Legal Backgrounder

Vol. 35 No. 5 March 6, 2020

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

In *Scholle*, Colorado Supreme Court Should Clarify Collateral Source Rule's Application to Medical Expense Damages

by H. Thomas Watson, Karen M. Bray, and Sarah E. Hamill

In November 2019, the Colorado Supreme Court granted review in *Scholle v. Delta Air Lines, Inc.*, Nos. 18CACO49 & 18CAA0760, __P.3d__, 2019 WL 2219704 (Colo. App. May 23, 2019) and will decide whether a plaintiff may recover medical expense damages measured by "billed" amounts far exceeding amounts actually paid. *Scholle* may (and *should*) reverse a trend allowing plaintiffs to recover tort damages based on inflated medical bills that no one ever pays.

The Prevalence of Inflated Medical Bills Complicates the Measure of Medical Expense Damages

In Colorado (as elsewhere), a "bedrock goal of tort law is to 'make the plaintiff whole.' Tort law thus disfavors 'windfall' damage awards that make the plaintiff better off" than before the tort. *LeHouillier v. Gallegos*, 434 P.3d 156, 164 (Colo. 2019) (citation omitted).

When tort plaintiffs seek medical expense damages, "the correct measure of damages is the necessary and reasonable value of the [medical] services rendered." *Kendall v. Hargrave*, 349 P.2d 993, 994 (Colo. 1960). Reasonable value is typically measured by "what a willing buyer would pay a willing seller under normal economic conditions." *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 203 (Colo. 2005); *City of Thornton v. Pub. Utils. Comm'n*, 402 P.2d 194, 198 (Colo. 1965). However, the reasonable value of medical services is a murky issue, in part because the amount healthcare providers *bill* often vastly exceeds the amount typically *paid* for their services.

In the United States healthcare system, "[t]he market price [of medical services] is not visible." *See* Nina Zhang, *The Price is Right? What is "Usual, Customary, and Reasonable" Between Provider and Payor*, 30 Health Law., no. 4, 2018 at 12. Service providers typically bill at high rates, but usually accept far less as full payment. *See id*. Therefore, inflated bill rates do not reflect the market value of services. *See id*. at 12-15. Likewise, billed amounts do not reflect the plaintiff's actual loss for medical expenses.

Over Dissenting Opinions, Colorado's Supreme Court Has Allowed Plaintiffs to Recover Inflated Medical Expense Damages at Billing Rates they Did Not Pay

Colorado's collateral source rule has two parts: a preverdict evidentiary component barring evidence that the plaintiff's loss was paid by a collateral source (such as insurance), *e.g.*, *City of Pueblo v. Ratliff*, 327 P.2d 270, 274 (Colo. 1958), and a postverdict setoff component.[1] In 2010, the Colorado Legislature codified the rule's evidentiary aspect: "The fact *or amount* of any collateral source payment or benefits shall not be admitted as evidence in any action against an alleged third-party tortfeasor." Colo. Rev. Stat. § 10-1-135(10)

[1] A 1986 statute sets off tort recoveries by amounts paid by an insurance company (subject to certain exceptions). Colo. Rev. Stat. § 13-21-111.6 (1986). This law reduces, but does not eliminate, windfalls because juries are awarding amounts billed for healthcare services and the court only reduces those awards by the lower amounts actually paid—with plaintiffs retaining the difference.

H. Thomas Watson and **Karen M. Bray** are Partners, and **Sarah E. Hamill** is an Appellate Fellow, with Horvitz & Levy LLP in Burbank, CA.

(a) (2010) (emphasis added). The Colorado Supreme Court has recently issued split decisions applying the collateral source rule. Each time, the majority—over a strong dissent—allowed the plaintiff to recover the full amount *billed* for medical services rather than the lower amount accepted as full payment.

First, in *Volunteers of America Colorado Branch v. Gardenswartz*, 242 P.3d 1080, 1082, 1085 (Colo. 2010), the majority opinion by former Chief Justice Mullarkey held that a plaintiff may recover the full amount billed by healthcare providers. The majority reasoned that medical-bill discounts resulting from an insurer's negotiations with the medical providers are benefits for which a plaintiff paid consideration, and a tortfeasor should not benefit from a plaintiff's foresight in securing insurance. *Id*. at 1086-88. As a result, the plaintiff recovered medical expense damages nearly *twice* the amount accepted as full payment for the services rendered. *Id*. at 1085-88. Justices Coats and Eid joined Justice Rice's dissent in *Gardenswartz*, explaining that the majority opinion compels juries to base medical expense damage awards on "theoretical damages," instead of the reasonable value of the services, which produces inflated damage awards and fails to avoid double recovery. *Id.* at 1090-92 (Rice, J., dissenting).

Two years later, the Supreme Court issued three collateral source decisions: *Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562 (Colo. 2012), *Smith v. Jeppsen*, 277 P.3d 224 (Colo. 2012), and *Sunahara v. State Farm Mutual Automobile Insurance Co.*, 280 P.3d 649 (Colo. 2012). Justice Rice, who authored the *dissent* in *Gardenswartz*, wrote the *majority* opinions in all three cases, relying in part on the 2010 collateral source rule statute.

The majority in *Crossgrove* held that evidence of the $40,000 amount *paid* by insurers and accepted as full payment for healthcare services was *inadmissible*, but the $250,000 amount *billed* by the providers was admissible. 276 P.3d at 563-64. The majority reasoned that insurance payments must be excluded because "such evidence could lead the fact-finder to improperly reduce the plaintiff's damages award on the grounds that the plaintiff already recovered his loss from the collateral source." *Id*. at 565. The same majority decided *Sunahara,* 280 P.3d at 654-55, the same way.

The *Crossgrove* majority held that evidence of the amount actually paid is inadmissible even for the purpose of determining the reasonable value of the medical expenses. 276 P.3d at 565 n.4. The majority recognized that its decision conflicted with *Kendall*, 349 P.2d at 994, which permitted evidence of amounts paid for medical services for "the purpose of ascertaining the reasonable value of those medical expenses." *Crossgrove*, 276 P.3d at 566-67. The majority also recognized that healthcare bills far exceed amounts accepted as full payment. *Id.* at 567. Nevertheless, the majority reasoned that admitting this evidence "for any purpose . . . carries with it an unjustifiable risk that the jury will infer the existence of a collateral source . . . and thereby improperly diminish the plaintiff's damages award." *Id.* The majority explained that its opinion was consistent with the terms of the collateral source rule statute—Colorado Revised Statutes section 10-1-135(10)(a). *Crossgrove*, 276 P.3d at 565 n.3; *see Jeppsen*, 277 P.3d at 228.

Justices Coats and Boatright joined Justice Eid's dissents in *Crossgrove*, *Jeppsen*, and *Sunhara*, explaining that the amount accepted by healthcare providers as full payment is relevant to the reasonable value of those services. *Crossgrove,* 276 P.3d at 568-69 (Eid, J., dissenting); *Sunhara*, 280 P.3d at 661-62 (Eid, J., concurring in part and dissenting in part); *see Jeppsen*, 277 P.3d at 230 (Eid. J., dissenting). In fact, amounts paid may be the best evidence of reasonable value—medical service providers would not likely accept an unreasonable amount. Without evidence of the actual payments, juries are left "with what is at best an incomplete picture of the services' reasonable value." 276 P.3d at 569. The only amount juries learn about is the amount billed, which is "an amount that no one actually paid." *Id*. The dissent further argued that the collateral source rule "does not come into play" when a defendant seeks to introduce the amount paid but does not seek to introduce evidence of "'benefits received' [by the plaintiff] for 'the purpose of mitigating damages.'" *Id.*

Scholle Provides Current Colorado Supreme Court Justices with an Opportunity to Hold that Evidence of Amounts Paid for Healthcare Services Is Admissible

In *Scholle*, 2019 WL 2219704, the Court of Appeals addressed the collateral source rule in the context of workers' compensation insurance. William Scholle, a United Airlines employee, was injured in a luggage tug collision with a Delta Air Lines employee. *Id.* at *2. United paid for Scholle's medical expenses under Colorado's workers' compensation system, and settled a subrogation claim against Delta. *Id*. Under Colorado's workers' compensation statute, any amounts billed in excess of the statutory-fee schedule are unlawful, void, and unenforceable. *Id*. at *8. In Scholle's suit against Delta, the trial court "considered evidence of the amounts paid by United for Scholle's medical treatment," and awarded him economic damages set off by the amount United had paid in workers' compensation. *Id.* at *2. This, in effect, reduced Scholle's economic damages to zero. *Id*.

On appeal, Scholle argued that the trial court erred by admitting evidence of the amount of medical expenses paid by United's workers' compensation benefits instead of the amount billed by healthcare providers. *Id*. at *3. He argued that the workers' compensation payments were collateral source benefits and therefore inadmissible. *Id*. By contrast, Delta argued that the billed amounts were properly excluded because Scholle was never liable for those amounts. *Id*.

The Court of Appeals agreed with Scholle, holding that, under the collateral source rule, the amount billed by the healthcare providers was admissible but the workers' compensation benefit payments were not. *Id.* at *1. Under the court's decision, even though Scholle will never be required to pay the amounts billed, those amounts were admissible as the sole measure of his medical expense damages. *See id*. at *7-*8.

The Colorado Supreme Court granted review in *Scholle* to decide: "Whether, in an action brought by an injured worker against a third-party tortfeasor, the collateral source rule, as codified at 13-21-111.6, C.R.S. (2019), precludes admission of the amount of medical expenses paid by the plaintiff's workers' compensation insurer, where (1) amounts billed in excess of scheduled healthcare fees and rates allowed under the Workers' Compensation Act are unlawful, void, and unenforceable, and (2) the third-party defendant has already extinguished the workers' compensation insurer's subrogated interest in the medical expenses paid by settling the insurer's claim." *Scholle v. Delta Air Lines, Inc.*, No. 19SC546, 2019 WL 5922201 (Colo. Nov. 12, 2019).

The Court that will decide *Scholle* is comprised of Chief Justice Nathan B. Coats and Associate Justices Monica M. Márquez; Brian D. Boatright; William W. Hood, III; Richard L. Gabriel; Melissa Hart; and Carlos A. Samour, Jr. The only current member of the Court who joined the majority opinions in *Crossgrove, Jeppsen,* and *Sunahara* is Justice Márquez, who therefore may vote to affirm in *Scholle.*[2] However, Chief Justice Coats and Justice Boatright *dissented* in those three cases and Chief Justice Coats *dissented* in *Gardenwartz* as well (Justice Boatright was not on the court when *Gardenwartz* was decided). Assuming they continue to hold the positions expressed in those dissenting opinions, there should be two votes to reverse in *Scholle*.

Justices Hood, Gabriel, Hart, and Samour all joined the Supreme Court after the above-referenced cases were decided. However, *Calderon v. American Family Mutual Insurance Co.*, 383 P.3d 676 (Colo. 2016) may shed light on how some of these new justices may rule. In *Calderon*, the majority held that a recent statute prohibited previously paid MedPay benefits from being set off against uninsured/underinsured motorist benefits. *Id*. at 676-78 (construing Colo. Rev. Stat. § 10-4-609(1)(c) (2016)). Significantly, Justice Gabriel dissented, joined by Justices Márquez and Hood, arguing that the statutory scheme should be construed to "permit[ ] such a setoff when, as here, a setoff is *necessary to avoid a double recovery*." *Id.* at 680 (Gabriel, J., dissenting) (emphasis added). The dissent further explained that the collateral source rule

[2] No current member of the court joined the majority opinion in *Gardenswartz.* Justice Márquez was appointed on Sept. 8, 2010, but not sworn in until Dec. 10, 2010—about a month after *Gardenswartz* was decided.

  ISBN 1056 3059

did not prohibit such a setoff where "the party liable for the damages award and the 'collateral source' are the same entity." *Id.* at 687.

Thus, even if Justice Márquez votes to affirm in *Scholle*, Justices Gabriel and Hood seem aligned with the positions of Chief Justice Coats and Justice Boatwright, as shown in the *dissenting* opinions in *Gardenswartz*, *Crossgrove*, *Jeppsen,* and *Sunahara.*

Public Policy Supports Limiting Medical Expense Damage Awards to the Actual Market Value of Healthcare Services

Colorado's collateral source rule, as applied in *Gardenswartz*, *Crossgrove*, *Jeppsen*, and *Sunahara*, contravenes the basic legal principle that tort damages should be awarded to fully compensate a plaintiff, *without* awarding a windfall. *LeHouillier*, 434 P.3d at 164. These decisions bar evidence of the amounts paid for medical services, even though these amounts best reflect the actual market value of services. While excluding the best evidence regarding the value of medical services, the decisions allow plaintiffs to recover amounts *billed* for those services—which plaintiffs will never have to pay. As a result, plaintiffs recover windfall damages, which is unsound and unfair.

The majority in *Crossgrove* expressed concern that admitting evidence of the amounts paid "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 . . . and thereby improperly diminish the plaintiff's damages award." 276 P.3d at 567. That concern is misplaced. Under the Affordable Care Act, federal law seeks to ensure that everyone in the United States has health insurance regardless of their health or financial condition. *See* 26 U.S.C. § 5000A (2012); 42 U.S.C. §§ 300gg, 300gg-1, 300gg-3, 300gg-4, 18022, 18031, 1844 (2012). Thus, most jurors likely assume that plaintiffs have health insurance covering the medical expenses for which they seek damages.

It makes little sense to bar evidence regarding the amount paid for medical services. However, the 2010 Colorado collateral source rule statute states that the "fact or *amount* of any collateral source payment or benefits shall not be admitted as evidence in any action against an alleged third-party tortfeasor." Colo. Rev. Stat. § 10-1-135(10)(a) (emphasis added). The *Scholle* Court could conceivably adopt Justice Eid's dissenting opinion in *Jeppsen*, and hold that the 2010 statute makes "no change at all" to "the long-standing rule that juries should consider what a medical provider accepted as payment for medical services in determining the reasonable value of those services." 277 P.3d at 230 (Eid, J., dissenting). Alternatively, the Colorado Legislature could amend the statute to strike the words "or amount."

But even as worded, the statute can and should be harmonized with the rule that medical expense damages should be limited to the reasonable value of the services. For example, a trial court may exclude evidence of any actual "benefits received" under the collateral source rule, but still admit evidence of the *amounts typically accepted* as full payment for the purpose of ascertaining the reasonable value of medical services rendered. *Crossgrove*, 276 P.3d at 569 (Eid, J., dissenting). In other words, a trial court may allow evidence regarding the amounts typically paid while excluding evidence of *who* typically pays those amounts. *See id*. This would provide Colorado juries with a sound "financial benchmark" from which to make reasonable damages determinations. *Id*.

  ISBN 1056 3059