AGGRESSIVE APPLICATION OF THE COLLATERAL SOURCE RULE CONTINUES IN *FORFAR V. WALMART*

Parties involved in personal injury cases continue to debate whether the jury should consider evidence of healthcare charges paid, versus the higher amounts billed by providers. Over the past several years, our Courts have acknowledged that the proper measure of damages is the necessary and reasonable value of services provided yet preclude any evidence showing the actual costs of the treatment received. Recently, the third division of the Colorado Court of Appeals held the collateral source rule in C.R.S. § 10-1-135(10)(a) and the contract exception set forth in C.R.S. § 13-21-111.6 exclude evidence relating to Medicare benefits. The Court affirmed the District Court rulings that allowed Plaintiff to seek the amounts billed for medical treatment he received after slipping and falling in a Wal-Mart location despite his status as a Medicare beneficiary. *See, Forfar v. Walmart, 2018 COA 125.*

Prior to trial, Wal-Mart argued the amounts contained in agreements between Plaintiff and his medical services providers were inadmissible since they were void under certain Medicare regulations. Thus, according to Wal-Mart, the "reasonable value" of Plaintiff's medical expenses was "limited to the Medicare approved charges for the services." Through its experts, Wal-Mart argued that Plaintiff's past treatment expenses should be capped at $9,170.83 based on Medicare's limitations. The trial court disagreed and ruled Wal-Mart could not present evidence to the jury regarding the Medicare limits.

Over Wal-Mart's objection, Plaintiff blackboarded $72,636.00 in treatment costs at trial. The jury found in favor of Plaintiff and awarded him $44,000.00 for past medical services. Wal-Mart moved for a post-trial reduction of Plaintiff's damages pursuant to Colorado's collateral source rule, again arguing that the damages awarded by the jury for Plaintiff's past medical expenses should be reduced to "Medicare accepted rates." The trial court denied Wal-Mart's request, holding that Medicare benefits fell within the contract exception set forth in the collateral source statute.

Wal-Mart appealed the trial court's pre- and post-trial orders regarding Plaintiff's ability to recover amounts for medical services exceeding the limits established by Medicare and argued the "reasonable value" of Plaintiff's medical expenses was "limited to the Medicare approved charges for the services."

Further, Wal-Mart argued federal law stands for the proposition that a defendant cannot be liable for amounts exceeding Medicare limits on medical services provided to a beneficiary and preempts Colorado law to the contrary. Wal-Mart's attorneys cited 42 U.S.C. §§ 1395u(b)(18)(B) and 1395w-4(g)(1)(A)(ii) for the proposition it cannot be held liable for amounts exceeding Medicare limits on medical services provided to a beneficiary. Wal-Mart argued, to the extent a conflict existed between C.R.S. § 13-21-111.6 and the applicable federal statutes and regulations, the federal law preempts Colorado's statute on the issue.

The Court of Appeals ultimately affirmed the trial court's rulings. The Court held generally, C.R.S. § 10-1-135(10)(a) operates to exclude evidence of collateral source benefits

based on the risk that a jury might "improperly reduce the plaintiff's damages award on the grounds that the plaintiff already recovered his loss from the collateral source." *Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562, 565 (Colo. 2012). Similarly, C.R.S. § 13-21-111.6 allows the Court to reduce a plaintiff's judgement based on compensation received for the losses from a third-party, but does not allow reduction where the benefits or amounts received were pursuant to a contract entered into by the plaintiff.

While acknowledging, "the correct measure of damages is the necessary and reasonable value of the services rendered," the Court of Appeals affirmed the trial court's decision precluding Wal-Mart from admitting evidence of Medicare's limitation on chargeable amounts for treatment received by Plaintiff. According to past precedent cited in the decision, "benefits from Social Security, Medicaid, and public retirement plans all meet the definition of a collateral source" as contemplated under C.R.S. § 10-1-135(10)(a). *Forfar*, ¶ 22, citing *Pressey v. Children's Hosp. Colo.*, 2017 COA 28, ¶ 13. The Court also cited the Supreme Court's decision in *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080, 1083 (Colo. 2010) in support of its holding, finding that application of the collateral source rule "prohibits the wrong-doer from enjoying the benefits procured by the injured plaintiff."

Moreover, the appellate court dismissed Wal-Mart's preemption arguments, finding its position did "not survive scrutiny" and holding Wal-Mart had overstated the legal effect of the federal provisions at issue, and that no conflict existed between the federal law and Colorado statutes regarding collateral source evidence.

The *Forfar* opinion continues Colorado's trend of aggressive application of the two collateral source statutes to preclude any evidence of actual amounts paid for a plaintiff's medical services. The jurisprudence in *Crossgrove, Gardenswartz, Pressey* and other opinions broadly interpret the contract exception in C.R.S. § 13-21-111.6 to prevent demurrer of economic amounts awarded to plaintiffs for past medical expenses. Colorado Courts have now determined evidence of benefits from SSDI, Medicaid, and Medicare, and insurance carrier benefits and discounts received on medical treatment are all inadmissible based on the risk a jury may infer the existence of a collateral source.

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