5) The fact that a third-party payor (a/k/a insurance company) has already paid the bill?

No. However, South Carolina Courts allow evidence of payment by insurance company to impeach the plaintiff's credibility. *Bonaparte v. Floyd,* 291 S.C. 427, 443, 354 S.E.2d 40, 50 (Ct.App.1987).

(6) Any other factors?

"Among those factors to be considered by the jury are the amount billed to the plaintiff, and the relative market value of those services." *Haselden v. Davis,* 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003).

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. *Covington v. George*, 359 S.C. 100, 597 S.E.2d 142 (2004).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

There is a long-standing practice in South Carolina for Plaintiffs' attorneys to argue plaintiff's non-economic damages could be determined by using a multiplier of the medical care expenses. However, "[South Carolina's] Supreme Court has repeatedly stated: [t]he proper amounts to be rendered, as actual or punitive damages, are left, under our law, almost entirely to the trial jury and the trial judge." *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct.App. 2000).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

While no South Carolina Court has addressed this issue, it is reasonable and logical to conclude such practice would be permitted because the collateral source rule prohibits the introduction of the actually paid amount.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

South Dakota

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

In general, South Dakota has kept its common law collateral source rule in tact. Defendants are prohibited from introducing evidence that a plaintiff's award would be reduced because of a benefit received wholly independent of the defendants. *Papke v. Harbart*, 738 N.W.2d 510, (S.D. 2007). The collateral source rule prohibits defendants from reducing their liability because of payments made to the plaintiff by independent sources. *Id.*

However, South Dakota has created a limited exception to the common law collateral source rule through a statute that allows evidence of certain collateral sources in medical malpractice claims. S.D.C.L. §21-3-12 provides that in medical malpractice claims the defendant can introduce evidence to prove that special damages were paid for or are payable by insurance "which is not subject to subrogation and which was not purchased privately." Admissible evidence also includes payments from state or federal governmental programs not subject to subrogation. S.D.C.L. §21-3-12 (2011).

South Dakota courts do not permit evidence of collateral sources to impeach the testimony of a plaintiff regarding financial hardship. The South Dakota Supreme Court has held that the plaintiff's collateral sources cannot be examined through the defendant's case because of the influence it might have on the jury in determining an amount for damages. *Jurgenson v. Smith*, 611 N.W.2d 439 (S.D. 2000).

The South Dakota Supreme Court has also addressed the issue of write-offs. In *Papke*, the court held that the collateral source rule precluded the defendant surgeons from entering into evidence amounts from medical services that were written off because of the contractual limits between the plaintiff's medical providers and Medicaid and Medicare. The court acknowledged that the collateral source rule might sometimes create a windfall for a plaintiff, but allowed the rule to stand. *Papke v. Harbart*, 738 N.W.2d 510 at 533.

B. Recovery/Damages Issues

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The South Dakota Supreme Court has held that the calculation of damages for pain and suffering is "susceptible of no mathematical or rule of thumb computation." Since there are no accurate means of monetarily evaluating pain and suffering, the amount of damages to be awarded must largely be left to the "good judgment of the jury." *Plank v. Heirigs*, 156 N.W.2d 193, 203 (S.D. 1968).

In addition, the supreme court has stated that a plaintiff is generally entitled to recover only the reasonable value of medical services provided. *Papke v. Harbert*, 738 N.W.2d 510 at 533.

C. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

This has not been addressed as a constitutional issue in South Dakota.

Tennessee

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes, Tennessee has adopted the Restatement (Second) of Torts §920A. *See, Fye v. Kennedy,* 991 S.W.2d 754, 762-65 (Tenn.Ct.App. 1998).

a. If so, is there a right of subrogation for the insurer?

Yes, the injured party does not generally receive a double recovery because most insurers, upon paying their insured, are subrogated to the insured's continuing rights against the responsible tortfeasor. *See, Travelers Insurance Co. v. Williams*, 541 S.W.2d 587 (Tenn. 1976); *Hunter v. Burke,* 958 S.W.2d 751, 756 (Tenn. Ct.App. 1997).

The State's (TennCare) subrogation interest is governed by Tennessee Code Annotated §71-5-117.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes, the collateral source rule applies even when the medical services have been gratuitously rendered. *See, Fye v. Kennedy,* 991 S.W.2d 754 (Tenn.Ct.App. 1998).

a. If so, is there a right of subrogation for the charitable provider?

Yes.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No.

a. If so, what are the differences?

The only difference is the subrogation rights of the various third-party payment sources.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Collateral source matters are governed by a combination of both statute and common law. Most cases are governed by common law through Restatement (Second) of Torts §920A.

Medical malpractice actions are governed by Tennessee Code Annotated §29-26-119.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

Plaintiff is generally allowed to keep any windfall subject to the subrogation rights of the third party payor.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Tennessee allows plaintiffs to recover the reasonable value for necessary services to treat the injury or condition in question. *See, Fye v. Kennedy,* 991 S.W.2d 754, 762-65 (Tenn.Ct.App. 1998).

In medical malpractice cases, the plaintiff's recover is governed by Tennessee Code Annotated §29-26-119.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Whether the medical charges were reasonable and necessary is for the jury to decide.

a. If a question of fact for the jury, is the jury allowed to consider the following?

There is scant case law on what information the jury can consider in order to determine the reasonable value of the medical treatment rendered. A defendant is permitted to introduce relevant evidence regarding necessity, reasonableness, and whether a claimed service was actually rendered. However the jury is not entitled to know that a bill has been partially forgiven. *See, Fye v. Kennedy,* 991 S.W.2d 754 (Tenn.Ct.App. 1998).

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No, regardless of whether a collateral source is involved, the plaintiff is permitted to recover the reasonable value of necessary medical services.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

No. This author can find no case law addressing the fairness of allowing a plaintiff to recover more than was actually paid for treatment.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

There is no Tennessee case which specifically deals with whether a plaintiff would be permitted to use "billed value" at trial as a basis for non-economic damages award. Generally speaking, there is no definite standard or method of calculation prescribed by law by which to fix reasonable compensation for pain and suffering, permanent injury, disfigurement, and loss of enjoyment of life. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694 (Tenn.Ct.App. 1999).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

See, response to C.1.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

The only constitutional challenge to the collateral source rule in the State of Tennessee occurred when the Tennessee Legislature adopted Tennessee Code Annotated §29-26-119 as part of the Medical Mal-

practice Act. The statute was upheld and found constitutional under both the United States and Tennessee Constitutions. *See, Baker v. Vanderbilt University*, 616 F.Supp. 330 (M.D. Tenn. 1985).

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

At this point, the State of Tennessee has not adopted any clear "price spread" rules and it is this author's opinion that evidence of the price spread in medical services rendered to an injured plaintiff could be admissible to show the reasonableness of the services rendered so long as evidence of who is actually paying those benefits is not disclosed to the jury.

Texas

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes, to a limited extent. The Texas collateral source rule bars a wrongdoer from offsetting his assessed damage liability by the amount of payment a plaintiff received from a collateral source, *i.e.*, insurance benefits. Therefore, a plaintiff is allowed to recover from a wrongdoer the amount of payments made by insurers.

The application of the collateral source rule depends less upon the source of funds than upon the character of the benefits received. Medical insurance, disability insurance, employment benefits, social legislation benefits, other forms of protection purchased by a plaintiff are independent sources subject to the collateral source rule.

However, under Texas Civil Practice and Remedies Code Section 41.0105 a plaintiff may only recover *medical or health care expenses* actually paid or incurred by the plaintiff or a collateral source. Under this statute, a plaintiff may not recover medical or health care expenses billed, but written-off or written-down based upon the insurer's relationship with the medical provider.

See attached discussion of the Texas collateral source rule and statutory limitations.

a. If so, is there a right of subrogation for the insurer?

Yes.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

This issue has not been decided after enactment of Section 41.0105.

The exact issue was presented to the Dallas Court of Appeals in the case, *Big Bird Tree Serv. v. Gallegos*, No. 05-10-00923-CV. The case was submitted to the court of appeal on December 14, 2011 and a decision is pending.

Prior to enactment of Section 41.0105, Texas courts held a plaintiff could recover the reasonable value of any gratuitous medical services provided to a Plaintiff. *Texarkana Memorial Hosp., Inc. v. Murdock*, 903 S.W.2d 868, 874 (Tex. App.—Texarkana 1995), *rev'd on other grounds*, 946 S.W.2d 836 (Tex. 1997) (citing *Brown v. American Transfer & Storage Co*., 601 S.W.2d 931 (Tex. 1980); *McLemore v. Broussard*, 670 S.W.2d 301 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Oil Country Haulers v. Griffin*, 668 S.W.2d 903 (Tex. App. - Houston [14th Dist.] 1984, no writ)); *Texas Power & Light Co. v. Jacobs*, 323 S.W.2d 483 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.); *City of Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.).

a. If so, is there a right of subrogation for the charitable provider?

No cases could be located concerning this issue. However, if there were such a right, then the service would not truly be free or charitable.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Yes.

a. If so, what are the differences?

This issue is governed by Tex. Human Resources Code §32.033 which states, "[t]he filing of an application for or receipt of medical assistance constitutes an assignment of the applicant's or recipient's right of recovery from: (1) personal insurance; (2) other sources; or (3) another person for personal injury caused by the other person's negligence or wrong."

The state's right of recovery is limited to "the amount of the cost of medical care services paid" by the state.

Therefore, if a plaintiff receives Medicare or Medicaid benefits or other benefits provided by the state, the plaintiff automatically assigns a right of recovery for payment of medical expenses to the State. The Plaintiff can still pursue recovery in litigation, however.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Both. See attached discussion of the Texas collateral source rule and statutory limitations.

5. If State law allows the Plaintiff to recover more than was paid (by the Plaintiff), who keeps the windfall?

The Plaintiff, subject to the limitations of Texas Civil Practice & Remedies Code §41.0105.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider (collateral source).

Yes. Tex. Civ. Prac. & Rem. Code §41.0105.

b. Amount actually billed by the third-party (medical-services) provider.

No. Tex. Civ. Prac. & Rem. Code §41.0105.

c. "Reasonable value" of medical services provided.

Not exactly. The Plaintiff must prove the medical services expenses were necessary and reasonable but the recovery is still also limited to the amount actually paid or incurred.

d. Other

To recover for past medical expenses, a plaintiff must prove: (1) the expenses were necessary to treat the injury and were reasonable in amount, and (2) the expenses were paid or incurred by or on behalf of the plaintiff. Tex. Civ. Prac. & Rem. Code §§18.001, 41.0105; *Haygood v. De Escabedo*, 356 S.W.3d 390, 399 (Tex. 2011) (recognizing that claimant seeking to recover medical expenses must prove both that fees are reasonable pursuant to Section 18.001 but also limited to the amount actually paid or incurred under Section 41.0105).

Plaintiff can prove past medical expenses were reasonable and necessary either by expert testimony or by affidavit of past expenses. *Ibrahim v. Young*, 253 S.W.3d 790, 808 (Tex. App.—Eastland 2008, pet. denied); Tex. Civ. Prac. & Rem. Code §18.001.

Amount of medical expenses is determined by the jury and can include hospital care, doctors' services, services of other health-care providers (*e.g.*, chiropractors, psychiatrists, nurses, physical therapists), laboratory tests, and transportation. *Coca-Cola Bottling Co. v. White*, 545 S.W.2d 279, 280-81 (Tex. App.—Waco 1976, no writ).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

Yes. See discussion in (1) above.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

The jury may only consider the amount actually paid or incurred. Evidence of the amount billed could only be considered if there was no reduction or adjustment in that amount, *i.e.*, the full amount billed is the amount actually paid or incurred. Evidence that a third-party payor already paid the bill would be inadmissible under the collateral source rule. See attached discussion of the Texas collateral source rule and statutory limitations.

3. Does the damage a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Yes, if the payment by the collateral source resulted in a reduction of the amount charged by the medical provider. See attached discussion of the Texas collateral source rule and statutory limitations.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. In *Haygood v. De Escabedo*, 356 S.W.3d 390, 395-96 (Tex. 2011) the Supreme Court of Texas determined that allowing a Plaintiff to recover the full amount billed, rather than the amount actually paid or incurred for treatment would result in an improper windfall to Plaintiff. "To impose liability for medical expenses that a health care provider is not entitled to charge does not prevent a windfall to the tortfeasor; it creates one for a claimant . . . ."

See attached discussion of the Texas collateral source rule and statutory limitations.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

If the claimant is liable for the billed value of the medical expenses, then he may introduce evidence of that amount at trial. However, if the provider reduced or adjusted the billed amount because of private or government insurance, then the plaintiff may only introduce evidence of the amount actually paid or incurred. The collateral source rule precludes any mention of insurance benefits or coverage.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

See previous answer.

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

Yes.

(1) *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App. – San Antonio 2007, no pet.).

After holding Texas Civil Practice & Remedies Code Section 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted or "written off" by a collateral source, the Court addressed constitutional arguments that: (1) if defendants are allowed to benefit from medical provider write-offs, then the statute's "sole purpose would be to discriminate against financially responsible injured parties by taking away their benefits or rights they acquired under their health insurance policy, and give that right or benefit to a wrongdoer, thus treating the financially responsible injured party differently than a financially irresponsible party"; and (2) Section 41.0105, effectively, operates as a violation of the open courts provision of the Texas Constitution.

With regard to issue (1), the Court held, "[i]t does not seem likely, however, that the Legislature considered the possibility that people will risk not having their medical bills covered by insurance just to make sure that a defendant from whom they may recover will not benefit from their health insurance coverage. It is more likely that the Legislature's purpose was to develop a statutory scheme that would allow neither the injured plaintiff nor the responsible defendant to benefit from the medical provider's write-off. In the end, regardless of whether an injured plaintiff is covered by health insurance or whether some of his bills are written off because of contracts with health insurance carriers, the injured plaintiff will still be able to recover from the defendant the amount paid to his medical provider. Thus, the statute has a reasonable relation to a proper legislative purpose, and it is not arbitrary or discriminatory."

With regard to issue (2), the Court held, "Section 41.0105 in no way restricts a common law cause of action. A plaintiff still has access to the courts to bring a common law cause of action against a negligent defendant for injuries sustained in an accident. By allowing the defendant an offset for a medical provider's write-off due to a contract with the plaintiff's insurance carrier, the Legislature has only limited the damages a plaintiff may recover. As stated above, the plaintiff will still be able to recover the amount paid to his medical provider. We, therefore, find no open courts violation."

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No cases could be located concerning this issue.

Utah

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Pursuant to the collateral source rule, Utah allows a plaintiff to recover the costs of third-party payments made by insurers for medical treatment. Utah law states that "when an insurance company pays a party a sum of money pursuant to a policy, the premium of which was not paid by nor contributed to by the defendant, the payments so received belong to the plaintiff and are not to be credited to the defendant." *Phillips v. Bennett*, 439 P.2d 457, 457-58 (Utah 1968). This general rule would likely apply to psychological treatment also, although no Utah state court has addressed the issue directly. See *Mahana v. Onyx Acceptance Corp.*, 96 P.3d 893, 901 (Utah 2004) ("[T]he collateral source rule is applicable unless the collateral recovery comes from the defendant or a person acting on his behalf"). Federal courts applying Utah law have followed this rule and have allowed plaintiffs to recover costs of psychological treatment paid by third parties. See *Chavez v. Poleate*, No. 2:04-CV-1104 CW, 2010 WL 678940, at *2 n.2 (D. Utah Feb. 23, 2010) (allowing recovery for prison inmate whose psychological treatment was paid for by state).

Medical malpractice cases present an exception to the general rule. In these cases, state statute requires a court to "reduce the amount of the award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him. No reduction may be made for collateral sources for which a subrogation right exists as provided in this section nor shall there be a reduction for any collateral payment not included in the award of damages." Utah Code Ann. §78B-3-405(1) (2010). In these situations, any reduction occurs only after liability is found and damages are awarded by the fact-finder; thus, from the fact-finder's perspective, the case plays out as if the plaintiff could recover the cost of the insurer's payments. However, the plaintiff is not actually permitted to recover the cost of such payments. *See id.* at §78B-3-405(2).

a. If so, is there a right of subrogation for the insurer?

Insurers have a right of subrogation under Utah law. Utah Code Ann. §31A-21-108. Generally, "the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tort-feasor," although parties may enter a different arrangement via contract if they wish. *Birch v. Fire Ins. Exchange*, 122 P.3d 696, 698 (Utah Ct. App. 2005. In medical malpractice cases, the terms of the Utah Health Care Malpractice Act limit an insurer's right of subrogation to "amounts paid or received prior to settlement or judgment." Utah Code Ann. §78B-3-405(4). These amounts are only recoverable if the insurer serves written notice on the defendant against whom the malpractice claim is being asserted "at least 30 days before settlement or trial of the action. . . ." *Id.*

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Utah courts have stated in dicta that a tortfeasor's liability is not decreased "when charitable agencies come to the rescue of an injured person. . . ." *Suniland Corp. v. Radcliffe*, 576 P.2d 847, 848 (Utah 1978). However, no Utah case has addressed the issue in a holding. The Federal District Court for the District of Utah has allowed a plaintiff prison inmate to recover the cost of medical expenses paid by the State of Utah on her behalf. *Chavez v. Poleate*, No. 2:04-CV-1104 CW, 2010 WL 678940, at *2 (D. Utah Feb. 23, 2010).

In the medical malpractice context, "benefits received as gifts, contributions, or assistance made gratuitously" are not collateral sources required to be counted in determining a reduction of damages under the Utah Health Care Malpractice Act. Utah Code Ann. §78B-3-405(3)(c).

a. If so, is there a right of subrogation for the charitable provider?

No Utah law addresses the right of subrogation for a charitable provider.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

While no Utah case law exists on this question, the Federal District Court for the District of Utah has held that worker's compensation payments are not to be treated differently from other collateral sources. *Amos v. W.L. Plastics, Inc.*, No. 2:07-CV-49 TS, 2010 WL 360772, at *2-3 (D. Utah Jan. 22, 2010). Similarly, the Tenth Circuit has held, in a case arising out of Utah, that Railroad Retirement Act disability payments are collateral sources that do not limit a plaintiff's recovery. *Green v. Denver & Rio Grande W. R. Co.*, 59 F.3d 1029, 1032-33 (10th Cir. 1995) ("Our cases have always treated payments from the public treasury, at least when funded by a tax scheme to which the injured party contributed, as from a collateral source").

In the medical malpractice context, Utah's tort reform provisions dictate that deduction must be made from any damage award for "medical expenses and disability payments payable under the United States Social Security Act, any federal, state, or local income disability act, or any other public program, except the federal programs which are required by law to seek subrogation. . . ." Utah Code Ann. §78B-3-405(3)(a). The statute likewise requires deduction for any other health or income replacement insurance with the exception of life insurance, as well as deduction for private insurance plans and employer-provided disability plans. *Id.* at §78B-3-405(3)(b-d).

4. Are collateral source matters governed by statute, common law, or a combination of both?

In general, collateral source matters are governed by common law. See generally *Mahana v. Onyx Acceptance Corp.*, 96 P.3d 893 (Utah 2004). However, the Utah Health Care Malpractice Act is the controlling law regarding medical malpractice actions. *See* Utah Code Ann. §§78B-3-401 to -424.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The plaintiff is allowed to keep any windfall under Utah law. "The [collateral source] rule applies even in those cases where it results in a windfall to the plaintiff based on the premise that the plaintiff victim, rather than the defendant tortfeasor, should be the beneficiary of any windfall." *Mahana v. Onyx Acceptance Corp.*, 96 P.3d 893, 901 (Utah 2004).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The stated basis for recovery is the "reasonable value" of the treatment; thus, "once injuries have been shown, evidence is required to show that the medical expenses accurately reflect the necessary treatment that resulted from the injuries and that the charges are reasonable." *Gorostieta v. Parkinson*, 17 P.3d 1110, 1117-18 (Utah 2000); see also Model Utah Jury Instructions §CV2005 (2nd ed. 2010) ("reasonable and necessary expenses for medical care"). Whether the evidence of the expenses themselves is based on their billed value or the amount actually paid by a plaintiff or insurer is as yet undecided. See *Tschaggeny v. Milbank Ins. Co.*, 163 P.3d 615, 621 (Utah 2007) (noting that "application of the collateral source rule to medical bill write-offs is a matter of first impression in Utah" but declining to reach issue). The Federal District Court for the District of

Utah has predicted that Utah law *does* allow the billed amount to serve as the basis for recovery. *Amos v. W.L. Plastics, Inc.*, No. 2:07-CV-49 TS, 2010 WL 360772, at *2 (D. Utah Jan. 22, 2010).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Utah law does not provide a specific definition of the "reasonable value" of medical services. In general, the rule is that "damages are based on fault and are generally limited only by the findings and conscience of the jury." *Aris Vision Inst., Inc. v. Wasatch Property Mgmt., Inc.*, 143 P.3d 278, 282 (Utah 2006).

a. Is the jury allowed to consider the following:

i. The amount actually paid for the services?

Whether a jury may consider the amount actually paid for medical services is unaddressed in Utah law.

ii. The amount billed for the services?

A jury may consider the amount billed for medical services. *Steventt v. Wal-Mart Stores, Inc., 977* P.2d 508, 515 (Utah App. 1999). Before such bills can be submitted to the jury, a plaintiff must provide foundation that the medical services were necessitated by the injuries arising from the event in question and that the charges were reasonable. *Id.* This foundational requirement can be met by testimony from the plaintiff and does not require testimony from a doctor or insurance adjuster. *Id.* (stating that plaintiff had met the foundation requirements by testifying that the bills arose from the accident, that they were forwarded to her insurance provider, and that the insurance provider paid the bills without objection).

iii. Provider testimony on the value of their services as compared to billed amounts?

A physician, other medical provider, or insurance provider may testify as to the reasonableness of the value of a plaintiff's treatment. *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 514 (Utah Ct. App. 1999). Whether a provider may give testimony regarding the value of their services as compared to the billed amounts is not addressed in Utah law.

iv. Expert testimony on accuracy of provider billing rates?

No Utah case has been found in which a party attempted to admit such evidence, likely because the controversy over whether the billed amount or paid amount may be used as evidence has not yet been resolved. See *Tschaggeny v. Milbank Ins. Co.*, 163 P.3d 615, 621 (Utah 2007) (declining to reach issue of whether billed amount is admissible).

v. The fact that a third-party payor (a/k/a an insurance company) has already paid the bill?

Evidence that an insurer has paid the plaintiff's medical bills is admissible to show that the billed amount was reasonable. *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 515 (Utah Ct. App. 1999) (holding that the plaintiff's testimony that her medical bills had been submitted to and paid by her insurance company provided sufficient foundation that the medical charges were reasonable).

vi. Any other factors?

Utah courts have stated that "[w]hen the bill of a physician is paid it is prima facie evidence of its reasonableness." *Barlow v. Salt Lake & U.R. Co.*, 194 P. 665, 674 (Utah 1920); see also *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 514 (Utah Ct. App. 1999) (same).

3. Do the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Generally, the amount of recovery does not vary based on the presence or absence of a collateral source. See *Phillips v. Bennett*, 439 P.2d 457, 457-58 (Utah 1968), Model Utah Jury Instruction §CV2024 ("You

shall award damages in an amount that fully compensates [name of plaintiff]. Do not speculate on or consider any other possible sources of benefit [name of plaintiff] may have received").

The only exception to this rule is defined by statute in the medical-malpractice context. *See* Utah Code Ann. §78B-3-405. Utah's medical malpractice statute requires a diminution in the plaintiff's recovery by the amount of the collateral sources available, unless a provider of collateral-source funds pursues its right of subrogation under the statute. *Id.* at §78B-3-405(1).

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

In general, the rule in Utah is that a windfall to the plaintiff is not frowned upon. See *Mahana v. Onyx Acceptance Corp.*, 96 P.3d 893, 901 (Utah 2004). Utah courts, however, have not directly addressed the fairness of allowing a plaintiff to recover more than any party (the plaintiff or her insurer) paid for treatment. See *Tschaggeny v. Milbank Ins. Co.*, 163 P.3d 615, 621 (Utah 2007) (declining to reach issue).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Utah Courts have not specifically addressed this question. A jury is generally permitted to review the billed value at trial. *Steventt v. Wal-Mart Stores, Inc., 977* P.2d 508, 515 (Utah App. 1999). However, Utah has not specifically allowed or prohibited the use of the billed value as a basis for non-economic damages.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Utah courts have not specifically addressed this question. See *Tschaggeny v. Milbank Ins. Co.*, 163 P.3d 615, 621 (Utah 2007) (failing to reach question of use of billed value as basis for recovery).

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your state?

No cases implicating federal constitutional concerns have been found in this area. The Utah Supreme Court recently addressed a state constitutional issue in *Anderson v. United Parcel Service*. 96 P.3d 903, 907 (Utah 2004). The specific issue was the constitutionality of the damages-apportionment portion of Utah's workers' compensation statute, which gives insurers first opportunity to recover upon the receipt of a judgment against a third-party tortfeasor. Utah Code Ann. §34A-2-106(5). The plaintiffs in *Anderson* argued that this scheme violated a portion of the Utah Constitution, which states that "The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law." Utah Const. art. XVI, §5. The court disagreed, holding that a provision altering the disbursement of damage awards did not have the effect of "abrogating" the plaintiffs' right to damages or limiting the amount recoverable; furthermore, the exemption for "injuries resulting in death" was applicable, since the plaintiffs' underlying action was for wrongful death. *Anderson*, 96 P.3d at 907-08.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

While there may be potential for a challenge to the collateral source provisions of the Utah Health Care Malpractice Act on the grounds that they violate the equal-protection and due-process provisions of the Utah Constitution, such a challenge is unlikely to succeed given the Utah Supreme Court's decision to uphold similar challenges to other tort reform provisions. See *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (upholding cap on medical-malpractice damages).

Vermont

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. The collateral source rule "allows plaintiff to make a full recovery against the tortfeasor even when compensated for injuries by a source independent of the tortfeasor. However, that rule is usually limited to compensation provided an injured party through insurance, unemployment benefits or similar compensation yielded because the plaintiff actually or constructively paid for it, or in cases where the collateral source would be recompensed from the total recovery through subrogation, refund or some other arrangement. The cases reflect the philosophy that a tortfeasor should not reap the benefits of a victim's providence." *See My Sister's Place v. City of Burlington and Lt. John Vincent*, 139 Vt. 602, 612-13 (1981).

a. If so, is there a right of subrogation for the insurer?

The ability of an insurer to subrogate generally depends on the wording of the policy.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Yes. "The 'collateral source' rule prohibits a tort defendant from obtaining 'a setoff for payment the plaintiff receives from a third, or collateral, source.'" *Madrid v. Paquette*, 2008 Vt. Super. LEXIS 83, *2 (Superior Court of Vermont Addison County July 28, 2008), quoting, *Hall v. Miller*, 143 Vt. 135, 141, 465 A.2d 222 (1983). The collateral source rule bars any reduction in damages based upon charitable donations to Plaintiff. *Id*. at *3. It stands to reason that free or donated care received by Plaintiff is recoverable (costs).

a. If so, is there a right of subrogation for the charitable provider?

The case law does not indicate that there is a right of subrogation for the charitable provider.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

Vermont does not treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare, Medicaid, a private insurer or some other third party source. "… under Vermont law Medicaid benefits are to be treated the same as insurance, gifts, or charitable donations to an injured plaintiff. The collateral source rule bars any reduction in damages as a result of the Medicaid payments." *Madrid v. Paquette*, 2008 Vt. Super. LEXIS 83, *3 (Superior Court of Vermont Addison County July 28, 2008).

a. If so, what are the differences?

N/A.

4. Are collateral source matters governed by statute, common law, or a combination of both?

In Vermont, collateral source matters are governed by common law. There is a caveat to this when it comes to the payment of workers' compensation benefits and recoveries associated therewith. "Section 624 of Title 21 (21 V.S.A. Section 624) governs recoveries from third parties in workers' compensation cases. … Section 624(a) provides that a workers' compensation recovery is not an employee's exclusive remedy when a third party is also liable for damages. …. Section 624(b) governs settlement of claims by employees, employers, and their respective insurance carriers, and section 624(c) provides that settlements by employees do not bar further action by the employer or its insurance carrier. Section 624(e) provides that damages recovered by employees will be applied as follows: first, the employer (or its insurance carrier) shall be reimbursed for any

amounts paid or payable to the date of recovery; second, the employee is paid the balance of the recovery, but that payment is treated as an advance on any future payments due to the employer." *Smedberg v. Detlef's Custodial Service, Inc.,* 940 A.2d 674, 683-84 (2007). In *Windsor*, below, the court cited to decisions from other jurisdictions which counseled against the application of the collateral source rule to scenarios where liability determinations were not based on fault. In *Dennison v. Head Constr. Co.*, 458 A.2d 868, 874 (Ct. of Special Appeals Md. 1983) (Because an award of workers' compensation benefits does not involve questions of wrongdoing, the collateral source rule does not prevent the state from reducing state benefits where worker received federal benefits for the same injuries.) The picture becomes less clear when there is a third-party wrongdoer whose liability may be based on fault considerations.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

In Vermont, if Plaintiff recovers more than was paid the Plaintiff keeps the windfall. "There is no reason why the rule should be any different by the happenstance that the injured party qualifies for Medicare or that the medical provider accepted less than the billed amount due to Medicare restrictions, contracts with medical insurers, benevolence, or any other reason." *Sherman v. Ducharme et al.*, 2009 Vt. Super. LEXIS 66, *4 (Superior Court of Vermont, Windsor County November 10, 2009).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Reasonable value of medical services provided.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Indications from the case law are that "reasonable value" is left for the jury or the finder of fact to decide. A Plaintiff bears the burden of establishing the reasonableness of medical bills in a trial setting. To satisfy that burden, a Plaintiff will typically rely on the testimony of a medical expert to establish that the bills were necessary and reasonable in amount based upon knowledge of the charges for such services. *See Sherman v. Ducharme et al.,* 2009 Vt. Super. LEXIS 66 (Superior Court of Vermont, Windsor County November 10, 2009). Defendant argued that evidence of Medicare payments is an indication of the reasonableness of those charges. The court disagreed. "Simply stated, the amount actually paid for medical services, if anything, is much different than the value of those services. Actual payment does not equate with reasonable value and is influenced by many other factors." *Id.* at *3.

In reasoning that "[t]he amount actually paid for medical services is not admissible as evidence of the value of those services," the court cited to a Wisconsin case. *See Leitinger v. DBart, Inc.,* 2007 WI 84, 302 Wis.2d.110, 736 N.W.2d 1, 18 (Wis. 2007). "Evidence of value instead comes from the medical expert opinion at trial in the form of opinion as to reasonableness of the medical charges, not the medical payments." *Sherman* at *4-*5.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

N/A.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

In determining the reasonable value of medical services, the jury, or finder of fact, is allowed to consider expert testimony on the reasonableness of the medical charges. See answer above.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Vermont courts embrace the truly punitive nature of the collateral source rule. The focus is not on fairness per se, but as between the injured party and the wrongdoer, courts want to ensure that the party whose negligence or conduct caused the injury bears the financial burden for the loss. Courts recognize that the rule may result in a plaintiff obtaining a "double recovery." Securing a windfall for plaintiffs is not, however, the essential purpose of the rule. The essential purpose of the rule is preventing a wrongdoer from escaping liability for his or her misconduct. *See Windsor School District v. State of Vermont and Department of Corrections*, 183 Vt. 452 (2008).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

There is no indication in the case law that this is permitted. As discussed herein, the damage measure for medical expenses is simply "the reasonable value of the services rendered to the plaintiff." According to *Smedberg*, above, a jury may consider the type of medical services rendered in reaching a determination on the valuation of non-economic damages. "Second, the damages awarded -- $0 for past and future pain and suffering and loss of enjoyment of life – were grossly inadequate given the evidence adduced at trial. Citations omitted. This is not a case where plaintiff's injuries are de minimis or speculative, or where medical expenses were incurred to rule out the possibility of injury." 940 A.2d at 681. In support, the *Smedberg* court cited to a district court decision from Oklahoma and a state court decision from Nebraska. In both instances, the courts upheld a jury verdict of $0 for pain and suffering because medical expenses were incurred only to determine that no serious injuries were caused and/or sustained. *Id*. In Smedberg, the court determined that "[t]here was no dispute at trial over whether the surgery was reasonable and necessary, nor does the record suggest that the surgery was meant to remedy a preexisting condition or anything other than injuries sustained in the hallway slip and fall. According to plaintiff's doctor's uncontradicted testimony, she attempted various nonsurgical methods to manage the pain and avoid surgery, but without success." *Id*.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

See answer to C.1. above.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No.

Virgin Islands

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

No. In 1986, the Virgin Islands Legislature enacted 5 V.I.C. §427, partially abrogating the collateral source rule as it relates to payments for medical expenses or lost income only. In its entirety, the statute reads as follows:

> 5 V.I.C.§427 Collateral source rule limitation
>
> > In any cause of action alleging damages for medical expenses or lost income sustained by or on behalf of a party, including, without limitation, actions alleging damages for bodily injury, death or property damage, or any combination thereof, the collateral source rule shall not be applied. Any party may introduce evidence that the other party who is claiming damages for medical expenses or lost income has received, or is entitled to receive, other compensation for such damages, including, but not limited to benefits from workmen's compensation, medical and hospital insurance, prepaid health care, social security, retirement or pension, and any employer paid program, such as wage continuation and disability benefits programs. Nothing in this section shall be construed to reduce any award where there is a statutory lien against the judgment as a result of a third party payment.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

There is no case law in the Virgin Islands on the issue of whether the recovery of free or charitable medical care would be treated any differently than paid medical care. However, it is likely that a court would apply the provisions of 5 V.I.C.§427 as the statute applies to the receipt of any other compensation for medical expenses and lost income received by the party, and is not limited to benefits from insurance programs.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

There is no statute or case law in the Virgin Islands that differentiates between payments received from Medicare, Medicaid or a private insurer.

4. Are collateral source matters governed by statute, common law, or a combination of both?

A combination of both. As referenced above, 5 V.I.C.§427 abrogates the collateral source rule as it relates to payments for medical expenses or lost income only. In the recent decision of *Pedro v. Huggins*, __ V.I. __; 2010 WL 891040 *2 (Super. Ct. 2010), the Virgin Islands Superior Court stated that 5 V.I.C.§427 must be strictly construed, limiting its application to medical expenses and lost income. The Superior Court clarified that the statute is "not a wholesale abrogation or nullification of the collateral source rule" but only a "mere limitation in the application of the collateral source rule." The collateral source rule is still alive and well in the Virgin Islands as it relates to collateral source payments for other damages, such as damage to property.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall.

Not applicable as it relates to third-party payments made by insurers for medical or psychological treatment. *See* 5 V.I.C.§427.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment what is the stated basis for recovery?

Not applicable. *See* 5 V.I.C.§427.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Not applicable. *See* 5 V.I.C.§427.

3. Do the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Not applicable. *See* 5 V.I.C.§427.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Not applicable. *See* 5 V.I.C.§427.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

There is no case law guidance in the Virgin Islands with regard to whether a Plaintiff can use the billed amount of medical bills or the amount actually paid by an insurer as a basis for determining non-economic damages. It is also difficult to predict how the Virgin Islands Supreme Court would decide the issue. The Supreme Court generally takes a plaintiff-friendly approach; but, given the Virgin Islands' partial abrogation of the collateral source rule, seemingly designed to preclude double recovery by the plaintiff, a good argument can be made that the Plaintiff cannot recover costs that not actually incurred. This would also be consistent with the rule that a Plaintiff is only entitled to recover actual damages incurred.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services.

To our knowledge, this issue has not been litigated in the Virgin Islands.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State Constitution to challenge "price spread" rules that currently exist?

Not applicable.

Virginia

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A. Collateral Source Rules

1. Is Plaintiff permitted to recover third-party payments?

Yes. "[C]ompensation or indemnity received by a tort victim from a source collateral to the tortfeasor may not be applied as a credit against the quantum of damages the tortfeasor owes. A person who is negligent and injures another owes to the latter full compensation for the injury inflicted, and payment for such injury from a collateral source in no way relieves the wrongdoer of the obligation." *Acuar v. Letourneau*, 260 Va. 180, 189, 531 S.E.2d 316, 320 (2000) (internal citations and alterations omitted).

a. Right of subrogation?

No. "No insurance contract providing hospital, medical, surgical and similar or related benefits … shall contain any provision providing for subrogation of any person's right to recovery for personal injuries from a third person." Va. Code §38.2-3405; *accord* Va. Code §38.2-2209 (forbidding any right of subrogation in favor of a liability insurance carrier against a third-party tortfeasor for sums the insurer paid an insured for medical expenses incurred for bodily injury caused by an accident).

2. Is Plaintiff permitted to recover free or charitable care?

Yes. "If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers." *Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 387, 560 S.E.2d 246, 251 (2002) (quoting Restatement (2d) of Torts §920(A)).

a. Right of subrogation?

No. See A.1.a above.

3. Does it matter if the payer is Medicare, Medicaid, a private insurer, etc.?

No. "Originally, the collateral source rule applied exclusively to claims ex delicto. In the early cases, the collateral compensation involved was money paid the plaintiff by his own insurer. Later cases have applied the rule to social security benefits, public and private pension payments, unemployment and workers' compensation benefits, vacation and sick leave allowances, and other payments made by employers to injured employees, both contractual and gratuitous." *Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377, 387, 560 S.E.2d 246, 251 (2002) (citation and quotation marks omitted).

4. Are collateral source matters governed by statute or common law?

Common law.

5. Who keeps windfall?

Plaintiff. "A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall. Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer." *Acuar v. Letourneau*, 260 Va. 180, 193, 531 S.E.2d 316, 323 (2000).

B. Value of Recovery

1. What is stated basis for recovery for medical/psychological treatment?

Amount actually billed by third-party provider, provided it is reasonable; write-offs cannot be held against Plaintiff. *Acuar v. Letourneau*, 260 Va. 180, 189, 531 S.E.2d 316, 320 (2000); *McMunn v. Tatum*, 237 Va.

558, 568, 379 S.E.2d 908, 913 (1989) (providing that jury must find that bills are authentic, reasonable, medically necessary, and caused by the defendant's negligence).

2. Are Plaintiff's damages affected by collateral source?

No. *Acuar v. Letourneau*, 260 Va. 180, 189, 531 S.E.2d 316, 320 (2000).

3. Have Courts addressed when Plaintiff recovers more than actual payment?

Yes. It is allowed as a "windfall" to plaintiff. See A.5 above.

C. Use of Specials at Trial

1. Can Plaintiff use billed value at trial for non-economic damages?

Yes, can use medical bills as evidence that Plaintiff did in fact suffer pain and suffering. *Parker v. Elco Elevator Corp.*, 250 Va. 278, 280, 462 S.E.2d 98, 100 (1995); *accord Barkley v. Wallace*, 267 Va. 369, 373, 595 S.E.2d 271, 273-74 (2004).

2. Even if it was not the amount actually paid?

Likely yes, for the same reasons given in C.1 above. *See Barkley v. Wallace*, 267 Va. 369, 373, 595 S.E.2d 271, 273-74 (2004) (allowing bills to show non-economic damages where bills had been discharged in bankruptcy).

D. Constitutional Issues

1. Any constitutional challenge to Collateral Source Rule or cost of treatment issues?

No.

2. Any constitutional basis for challenging "price spread" rules?

No. Since the above rules are based in common law and not statutory law, no constitutional challenge seems likely.

Washington

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes.

a. If so, is there a right of subrogation for the insurer?

Yes. Washington's doctrine of equitable subrogation enables an insurer that has paid its insured's loss to recoup that payment from the party responsible for the loss. *Mahler v. Szucs,* 135 Wn.2d 398, 413, 957 P.2d 632 (1998), *rev'd on other grounds*, *Matstuk v. State Farm Fire & Cas. Co.*, 2012 WL 402050 (2012). Under this doctrine, the "general rule is that where the insured is entitled to receive recovery for the same loss from more than one source, *e.g.,* the insurer and the tortfeasor, the insurer acquires a right to subrogation only after the insured has been fully compensated for all of the loss." *Leingang v. Pierce Cy. Medical Bureau, Inc.,* 131 Wn.2d 133, 138 n. 2, 930 P.2d 288 (1997).

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Probably. While Washington has not specifically addressed this issue, it follows a "strict exclusion rule." This rule excludes all evidence of payments, the origin of which is independent of the tort-feasor, received by the plaintiff. *Boeke v. International Paint Co*., 27 Wn. App. 611, 618, 620 P.2d 103 (1980) (*citing Reinan v. Pacific Motor Trucking Co*., 270 Or. 208, 212-13, 527 P.2d 256 (1974)).

a. If so, is there a right of subrogation for the charitable provider?

Maybe, but again the collateral source rule has not been specifically applied to charitable contributions.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No. *See Ciminski v. SCI Corp*., 90 Wn.2d 802, 807, 585 P.2d 1182 (1978). In *Ciminski*, the defendant argued that the collateral source rule should only apply if the plaintiff financially contributed to the insurance or benefit. *Id*. at 804. The defendant argued that because plaintiff had not paid any taxes funding Medicare, the plaintiff should not be gratuitously rewarded. *Id*. The Washington Supreme Court disagreed, and held that Medicare payments were subject to the collateral source rule, and not admissible at trial. *Id*. 807.

a. If so, what are the differences?

None.

4. Are collateral source matters governed by statute, common law, or a combination of both?

Mostly common law, however, RCW 7.70.080 replaces the common law collateral source rule, and allows the defendant to present evidence that the plaintiff has already been compensated. This exception *only* applies in lawsuits against health care providers.

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The Washington Supreme Court has long held that "payments, the origin of which is independent of the tort-feasor, received by a plaintiff because of injuries will not be considered to reduce the damages other-

wise recoverable." *Ciminski*, 90 Wn.2d at 804, *see also, Johnson v. Weyerhaeuser Co*., 134 Wn.2d 795, 798, 953 P.2d 800 (1998). Accordingly, "as between an injured plaintiff and a defendant-wrongdoer, the plaintiff is the appropriate one to receive the windfall." *Xieng v. Peoples Nat'l Bank*, 120 Wn. 2d 512, 523, 844 P.2d 389 (1993) (*citing Ciminski*, 90 Wn. 2d at 805-06).

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a.Amount actually paid by the third-party provider.

b.Amount actually billed by the third-party provider.

c."Reasonable value" of medical services provided.

d.Other

Washington follows (c) the "reasonable value" of medical services provided. The plaintiff in a negligence case may recover only the reasonable value of medical services received, not the total of all bills paid. *Hayes v. Weiber Enterprises*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001) (*citing Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997)). Accordingly, the plaintiff must prove that medical costs were reasonable and, in doing so, cannot simply rely on medical records and bills. *Nelson v. Fairfield*, 40 Wn. 2d 496, 501, 244 P.2d 244 (1942). "In other words, medical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable." *Patterson*, 84 Wn. App. at 543.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

The concept of "reasonable value" is for the jury to decide. The burden of proving the reasonableness and necessity of medical expenses, however, rests with the plaintiff. *Patterson*, 84 Wn. App. at 543. To prove the reasonableness and necessity of past medical expenses, the plaintiff may not rely solely on his or her own testimony as to amounts incurred. *Nelson*, 40 Wn. 2d 496, 501, 244 P.2d 244 (1952). Nor can the plaintiff rely solely on medical records and bills. *Patterson*, 84 Wn. App. at 543. "[M]edical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and the bills were both necessary and reasonable." *Id*. Generally, expert testimony will be necessary to establish the reasonableness and necessity of medical expenses. *See Lakes v. von der Mehden*, 117 Wn. App. 212, 219, 70 P.3d 154 (2003) (suggesting that in the absence of an admission by defendant that certain medical expenses were reasonable and necessary, expert testimony would be needed).

> Proof of such special damages need not be unreasonably exacting and may come from any witness who evidences sufficient knowledge and experience respecting the type of service rendered and the reasonable value thereof. The witness need not be the attending physician or a physician at all, for that matter, so long as he demonstrates the requisite qualifications within the sound discretion of the trial court, at which point the issue becomes one of the weight to be attached to his testimony.

Kennedy v. Monroe, 15 Wn. App. 39, 49-50, 547 P.2d 899 (1976) (*citing Palmer v. Massey-Ferguson, Inc*., 3 Wn. App. 508, 476 P.2d 713 (1970).

When the plaintiff presents sufficient evidence establishing the reasonableness and necessity of his or her medical treatment and expenses, and the defendant elicits no controverting evidence, the reasonableness and necessity of plaintiff's medical expenses are not a matter of legitimate dispute. *Palmer v. Jensen*, 132 Wn. 2d 193, 199, 937 P.2d 597 (1997).

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

No. *Hayes*, 105 Wn. App. 611.

(2) The amount billed for the services?

Yes. *Hayes*, 105 Wn. App. 611.

(3) Provider testimony on the value of their services as compared to billed amounts?

Yes. *See Kennedy,* 15 Wn. App. at 49.

(4) Expert testimony on accuracy of provider billing rates?

Yes. *See Kennedy,* 15 Wn. App. at 49.

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill)?

No, that would violate Washington's collateral source rule.

(6) Any other factors?

Yes, the parties are essentially allowed to present any evidence regarding the reasonable value of the medical expenses – through their medical expert – so long as the defendant does not present evidence regarding the negotiated rate paid by the insurance company. *See Hayes*, 105 Wn. App. 611.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. This issue was addressed by the Washington Supreme Court in *Ciminski v. SCI Corp*:

> Where a part of a wrongdoer's liability is discharged by payment from a collateral source, as here, the question arises who shall benefit therefrom, the wrongdoer or the injured person. No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act. If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing. We think we may judicially note that notwithstanding that the law contemplates full compensation, incidental losses and handicaps are suffered in a great number of personal injury cases which are not, and cannot be, fully compensated.

Ciminski, 90 Wn.2d at 807.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

No. *See* Washington Pattern Jury Instructions 30.01.01, 30.04 - 30.06. In awarding non-economic damages, the jury is only allowed to consider: (1) nature and extent of injuries; (2) the disability/disfigurement/loss of enjoyment of life experienced and with a reasonable probability to be experienced in the future; and (3) the pain and suffering (both mental and physical) experienced and with reasonable probability to be experienced in the future.

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

No. *See* above.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

No.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

No, it does not appear that Washington's collateral source rule violates any provision of Washington's constitution.

West Virginia

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Plaintiffs in West Virginia are generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment. However, in cases in which the defendant is a political subdivision, pursuant to the anti-subrogation provision of the Governmental Tort Claims and Insurance Reform Act, W. Va. Code §29-12A-13(c), as interpreted by *Foster v. City of Keyser*, 501 S.E.2d 165 (W.Va. 1997), the political subdivision defendant is entitled to an off-set for amounts paid by third-party payors.

a. If so, is there a right of subrogation for the insurer?

In most cases in West Virginia, there is a right of subrogation for the insurer. However, in cases where a political subdivision is the defendant, any third-party payors are not permitted to subrogate. *See Foster*, 501 S.E.2d 165.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

The Supreme Court of Appeals in West Virginia has held, "An injured person is entitled to recover damages for reasonable and necessary nursing services rendered to him, whether such services are rendered gratuitously or paid for by another." Syl. pt. 5, *Kretzer v. Moses Pontiac Sales*, 201 S.E.2d 275 (W. Va. 1973).

The Court explained its holding:

> The general rule is that a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonably required by the injury. This is a recovery for their value and not for the expenditures actually made or obligations incurred. Thus, under this general rule, the fact that the medical and nursing services were rendered gratuitously to the one who was injured will not preclude the injured party from recovering the value of those services as a part of his compensatory damages.

Kretzer, 201 S.E.2d at 281 (quoting 22 Am. Jur. 2d, Damages, §207).

However, skillful defense practioners in West Virginia can still take the position that the holding in *Kretzer* does not apply to written off or adjusted amounts where healthcare providers have adjusted their charges based upon a negotiated arrangement with a health care provider. One can argue, using the following case law, that gratuitous care provided by health care providers and then written off, does not constitute an "actual loss" of the Plaintiff. "Compensatory damages are such as measure the actual loss, and are given as amends therefor." Syl. pt 1, *Talbott v. W. Va. C. & P. R'y. Co*., 26 S.E. 311, 311 (W. Va. 1896), *rev'd on other grounds*, *Shaver v. Edgell*, 37 S.E. 664, 668 (W. Va. 1900)). In its discussions concerning the purpose of compensatory damages, the West Virginia Supreme Court of Appeals has stressed that they are to compensate for actual losses incurred by the plaintiff:

> Primarily, the aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant's injurious conduct....compensatory damages indemnify the plaintiff for injury to property, loss of time, necessary expenses, and other actual losses. They are proportionate or equal in measure or extent to plaintiff's injuries, or such as measure the actual loss, and are given as amends therefor....The general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been in if the tort had not been committed....a pre-

> vailing plaintiff may recover compensatory damages for, among other things, expenses actually incurred in repairing or redressing the injury occasioned by the defendant's conduct....

Kessel v. Leavitt, 511 S.E.2d 720, 812 (W. Va. 1998).

a. If so, is there a right of subrogation for the charitable provider?

There is no case or statutory law in West Virginia that directly addresses the issue of whether there is a right of subrogation for the charitable provider.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

West Virginia, through statute, provides for a right of subrogation for the state Department of Health and Human Resources where a Medicaid recipient has recovered damages for the costs of medical treatment paid for by Medicaid:

> If medical assistance is paid or will be paid to a provider of medical care on behalf of a recipient of medical assistance because of any sickness, injury, disease or disability, and another person is legally liable for such expense, either pursuant to contract, negligence or otherwise, the Department of Health and Human Resources shall have a right to recover full reimbursement from any award or settlement for such medical assistance from such other person or from the recipient of such assistance if he or she has been reimbursed by the other person. The department shall be legally assigned the rights of the recipient against the person so liable, but only to the extent of the reasonable value of the medical assistance paid and attributable to the sickness, injury, disease or disability for which the recipient has received damages. When an action or claim is brought by a medical assistance recipient or by someone on his or her behalf against a third party who may be liable for the injury, disease, disability or death of a medical assistance recipient, any settlement, judgment or award obtained is subject to the claim of the Department of Health and Human Resources for reimbursement of an amount sufficient to reimburse the department the full amount of benefits paid on behalf of the recipient under the medical assistance program for the injury, disease, disability or death of the medical assistance recipient. The claim of the Department of Health and Human Resources assigned by such recipient shall not exceed the amount of medical expenses for the injury, disease, disability or death of the recipient paid by the department on behalf of the recipient. The right of subrogation created in this section includes all portions of the cause of action, by either settlement, compromise, judgment or award, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to the subrogation. Any settlement, compromise, judgment or award that excludes or limits the cost of medical services or care shall not preclude the Department of Health and Human Resources from enforcing its rights under this section. The secretary may compromise, settle and execute a release of any such claim, in whole or in part.

W. Va. Code §9-5-11 (2011).

Also, in cases where a political subdivision is a defendant, and the anti-subrogation provisions found at W. Va. Code §29-12A-13(c) apply, plaintiffs' counsel often argues that Medicare reimbursement statutes preempt the state anti-subrogation provision.

a. If so, what are the differences?

See, discussion above.

4. Are collateral source matters governed by statute, common law, or a combination of both?

In West Virginia, collateral source matters are governed primarily by common law, with the notable exception of the anti-subrogation provisions that pertain to political subdivision defendants, found at W. Va. Code §29-12A-13(c).

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

In West Virginia, if there is a windfall, it is usually kept by the Plaintiff and his or her attorney. However, in cases in which medical treatment was paid for by a private health insurer, health care providers may seek to recover additional amounts over and above what was paid.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

In West Virginia,

> [t]he general rule on proof of medical services is that the proper measure of damages is not simply the expenses or liability incurred, or that which may be incurred in the future, but rather the reasonable value of medical services made necessary because of the injury proximately resulting from the defendant's negligence…. A plaintiff may thus recover for the reasonable value of the medical services rendered him because of the injury, provided that he can also show that these services were necessary.

Jordan v. Bero, 210 S.E.2d 618, 637 (W. Va. 1974) (internal citations omitted).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

In West Virginia, the concept of what constitutes "reasonable value" is not firmly defined. Instead, it is left for the jury to decide. However, West Virginia courts have ruled that

> To warrant a recovery for future medical expenses, the proper measure of damages is not simply the expenses or liability which shall or may be incurred in the future but it is, rather, the reasonable value of medical services as will probably be necessarily incurred by reason of the permanent effects of a party's injuries.

Syl. pt. 5, *Reed v. Wimmer*, 465 S.E.2d 199 (W. Va. 1995).

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

(2) The amount billed for the services?

(3) Provider testimony on the value of their services as compared to billed amounts?

(4) Expert testimony on accuracy of provider billing rates?

(5) The fact that a third-party payor (a/k/a insurance company has already paid the bill?

(6) Any other factors?

In West Virginia, most trial courts will permit a jury to consider the amount billed for medical services, provider testimony on the value of the provider's services, and expert testimony on the reasonable value of medical services. In most personal injury tort claims, West Virginia courts will not permit inquiry as to whether the Plaintiff has received payments from collateral sources at the trial of the personal injury action. *Ratlief v. Yokum*, 280 S.E.2d 584, 590 (W. Va. 1981).

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Generally, in West Virginia, the damages a Plaintiff is permitted to recover for the cost of treatment does not vary based on whether a collateral source is involved.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

The West Virginia Supreme Court of Appeals has noted in *dicta*, "[t]he collateral source rule was established to prevent the defendant from taking advantage of payments received by the plaintiff as a result of his own contractual arrangements entirely independent of the defendant." *Ratlief*, 280 S.E.2d at 590.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

In West Virginia, Plaintiff is normally permitted to use the billed value of medical treatment at trial as a basis for non-economic damages awards, and, furthermore, the appellate court will look to the billed amounts in any post-verdict assessment of whether the damages verdict was appropriate. *See*, *e.g., Grove v. Myers*, 382 S.E.2d 536, 545 (W. Va. 1989).

However, it is important to note that the West Virginia Supreme Court of Appeals has ruled that it is improper to attempt to use a per diem argument or to place a money value on pain and suffering. *Crum v. Ward*, 122 S.E.2d 18, 25 (W. Va. 1961).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Generally, courts in West Virginia will permit Plaintiff to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

The West Virginia Supreme Court of Appeals has not considered a constitutional challenge to the collateral source/ cost of treatment issues discussed above.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

There may be a basis under West Virginia's Constitution to argue that plaintiffs who are insured through private pay health insurance carriers and plaintiffs who receive payment for their medical bills through Medicaid are treated differently because both classes of plaintiffs can present the billed amounts as evidence of the "reasonable value" of their medical damages, but privately-insured plaintiffs may have to reimburse their healthcare providers for amounts not covered by insurance that they recover in litigation while plaintiffs covered by Medicaid are statutorily-protected from such collection efforts and get to keep their windfall recoveries. As such, one could argue that there is an equal protection violation.

Wisconsin

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Under the collateral source rule in Wisconsin, a plaintiff's recovery cannot be reduced by payments or benefits from other sources. *Koffman v. Leichtfuss,* 2001 WI 111, ¶ 29, 246 Wis. 2d 31, 47, 630 N.W.2d 201, 209. The collateral source rule prevents certain payments made on the plaintiff's behalf received by the plaintiff from inuring to the benefit of a defendant-tortfeasor. *Id.; see also Heritage Mut. Ins. Cr. v. Graser,* 2002 WI App. 125, ¶ 8, 254 Wis. 2d 851, 854, 647 N.W.2d 385, 387; *see also McLaughlin v. Chicago, Milwaukee, St. Paul & Pac. R.R.,* 31 Wis. 2d 378, 395-96, 143 N.W.2d 32, 40-41 (1966). Collateral sources may include health care insurers, voluntary services, and Medicare.

A plaintiff is generally permitted to recover the costs of third-party payments made by health care insurers for medical treatment. The fact that a plaintiff received health insurance benefits should not diminish the damages awarded to the plaintiff. *McLaughlin v. Chicago, Milwaukee, St. Paul & Pac. R.R.,* 31 Wis. 2d 378, 395-96, 143 N.W.2d 32, 40-41 (1966). When a plaintiff seeks damages for past medical expenses, payments made by a health insurer are deemed to be a collateral source such that the plaintiff is allowed to claim the amount billed, rather than being required to claim the amount paid, as past medical expenses in the event that a trial should be required. *Leitinger v. DBart, Inc.,* 2007 WI 84, ¶ 23, 302 Wis. 2d 110, 122, 736 N.W.2d 1, 6.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Gratuitous benefits conferred upon a plaintiff fall within the ambit of the collateral source rule. *Thoreson v. Milwaukee & Suburban Transport Co.,* 56 Wis. 2d 231, 243, 201 N.W.2d 745, 752 (1972). The benefit is measured by the reasonable value of the gratuitous benefits conferred upon the plaintiff, not the actual charge. In fact, oftentimes with gratuitous benefits there may not be an actual charge. The fact that necessary medical services are rendered gratuitously to one who is injured should not preclude the injured party from recovering the reasonable value of those services as part of an injured party's compensatory damages. *Id.*

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

The collateral source rule also applies to Medicare benefits. The Wisconsin Supreme Court has held that there is no apparent difference between private health insurance and Medicare, other than the fact that Medicare is administered by the federal government. *Merz v. Old Republic Ins. Co.*, 53 Wis. 2d 47, 54, 191 N.W.2d 876, 879 (1971)

A collateral source, such as a health insurer, may have a right of subrogation or reimbursement. An insurer who pays a claim on behalf of its insured, under a policy providing for subrogation, has a cause of action against the tortfeasor for its subrogated interest. *Mutual Serv. Casualty Co. v. American Family Ins. Group*, 140 Wis. 2d 555, 561, 410 N.W.2d 582, 584 (1987).

By virtue and to the extent of payments made on behalf of another, a subrogated party obtains a right of recovery in an action against a third-party tortfeasor and is a necessary party in an action against such a tortfeasor. *Koffman v. Leichtfuss*, 2001 WI 111, ¶ 33, 246 Wis. 2d 31, 50, 630 N.W.2d 201, 210. An insurer's subrogation interest is limited to the amounts paid to the medical treatment providers. *Id.*

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

Under Wisconsin law, a plaintiff who has been injured by the tortious conduct of another is entitled to recover the reasonable value of his medical costs reasonably required by the injury. *Thoreson v. Milwaukee & Suburban Transport Co.,* 56 Wis. 2d 231, 243, 201 N.W.2d 745, 752 (1972). Billing statements consisting of medical charges are presumed to be reasonable and necessary. Wis. Stat. §908.06(6m)(bm).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

A plaintiff can recover payments made for medical treatments that are proven to be reasonable in amount and necessary for the treatment of the injuries giving rise to the claim. Wis. Stat. §908.06(6m)(bm). Under Wis. Stat. §908.06(6m)(bm), such payments are presumed reasonable in amount and necessary. This statutory subsection provides:

> (6m)(bm) *Presumption*. Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

Despite the presumption, a defendant may still rebut the presumption through their own expert's testimony regarding the reasonableness and necessity of the charges.

3. Does the damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

Despite the statutory presumption, a plaintiff still needs to prove that the injuries were caused by the tortfeasor's conduct. Wisconsin Statute §908.03(6m)(bm) has nothing to do with whether a particular condition or symptom exhibited by the patient when seeing the health care provider resulted from an accident, or resulted from some other cause unrelated to the accident. The statute merely precludes quibbling about whether health care providers properly assessed what a particular patient needed presenting all of the conditions and symptoms presented by the patient.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Nothing precludes a defendant from arguing at trial that some or all of the medical expenses incurred by the plaintiff after an accident, and some or all of the injuries that relate to such post-accident medical expenses, had some cause (*e.g.*, pre-existing condition, separate post-accident in jury) other than the accident that is the subject of the litigation. In *Hanson v. American Family Mut. Ins. Co.,* 2006 WI 97, 294 Wis. 2d 149, 716 N.W.2d 866, merely correlating its decision with longstanding nineteenth century case law, the Wisconsin Supreme Court ruled that a plaintiff is entitled to the past medical expenses associated with an accident-caused injury without regard to whether the treatment for which those expenses were paid constituted necessary or unnecessary treatment for such accident-caused injuries. *See Hanson*, 2006 WI 97 at ¶ 3, 294 Wis. 2d at 152-53, 716 N.W.2d at 868.

This rule merely followed as a logical corollary of the rule that whenever a tortfeasor causes an injury to another person who then undergoes unnecessary medical treatment of those injuries despite having exer-

cised ordinary care in selecting her doctor, the tortfeasor remains responsible for all of the plaintiff's damages arising from any mistaken or unnecessary surgery. *See Butzow v. Wausau Mem'l Hosp.,* 51 Wis. 2d 281, 285-86, 187 N.W.2d 349 (1971); *see also Selleck v. Janesville*, 100 Wis. 157, 75 N.W. 975 (1898). After *Hanson*, the injury at issue still needs to be causally related to the accident; it is just that the treatment—if for an accident-related injury—need not also, and additionally, be causally related to the accident.

So long as there is at least some significant evidence in the record to support the defense's non-causation theory, nothing in *Hanson* or any other law precludes the defense from disputing that some or all of the medical expenses claimed by the plaintiff are not causally-related to the accident. And no expert testimony is needed as a prerequisite for offering such an argument, for, as trial practitioners know well, a jury is "not bound by any experts opinion." Wis. JI-Civil 260.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

In Wisconsin, a plaintiff's argument that non-economic damages (*e.g.*, pain and suffering) should be awarded is generally not based on any specific formula. It is conceivable, however, that a plaintiff could argue that an award of pain and suffering should be based on the billed value of medical specials.

"Counsel for both the plaintiff and the defendant may make an argumentative suggestion in summation from the evidence of a lump sum dollar amount for pain and suffering which they believe the evidence will fairly and reasonably support." *Affett v. Milwaukee & Suburban Transport Corp.*, 11 Wis. 2d 604, 614, 106 N.W.2d 274 (1960). Wisconsin courts have expressed its faith in the jury system and the ability of jurors to discern absurdities presented to them. *Fischer v. Fischer*, 31 Wis. 2d 293, 302, 142 N.W.2d 857 (1966), *overruled in part on other grounds*, *In re Stromsted*, 99 Wis. 2d 136, 144, 299 N.W.2d 226, 230 (1980).

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

There have been no constitutional challenges to the collateral source rule in Wisconsin.

Wyoming

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

a. If so, is there a right of subrogation for the insurer?

Yes, the insurer has a right of subrogation. Under Wyoming common law, a plaintiff is entitled to recover the reasonable value of the medical services necessary to treat the injury, even if the expenses were paid by the plaintiff's medical insurer, and even if the medical services are rendered gratuitously. *Grayson*, 256 F.2d at 65-66 (applying Wyoming law); *Banks*, 694 P.2d at 105. See also *Commercial Union Ins. Co. v. Postin*, 610 P.2d 984 (1980), discussing insurer's right of subrogation.

At common law, the insurer's right to subrogation must be enforced in the name of the insured, but the insurer may enforce in its own name if the insured's loss was paid in full. Rule 17, W.R.C.P.; *Gardner v. Walker*, 373 P.2d 598 (Wyo. 1962). To protect its right of subrogation, an insurer must provide notice of its claim. *Stilson v. Hodges*, 934 P.3d 736 (Wyo. 1997). W.S. §26-13-113, provides that if an insurer decides to subrogate, that insurer shall include the deductible in any subrogated loss claim, and shall pay the deductible without any deduction for expenses of collection before any of the recovery is applied to any other use. An insurer which pays a loss not covered by its policy is a volunteer and enjoys no right of subrogation, and cannot claim legal or equitable subrogation. Likewise, because there was not a contract assigning subrogation rights by insured to insurer, latter could not claim conventional or contractual subrogation. *Commercial Union Ins. Co. v. Postin*, 610 P.2d 984 (Wyo. 1980)

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

a. If so, is there a right of subrogation for the charitable provider?

Yes. The charitable provider may have a right to equitable subrogation. Under Wyoming common law, a plaintiff is entitled to recover the reasonable value of the medical services necessary to treat the injury, even if the expenses were paid by the plaintiff's medical insurer, and even if the medical services are rendered gratuitously. *Grayson*, 256 F.2d at 65-66 (applying Wyoming law); *Banks*, 694 P.2d at 105. See also *Northern Utilities v. Town of Evansville*, 822 P.2d 829, discussing various rights of subrogation. Subrogation is an equitable doctrine; and therefore equitable principles apply in determining whether subrogation is available. *Id*.

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare v. Medicaid vs. a private insurer, or some other third-party source?

a. If so, what are the differences?

There are no published decisions which distinguish recovery of costs paid by social welfare benefits as opposed to private insurers.

4. Are collateral source matters governed by statute, common law, or a combination of both?

In Wyoming, collateral source matters are governed by common law, as adopted in *Grayson*, 256 F.2d at 65-66.

5. If State law allows the Plaintiff to recover more than what was paid, who keeps the windfall?

There are no published decisions on this issue, but it is likely that the Plaintiff will be allowed to keep the windfall.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

a. Amount actually paid by the third-party provider.

b. Amount actually billed by the third-party provider.

c. "Reasonable value" of medical services provided.

d. Other

The plaintiff may recover only the reasonable value of necessary medical services provided, as evidenced by the character of the plaintiffs injuries, the obligation incurred by the plaintiff, the sums paid out for medical fees and hospitalization by the plaintiff, and the charges made for the treatment by the provider. *Northwest States Utilities Co. v. Ashton*, 65 P.2d 235 (1937).

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

b. If a question of fact for the jury, is the jury allowed to consider the following?

i. Amount actually paid for the services?
ii. The amount billed for the services?
iii. Provider testimony on the value of their services as compared to billed amounts?
iv. Expert testimony on accuracy of provider billing rates?
v. The fact that a third-party payor (a/k/a insurance company) has already paid the bill?
vi. Any other factors?

The concept of reasonable value is an issue for the jury to decide. With respect to reasonably and necessarily incurred medical expenses, the jury may consider the nature of the plaintiffs injuries, the amount actually paid or billed, provider testimony on the value of their services, and expert testimony regarding billing rates. *Northwest States Utilities Co. v. Ashton*, 65 P.2d 235 (1937), *Weaver v. Mitchel*, 715 P.2d 1361 (1986).

3. Does the damage a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

There are no published decisions on this issue, but recovery probably does not vary based on whether a collateral source is involved.

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

There are no published decisions on this issue, but plaintiff is probably entitled to private party rate, regardless of the amount actually paid.

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

Yes, as noted above.

2. Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Yes, as noted above.

D. Constitutional Issues

1. Have Collateral Source / cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your state?

There are no published decisions on constitutionally related collateral source issues at the present time.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

Not at this time.