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NO. 51317-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CESAR BELTRAN-SERRANO,

Plaintiff/Respondent,

v.

CITY OF TACOMA

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This court has previously held that a plaintiff in a tort case “may recover only the reasonable value of medical services received, and not the total of all bills paid.” Patterson v. Horton, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997)(citing the Supreme Court in Torgeson v. Hanford, 79 Wash. 56, 58-59, 139 P. 648 (1914)). Other than precluding evidence of collateral source¹, no Washington appellate court has ever held that competent expert testimony cannot be offered by a defendant on this issue.

The superior court, when faced with competing expert opinions on the reasonable value of the medical care, resolved a material question of disputed fact and ordered that any jury award for the plaintiff must include payment of \$712,719.99, representing the full amount billed for past medical care.

If permitted to stand, the superior court’s ruling in the instant case will effectively preclude defendants in tort litigation from proffering competent expert testimony on the reasonable value of medical care.

II. ASSIGNMENT OF ERROR

The trial court erred when it resolved a disputed issue of material

¹ The superior court’s ruling in this case was not based on an application of the collateral source doctrine and the City of Tacoma is not challenging that doctrine. In fact, the defense expert’s opinion did not rely, in any way, on facts that would implicate the collateral source doctrine.

fact on summary judgment.

ISSUE: Does a trial court commit reversible error when, on a motion for summary judgment, the trial court refuses to consider competent expert testimony on the issue of the reasonable value of medical care and resolves a material question of fact created by conflicting expert opinions, by finding that the amount billed for past medical services is reasonable, as a matter of law.

III. STATEMENT OF THE CASE

On June 29, 2013, plaintiff Cesar Beltran picked up a 10 pound chunk of ragged metal construction debris and swung it at Tacoma Police Officer Michel Volk. After first unsuccessfully attempting to use her taser to subdue Mr. Beltran, Officer Volk used her duty-issued firearm and shot Beltran four times. Mr. Beltran survived his wounds, but his injuries required extensive medical treatment. It is undisputed that the medical treatment provided to Mr. Beltran for his acute injuries was medically reasonable and necessary. What is disputed is the reasonable value of that medical care.

Plaintiff moved for partial summary judgment on the past medical specials, asking the court to determine that the amount billed for past medical care was reasonable, as a matter of law. CP 26-34. In support of his motion, plaintiff offered an expert opinion from Anthony Choppa, a

vocational rehabilitation counselor. CP 116-177. Mr. Choppa's opinion on the reasonableness of the medical bills was that the amounts billed were reasonable because those are the amount that providers normally bill. CP 119 In response, the City offered an expert opinion from Dr. Thomas Wickizer, a healthcare economist, professor and researcher. CP 201-260. Dr. Wickizer's opinion was that the health care markets, due to their distinctive features, do not resemble competitive markets, and that hospital and physician billed charges do not represent the reasonable value of the medical services provided. *Id.* Utilizing data from Federal Cost Reports, Dr. Wickizer opined that the reasonable value of the medical services was equal to the cost of providing those services plus a reasonable profit margin, consistent with historical data. In Mr. Beltran's case, this methodology (reasonable value = cost + profit margin) resulted in a determination that the reasonable value of the medical care provided to Mr. Beltran was approximately 33.4% of the billed charges. CP 205.

On September 1, 2017, the superior court granted plaintiff's Motion for Partial Summary Judgment on Past Medical Specials. In so doing, the superior court found, as a matter of law, that the amount billed for the medical services provided to Mr. Beltran was reasonable. CP 322. The court made this ruling even though the defense had opposed the motion and had

presented competent expert testimony that the reasonable value of the medical services provided was \$252,954, as opposed to the \$756,714 billed.

The superior court subsequently certified the issue for discretionary review pursuant to RAP 2.3(b)(4). CP 325. The City petitioned this Court for discretionary review and review was granted, pursuant to RAP 2.3(b)(4).

IV. ARGUMENT

A. Standard of Review

This Court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court. Woodward v. Lopez, 174 Wn. App. 460, 467, 300 P.3d 417 (2013).

“[A] summary judgment motion under CR 56(c) may be granted if the pleadings, affidavits, and depositions before the trial court establish that there is no genuine issue of material fact and that as a matter of law the moving party is entitled to judgment. Ruff v. Cty. of King, 125 Wn.2d 697, 703, 887 P.2d 886, 889 (1995). “All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party[.]” Sherman v. State, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). “Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *But a court must deny summary judgment when a party raises a material factual dispute.*” (emphasis added) Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485-86, 78 P.3d 1274

(2003)(citing Ruff v. County of King, *supra*; Balise v. Underwood, 62 Wn.2d 195, 200, 381 P.2d 966 (1963)).

Material facts are those upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). “The legal inquiry shapes what is a material fact.” Smith v. Safeco Ins. Co., 150 Wn.2d at 486.

B. Plaintiff failed to carry his burden on summary judgment.

As outlined above, plaintiff brought a motion for partial summary judgment, asking the superior court to decide, as a matter of law, whether the past medical specials were reasonable, and offered testimony from Anthony Choppa, a vocational rehabilitation counselor. CP 116. As outlined in Mr. Choppa’s declaration, plaintiff is claiming to have sustained special damages for past medical treatment in the amount of \$712,719.99. CP 119. To establish the reasonable value of the more than \$700,000 billed for past medical care – the sole issue before the superior court – Mr. Choppa offered a single, conclusory statement:

I have reviewed the charges associated with the above listed medical care. It is my opinion that the charges incurred are customary of the amounts charged by hospitals and medical providers in the community and are therefore reasonable.

CP 119, para. 10. In other words, Mr. Choppa's opinion is that the amounts billed for Mr. Beltran's past medical treatment are reasonable because those amounts are consistent with what hospitals and providers routinely bill for such services. Under Washington law, however, this single, conclusory statement is insufficient to support the court's order granting the plaintiff's motion for summary judgment. CP 322-24.

Plaintiff bears the burden of proving his economic damages. Lopez v. Salgado-Guadarama, 130 Wn. App. 87, 92-93, 122 P.3d 733 (2005); WPI 30.01.01. Pursuant to RCW 4.56.250(1)(a), economic damages, including medical expenses, are defined as "objectively verifiable monetary losses[.]" RCW 4.56.250(1)(a) (2018). Further, with respect to medical expenses, "[a] plaintiff ... may recover *only the reasonable value* of medical services received, *not* the total value of all bills paid." (emphasis added) Patterson v. Horton, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997). "[T]he amount billed or paid is not itself determinative. The question is whether the sums requested for medical services are reasonable." (emphasis added) Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 616, 20 P.3d 496 (2001). See also WPI 30.07.01 (allowing recovery of "[t]he reasonable value of necessary medical care, treatment, and services received to the present time"). Moreover, in carrying this burden, a plaintiff "*cannot rely solely on the medical records and bills.*" (emphasis added) Patterson, 84 Wn. App.

at 543. “Medical records and bills are relevant to prove past medical expenses only if supported by additional evidence that the treatment and bills were both necessary and reasonable.” Id.

Considered in the context of Patterson and Hayes, Mr. Choppa’s single, conclusory statement is wholly inadequate to carry plaintiff’s burden on this issue. The City, however, did not rest on the inadequacy of plaintiff’s proffered evidence, but instead, provided the superior court with competent expert testimony to rebut Mr. Choppa’s opinion.

The City does not dispute that the plaintiff sustained significant physical injuries as a result of the shooting. Further, the City does not dispute that the medical treatment provided to the plaintiff, as outlined in paragraphs 5 through 8 of Mr. Choppa’s declaration, was reasonable and medically necessary for treatment of those injuries. CP 118-119. The City does dispute, however, that the actual billed amount – the measure of special damages being claimed by plaintiff – represents the reasonable value of the medical services provided to the plaintiff.

C. The City adduced competent expert testimony in opposition to plaintiff’s motion for summary judgment.

To address the reasonable value of past and future medical care, the City retained Dr. Thomas Wickizer, a health care economist currently with Ohio State University and formerly with the University of Washington. CP

201-260. Dr. Wickizer has decades of experience in this field, researching, writing and teaching on the issue of healthcare economics. CP 208-239. Dr. Wickizer is a tenured professor in the College of Public Health at Ohio State University, and has served in a number of positions, including being the Chair of the Division of Health Services Management and Policy and being the Director of the Center for Health Outcomes, Policy and Evaluation Studies. CP 202. Prior to taking a position at Ohio State, Dr. Wickizer was a professor at the University of Washington in the Department of Health Services for twenty years. *Id.* He has twenty-eight years of teaching and research experience and has authored or co-authored in excess of one hundred twenty peer reviewed articles on, *inter alia*, health care expenditures, hospital expenditures and cost containment programs. *Id.* There is no question that Dr. Wickizer has the requisite education, training and experience to offer an expert opinion on the reasonable value of healthcare expenses under Evidence Rule 702². See State v. McPherson,

² ER 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Under the rule, expert testimony is admissible if 1) the witness qualifies as an expert and 2) the testimony would assist the trier of fact. State v. McPherson, 111 Wn. App. 747, 761, 46 P.3d 284 (2002). As outlined above, Dr. Wickizer clearly has the qualifications to offer an expert opinion. Further, his testimony will assist the trier of fact in assessing the value of medical services, an area about which few jurors are likely to have much knowledge. See State v. Groth, 163 Wn. App. 548, 564, 261 P.3d 183 (2011)(“Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading.”).

111 Wn. App. 747, 761, 46 P.3d 284 (2002)(a witness may be become qualified to offer expert opinions through formal training or practical experience).

Unlike Mr. Choppa's single, conclusory, self-serving statement, Dr. Wickizer provided a detailed analysis to support his opinions in this case. As outlined in his declaration, Dr. Wickizer explained why the health care industry is not a traditional market, and why billed charges bear little relationship to the value of the health care services provided to patients. CP 203-204, paras. 9-11. See also CP 244-248. For example, in a 2006 peer reviewed study, one researcher established that hospitals accepted – from all payers – an average of 38% of the billed charges. CP 204, para. 12; CP 246-247. Further, Dr. Wickizer's opinion highlights the fallacy of relying on only the billed charges in determining the reasonable value of the medical services provided:

Hospital charges vary widely even within a small geographical area. ... For example, the billed charge for DRG 470 (Major Joint Replacement) varied from a high of \$91,784 (Tacoma General) to a low of \$41,122 (Virginia Mason). Similarly, for DRG 238 (Major CVD [cardiovascular disease] Procedure), billed charges ranged from \$159,162 (St. Joseph) to \$71,473 (Virginia Mason). *If billed charges were used as the metric to evaluate the reasonable value of medical expenses for DRG 470, would a patient hospitalized in Tacoma General deserve 2.23 times the award for economic damages as a patient hospitalized in Virginia Mason, despite the fact that*

Virginia Mason is widely respected as an excellent hospital?

(emphasis in original) CP 247. In short, Dr. Wickizer's opinion is based on a central thesis, established by peer reviewed studies, that "hospital and physician billed charges bear little relationship to the resources used to provide care and do not represent the reasonable value of medical services." CP 249.

In order to determine the reasonable value of medical care provided to Mr. Beltran in this case, Dr. Wickizer applied a basic, tried-and-true economic principle: *the reasonable value of a good or service is determined by the cost of producing the good or service, plus the profit margin that the market will bear.* Dr. Wickizer applied this principle to the hospital medical charges utilizing information contained in the annual Federal Cost Reports. CP 204-205; CP 249-251. Each year, hospitals that treat Medicare patients (which is essentially all United States community hospitals) are required to submit a detailed annual report to the federal government, documenting the hospital's revenues and expenses. *Id.* The cost information contained in these annual reports relates to all patients (insured, uninsured, private pay, Medicare, et seq.) and not just those patients who are receiving Medicare benefits. *Id.* Further, the Federal Cost Report contains extensive information about what it costs the hospital to provide various tests, procedures and services. *Id.* Finally, the report contains information about the "cost-to-

charge” (CCR) ratio for the various tests, procedures and services. *Id.* For example, a CCR of .5 indicates that the cost to the hospital of providing that particular service is 50% of the billed charge³.

Dr. Wickizer used the medical billing records for the services provided to Mr. Beltran by the various hospitals and applied the CCR from the Federal Cost Report for each specific provider to the billed charges for the hospital services provided to Mr. Beltran. CP 251-255. By doing so, Dr. Wickizer was able to determine how much it cost each hospital to provide the specific services rendered for Mr. Beltran. Dr. Wickizer then added a reasonable profit margin of 5% to the actual cost of providing the specific services to Mr. Beltran⁴. Using this methodology, Dr. Wickizer *concluded that the reasonable value of the past medical services provided to plaintiff in this case represents approximately 33.4% of the billed amounts.* CP 205.

Further, it is important to note that Dr. Wickizer’s opinion does not implicate the collateral source rule. “Under the collateral source rule, 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

³ As noted in Dr. Wickizer’s report, some of the cost-to-charge (CCR) ratios imply a mark-up of charges over costs between 400% and 2000%. CP 251.

⁴ Peer reviewed literature shows that hospitals normally show a profit margin from roughly 2% for non-profit hospitals to 6% for for-profit hospitals.

otherwise recoverable.” Ciminski v. Sci Corp., 90 Wn.2d 802, 805, 585 P.2d 1182 (1978).

“The policy behind the rule is that the wrongdoer should not benefit *from collateral payments* made to the person he has wronged.” In other words, “[t]he very essence of the collateral source rule requires exclusion of evidence of other money received by the claimant so the fact finder will not infer the claimant is receiving a windfall and nullify the defendant’s responsibility.”

(emphasis added) Peterson-Gonzales v. Garcia, 120 Wn. App. 624, 637, 86 P.3d 210, rev. denied, 152 Wn.2d 1027 (2004). “[T]he collateral source rule is of necessity *triggered by evidence related to the payment made to the injured party.*” (emphasis added) Peterson-Gonzales, 120 Wn. App. at 636.

In the instant case, Dr. Wickizer’s opinions do not rely upon, or even consider, any payments received by plaintiff or made on his behalf, for the past medical care. Instead, Dr. Wickizer utilizes available data and determines how much it actually cost each particular hospital to provide these specific services to this specific patient, and then he adds the reasonable profit margin that the market will bear. And because Dr. Wickizer’s opinion does not rely upon or reference any actual payments made to Mr. Beltran or on his behalf from a collateral source for his medical care, the collateral source rule is simply not applicable.

In sum, the City provided a detailed opinion from a qualified expert, outlining why the amounts billed for medical care do not represent

reasonable value⁵, and providing an alternative methodology for evaluating the reasonableness of the charges for past medical care. Plaintiffs did not file and properly note a motion to exclude or strike Dr. Wickizer's testimony⁶, and consequently, the court was obligated to consider it.

D. The superior court erred when it decided a material question of fact, as opposed to submitting the issue to the jury.

As outlined above, under Washington law, the issue is not what health care providers normally charge. The issue whether the sums requested for medical services are reasonable. Further, Washington law does not presume that medical bills are reasonable: "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 v. Horton, 84 Wn. App. at 543. Moreover, "[p]roof of [medical expenses] need not be unreasonably exacting and may come from any witness who evidences sufficient knowledge and experience

⁵ Even plaintiff's expert, Mr. Choppa, admitted in his deposition that healthcare providers will discount the billed amount in exchange for cash payment and that his opinion on the reasonableness of the billed amount does not take this practice into account. CP 191, lines 10-17; CP 194, line 8 – CP 195, line 2.

⁶ Plaintiff attempted to backdoor a motion to exclude in their reply brief (see CP 262-270), but did not properly note a motion to exclude in conformance with the Pierce County Local Rules. The superior court expressly noted that there was no motion to exclude pending before it and ordered plaintiff to strike the language excluding Dr. Wickizer from the order. RP 15:25 – 16:14. See also CP 323 – 324.

respecting the type of service rendered and the reasonable value thereof.”
Kennedy v. Monroe, 15 Wn. App. 39, 49, 547 P.2d 899 (1976).

The disputing opinions proffered by the parties’ respective experts on the issue of the value of the medical services should have precluded summary judgment by the trial court on this issue. An expert opinion on an ultimate issue of fact is sufficient to preclude summary judgment. Woodward, 174 Wn. App. at 468; Eriks v. Denver, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992); Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). And, in the context of summary judgment, an expert must support his opinion with specific facts—things that exist in reality. Woodward, 174 Wn. App. at 468. Statements of ultimate facts or conclusory statements of fact are not sufficient to defeat a summary judgment motion. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). In the instant case, Dr. Wickizer’s opinion was properly supported by factual data and analysis such that the trial court erred in disregarding it for purposes of summary judgment.

In Woodward, the parties disputed their respective interest in a parcel of land which had been previously subdivided. Appellant argued that an easement by implication existed through respondents’ property for ingress, egress, and utilities for the benefit of the lots owned by plaintiff. Appellant submitted a declaration from a professional engineer

and land surveyor stating that he previously observed an existing roadbed and fence gates at each end of the disputed strip, which was used by the original owner. Woodward, 174 Wn. App at 465-466. Appellant also submitted an opinion from a wetland expert who reasoned that the only reasonable access to appellant's lots was over respondents' property, as the alternative would be prohibitively expensive, requiring appellants to construct a road and lay utilities across wetlands. Id. at 466. Division Two of the Court of Appeals found appellant raised genuine issues of material fact regarding the parties' intent, prior use, and reasonable necessity of gaining access to the lot through the respondents' property, and held that the trial court erred in granting summary judgment to respondents on appellant's claim of an implied easement. Id. at 272.

In Lamon v. MacDonnell, supra, plaintiff, a flight attendant, sustained falling through an emergency exit hatch that had been left open, contrary to instructions received during training, by another attendant in an airplane galley. Lamon, 91 Wn.2d at 346-47. Plaintiff alleged defective design and manufacture of the aircraft, and that the manufacturer had negligently failed to properly warn of a dangerous condition. Lamon, 91 Wn.2d at 346. The trial court granted summary judgment to the defendant. The Washington Supreme Court reversed, holding an expert's affidavit that had been introduced before the trial court comparing the escape hatches of

the aircraft at issue with a plane from a different manufacturer, opining that "the comparison of the two hatches in the affidavit raises the inference that a reasonable alternative which poses less risk is feasible." Lamon, 91 Wn.2d at 352.

Inexplicably, the superior court unilaterally rejected the defense expert's testimony on the grounds that it "would not be fair." RP 14, line 1-5. Although there is no Washington authority that restricts the type of evidence that can be presented on the issue of the reasonable value of medical care, the superior court determined that it was "not fair" or "legitimate" for the defense to present expert testimony that the reasonable value of the services was based on the cost of providing those services plus an established profit margin. RP 15, line 13-19. In so doing, the superior court resolved a material question of fact and ordered, that in the event the jury finds for the plaintiff, the jury's award must include the full amount billed for past medical care, in the amount of \$712,719.99. This is clear error.

Further, the superior court's ruling was not in response to a motion to exclude and in fact, the trial court expressly declined to include exclusion of Dr. Wickizer in its ruling. Instead, the trial court reasoned that it was unfair to allow Dr. Wickizer to testify that hospitals do not expect to receive full payment of the billed amounts (RP 15, line 13-17), even though peer

reviewed literature establishes that as a matter of fact. Moreover, the superior court reasoned that the issue should be addressed in a post-trial ruling based on what was actually paid for the medical services provided to the plaintiff. RP 13, line 21 through RP 14, line 22. The superior court was unable to provide guidance, however, as to how the issue procedurally could be addressed by the court post-trial or how such a motion could be brought without implicating the collateral source doctrine.

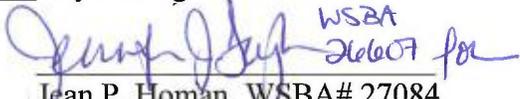
V. CONCLUSION

As outlined herein, the superior court erred in deciding, as a matter of law, that the billed amounts for Mr. Beltran were reasonable. The City had proffered competent expert testimony to rebut plaintiff's expert and consequently, there was a material question of fact that precluded summary judgment.

Therefore, the City respectfully asks this Court to reverse the trial court's order granting partial summary judgment and directing that the issue of the reasonable value of past medical care be submitted to the jury, with the jury being permitted to consider both experts' opinions.

DATED this 8th day of August, 2018.

By:


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CERTIFICATE OF SERVICE

I hereby certify that I forwarded the foregoing documents:

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/s/ Gisel Castro

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EXECUTED this 9th day of August, 2018, at Tacoma, WA.

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