IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS

KC Plaintiff	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 06 CV XXXX
	)	
Defendant Doctor	)	
	)	
Defendant.	)	

MOTION IN LIMINE FOR ORDER THAT PLAINTIFF MAY RECOVER AMOUNTS OF MEDICAL EXPENSES

COMES NOW plaintiff seeking an Order in Limine that plaintiff is entitled to recover the full amount billed by plaintiff's caregivers under the collateral source rule.

I. INTRODUCTION

This is a "medical malpractice" case in which plaintiff is seeking to recover the reasonable value of the treatment and expenses associated with her medical care. Included within the damages is the reasonable value of plaintiff's past medical treatment. Some of the medical bills were paid by private third party insurers. Often, these private third party payors did not pay the entire charge of the provider and the remainder was then "written-off" by the provider. The plaintiff anticipates that defendant will take the position that any recovery for past medical treatment on amounts paid by third parties is limited to the amount actually paid.

In fact, the amount recoverable for plaintiff's past medical treatment is not limited to amounts actually incurred for medical services or the "net" loss. Rather, Kansas law entitles injured plaintiffs to damages based on the "reasonable" value of the treatment. See Shirley v. Smith, 261 Kan. 685, 693-94, 933 P.2d 651 (1997) (holding that plaintiff

can recover for self-catheterization). Plaintiff intends to present testimony that the amounts actually billed by plaintiff's health care providers represent the reasonable value of those services.

To reduce defendant's liability by the benefit enjoyed by plaintiff violates the collateral source rule which is deeply rooted in Kansas jurisprudence. "[T]he collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." Zak v. Riffel, 34 Kan. App. 2d 93, 105 (Kan. Ct. App. 2005) (citing Farley v. Engelken, 241 Kan. 663, 666, 740 P.2d 1058 (1987)). The rationale of the collateral source rule as it exists in Kansas is as follows:

> The purpose of the collateral source rule is to prevent the tortfeasor from escaping full liability resulting from his or her actions by requiring the tortfeasor to compensate the injured party for all of the harm, not just the net loss.… A benefit secured by the injured party either through insurance contracts, advantageous employment arrangements, or gratuity from family or friends should not benefit the tortfeasor by reducing his or her liability for damages. If there is to be a windfall, it should benefit the injured party rather than the tortfeasor.

Id., at 106-07 (quoting Rose v. Via Christi Health Systems, Inc., 276 Kan. 539, 544, 78 P.3d 798 (2003), modified on rehearing 279 Kan. 523, 113 P.3d 241 (2005)). Any attempt by defendant's to reduce their liability using providers' write-offs is precisely what the collateral source rule exists to prevent, i.e. defendant receiving a windfall because they were lucky enough to injure a plaintiff covered by private insurance entitling them to significant write-offs.

II. ARGUMENTS AND AUTHORITIES

A. Reliance on Bates v. Hogg is flawed.

It is anticipated that defendant's argument will rest largely on the Kansas Court of Appeals decision in Bates v. Hogg, 22 Kan. App. 2d 702, 921 P.2d 249 (1996). In Bates, Justice Gernon, then a judge on the Court of Appeals, wrote for the majority in holding that in the unique setting of Medicaid, "a medical provider, by agreement and contract, may not charge Medicaid patients for the difference between their customary charge and the amount paid by Medicaid. Therefore, the amount allowed by Medicaid becomes the amount due and is the "customary" charge under the circumstances we have before us." Bates, 22 Kan. App. 2d at 705. The Bates court's reasoning rested in large part on a perceived injustice in allowing a Medicaid recipient, who presumably contributed nothing toward his coverage, to pocket the write-off. See id. at 706. Justice Gernon held that such a result would be "unconscionable." See id. Following Bates, a series of unpublished federal district court decisions applied and expanded its holding to write-offs pursuant to Medicare and even private health insurance. See Wildermuth v. Staton, No. CIV. A. 01-2418-CM, 2002 WL 922137 (D. Kan. April 29, 2002) (applying Bates to preclude recovery of Medicare write-off); Strahley v. Mercy Health Ctr. Of Manhattan, Inc., No. CIV. A. 99-2439-KHV, 2000 WL 1745291 (D. Kan. Nov. 9, 2000) (applying Bates to preclude recovery of private health insurance write-off).

During the period immediately following Bates and its progeny, it seemed clear that a plaintiff could not recover amounts written-off pursuant to Medicaid and arguably, based on the limited precedential value of unpublished federal district court decisions, plaintiff could not recover amounts written off pursuant to Medicare or private health insurance. On October 31, 2003, however, the Kansas Supreme Court, in an opinion

ironically authored by then Supreme Court Justice Gernon, took the legs out from under Bates.

In Rose v. Via Christi Health System, Inc., 276 Kan. 539, 78 P.3d 798 (2003) (hereinafter "Rose I"), Justice Gernon limited the Bates holding to only cases involving Medicaid and specifically held that the collateral source rule prohibited a tortfeasor from reducing its liability based on amounts written off pursuant to Medicare. See Rose I, 276 Kan. at 546. In Rose I, the trial judge allowed the plaintiff to claim the full amount of her bills, including amounts written off, at trial. Id. at 541. After the jury returned a verdict in her favor, however, the trial court allowed the defendant, Via Christi, to "offset" against the medical expenses portion of the verdict, those portions of its charges it had written off pursuant to Medicare. Id. The plaintiff appealed the trial court's decision to allow the "offset" and the defendant cross-appealed the trial court's decision to allow the plaintiff to submit the full amount of the medical bills to the jury - an issue that would only be reached in the event the court reversed the trial court's decision to allow the "offset." Id. at 540.

In Rose I, the Kansas Supreme Court reversed the trial court's decision to allow an offset holding that the offset amounted to a "charge," to a Medicare beneficiary which is prohibited by 42 U.S.C. § 1395cc(a)(1)(A)(i). Id. at 544. The Court then turned to the issue relevant to the case at bar, i.e. whether a plaintiff should be permitted to claim the full amount of a health care provider's charges despite portions being written off pursuant to Medicare, or in the case at bar, a third party insurance contract.

The Court began by acknowledging the collateral source rule as it has existed in Kansas throughout the years: "benefits received by the plaintiff from a source wholly

independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." Id. at 544. Justice Gernon set forth the rationale for the rule as follows:

> The purpose of the collateral source rule is to prevent the tortfeasor from escaping full liability resulting from his or her actions by requiring the tortfeasor to compensate the injured party for all of the harm, not just the net loss.… A benefit secured by the injured party either through insurance contracts, advantageous employment arrangements, or gratuity from family or friends should not benefit the tortfeasor by reducing his or her liability for damages. If there is to be a windfall, it should benefit the injured party rather than the tortfeasor.

Id. (citations omitted). Justice Gernon then distinguished his own court of appeals opinion in Bates reasoning that Bates was, by its express terms, limited to the facts of that case and furthermore, Medicare is akin to private insurance as it is purchased through payroll deductions as opposed to the purely welfare-type nature of Medicaid which is free to all who qualify. Id. at 545.

The Court held that "[b]ased upon the payment of premiums by Medicare participants, we find that Medicare is akin to private insurance and can be distinguished from Medicaid in that regard. Accordingly, we hold that the Bates decision is limited to cases involving Medicaid."[1] Id. at 546. Justice Gernon then reasoned that in Kansas, recovery is not limited to amounts paid or incurred; rather, a plaintiff is entitled to recover the "reasonable expense of treatment" and that amounts written-off pursuant to Medicare contracts are collateral source benefits that cannot be used to reduce a tortfeasor's liability. Id. at 548-49. Justice Gernon reasoned that the benefits of the

[1] Implicit within the reasoning of Rose I is that by paying premiums in the case of private insurance or paying Medicare "premiums" through employee contributions, a plaintiff has become entitled to a benefit for which he paid which, in these cases, is the provider write off - or that at least, allowing one who has contributed to the collateral source to recover the provider write-off is more palatable than allowing a Medicaid recipient to do so.

contractual write-offs in the case of Medicare or private health insurance should flow to the injured party as opposed to the tortfeasor and articulated this policy as follows:

> Public policy in Kansas supports the theory that any windfall from the injured party's collateral source should benefit the injured party rather than the tortfeasor, who should bear the full liability of his or her tortuous actions without regard to the injured parties' method of financing his or her medical treatment.

Id. at 551. Thus Rose I squarely held that amounts written off by a healthcare provider pursuant to Medicare, or a private insurance, are a collateral source benefit and thus, cannot serve to reduce a tortfeasor's liability.

In Rose I, Justice Luckert authored a thorough dissent that disagreed with the majority's disposition of the issue. First, Justice Luckert disagreed with the majority's holding that the offset allowed by the trial judge amounted to a prohibited charge under 42 U.S.C. § 1395cc(a)(1)(A)(i). Id. at 553 (J. Luckert dissenting). Secondly, Justice Luckert made the point that in that particular case, because the health care provider writing off portions of the bill was the defendant, the source of the benefit was not truly "collateral." See id. Importantly, Justice Luckert made a point to distinguish the Rose I situation from the more common situation, such as the one in the case at bar, where the write off comes from a health care provider that is not the defendant:

> In these cases [such as the case at bar] the plaintiff is injured through the negligence of or other wrongful act of a defendant and receives treatment for those injuries from a Medicare provider who is not a defendant. The bill for medical services is then paid by Medicare, and the provider writes off those amounts which Medicare does not reimburse, thus, providing a benefit to the plaintiff to which the wrongdoer did not contribute and which is, therefore, collateral to the tortfeasor. *By definition, the collateral source rule applies in these situations.*

Id. at 552. Justice Luckert's dissent argued that because the write-off was made by the defendant itself, it should be considered an off-set against the reasonable value of the medical treatment.

Likely due to the issues raised by Justice Luckert, the Court granted a motion for rehearing thereby suspending the effect of the Rose I opinion. After rehearing was granted but before the Kansas Supreme Court handed down the second opinion in the case "modify[ing]" the initial opinion the effect of the Rose I decision was suspended. During this time, the Kansas Court of Appeals handed down two unpublished decisions, heard by the same three judge panel, ignoring the reasoning of Rose I and extending the holding of Bates to private health insurance and Medicare. See Fischer v. Farmers Ins. Co., Inc., No. 90,246, 2005 WL 400404 (Kan. Ct. App. Feb. 18, 2005) (extending the reasoning of Bates to preclude recovery of private health insurance write-offs); Liberty v. Westwood United Super, Inc., No 89,143, 2005 WL 1006363 (Kan. Ct. App. 2005) (extending the reasoning of Bates to preclude recovery of Medicare write-offs). On June 3, 2005, however, the Kansas Supreme Court again refused to adopt the Bates rule and reaffirmed the doctrinal underpinnings of the collateral source rule in Rose v. Via Christi Health System, Inc., 279 Kan. 523, 113 P.3d 241 (2005) (hereinafter "Rose II"). As demonstrated herein, the Rose II opinion rejects the reasoning of Fischer and Liberty and renders them a nullity.

In Rose II, Justice Luckert, the author of the dissent in Rose I, delivered the opinion of the Court. The opinion essentially parallels her dissent in Rose I holding that the trial court's decision to setoff Via Christi's Medicare write-off did not amount to a "charge" under 42 U.S.C. § 1395cc(a)(1)(A)(i). Rose II, 113 P.3d at 244. Furthermore,

because the amounts at issue were written off by the defendant Via Christi and thus the benefit to the plaintiff did not flow from a "collateral source," the collateral source rule did not apply. Id. at 245-48. The Court did not explicitly reach the issue of whether the Medicare write-off, when paid by a third party, is a collateral source. Id. at 248. The Court left little doubt, however, about where it stood on the issue.[2]

In Rose II, the Court cited Harrier v. Gendel, 242 Kan. 798, 800, 751 P.2d 1038 (1988), and the Restatement (Second) of Torts § 920A in holding that "[t]he collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." See Rose II 113 P.2d at 245 (citing Harrier, 242 Kan. at 800 (holding that statute repealing the collateral source rule for medical malpractice plaintiffs was unconstitutional)). Thus, the Rose II court reasoned that a tortfeasor's liability will not be diminished by "[p]ayments made to or benefits conferred on the injured party from other sources [which] are not credited against the tortfeasor's liability although they cover all or a part of the harm for which the tortfeasor is liable." Id.

In Rose II, the Kansas Supreme Court emphasized that the principles set forth in Restatement (Second) of Torts § 920A are "consistent with Kansas common-law principles" and specifically stated that "[t]he collateral source rule in Kansas … is consistent with the Restatement (Second) of Torts § 920A …." Rose II, 113 P.3d at 245.

[2] Significantly, the Rose II court has not ordered the Rose I opinion to be withdrawn; rather characterizing the holding as modifying the Rose I decision. In fact, the Rose I holding regarding the collateral source doctrine has been cited by the Kansas Court of Appeals since Rose II was handed down. In Zak v. Riffel, 34 Kan. App. 2d 93 (Kan. Ct. App. 2005)(cited supra), the Kansas Court of Appeals quoted heavily from Rose I in setting forth the rationale of the collateral source rule. See Zak, 34 Kan. App. 2d at 105-07 (quoting Rose v. Via Christi Health Systems, Inc., 276 Kan. 539, 544, 78 P.3d 798 (2003), modified on rehearing 279 Kan. 253, 113 P.3d 241 (2005)).

(citing Harrier, 242 Kan. at 800). The Restatement sets forth the effect of benefits conferred upon an injured party by a third party as follows:

> Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

Restatement (Second) of Torts § 920A(b) (emphasis added). In the comments, the drafters set forth the policy behind § 920A(b) as follows:

> Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. 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. The 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. One way of stating this conclusion is to say 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.

Id. (comment b). In addition to explicitly endorsing the Restatement as the law of Kansas, the court in Rose II, relied heavily on Candler Hosp. v. Dent, 491 S.E.2d 868 (Ga. Ct. App. 1997). In Candler, the Georgia Court of Appeals specifically held that a tortfeasor could not reduce its liability by those portions of a medical bill written-off by a third-party health care provider after Medicare paid a portion thereof. See Rose II, 113 P.2d at 246 (noting that in Candler although the write-off was a collateral source when provided by a third party, the defendant was entitled to "setoff" of the write-off because the health care provider was the defendant, not a third party). The Rose II court, after

noting the Candler court's holding regarding the collateral source rule stated that "[t]he rationale of the Georgia court parallels Kansas common law regarding damages." Id. at 247.

By endorsing the Restatement and the reasoning of Candler, the Kansas Supreme Court has indicated that the collateral source rule is alive and well in Kansas and a benefit which flows to an injured party cannot be used to reduce a tortfeasor's liability. Also significant is what the Kansas Supreme Court did not say.

The Rose II Court chose not to adopt the reasoning of Bates v. Hogg and its progeny i.e. that the paid amount is the "customary" charge because that is the maximum that the provider could charge. In fact, the Rose II court implicitly rejected this holding. In distinguishing between a credit and a true "offset" the Court noted that the proper terminology to be used in the setting of a tortfeasor reducing its liability by writing off a portion of its bill is a "credit" because this acknowledges that the amount written off is "an appropriate measure of recoverable damages." Rose II, at 245. Thus, in addition to affirmatively endorsing the Restatement approach, the Rose II court rejects the reasoning of Bates.

B. Write-offs are analogous to gratuitous services.

Plaintiff is also entitled to expenses in the full amount billed by her health care providers because insurer write-offs are analogous to gratuitous services, which are recoverable under Kansas law. Kansas law has long held that a plaintiff can recover the reasonable value of medical services that are provided at no charge. Lewark v. Parkinson, 73 Kan. 553, 85 P. 601-02 (Kan. 1906) (holding that plaintiff could recover reasonable value of free care provided by sons). The Kansas Supreme Court recently

reinforced Lewark's allowance for recovery of gratuitous services when it held that a plaintiff could recover the reasonable value of self-catheterization. Shirley v. Smith, 261 Kan 685, 693-94, 933 P.2d 651, 658 (Kan. 1997) (citing Lewark, 73 Kan. at 555, 85 P. 601).

As stated above, it is well-established that the plaintiff may recover the reasonable value of this treatment despite the fact they did not become liable therefor. It would be illogical to allow plaintiff to recover for such services yet deprive them from recovering the portion of a provider's charge that was written-off by the provider. In fact, the write-offs in this case are benefits for which the plaintiff bargained and paid premium through the procurement of health insurance. Thus, it would be even less just to deprive her of her right to recover the reasonable value of the treatment charged regardless if a portion thereof was written-off by a provider.

In fact, the Hawaii Supreme Court recently followed this reasoning to allow a Medicare/Medicaid plaintiff to recover the full value of medical services. In Bynum v. Magno, 101 P.3d 1149 (Haw. 2004), defendant doctors argued that a plaintiff whose bills were covered by Medicare and Medicaid was entitled only to the amount actually paid to his care providers. The Hawaii Supreme Court disagreed, saying that the difference between the amount charged and the amount paid was similar to gratuitous services. This similarity brought the full amount of the bills under the collateral source rule and prevented the plaintiff's medical expenses from being reduced to the amount paid by Medicare and Medicaid. Id. at 1157.

III. CONCLUSION

To allow defendant to pay less than the full amount of damages would grant them a windfall. And to confer a windfall upon defendant simply because they were fortunate enough to injure someone who was in fact insured would be inequitable and would run counter to Kansas' long held public policy under the collateral source rule.

WHEREFORE plaintiff respectfully requests that this Court Order that plaintiff is entitled to recover the full amount billed by providers for medical expenses.

Respectfully submitted,

THE LAW OFFICES OF
STEPHEN R. BOUGH

By_____

Stephen R. Bough, #18598
917 W. 43rd Street, Suite 100
Kansas City, MO 64111
(816) 931-0048 phone
(816) 931-4803 fax
stephen@boughlawfirm.com

ATTORNEY FOR PLAINTIFF