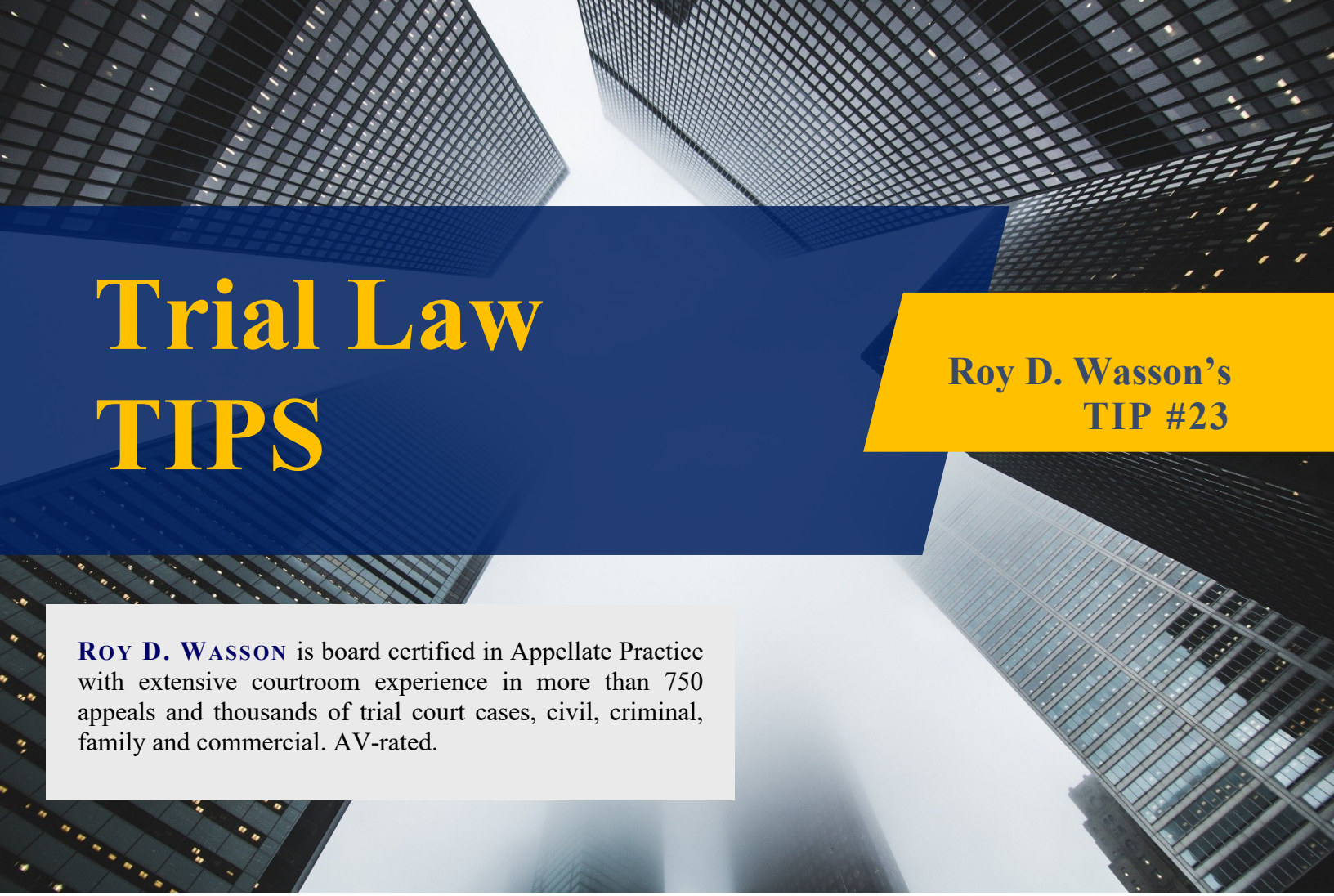

Trial Law TIPS

Roy D. Wasson's TIP #23

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Introducing the Full-Amount of Written-Off Medical Bills

Introduction

From time-to-time the health care providers from whom our clients receive medical treatment accept less than the full amount of their bills and write-off the balance which would otherwise be owed. Such write-offs may result from statutory provisions which limit the providers' recovery, such as Medicare and Medicaid laws, or from contractual agreements with group insurers and Health Maintenance Organizations. Or the hospital may simply write-off a bill out of pity to your client or other motives. The defendant should not receive the benefit of such fortuitous reductions but should have to pay the full amount of reasonable and necessary medical expenses which he or she caused. Numerous cases from around the United States—including jurisdictions known to be more conservative than Florida—have held that an injured plaintiff may

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put the full amount of his or her medical bills in evidence and recover amounts negotiated away or forgiven by providers.

At least a couple of bad Florida wrongful death cases have been decided on the issue: in the First District and the Fourth. This article will provide you with a strong argument to limit those decisions to death cases, and to recover the full amount of bills — including write-offs—in personal injury actions. Apart from the question of the recoverability of damages for written-off medical expenses, the full amount of the bills should come in to evidence for at least two other purposes. One of those is to inform the jury about the severity of the plaintiff's injuries to assist the jury in determining the amount of non-pecuniary damages. The jury should hear it if your crash victim client sustained $50,000 in medical expenses instead of $5,000 to help the jury understand the significance of the injuries. The other reason is to inform the jury about the costs of procedures which your client may have to pay for future treatment, when the circumstances may or may not include a gratuitous reduction in the amount of those bills.

Bills Reduced Under Medicare and Medicaid Statutes

A number of cases which have addressed the issue hold that a recipient of such benefits can and should recover the full amount of reasonable and necessary medical expenses, not just the amount paid by Medicare or Medicaid. Those decisions share with Florida the rule of law that damage awards are not to be reduced by the amounts actually paid by those governmental programs. The cases then apply the same logic to the amount of medical bills which providers have to write off for beneficiaries of Medicare and Medicaid programs. As has been held by several persuasive and recent decisions of courts from around the nation, the written-off portion of a medical bill which results from a provider's acceptance of Medicare or Medicaid is a benefit recoverable under collateral source statutes and doctrines, just as is the amount actually paid to the provider by those governmental programs.[1]

[1] Under Florida's collateral source statute, there is no reduction in the amount to be awarded by the jury as a result of the fact that a Florida plaintiff is a recipient of Medicare of Medicaid. § 768.76(2)(b), Fla. Stat. (2002).

The Supreme Court of South Carolina decided this issue favorably to Plaintiff's position in *Haselden v. Davis*, 579 S.E.2d 293 (S.C. 2003), a case in which the plaintiff introduced his medical bills into evidence totaling $77,905, and the defendant appealed, arguing that the only amount which should have been introduced was the amount paid by Medicaid, or $24,109. South Carolina has a collateral source rule similar to Florida's, in that a plaintiff's recoverable medical expenses are not reduced by his or her receipt of benefits from Medicare or Medicaid. The *Haselden* court affirmed the ruling that the full amount of the medical expenses was admissible, and stated that "to hold that the plaintiff is limited to damages in the amount actually paid by Medicaid is contrary to the purposes behind the collateral source rule and would result in a windfall to the defendant tortfeasor." Id. Although acknowledging cases to the contrary (which we all need to be aware of in litigating the issue), the court held:

> 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. 22 Am. Jur. 2d Damages, § 198 (1988). Although the amount paid may be relevant in determining the reasonable value of those services, the trier of fact must look to a variety of other factors in making such a finding. Among those factors to be considered by the jury are the amount billed to the plaintiff, and the relative market value of those services. *Kashner v. Geisinger Clinic*, 432 Pa. Super. 361, 638 A.2d 980 (Pa. 1994).
>
> Clearly, the amount actually paid for medical services does not alone determine the reasonable value of those medical services. Nor does it limit the finder of fact in making such a determination. Id., citing D. Dobbs, Handbook on the Law of Remedies § 8.1, at 543 (1973) ("The measure of recovery is not the cost of services ... but their reasonable value.... Recovery does not depend on whether there is any bill

> at all, and the tortfeasor is liable for the value of medical services even if they are given without charge, since it is their value and not their cost that counts."); Restatement (Second) of Torts § 924 comment f (1979) ("The value of medical services made necessary by the tort can ordinarily be recovered although they have created no liability or expense to injured person, as when a physician donates his services."). *See also Ellsworth v. Schelbrock*, 2000 WI 63, 611 N.W.2d 764, 235 Wis. 2d 678 (Wis. 2000)(noting that test is the reasonable value, not the actual charge).

Id. (Emphasis added).

The same issue arose in *Williamson v. Odyssey House, Inc*., No. 99-561-JD, 2000 U.S. Dist. LEXIS 16396 (D.N.H. Nov. 3, 2000), where the court considered and denied a defendant's motion in limine seeking to exclude evidence of the full amount of the plaintiff's medical expenses because the health care providers had received Medicaid benefits, thereby satisfying the plaintiff's obligation to those providers. The court cited a Supreme Court of New Hampshire decision which established the measure of damages for medical expense as the reasonable value of those services, and cited New Hampshire's collateral source doctrine which, like that of Florida, did not preclude recovery of medical expenses paid by collateral sources including Medicaid.

The court in *Williamson* held:

> The defendant relies on decisions from other jurisdictions which hold that a plaintiff's damages are limited to the amount of medical expense actually paid and that amounts that are "written off" should be excluded. *See, e.g., Mitchell v. Hayes*, 72 F. Supp. 2d 635, 637 (W.D. Va. 1999); *Ward-Conde' v. Smith*, 19 F. Supp. 2d 539, 541-42 (E.D. Va. 1998); *McAmis v. Wallace*, 980 F. Supp. 181, 186 (W.D. Va. 1997); *Terrell v. Nanda*, 759 So. 2d 1026, 1031 (La. Ct. App. 2000); *Hanif v. Housing Auth.*, 200 Cal. App. 3d 635, 643, 246 Cal. Rptr. 192 (1988). As the plaintiff points out, *Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d

> 316, 322-23 (Va. 2000), in which the Virginia Supreme Court held that the proper measure of damages included the amounts that had been written off by the plaintiff's health care providers, significantly undermines the decisions by the district courts in Virginia. Other jurisdictions have also concluded that the reasonable value of medical services, rather than the amount actually paid, is the proper measure of damages of personal injury. *See Chapman v. Mazda Motor of Am., Inc*., 7 F. Supp. 2d 1123, 1125 (D. Mont. 1998); *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295, 304 (S.C. Ct. App. 2000); *Ellsworth v. Schelbrock*, 2000 WI 63, 611 N.W.2d 764, 769, 235 Wis. 2d 678 (Wis. 2000).
>
> In light of New Hampshire's collateral source rule and the standard for the measure of damages for medical costs, the court concludes that the reasonable value of medical services that Griffin has required and probably will require in the future is the proper measure of damages, regardless of the amount paid for those services by Medicaid.

Id. (Emphasis added).

Florida law similarly defines the measure of recoverable medical expenses as those which are "reasonable and necessary," without imposing any requirement that those expenses have been paid by the plaintiff to be recoverable. *See* 17 Fla. Jur. 2d Damages §73 (1997). That is an important point I will come back to in distinguishing the Florida wrongful death cases.

Other cases have similarly noted that the applicable definition of compensable damages—and the status of the paid portion of Medicaid or similar benefits as recoverable under collateral source rules—operate in combination to render recoverable the unpaid and written-off part of medical expenses.

In *Ellsworth v. Schelbrock*, 611 N.W.2d 764 (Wis. 2000), the defendant argued that the plaintiff should not recover any amounts for medical expenses because Medicaid had paid a reduced sum to the providers and the balance had been written-off. The

Supreme Court of Wisconsin applied the collateral source doctrine of that state to hold that the plaintiff could recover the reasonable value of his medical expenses against a negligent tortfeasor, including the amounts actually paid by Medicaid, and the amounts billed by the health care providers and written-off due to their acceptance of Medicaid:

> Schelbrock . . . asserts that because Ellsworth did not personally incur any liability for her medical expenses she is not entitled to an award of damages on this basis or to the benefit of the application of the collateral source rule.
>
> According to Schelbrock, Ellsworth incurred no liability because the health care providers agreed to accept as payment in full the amount received from Medical Assistance. Wis. Admin. Code § HFS 106.04(3) (April, 1999). In addition, Wis. Stat. § 49.49(3m)(a) provides that, in general, a health care provider who accepts the payment made by Medical Assistance may not impose additional charges upon the program participant. We are not persuaded.
>
> * * *
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> In keeping with precedent and well-established tort policy, we conclude that the collateral source rule applies to Medical Assistance benefits. The injured party may establish and recover the reasonable value of the medical services received gratuitously via Medical Assistance. The state's subrogated amount is deducted from this recovery, and the injured party is entitled to any remainder. As a result, the responsibility for the victim's injury remains fully on the wrongdoer.

611 N.W.2d at 768, 771 (emphasis added and footnotes deleted).

As will be shown below, the "bad" cases from Florida on this subject do not deal with Medicare or Medicaid write-offs, but deal instead with negotiated reductions obtained by the plaintiffs'

private insurance companies. Those decisions also involve wrongful death claims instead of bodily injury claims, which apply a much different test for recovery of medical expenses than the "reasonable and necessary" test applicable to injury cases.

Insurance Company Write-Offs and Reductions

A number of recent cases from the highest courts of various jurisdictions involve the very similar situation of a plaintiff's private insurance company negotiating with health care providers to accept a reduced sum and "write-off" the difference. Most of those authorities have held that the plaintiff can recover the full amount of the original medical expenses in a tort action, not just the amount which was paid on his behalf by the insurer.

One such directly analogous decision is the Supreme Court of Wisconsin's case of *Koffman v. Leichtfuss*, 630 N.W.2d 201 (Wis. 2001), which held that a plaintiff whose medical insurer had satisfied the claims of his health care providers by paying them at a reduced contractual amount, still could recover the full value of those medical bills from the tortfeasor. The trial court in *Koffman* had agreed with the defense position that the plaintiff could not recover the amount of medical expenses over and above that amount accepted by his providers from his insurers, and the total amount of their bills, because the difference had been "written-off."

On appeal, the Supreme Court reversed, holding that the full amount of medical bills was recoverable, using two approaches. First, the court held that full recovery was consistent with the measure of such damages: "the reasonable value of medical services rendered," as opposed to the amount paid by the plaintiff. *Id.* at 209.

Florida's similar definition of recoverable medical damages renders that holding directly on point. Second, the court applied the principles underlying Wisconsin's collateral source rule—which, like Florida law, permits a plaintiff to recover as damages the amounts actually paid by a health insurer—to also permit recovery of the amount between that received by the providers and their total bills. The amount which the plaintiff's insurer had arranged to be "written-off" was a benefit which resulted from his entitlement to a recoverable collateral source, just as much (if not more) than was

the amount which the insurer had actually paid, so it would not make sense to allow the plaintiff to recover part of those sums he had not paid, but not the rest of them. The court also held that to deny recovery would be to provide the defendant tortfeasor with a windfall.

The situation in *Koffman* also was considered recently by the District of Columbia Court of Appeals in *Hardi v. Mezzanote*, 818 A.2d 974 (D.C. App. 2003).

There the court held that the full amount of the plaintiff's medical bills could be admitted into evidence and recovered from the defendant, including the amount over and above that which the providers had accepted from the plaintiff's insurers and had "written-off." Applying the principles from the collateral source doctrine which permitted recovery of the sums paid by the insurer, the court held "because any write-offs conferred would have been a by-product of the insurance contract secured by appellee, even those amounts should be counted as damages." *Id*.

The Supreme Court of Virginia held the same way in *Acuar v. Letourneau*, 531 S.E. 2d 316 (Va. 2000). The collateral source rule of that state permitted the plaintiff to recover the amounts actually paid by his insurer. Noting the policy reasons against permitting the tortfeasor to enjoy the benefit of the fortuitous situation of the write-offs, the Virginia high court held that the principle underlying that state's collateral source rule likewise allowed recovery of the written-off sums: "Those amounts written off are as much of a benefit for which Letourneau paid consideration as are the actual cash payments made by his health insurance carrier to the health care providers." *Id*. at 322.

The "Bad" Florida Death Cases Like *Dourado* and *Horton*

There are two Florida cases in which courts have held that the Plaintiff may not recover the portion of medical bills which have been written-off by the healthcare provider or negotiated down by the insurance company. However, both of those cases are wrongful death cases involving a much different standard for determining the recoverability of medical expenses as damages.

The most recent of those cases is *Dourado v. Ford Motor Co*., 28 Fla. L. Weekly D522 (Fla. 4th DCA February 19, 2003). The court affirmed the exclusion of those portions of the medical bills above that which was paid by the decadent's insurance company, holding: "The Wrongful Death Act, sections 768.21(5) and (6)(b), Florida Statutes, does not authorize the admission of evidence of medical expenses not charged against the estate or paid by or on behalf of the decedent as proof of economic loss. Id. The standard for determining the compensability of medical bills under the Wrongful Death Act is not whether those bills are "reasonable and necessary" as is the standard applicable to personal injury cases. Instead, as indicated by the court in *Dourdo*, the statute limits recovery of medical expenses to those which "may be covered by a survivor who has paid them," and those "who have become a charge against [the decedent's] estate or that were paid by or on behalf of decedent. §768.21(5)&(6)(b)(emphasis added). Obviously, expenses which have been written-off by the provider have not been "paid" by a survivor or by the estate. Neither are such bills any longer a "charge against" the estate.

The other case on the subject is *Horton v. Channing*, 698 So. 2d 865 (Fla. 1st DCA 1997). That case began as a personal injury case, but during the course of the litigation the injured plaintiff died. Therefore, the case was re-pled as a wrongful death case thereby changing the measure of recoverable medical expenses. The court's holding that the amount of the bills in Horton above those paid by the decedent's Blue Cross/Blue Shield plan were not recoverable against the defendant should not be accepted by courts as authority for the proposition that such bills are not recoverable in a personal injury case where the standard for recoverability is not limited by the statutory language. In a personal injury case under Florida law, the test for recovery of medical expenses is whether they were "reasonable and necessary," not whether they actually have been paid. *See East West Karate Association v. Riquelme*, 638 So. 2d 604 (Fla. 4th DCA 1994).

Admissibility of Evidence of Full Amount of Bills for Other Purposes

Even apart from the question of what past medical expenses are recoverable from the defendant in a given case the courts should

permit the evidence of the total amount of those bills, because the amount is relevant to demonstrating the full nature and extent of the plaintiff's injuries, and on the question of future damages, which may or may not be covered by Medicare or reduced by the provider.

This issue was addressed by the court in *Chapman v. Mazda Motor Co.,* 7 F. Supp. 2d 1123 (D. Mont. 1998) in which the court ruled on a similar motion in limine filed by the defendant seeking to preclude plaintiff from introducing evidence of the amount of medical bills written-off by providers who had accepted Medicaid. Although indicating skepticism that the plaintiff could recover damages for those amounts which providers had written-off, the court found that the evidence would be relevant even if the written-off portions of the bills were not recoverable, holding:

> While the amounts of disallowed medical expenses are not relevant to prove damages for past medical loss, it does not follow that the evidence of medical expenses is irrelevant for all purposes. For instance, Chapman says evidence of total medical bills is admissible "to show the jury the severity and the extent of her injuries." Br. in Opp. at 3. I agree. Even if medical expenses were disallowed by medicaid, the documentation for such expenses presumably lists the medical procedures and treatments dispensed. They may bear on the necessity of future needs and provide a foundation for a life care plan. They are relevant to prove the nature and extent of Chapman's injuries. Evidence of cost for the complete range of treatment and care dispensed in past medical treatment may be relevant to future medical care and expenses required.
>
> Accordingly, Mazda's motion is DENIED.

Id. at 1125(emphasis added).

Other cases recognizing that the amount of a plaintiff's medical bills is relevant to the plaintiff's pain and suffering include *Mascarenas v. Gonzalez*, 497 P.2d 751 (N.M. App. 1972); *Melaver v. Garis*, 138 S. E. 2d 435 (Ga. App. 1964).

Defense attorneys know that juries can better understand the true extent of a plaintiff's condition, and more accurately award damages for pain and suffering and other intangible elements, if they hear about the full amount of medical expenses necessitated by their clients' conduct, so their motive in making such motions in limine is not just to reduce the risk of an award of non-recoverable amounts of damages. They employ a strategy of trying to keep such evidence away from the jury in order to unfairly reduce the recoverable damages. *See* Lee, *Reasonable Medical Treatment Means Actual Cost* (Summer 2002) 17 Defense Comment 14 (suggesting tort defense attorneys can achieve a reduction of both special and general damages by limiting plaintiffs to proof of actual medical costs). Don't let them keep up this strategy of deception!

Conclusion

Defendants should not be permitted to deceive the jury by keeping out evidence of the true amount of damages caused by their negligence and should not receive a windfall from fortuitous circumstances under which healthcare providers' bills are reduced. In the absence of some special statutory limitation upon damages such as that under the Wrongful Death Act, tortfeasors should be obligated to pay the full measure of damages for medical expenses resulting from their negligence, and the jury should be permitted to consider the full amount of those expenses on the question of the plaintiffs' future economic damages and past pain and suffering.

Keep Tryin!

Roy

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