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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CESAR BELTRAN-SERRANO, an incapacitated person, individually, and BIANCA BELTRAN, as guardian ad litem of CESAR BELTRAN-SERRANO, Respondent, v. CITY OF TACOMA, a political subdivision of the State of Washington, Petitioner,	No. 51317-0-II UNPUBLISHED OPINION

MELNICK, J. — We granted the City of Tacoma's motion for discretionary review of the trial court's order granting Cesar Beltran-Serrano's partial summary judgment motion on past medical expenses.[1] In opposition to the partial summary judgment motion, the City submitted a report from Dr. Thomas Wickizer, a health economist and professor, who opined that the hospital and physician billed charges were not reasonable. The City argues that the trial court committed reversible error when it resolved a genuine issue of material fact on the reasonableness of the medical bills incurred by Beltran-Serrano. We agree that the court improperly granted partial summary judgment. We reverse and remand to the trial court.

[1] The parties use the term "specials" but we refer to them as expenses.

FACTS

On June 29, 2013, Tacoma Police Department Officer Michel Volk encountered Cesar Beltran-Serrano, a mentally disabled individual, who was walking southbound on Portland Avenue in Tacoma. During this encounter, Officer Volk shot Beltran-Serrano four times.

Medical professionals immediately transported Beltran-Serrano to Tacoma General Hospital for surgery. Beltran-Serrano remained in the hospital for almost two months. . He sustained multiple injuries from the gunshot wounds including "injuries to the bilateral upper extremities, chest, abdomen, pelvis, spine, and sacrum." Clerk's Papers (CP) at 45. During his hospitalization and after, he received intensive care for his injuries. .

For this incident, Beltran-Serrano filed suit against the City for damages, including medical expenses for which he was billed approximately $713,000. He alleged that Officer Volk negligently shot him. Beltran-Serrano subsequently moved for partial summary judgment on the medical expenses. He relied on experts to establish that they were reasonable, necessary, and related to his treatment from the shooting. Dr. Jennifer James, an expert witness, conducted an independent medical evaluation of Beltran-Serrano and opined that "all of the treatment he has received since the incident has been reasonable, necessary, and causally related to the incident." CP at 70. Another expert, Anthony Choppa, a case manager and life care planner, opined that the medical costs were reasonable and customary. The City's expert, Dr. Alexsandra Zietak, also admitted that the physician charges were appropriate, but she could not comment on the hospital charges.

The City opposed Beltran-Serrano's motion for partial summary judgment on the medical expenses. The City agreed that Beltran-Serrano's treatment was reasonable and necessary but argued that the amount billed was not reasonable. The City primarily relied on a declaration and

report by Wickizer to assert that "there is a material question of fact on whether the amount billed for past medical services represents the reasonable value of the necessary medical care." CP at 178.

Wickizer opined that the hospital and physician charges did not represent the reasonable value of medical services provided to patients. He relied on Federal Cost Report data to determine that the reasonable value of the medical services was the cost-to-charge ratio (cost to the hospital of providing the services) plus a profit margin of 5 percent. In his opinion, he determined that the reasonable value of the medical services was approximately $253,000.

Beltran-Serrano responded to the City and argued that the trial court should exclude Wickizer's opinions under the collateral source rule, the *Frye*[2] test, and ER 702 and 703.

The trial court held a hearing on Beltran-Serrano's motion for partial summary judgment and granted it. It ruled, as a matter of law, that the amount billed for the medical services was reasonable and necessary. In addition, it entered an order that stated, "[S]hould the jury find for the Plaintiff in this matter, the verdict should include, but not be limited to, an award for past medical specials in the amount of $712,719.99." CP at 324.

The trial court did not orally address the admissibility of Wickizer's opinions but indicated that the issue could be taken up at a later time. In the order granting partial summary judgment, the court considered Wickizer's declaration and report.[3] In this order, the court struck the following language that Beltran-Serrano had proposed:

[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[3] The City attached Wickizer's declaration and report as exhibits to its response to Beltran-Serrano's motion for partial summary judgment. In granting partial summary judgment the court stated it relied on the City's response, "including the materials submitted in . . . opposition" to the motion for partial summary judgment. CP 322.

> The Court, having heard arguments of counsel and having reviewed all of the materials filed in support of and in opposition to Plaintiff's Motion, finds that Thomas Wickizer, PhD. and his opinions and testimony are excluded. The use of Dr. Wickizer would violate the collateral source rule and require a change in the rules of evidence. This is too difficult for the jury to determine reasonableness of every billing. Plaintiff should not be forced to argue re: discount of insurance "breaks" in the billings.

CP at 323.

The City sought discretionary review of the trial court's order granting Beltran-Serrano's partial summary judgment motion on past medical expenses. It argued that Wickizer's opinion created a material question of fact as to the value of the medical services Beltran-Serrano received. This court granted review under RAP 2.3(b)(4).

ANALYSIS

I. GENUINE ISSUE OF MATERIAL FACT

The City argues that the trial court erred in granting partial summary judgment because it resolved a genuine issue of material fact.

Beltran-Serrano agrees that the trial court erred by not excluding Wickizer's opinions and by ruling on a material fact that was in dispute. He further argues that we should decide that Wickizer's opinions are not admissible and as a result, no genuine issue of material fact exists. We agree that the trial court erred, but we do not address whether Wickizer's opinions are admissible.[4]

[4] We are aware that the exclusion of Wickizer's testimony in the trial court was recently upheld in *Gerlach v. Cove Apartments, LLC*, 8 Wn. App. 2d 813, ___ P.3d ___ (2019). In that case, the parties had a full opportunity to argue the issue, and the trial court had a full opportunity to consider the admissibility of Wickizer's report and testimony. Here, the parties have not yet had an opportunity to fully argue admissibility in the trial court.

A. LEGAL PRINCIPLES

We engage in the same inquiry as the trial court and review a summary judgment order de novo. *Woodward v. Lopez*, 174 Wn. App. 460, 467, 300 P.3d 417 (2013). We consider all evidence and all reasonable inferences that arise therefrom in the light most favorable to the nonmoving party. *Woodward*, 174 Wn. App. at 468.

Summary judgment is appropriate "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. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). The burden is on the moving party to demonstrate there is no genuine issue of material fact. *Woodward*, 174 Wn. App. at 468. On summary judgment, questions of fact may be determined as a matter of law "when reasonable minds could reach but one conclusion." *Ruff*, 125 Wn.2d at 703-04 (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)).

"'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.'" *Woodward*, 174 Wn. App. at 468 (internal quotation marks omitted) (quoting *Visser v. Craig*, 139 Wn. App. 152, 158, 159 P.3d 453 (2007)). However, "a nonmoving party 'may not rely on speculation [or on] argumentative assertions that unresolved factual issues remain.'" *Woodward*, 174 Wn. App. at 468 (quoting *Visser*, 139 Wn. App. at 158). "An expert opinion on an ultimate issue of fact is sufficient to preclude summary judgment." *Woodward*, 174 Wn. App. at 468; *see Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 353, 588 P.2d 1346 (1979). When a material fact is in dispute, a court must deny summary judgment. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003).

In a negligence case, a plaintiff may only recover the reasonable value of medical services, not necessarily the total of all bills paid. *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997). The plaintiff "must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills." *Patterson*, 84 Wn. App. at 543. "Proof of [medical expenses] need not be unreasonably exacting and may come from any witness who evidences sufficient knowledge and experience respecting the type of service rendered and the reasonable value thereof." *Kennedy v. Monroe*, 15 Wn. App. 39, 49, 547 P.2d 899 (1976).

B. THE TRIAL COURT ERRED IN RULING ON A DISPUTED MATERIAL FACT

The City argues that it provided a competent expert, Wickizer, in opposition to Beltran-Serrano's partial motion for summary judgment. Thus, the City contends that the disputing opinions by the parties' experts on the issue of reasonable medical services should have precluded partial summary judgment. Beltran-Serrano agrees that when it considered Wickizer's declaration the trial court erred by ruling on a disputed issue of material fact.[5]

In *Woodward*, the parties disputed their respective interest in a subdivided land parcel. *Woodward*, 174 Wn. App. at 463. The respondent moved for partial summary judgment and argued that no genuine issue of material of fact existed and as a matter of law, an express easement did not benefit the appellant's subdivision plat lots, no implied easement existed for the benefit of appellant's subdivision plat lots, and no private way of necessity existed through respondent's property. *Woodward*, 174 Wn. App. at 465. In opposition to the motion, the appellant produced a declaration of a professional engineer and land surveyor, and a declaration from a wetland expert. *Woodward*, 174 Wn. App. at 465-66. The trial court granted the respondent's motion and the

[5] Beltran-Serrano argues that we should nonetheless affirm the trial court because it should have ruled Wickizer's declaration inadmissible. We address this argument below.

appellant appealed arguing that the trial court erred because genuine issues of material fact existed. *Woodward*, 174 Wn. App. at 467.

In reversing the trial court, we held that viewing the declarations of these experts "in the light most favorable to the nonmoving party, they raise genuine issues of material fact regarding the parties' intent, prior use, and reasonable necessity" of accessing the lots through the respondent's property. *Woodward*, 174 Wn. App. at 472.

Likewise, in the present case, the City argued to the trial court that the only genuine issue of material fact involved whether the amount billed for Beltran-Serrano's past medical services represented the reasonable value of his medical care. The City rebutted Choppa's testimony with Wickizer's opinion. Wickizer supported his opinion with "specific facts" and did not rely on speculation. Wickizer's report asserted that "hospital and physician billed charges bear little relationship to the resources used to provide care and do not represent reasonable value of medical services." CP at 249. To estimate the reasonable charges, Wickizer applied the cost-to-charge ratio from the Federal Cost Report data and added a profit margin of 5 percent. The trial court reasoned "I don't think it's fair" or "legitimate" to allow Wickizer's opinions and then ruled that "it's appropriate for the plaintiff to have a determination as a matter of law that these bills were actually billed and are reasonable, necessary and related." Report of Proceedings (RP) at 14, 15.

"An expert opinion on an ultimate issue of fact is sufficient to preclude summary judgment." *Woodward*, 174 Wn. App. at 468. In viewing the evidence in the light most favorable to the nonmoving party, and because the court considered Wickizer's declaration in deciding the summary judgment motion, the City raised a genuine issue of material fact as to the reasonableness of the medical expenses. Therefore, we accept Beltran-Serrano's concession and conclude that the trial court erred in granting the motion.

However, while Beltran-Serrano agrees that the trial court erred by ruling on a disputed issue of material fact, he contends that Wickizer's opinions are inadmissible under the collateral source rule, ER 401 and 403, the *Frye* rule, ER 702 and 703, and public policy. Thus, Beltran-Serrano argues that the City has not provided any admissible evidence that the past medical expenses were unreasonable. As a result, Beltran-Serrano claims no genuine issue of material fact existed and the order granting partial summary judgment should be upheld on alternative grounds.

Here, Beltran-Serrano did not file a separate motion to exclude below, but instead raised his arguments that Wickizer's opinion should be excluded under the collateral source rule, *Frye*, and ER 702 and 703 in his response memorandum and at the motion for partial summary judgment hearing. The court did not rule on the issue and stated, "I don't think . . . that there was a motion to exclude." RP at 16. It also indicated that the issue could be taken up at a later time.

The City did not have an opportunity to fully address these issues at the trial court level. Furthermore, "an appellate court generally will not review a matter on which the trial court did not rule." *Meresse v. Stelma*, 100 Wn. App. 857, 867, 999 P.2d 1267 (2000); *see* RAP 2.4(a). Although there is a general rule allowing the court to affirm on any ground not considered by the trial court, that rule is based on the underlying assumption that the parties had a full and fair opportunity to develop facts relevant to that decision. *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976); *see Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). When this opportunity is not available, the proper resolution is to remand. *Bernal*, 87 Wn.2d at 414. Therefore, we decline to address Beltran-Serrano's arguments as to whether Wickizer's opinions are admissible.

We find many of the points made in the dissent compelling. We recognize *Gerlach v. Cove Apartments, LLC*, and its upholding of the exclusion of Wickizer's expert report. 8 Wn. App. 2d

813, ___ P.3d ___ (2019). We also share the dissent's concerns with the potential unworkability of the existing legal tests in light of the realities of the current health care system and its concerns about potentially exposing blameless plaintiffs to costs that they incurred through no fault of their own. Nevertheless, the City has not had a chance to fully argue the admissibility of Wickizer's report to the trial court based on a variety of theories. This threshold question must be decided before the motion for summary judgment can be appropriately resolved. As a result, remand is appropriate.

CONCLUSION

Because a genuine issue of material fact existed, the trial court erred in granting Beltran-Serrano's motion for partial summary judgment. We reverse the trial court's order of partial summary judgment and remand to the trial court.[6]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

I concur:

Glasgow, J.

[6] Nothing in this opinion should be read to preclude the filing of any new motions by either party; therefore, the trial court and the City may address the admissibility of Wickizer's opinions if the issue arises again.

WORSWICK, J. (dissenting) — This case provides us with an opportunity to make a critical decision in an area of law that lags behind the realities of the American health care billing system. The majority opinion, instead of providing guidance in this area, remands this case and invites the parties to file new motions. Majority at 9.

This court granted discretionary review under RAP 2.3(b)(4) on the issue of "whether the reasonableness of past medical specials can be resolved on a motion for partial summary judgment, when the defendant presents evidence that the amounts billed for medical treatment may not reflect the reasonable value of those treatments." Ruling Granting Review, *Cesar Beltran-Serrano v. City of Tacoma*, No. 51317-0-II at 5 (Wash. Ct. App. May 15, 2018). The ruling granting discretionary review correctly determined that this is a controlling question of law on which "a substantial ground for a difference of opinion" as to the question exists. *Id.* In my view, this court accepted review of this case to decide whether professor and health care economist Dr. Thomas Wickizer's opinions were admissible.

The majority holds that because the superior court did not exclude Dr. Wickizer's declaration, his opinions contained therein created a genuine issue of material fact. Although the majority states that it does not address whether Dr. Wickizer's opinions are admissible, its conclusion necessarily assumes that, for purposes of its decision, the opinions were admissible. But we should not assume that *any* evidence offered in opposition to summary judgment, regardless of admissibility or relevance to the actual issue, creates a question of fact.

If Dr. Wickizer's opinions are not admissible and relevant to the question, then they cannot create a genuine issue of material fact.[7] ER 402; CR 56(e). And if there is no genuine

[7] The record demonstrates that although the superior court read Dr. Wickizer's declaration, it did not find it convincing.

issue of material fact, then the plaintiff's motion for partial summary judgment should have been granted.

Modern American medical billing practices have created a situation where courts are struggling to apply both the reasonable value rule and the collateral source rule. The reasonable value rule allows a plaintiff to recover "only the reasonable value of medical services received, not the total of all bills paid." *Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997). "Thus, the plaintiff must prove that medical costs were reasonable and, in doing so, cannot rely solely on medical records and bills." *Patterson*, 84 Wn. App. at 543. The collateral source rule provides that "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 otherwise recoverable." *Ciminski v. SCI Corp.*, 90 Wn.2d 802, 804, 585 P.2d 1182 (1978).

We review summary judgment de novo, including the associated evidentiary decisions. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *Farrow v. Alfa Laval, Inc.*, 179 Wn. App. 652, 660, 319 P.3d 861 (2014). Even though the superior court did not expressly exclude Dr. Wickizer's declaration, I would hold that Dr. Wickizer's opinions were not relevant to the question of whether Beltran-Serrano's medical bills were reasonable and necessary. This irrelevant evidence was therefore inadmissible. And because it was inadmissible, no genuine issue of material fact exists.

Here, the City presented Dr. Wickizer's declaration as evidence that Beltran-Serrano's medical bills were unreasonable. Dr. Wickizer recalculated the "reasonable value" of the plaintiff's medical expenses by applying a cost-to-charge ratio from the hospital's federal cost report to each hospital inpatient charge. Dr. Wickizer explained that his "method of determining reasonable value is based on the actual cost of providing the services and does not include a

profit margin that one might argue hospitals deserve in considering the reasonable value of care." Clerk's Papers (CP) at 205. Dr. Wickizer emphasized that the billed amounts of medical treatment "bear little relationship to the resources used to provide care and do not represent reasonable value of medical services," evidenced by the fact that "virtually nobody pays full hospital charges." CP at 249.

Evidence that, on average, a procedure costs less than the amount charged or that physicians accept a lesser payment for services is not helpful in determining whether medical expenses were reasonable. *Gerlach v. The Cove Apartments*, No. 77179-5-I, slip op. at 15 (Wash. Ct. App. May 13, 2019), http://www.courts.wa.gov/opinions/pdf/771795%20order.opinion.pdf. Dr. Wickizer's generalized opinions actually describe a fictitious health care billing system and how that system *should* operate, as opposed to whether Beltran-Serrano's medical bills were reasonable in the context of the health care system as it exists. Although Dr. Wickizer identifies serious issues with health care billing practices, his declaration and report are not relevant, and therefore not admissible, to the question of whether Beltran-Serrano's bills were reasonable. ER 402; *Gerlach*, slip op. at 15; *Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001).

Allowing a plaintiff to recover the amount of the medical bills, despite the fact that the bills are not necessarily reflective of the cost or amounts received by insurance, can result in a windfall to plaintiffs. But preventing a plaintiff from recovering the actual cost of their medical damages based on a hypothetical system such as the one described by Dr. Wickizer would result in a windfall to tortfeasors. "[T]he real question is not whether there is a windfall, but rather

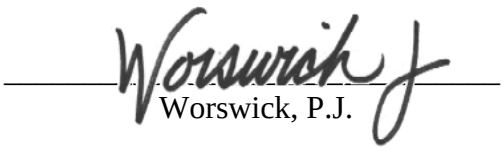
who is to get it. As between an injured plaintiff and a defendant, we have no hesitation in saying that the former is entitled to prevail." *Ciminski*, 90 Wn.2d at 806.

Allowing the jury to consider opinions such as those expressed by Dr. Wickizer exposes all plaintiffs—even those who are victims of intentional torts—to bear the costs of medical expenses foisted upon them by tortfeasors.

Severely injured plaintiffs such as Beltran-Serrano usually have no say as to whether they will be taken to a hospital, which hospital will treat them, which procedures will be employed to save their lives, and more importantly, how much they will be charged for those procedures. Beltran-Serrano was shot four times and was immediately incapacitated. He was taken to Tacoma General Hospital, where he incurred multiple surgeries and was hospitalized for 54 days. The City of Tacoma does not argue that he chose his treatment, or was able to bargain for his medical services. Instead, the City wants to argue that only a mere fraction of Beltran-Serrano's medical bills are reasonable.

The City's argument would apply to all plaintiffs. An uninsured plaintiff who has financial resources and who is injured by a tortfeasor is subject to the full cost of medical bills with no benefit of having those bills reduced by an agreement with either private medical insurance or a governmental program. Under the City's argument a completely faultless plaintiff would be exposed to incurring potentially hundreds of thousands of dollars in medical bills, because, according to Dr. Wickizer, some hypothetical world exists where a patient is charged only the cost of services plus some small percentage for overhead. In that case, it would be the defendant who would incur the "windfall" of not being responsible for damages he caused, and the faultless plaintiff who would be left with no recourse. I agree with the trial court's sentiment that this is not fair.

Other states have resolved this problem by either legislation or modification of the collateral source rule. It may be time for our Supreme Court to weigh in on this problem and clarify the standards for recovery of medical damages. However, in the case at hand, I would hold that Dr. Wickizer's declaration was irrelevant, and I would affirm the trial court's decision.



Worswick, P.J.