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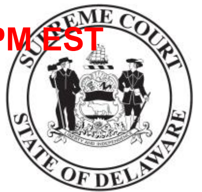

IN THE SUPREME COURT OF DELAWARE

JENNIFER L. SMITH, *Plaintiff-Appellant*, v. DELAINE MAHONEY, NICOLE MARIE RICHARDS, and THEOPHIL M. HOLLIS, *Defendants-Appellees*.	: : : : : : : : : :	Case No. 642, 2015 On Appeal from the Superior Court of the State of Delaware in and for Newcastle County, Case No. N12C-10-046 MMJ

PLAINTIFF-APPELLANT'S SECOND CORRECTED OPENING BRIEF

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TABLE OF AUTHORITIES

Cases

Allstate Insurance Co. v. Receivable Finance Co., 501 F.3d 398 (5th Cir. 2007) 15

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Central Appraisal District v. Lall, 924 S.W.2d 686 (Tex. 1996) 31

Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 (1907) 27, 28

Claudio v. State, 585 A.2d 1278 (Del. 1991) 21

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 22

Craig v. State, 457 A.2d 755 (Del. 1983) 23

Dahar v. Grzandziel, 599 A.2d 217 (Pa. Super. Ct. 1991) 15

Dimick v. Schiedt, 293 U.S. 474 (1935) 22

Evanston Hospital v. Hauck, 1 F.3d 540 (7th Cir. 1993) 12

Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998) 22

Gorka v. Sullivan, 671 N.E.2d 122 (Ind. Ct. App. 1996) 11

Harrison v. Rogers, 2008 WL 1816464 (D.S.C. Apr. 22, 2008) 11

Helfend v. Southern California Rapid Transportation District, 465 P.2d 61 (Cal. 1970) 32

Helman v. State, 784 A.2d 1058 (Del. 2001) 27

Henne v. Balick, 146 A.2d 394 (Del. 1958) 22

Hetzel v. Prince William County, 523 U.S. 208 (1998) 22, 24

In re Moore, 4 P.3d 664 (N.M 2000) 14

Joiner v. Medical Center East, Inc., 709 So. 2d 1209 (Ala. 1998) 16

Kennon v. Gilmer, 131 U.S. 22 (1889) 22

Lecates v. Justice of Peace Court No. 4, 637 F.2d 898 (3d Cir. 1980) 24, 25

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 31

Maier v. Santucci, 697 A.2d 747 (Del. 1997) 30

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 30

McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994) 7

Miller v. State Farm Mutual Automobile Insurance Co., 993 A.2d 1049 (Del. 2010) 5, 6

Minnesota Association of Health Care v. Minnesota Department of Public Welfare, 742 F.2d 442 (8th Cir. 1984) 11

Mitchell v. Haldar, 883 A.2d 32 (Del. 2005) 6, 7

Onusko v. Kerr, 880 A.2d 1022 (Del. 2005) 6, 8, 18

Oregon Association of Hospitals v. Bowen, 708 F. Supp. 1135 (D. Or. 1989) 16

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 29

Pardee v. Suburban Propane, L.P., 2003 WL 21213413 (Del. Super. May 22, 2003) 34

Payton v. New York, 445 U.S. 573 (1980) 29

Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204 (4th Cir. 2007) 11

Robb v. Pennsylvania Railroad Co., 210 A.2d 709 (1965) 31

Smothers v. Gresham Transfer Co., 23 P.3d 333 (Or. 2001) 29, 30

Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust Dated June 27, 2002, 410 F.3d 304 (6th Cir. 2005) 11, 12

St. Louis, Iron Mountain & Southern Railway Co. v. Craft, 237 U.S. 648 (1915) 21

State Farm Mutual Automobile Insurance Co. v. Nalbone, 569 A.2d 71 (Del. 1989) 33

State Farm Mutual Insurance Co. v. St. Joseph's Hospital, 489 P.2d 837 (Ariz. 1971) 15

Stayton v. Delaware Health Corp., 117 A.3d 521 (Del. 2015) .... *passim*

Stayton v. Delaware Health Corp., 2014 WL 4782997 (Del. Super. Ct. Sept. 24, 2014) 4

Taylor v. Cottrell, Inc., 795 F.3d 813 (8th Cir. 2015) 13

The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854) 21

Vlandis v. Kline, 412 U.S. 441 (1973) 23

Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990) 24

Yarrington v. Thornburg, 205 A.2d 1 (Del. 1964) 6

Yates v. Whyte, 4 Bing. N. C. 272 (1838) 21

Yorgan v. Durkin, 715 N.W.2d 160 (Wis. 2006) 14

Constitutional Provisions

Del. Const. Art. I, § 4 20

Del. Const. Art. I, § 9 27

Statutes

16 Del. Admin. C. § 13330 10

16 Del. Admin. C. § 14100 10

16 Del. Admin. C. § 14100.5 10

16 Del. Admin. C. § 14100.6 10

16 Del. Admin. C. § 14660 10

42 U.S.C. § 1395cc(a)(1) 9, 16

42 U.S.C. § 1395cc(a)(1)(A) 9

42 U.S.C. § 1396 24

42 U.S.C. § 1396(10)(B)(i) 25

42 U.S.C. § 1396(a)(25) 34

42 U.S.C. § 1396a(30)(A) 25

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42 C.F.R. § 411.35 11

42 C.F.R. § 411.35(c)(1) 16

42 C.F.R. § 447.15 12

68 Fed. Reg. 43940 (Jul. 25, 2003) 16

Other Authorities

Abbott on Shipping (1854) 21

Abel, Richard L., *The Real Tort Crisis—Too Few Claims*, 48 Ohio St. L.J. 443 (1987) 32

Blackstone, William, *Commentaries on the Laws of England* (1765)............. 29, 30

Brief of Amicus Curiae Delaware Trial Lawyers Association, *State Farm Mutual Automobile Insurance Co.* v. *Davis*, 80 A.3d 628 (Del. 2013) (No. 10-2013), 2013 WL 1566881 15

Calabresi, Guido, *The Costs of Accidents* (1970) 7

Coke, Edward, *The Second Part of the Institutes of the Laws of England* (London, E. & R. Brooke 1797) 29

Connecticut Bar Association Committee on Professional Ethics, Informal Opinion No. 95-18, *Letters of Protection*, 1995 WL 389628 (May 1, 1995) 14

Corwin, Edward, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 365 (1929)...................................... 29

Friesen, Jennifer, *State Constitutional Law* (1996)... 29

Goldberg, John C. P., *Twentieth-Century Tort Theory*, 91 Geo. L.J. 513 (2003) 33

Howard, A.E. Dick, *The Road from Runnymede* (1968)...................................... 29

Klausing, Craig, *Letters of Protection: Keeping Your Client's Promise*, Minnesota Lawyer, Mar. 19, 2001 15

Koch, Jr., William C., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333 (1997) 28

Magna Carta (1215) 28

Magna Carta (1225) 28

McKechnie, William S., *Magna Carta, A Commentary on the Great Charter of King John* (2d ed. 1914) 28

Pace, Caroline C., *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, 49 APR Hous. Law. 24 (2012) 13

Phillips on Insurance 21

Polinsky, A. Mitchell & Daniel L. Rubinfeld, *The Welfare Implications of Costly Litigation for the Level of Liability*, 17 J. Legal Stud. 151 (1988) 33

Restatement (Second) of Torts (1979) 7, 9, 21

Schuman, David, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35 (1986) 28

Schwartz, Gary T., *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Cal. L. Rev. 133 (1982) 7

State of Delaware, *Frequently Asked Questions About Medicaid and Medical Assistance*, *Eligibility* 3

Tribe, Laurence H. & Roger L. Pardieck, *Indiana's Medical Malpractice Reform*, 31 Ind. L. Rev. 1089 (1998) 30

Wikipedia, *Philip Yorke, 1st Earl of Hardwicke* 21

Zitter, Jay M., *Physicians' and Surgeons' Liens*, 39 A.L.R.5th 787 (1996) 18

NATURE OF PROCEEDINGS

This is the Plaintiff-Appellants' opening brief on appeal of a trial ruling that granted Defendant-Appellees' motion to alter the judgment by reducing the jury's verdict for past and future medical expenses to the extent of write-offs attributable to Medicaid reimbursement rates for the health-care provider and thereby deny application of the collateral source rule in cases involving Medicaid in *Jennifer L. Smith and Edward Smith v. Delaine Mahoney, Nicole Marie Richards, and Theophil M. Hollis*, C.A. No. N12C-10-046 MMJ.

The case at bar is a personal injury action stemming from two motor vehicle collisions. The case was heard in Superior Court by a jury, which reached a verdict on June 3, 2015. The motion to alter or amend the judgment was made June 17, 2015. The Superior Court issued its decision granting that motion, in part, on November 20, 2015.

SUMMARY OF ARGUMENT

1. In *Stayton v. Delaware Health Corp.*, 117 A.3d 521, 527 (Del. 2015), this Court reaffirmed Delaware's longstanding commitment to the collateral source rule, carving out a narrow exception for medical care expenses written off by Medicare, because the write-off of certain medical expenses were not a benefit conferred on plaintiffs in the form of gratuitous services. Medicaid, however, operates differently from Medicare and permits a provider to recover full payment for the medical services from the proceeds of a lawsuit, thereby satisfying the criterion that the *Stayton* Court held appropriate for applying the collateral source rule when the provider opts for the reduced Medicaid payment instead.

2. Use of the Medicaid lien as dispositive of the value of medical services runs afoul of the Delaware Constitution's jury-trial and due-process guarantees, as well as the federal Medicaid statute's equal-access requirement, that the value of medical services be the same for a Medicaid patient as it is for a non-Medicaid patient.

3. Because Medicaid is an insurance program for the financially needy, and abrogation of the collateral source rule in these instances will render it uneconomic to bring a lawsuit in the first place, the failure to apply the collateral source rule here impermissibly burdens access to the courts, as guaranteed by the Delaware Constitution.

STATEMENT OF FACTS

On October 5, 2010, Plaintiff Jennifer Smith, then working as a dental assistant,[1] was injured when her car was struck from behind as she was waiting at a red light by Defendant Delanie Mahoney. A short time later, on January 6, 2011, Smith was the unfortunate victim of a second collision, this time with Defendant Nicole Marie Richards. Smith's combined injuries were sufficiently extensive and painful that she could no longer work. Because of the level of her income at the time of the accidents, Smith was enrolled in Medicaid.[2] Smith's doctor originally opted to be paid out of the recovery from Smith's tort action, but later decided that he wanted more immediate payment and billed Medicaid, believing that the write-off he accepted would inure to Smith's benefit.[3] Subsequently, for her treatment paid by Medicaid, Medicaid asserted a lien of $5,197.71 on any third-party recovery Smith obtained.

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[1] App. A-27; App. A-32.

[2] The opinion below would appear to suggest that Smith was unemployed and not paying Medicaid taxes by simply stating that Smith was enrolled in Medicaid "at the time of the motor vehicle accidents." Court Opinion 2 (Docket Entry 78) (attached in addendum). In fact, regulations issued by the Delaware Health and Social Services Division of Medicaid & Medical Assistance, provide, "In general, if your household income is at or below the current 100% Federal Poverty Level for your household size, your family is likely to be eligible for Medicaid." State of Delaware, *Frequently Asked Questions About Medicaid and Medical Assistance*, *Eligibility*, http://www.dhss.delaware.gov/dhss/dmma/faqs.html#q4 (last visited Feb. 22, 2016). For a household of two, that income level is $15,730 annually. *See id.*

No evidence in the record contradicts Smith's deposition that she was working as a dental assistant at Jolly Smiles at the time of the two collisions.

[3] App. A-36.

Smith brought suit against both defendants. Mahoney and Richards joined in a motion *in limine* to limit plaintiff's past medical expenses and strike further medical expenses, arguing for an extension of the Superior Court's decision in *Stayton v. Delaware Health Corp.*, 2014 WL 4782997 (Del. Super. Ct. Sept. 24, 2014). The motion was denied.

After trial, the jury returned a favorable verdict for Smith on June 3, 2015, finding that compensation for her past medical expenses should be $24,911, compensation for pain and suffering $15,000, and compensation for future medical expenses $10,000. On June 17, 2015, Mahoney filed a motion to alter the judgment by lowering the awards for past and future medical expenses based on Medicaid write-offs, this time seeking an extension of this Court's decision in *Stayton v. Delaware Health Corp.*, 117 A.3d 521, 527 (Del. 2015), and asking that the collateral source rule not apply to medical expenses discounted due to Medicaid. App. A-18-24. The motion was granted, so that $19,713.29 was deducted from the jury's determination of past medical expenses, leaving only $5,197.71 for those expenses, the amount of Medicaid's lien against any third-party recovery. This timely appeal followed.

ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT AMENDED THE JUDGMENT AGAINST DEFENDANT TO REDUCE PLAINTIFF'S RECOVERY OF THE REASONABLE VALUE OF PAST MEDICAL SERVICES TO THE AMOUNT PAID BY MEDICAID FOR THOSE SERVICES ON THE BASIS OF *STAYTON*.

A. Question Presented

Does the collateral source rule apply to write-offs required by Medicaid when Medicaid reimburses a health care provider for services for which a tortfeasor is responsible? Plaintiff raised this issue in Plaintiff Smith's Answering Brief in Opposition to Defendant Mahoney's Motion to Alter or Amend the Judgment 9-19; and in Oral Argument on the Motion to Alter or Amend, Oct. 8, 2015 (A-59-64, A67-68).

B. Scope of Review

Application of the collateral source rule is a question of law subject to *de novo* review. *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1053 (Del. 2010).

C. Merits of Argument

1. *Stayton* does not require exclusion of Medicaid write-offs from the Collateral Source Rule.

a. This Court has retained the Collateral Source Rule.

The common law collateral source rule is "firmly embedded" in Delaware law and dictates that "a tortfeasor cannot reduce its damages because of payments or compensation received by the injured person from an independent source." *Stayton v. Delaware Health Corp.*, 117 A.3d 521, 527 (Del. 2015) (quoting *Mitchell v.*

Haldar, 883 A.2d 32, 38 (Del. 2005)). Under the rule, a plaintiff may recover damages from a tortfeasor for the reasonable value of medical services, even if the plaintiff has received complete recompense for those services from a source other than the tortfeasor. *Onusko v. Kerr*, 880 A.2d 1022, 1024 (Del. 2005); *Mitchell*, 883 A.2d at 38.

When this Court officially recognized the rule more than fifty years ago, it found the rule "predicated upon the theory that a tortfeasor has no interest in . . . monies received by the injured person from sources unconnected with the defendant." *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964). Instead, those payments inure to the benefit of the plaintiff rather than the tortfeasor. *Mitchell*, 883 A.2d at 38. *See*, *e.g.*, *Miller*, 993 A.2d at 1053 ("Because State Farm contributed nothing to the fund that created the collateral source and had no interest in that fund, State Farm should not have been allowed to benefit from it.").

Stayton reaffirmed Delaware's adherence to the collateral source rule and restated the importance of the policy underlying the rule, which is "based on the quasi-punitive nature of tort law liability," and does not allow "a windfall [to] a defendant who escapes, in whole or in part, liability for his wrong," but instead "favors the victim of the wrong rather than the wrongdoer." 117 A.3d at 527 (quoting

Mitchell, 883 A.2d at 38).[4] *Cf. McDermott, Inc. v. AmClyde*, 511 U.S. 202, 219 (1994) (collateral source rule reflects the policy that "making tortfeasors pay for the damage they cause can be more important than preventing overcompensation.") (footnote omitted).

This Court in *Stayton* also reaffirmed the proposition that the collateral source rule applies not only to payments to the plaintiff, but also to a write-off of medical expenses by a health care provider. Thus, the Court reaffirmed its holding in *Mitchell* that allowed plaintiff to recover reasonable medical expenses, despite the fact that the provider had agreed with plaintiff's employer-provided Blue Cross health insurance plan to accept a lower amount as payment in full. *Stayton*, 117 A.3d at 529-30.

2. In *Stayton*, this court excluded Medicare write-offs because they are not "benefits conferred by providers on injured parties."

In *Stayton*, this Court determined that write-offs accepted by Medicare providers do not stand on the same footing as write-offs accepted by providers who

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[4] The *Restatement of Torts* instructs that "the law of torts, which was once scarcely separable from the criminal law, has within it elements of punishment or deterrence." *Restatement (Second) of Torts* § 901, cmt. c (1979). *See also* Guido Calabresi, *The Costs of Accidents* 68-129 (1970) (safety is increased both by the "specific deterrence" of government regulation and the "general deterrence" of tort liability); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Cal. L. Rev. 133, 137 (1982) ("There is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior."). If upheld, the ruling would have taxpayers and Medicaid subsidize negligent misconduct by shielding defendants from the responsibility they would otherwise bear for the injuries they have caused.

have agreed with a patient's private insurer, as in *Mitchell*, or with the patient himself, as in *Onusko v. Kerr*, 880 A.2d 1022 (Del. 2005). The basis for the Court's distinction supports application of the collateral source rule to Medicaid write-offs.

Both Medicare and Medicaid are, of course, government programs, but differ in salient respects. Still, Medicare's governmental status was not an element in *Stayton*'s reasoning. Nor did the Court attach any significance to the fact that the plaintiff did, or did not, give consideration in exchange for the collateral source payment. In fact, the Court expressly rejected the proposition that the collateral source rule applies only to payments for which the plaintiff has paid consideration. *Stayton*, 117 A.3d at 529 n.37. Indeed, Medicare "is largely funded through taxes paid by employers and employees under the Federal Insurance Contributions Act," which are closely analogous to insurance premiums. *Id*. at 523-24.

Although the deep discounts made possible by Medicare's leverage gave the Court "pause," *id*. at 530, its existence does not constitute a limiting principle, nor does it necessarily distinguish Medicare or Medicaid from private insurers who may also be able to negotiate deep discounts. In fact, Delaware is among the states that have "applied the collateral source rule to provider write-offs as it has to third party payments," *id*. at 529, as "benefits conferred on plaintiffs by providers." *Id*. at 527. Nevertheless, this Court exempted Medicare write-offs from this approach because Medicare providers have no choice but to accept those write-offs, making the

discounts something other than "'benefits conferred on the injured party'" by providers. *Id*. (quoting *Restatement (Second) of Torts* § 920A(2) & cmt. c(3)).

As this Court pointed out, participating providers in Medicare must agree to certain conditions. *Id*. at 524 n.5 (citing 42 U.S.C. § 1395cc(a)(1)). Among the conditions spelled out in the statute is the requirement "not to charge . . . any individual *or any other person* for items or services for which such individual is entitled to have payment made under this subchapter." 42 U.S.C. § 1395cc(a)(1)(A) (emphasis added). Thus, the Court concluded, if an individual is entitled to Medicare payment for health care services, "[t]he provider cannot seek reimbursement for its medical services from anyone other than Medicare." 117 A.3d at 524.[5] In fact, this Court emphasized, "[t]he $3,421,246.94 that Stayton's healthcare providers wrote off was paid by no one." *Id*. at 531.

Moreover, the Court noted, "[b]eneficiary participation [in Medicare] is involuntary." *Id*. at 524. Medicare enrollees cannot "opt out" of the program to strike a different bargain with physicians or hospitals. Under these conditions, acceptance of the compulsory Medicare reimbursement cannot be the result of either a bargain with the patient or an outright gift conferred upon the patient by the

[5] Although Appellant does not challenge this Court's decision in *Stayton*, this Court's interpretation of 42 U.S.C. § 1395cc(a)(1)(A) is open to question. *See Am. Hosp. Ass'n v. Sullivan*, 1990 WL 274639, at *13 (D.D.C. May 24, 1990) (invalidating regulation prohibiting providers from seeking payment from liability insurer); and *infra* p. 15-16 & fn. 7.

provider. It is simply the price fixed by the federal government for its own purposes, resulting in a benefit "conferred on federal taxpayers," *id.* at 531, but not on patients.

3. Medicaid, unlike Medicare, permits health care providers to bargain with and confer benefits on patients.

On this crucial point, Medicaid differs dramatically from Medicare.[6] Acceptance of Medicaid reimbursements is not compulsory for providers treating Medicaid-eligible patients. Providers can instead pursue payment from the tortfeasor responsible for the patient's injury, or accept the patient's commitment to pay the provider out of an anticipated verdict or settlement. In that case, the provider is not limited to the discounted reimbursement provided by Medicaid but can obtain a full reasonable fee for services rendered. Consequently, if the provider chooses instead to file for Medicaid reimbursement, foregoing a claim against the tort recovery and accepting a lesser reimbursement, the action represents a "benefit[] conferred on plaintiffs by providers, in the form of services gratuitously rendered at a price below the standard rate," which this Court has declared is the standard for application of the collateral source rule. 117 A.3d at 527 & n.30.

It is true that a provider who submits a bill to Medicaid must accept the

[6] Medicaid is funded by both the federal government and the state and is administered in Delaware by the Department of Health and Social Services ("DHSS"). 16 Del. Admin. C. § 13330. Enrollment is voluntary, and eligibility is generally based on income and resources. *Id.* at § 14100. Qualifying individuals must apply and be accepted, *id.* at § 14100.5, and must reapply every 12 months to remain eligible. *Id.* at § 14100.6. A Medicaid recipient may become ineligible for a number of reasons, including receipt of income greater than the qualifying maximum. *Id.* at § 14660.

program's reimbursement as payment in full, 42 C.F.R. § 411.35, but the provider is not required to submit that bill to Medicaid. First, there is no obligation to accept Medicaid patients. *See*, *e.g.*, *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 207 (4th Cir. 2007); *Minn. Ass'n of Health Care v. Minn. Dep't of Pub. Welfare*, 742 F.2d 442, 446 (8th Cir. 1984) (despite the strong financial inducement for nursing homes to accept Medicaid patients, participation in the Medicaid program is nonetheless voluntary); *cf. Gorka v. Sullivan*, 671 N.E.2d 122, 132-33 (Ind. Ct. App. 1996) (denying challenge to reimbursement rates to providers of transportation of Medicaid patients because "the Providers' acceptance of the Medicaid contract is voluntary."). Even if a medical facility accepts Medicaid patients, that facility does not have to accept all such patients. *See Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1211 (6th Cir. 1997); *Harrison v. Rogers*, 2008 WL 1816464, at *3 (D.S.C. Apr. 22, 2008).

Second, unlike the issue this court found with Medicare, a Medicaid provider is not prohibited from "seek[ing] reimbursement for its medical services from anyone other than" Medicaid. For example, in *Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust Dated June 27, 2002*, 410 F.3d 304 (6th Cir. 2005), Spectrum provided Bowling with medical care for which it billed Medicaid and received $101,021. The Sixth Circuit held that Spectrum was not entitled to seek further payments out of Bowling's tort recovery because:

> Spectrum was not required to seek payment from Medicaid; instead, Spectrum could have provided its services in exchange for enforcing its lien, which was the original agreement between the parties. Having chosen to accept payment from Medicaid however, Spectrum abandoned all rights to further recovery of its customary fee from the lien. . . . By accepting the Medicaid payment, the service provider accepts the terms of the contract—specifically that the Medicaid amount is *payment in full.*

Id. at 315 (emphasis in original) (citing 42 U.S.C. § 1396a(a)(25)(C); and 42 C.F.R. § 447.15).

The Seventh Circuit has further explained, the Medicaid statute obligates state agencies "to vigorously pursue any third party who might bear some legal responsibility for footing the bill" so that the "government itself [is] not be stuck paying medical bills when another source is available." *Evanston Hosp. v. Hauck*, 1 F.3d 540, 543 (7th Cir. 1993). If providers want to have the opportunity to pursue full reimbursement from third parties, they merely need "not take Medicaid money in the first instance." *Id*. The crucial aspect, for this Court's purposes in this case, is the element of choice. That is, a doctor treating an accident victim who is Medicaid-eligible can choose to pursue payment from the proceeds of a tort action, which may constitute full payment for the provider. Or, the provider can file for reimbursement from Medicaid, for a smaller but quicker payment, thereby conferring a benefit on the patient.

4. Attorney letters of protection create the opportunity for Medicaid providers to confer a benefit on their patients.

A right to seek payment from the proceeds of a personal injury action can offer the provider greater payment for services, even while the option of seeking payment through Medicaid remains a back-up means of compensation. Patients who have a viable personal injury cause of action possess an asset that can provide payment for medical services, allowing the patient and provider to strike a bargain.

To take advantage of this ability to bargain, a medical lien on an anticipated tort recovery can assist injured patients in obtaining medical care while aiding providers in obtaining greater compensation for their services. Caroline C. Pace, *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, 49 APR Hous. Law. 24, 27 (2012); *cf. Am. Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135, 137 (Mo. 1989) (en banc) ("If a hospital meets certain requirements and follows certain procedures it can obtain a lien on the personal injury claims of its patients.").

Another means to this end is the "letter of protection," an agreement between the personal injury attorney and the provider. Pace, at 27. Consequently, as a federal appellate court has recently remarked, "the practice of offering a personal guarantee for payment from litigation proceeds or placing a lien on potential litigation proceeds is not uncommon." *Taylor v. Cottrell, Inc.*, 795 F.3d 813, 819-20 (8th Cir. 2015).

The letter of protection deserves consideration as a means of both increasing

access to medical services for the needy and allowing health care providers to obtain sufficient payment for services rendered to meet their payroll and keep the lights on. As described by the Connecticut Bar Association Committee on Professional Ethics,

> A letter of protection, as we shall discuss it, is a letter written by a lawyer—acting in the course of representing a client—to a provider of goods and services to or for the benefit of that client in which the lawyer undertakes to pay the provider for those goods and services out of funds the lawyer anticipates receiving for the client. Typically, the provider is a professional (*e.g.*, a physician) . . . . Typically, too, the funds from which payment is promised are funds anticipated from either settlement of the litigation or judgment in the case.

Conn. Bar Ass'n Comm. on Prof. Ethics, Informal Opinion No. 95-18, *Letters of Protection*, 1995 WL 389628, at *1 (May 1, 1995).

The New Mexico Supreme Court described a letter of protection as:

> [A] document by which a lawyer notifies a medical vendor that payment will be made when the case is settled or judgment is obtained. This is a common practice by which lawyers representing personal injury plaintiffs ensure clients will receive necessary medical treatment, even if unable to pay until the case is concluded.

In re Moore, 4 P.3d 664, 666 n.1 (N.M 2000). *See also Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 25-26 (Tex. Ct. App. 2005) ("Letters of protection are sometimes used by attorneys in personal injury litigation to guarantee payment to healthcare providers from the proceeds of any future recovery."); *Yorgan v. Durkin*, 715 N.W.2d 160, 165 (Wis. 2006) (Letters of protection are "a common practice by

which lawyers representing personal injury plaintiffs ensure clients will receive necessary medical treatment, even if unable to pay until the case is concluded."); *see also Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 401 (5th Cir. 2007).

As the Delaware Trial Lawyers Association has informed this Court: "In a typical personal injury case it is not unusual for a medical provider to accept a letter of protection which allows for the provider to provide services so long as the insured agrees to pay the provider out of any third party recovery." Br. of Amicus Curiae Del. Trial Lawyers Ass'n, *State Farm Mut. Auto. Ins. Co.* v. *Davis*, 80 A.3d 628 (Del. 2013) (No. 10-2013), 2013 WL 1566881, at *4. *See also CBA Collection Servs., Ltd. v. Potter, Crosse & Leonard, P.A.*, 1996 WL 527214, at *2-3 (Del. Super. Ct. Aug. 14, 1996), *aff'd*, 687 A.2d 194 (Del. 1996).

The primary appeal of such letters to health care providers is that they create contractual responsibility on the part of the attorney for paying the provider, beyond the obligation of the patient who, typically, already lacks insurance or other resources. *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 489 P.2d 837, 842 (Ariz. 1971); *Dahar v. Grzandziel*, 599 A.2d 217 (Pa. Super. Ct. 1991). Craig Klausing, *Letters of Protection: Keeping Your Client's Promise*, Minn. Lawyer, Mar. 19, 2001.

The fact that the provider has the option of seeking payment from the tortfeasor's liability insurer distinguishes the Medicaid write-off from the compulsory write-off by a Medicare provider who "cannot seek reimbursement for

its medical services from anyone other than Medicare." *Stayton*, 117 A.3d at 524.[7] The provider and patient can therefore strike an accommodation. The provider can agree to accept a larger payment out of the proceeds of the tort action. Or, the provider might agree to bill Medicaid and accept the more immediate, but smaller reimbursement. In such cases, a provider's acceptance can truly be deemed a "benefit[] conferred on plaintiffs by providers, in the form of services gratuitously rendered at a price below the standard rate," *id.* at 527, or "benefits bargained for by the patient." *Id.* at 530.

[7] The *Slayton* Court's understanding of Medicare may not be accurate. After the Health Care Financing Administration ("HCFA") issued regulations interpreting 42 U.S.C. § 1395cc(a)(1), as prohibiting providers who provide services to Medicare-eligible individuals from seeking payment from "any other person," two federal district courts held that the regulation was an incorrect interpretation of the statute and therefore invalid. *Sullivan*, 1990 WL 274639, at *13 (enjoining HCFA regulations that "limit the statutory right of Medicare providers to recover directly from liability insurers when the liability insurer is a primary payer who will pay promptly"); *Or. Ass'n of Hospitals v. Bowen*, 708 F. Supp. 1135, 1141 (D. Or. 1989) ("HCFA has no authority under the statute to prevent [a Medicare provider] from recovering its actual charges from a liability insurer who is available to pay promptly."). In response, HCFA has modified its regulations:

> In light of the AHA decision, we are continuing the policy which we stipulated during the AHA case with respect to all providers and suppliers (including physicians); that is, we are allowing them to bill liability insurance insurers or assert or maintain liens on a beneficiary's liability insurance settlement rather than billing Medicare.

68 Fed. Reg. 43940 (Jul. 25, 2003). The agency subsequently clarified its regulations to provide that a provider may recover from amounts *paid or payable* by a liability insurer:

> If this amount exceeds the amount payable by Medicare (without regard to deductible or coinsurance), the provider or supplier may retain the primary payment in full without violating the terms of the provider agreement or the conditions of assignment.

42 C.F.R. § 411.35(c)(1). *See also Joiner v. Med. Ctr. E., Inc.*, 709 So. 2d 1209, 1221 (Ala. 1998) (upholding the agency's actions following *Sullivan* and *Bowen*).

The Chief Justice, in his *Stayton* concurrence, noted that the Medicare write-offs in that case short-changed the provider. *Id*. at 536 (Strine, C.J., concurring). That concern is absent with respect to Medicaid write-offs. Health care providers are fully capable of seeking payment from the tortfeasor or the tortfeasor's liability insurer for the full amount of their bill for services rendered. The provider may do so by obtaining a medical lien on the proceeds of plaintiff's personal injury action or by accepting a letter of protection from the plaintiff's attorney promising to pay the provider out of such proceeds.

Plainly, Medicaid permits providers to seek full payment from successful plaintiffs, tortfeasors and their insurers. If a provider agrees to bill Medicaid instead and write-off a portion of the bill, that benefit is voluntarily conferred on the patient by the provider. It should be protected by the collateral source rule just as with private insurance and not diverted to the benefit of the tortfeasor.

5. Plaintiff's provider in this case conferred a benefit on plaintiff in the form of services gratuitously rendered at a price below the standard rate.

Even if this Court should determine that the collateral source rule does not apply to write-offs by Medicaid providers generally, the collateral source rule should nonetheless apply in this case. The circumstances in this case closely track those in *Onusko* and satisfy *Stayton*'s test for application of the collateral source rule.

In *Onusko*, the physical therapist who treated the plaintiff voluntarily reduced

the price of treatment sessions from $534 to $282 to encourage the plaintiff to pay cash. 880 A.2d at 1024. *Stayton* reaffirmed application of the collateral source rule there as "benefits conferred on plaintiffs by providers, in the form of services gratuitously rendered at a price below the standard rate." 117 A.3d at 527 & n.30.

In this case, Smith's treating physician, Dr. Grossinger, proposed, and Smith agreed, that in lieu of immediate payment for services rendered, Smith would grant a medical lien against any verdict or settlement arising out of her accidents. *See* App. A-38. Such liens may be created under the common law and in many states are recognized by statute. *See generally*, Annot., Zitter, Jay M., *Physicians' and Surgeons' Liens*, 39 A.L.R.5th 787 (1996). The letter executed by Smith also instructed her attorney to pay Dr. Grossinger out of the proceeds of any judgment or settlement before distributing any proceeds to her. In that respect, the letter served much the same function as a letter of protection.

The lien allowed Ms. Smith to obtain the prompt medical treatment she needed and allowed Dr. Grossinger to obtain payment of his full bill of nearly $25,000 from her settlement rather than the roughly $5,000 available from Medicaid. *See* A-40-45. As Dr. Grossinger explained, Medicaid reimbursements are so low that his practice could not continue if he billed Medicaid for all his patients. App. A-36.

Sometime thereafter, Dr. Grossinger decided to bill Medicaid for Ms. Smith's

treatment, relinquishing any right to collect full payment under the lien and conferring a benefit on Ms. Smith. *Id.* Dr. Grossinger thus accepted a lower payment than he could otherwise have demanded and wrote off the difference. That reduction was effectively a gratuitous benefit to Ms. Smith, who Dr. Grossinger expected could retain a larger portion of her tort recovery after repaying Medicaid. *Id.* *Stayton*'s basis for excepting Medicare write-offs from the collateral source rule—that they are not "benefits conferred on plaintiffs by providers"—clearly does not apply to this write-off by Dr. Grossinger. Instead, the reduction more closely resembles the action by the provider in *Onusko*, who voluntarily reduced the price of treatment.[8]

Similarly, Plaintiff Smith should be permitted to claim the entire amount of her medical bills, which she would have been obligated to pay out of the proceeds of her personal injury action, but for the deal she struck with her provider and the benefit conferred by Dr. Grossinger.

In sum, Medicaid write-offs generally, and in this case in particular, do not present the situation that compelled this Court to abrogate application of the collateral source rule to Medicare write-offs. Stayton's holding with respect to Medicare should not be extended to Medicaid.

[8] It is worth noting that Grossinger pointedly observed that providers are unlikely to confer such benefits on their indigent patients if the dollars saved are diverted to the benefit of the wrongdoer. App. A-36.

II. FAILURE TO APPLY THE COLLATERAL SOURCE RULE IN THIS CASE VIOLATES THE INTERRELATED RIGHTS TO A JURY TRIAL AND DUE PROCESS.

A. Question Presented

Does taking the damages determination away from the jury, imposing a conclusive presumption on the value of medical services based on the bill actually paid, and rendering cases involving Medicaid-eligible patients outside the collateral source rule violate the rights to a jury trial, and due process, as guaranteed by the Delaware Constitution? Plaintiff raised this issue in Plaintiff Smith's Answering Brief in Opposition to Defendant Mahoney's Motion to Alter or Amend the Judgment 21-23; and in Oral Argument on the Motion to Alter of Amend, Oct. 8, 2016 (A-62).

B. Scope of Review

Claims alleging the infringement of a constitutionally protected right are reviewed *de novo*. *Capano v. State*, 781 A.2d 556, 607 (Del. 2001).

C. Merits of Argument

1. Taking the damages decision from the jury violates the right to trial by jury.

Article I, section 4 of the Delaware Constitution provides that "[t]rial by jury shall be as heretofore." The jury-trial right has a special significance in the state's constitutional hierarchy. From the beginning, Delaware adopted "an unambiguous expression of its intention to perpetuate the right to trial by jury, as it had existed at

common law, for its citizens." *Claudio v. State*, 585 A.2d 1278, 1291 (Del. 1991). The steadfast and simple language of the amendment through three successive state constitutions "demonstrates an unambiguous intention to equate Delaware's constitutional right to trial by jury with the common law characteristics of that right." *Id*. at 1298. The collateral source rule is of common law origin. *Restatement (Second) of Torts* § 920A cmt. d. *See also The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152, 155 (1854) (citing *Yates v. Whyte*, 4 Bing. N. C. 272 (1838); *Phillips on Insurance* 2163; *Abbott on Shipping* 318) ("This is a doctrine well established at common law and received in courts of admiralty."). *Yates* states that the "point has been decided ever since the time of Lord Hardwicke." 4 Bing. N.C. at 283 (Park, J.). Lord Hardwicke served as Lord Chancellor of England from 1737-1756. Wikipedia, *Philip Yorke, 1st Earl of Hardwicke*, https://en.wikipedia.org/wiki/Philip_Yorke,_1st_Earl_of_Hardwicke (last visited Feb. 22, 2016). Thus, the collateral source rule was established in the common law prior to the first iteration of the Delaware Constitution.

Moreover, one of the constitutionally preserved characteristics of the jury from the common law is that the jury, as trier of fact, assesses damages. Longstanding precedent establishes that the determination of compensatory damages "involves only a question of fact." *St. Louis, Iron Mountain & S. R. Co. v. Craft*, 237 U.S. 648, 661 (1915), *cited with approval in Cooper Indus., Inc. v.*

Leatherman Tool Group, Inc., 532 U.S. 424, 437 (2001).

The United States Supreme Court has further recognized that juries have always served as the "judges of damages" and that "overwhelming evidence" establishes that "the consistent practice at common law was for juries to award damages." *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 353 (1998). *See also Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (a plaintiff "remain[s] entitled . . . to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact."); *Kennon v. Gilmer*, 131 U.S. 22, 29-30 (1889) (a "court has no authority . . . in a case in which damages for a tort have been assessed by a jury at an entire sum, . . . to enter an absolute judgment for any other sum than that assessed by the jury [unless] the plaintiff elected to remit the rest of the damages"). Any other approach, this Court has held, "would be casting aside entirely the rules of procedure long followed in this country and England of permitting a jury to determine the amount to which a plaintiff would be entitled as damage for pain and suffering or other unliquidated damage based solely upon the evidence submitted." *Henne v. Balick*, 146 A.2d 394, 398 (Del. 1958). *Cf. Hetzel v. Prince William Cnty.*, 523 U.S. 208 (1998) (holding that a court may not issue a remittitur without the offer of a new jury-trial, in order to preserve the common-law prerogatives of the jury consistent with the federal jury-trial right).

Although in *Stayton*, this Court stated that Medicare write-offs revealed "several shortcomings to the jury approach," it also recognized that "the amount billed and the amount paid are both relevant to the question of the reasonable value of medical services." 117 A.3d at 533. Faced with conflicting tensions between these two poles, it determined that, on balance, the "better course is to treat the amount paid by Medicare as dispositive of the reasonable value of healthcare provider services." *Id*.

Plaintiff suggests, at least in the Medicaid context, that that course raises serious problems at the juncture of the right to a jury trial and due process. If both types of evidence are relevant to the "reasonable value of medical services," if jurors are the "judges of damages," and if the jury trial right and due process forbid the establishment of irrebuttable presumptions,[9] the proper amount of damages representing the reasonable value of medical services may not be determined by a court or imposed upon the jury without permitting rebuttal evidence in any case where the right to a jury trial has been invoked.

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[9] *See Craig v. State*, 457 A.2d 755, 760 (Del. 1983) ("mandatory or conclusive presumption, that is, a presumption which makes it mandatory on the jury to find the presumed fact from the proven fact, constitutionally invades the province of the jury"); *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (irrebuttable or conclusive presumption violates due process "when that presumption is not necessarily or universally true, in fact, and when the State has reasonable alternative means of making the crucial determination.").

2. Due process considerations further compel allowing a jury to decide the reasonable value of needed medical services.

a. Due Process Guarantees equal recourse to the courts.

The constitutional mandate that damages be determined by the jury and not by subsequent application of "dispositive" evidence by a court, *see Hetzel*, 523 U.S. at 211, is further compelled by the due-process requirement that litigants have equal recourse to the courts. As the Third Circuit observed:

> If Delaware is to conform to the mandate of due process, it cannot deny to some litigants, in cases derived from common law actions, on the sole ground of wealth, the right to trial by jury which the state's own Constitution erects as an essential component of a "meaningful opportunity to be heard" for all such civil litigants.

Lecates v. Justice of Peace Court No. 4, 637 F.2d 898, 909 (3d Cir. 1980).

Because Medicaid is a program through which the federal government grants funds to participating states to provide health care services to needy individuals, *see* 42 U.S.C. § 1396; *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990), differential treatment on the basis of wealth in litigants' "full access to [the judicial] process raises grave problems for its legitimacy." *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971). For that reason, the Third Circuit held,

> [h]aving granted civil [litigants] a constitutional right to a jury trial, Delaware may not, consonant with due process, make a [party's] opportunity to enjoy the right dependent on the amount of money he has.

Lecates, 637 F.2d at 909. Creating a dispositive rule applicable to Medicaid-eligible patients, who, by definition, are financially needy, that does not apply to other patients, runs afoul of this due-process principle.

b. Federal law forbids differential treatment of Medicaid patients.

The due-process unequal access prohibition complements Medicaid's equal-access requirement. The Medicaid Act requires that the state Medicaid plan assure "that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area" and that medical assistance be made available in no lesser "amount, duration, or scope than medical assistance made available to any other such individual." 42 U.S.C. §§ 1396a(30)(A), 1396(10)(B)(i). This equal-access requirement assures that the Medicaid write-off does not adversely affect the value of the medical care received by a patient.

If the value of medical care for Medicaid patients must be the same as for non-Medicaid patients, the state whose implementing plan must reflect that federal mandate cannot otherwise devalue the care. Abrogation of the collateral source rule as applied to Medicaid patients does precisely that by differentiating the value of identical care depending on the patient's Medicaid status. Thus, preemptive federal law coincides with the due-process prohibition on conclusive presumptions to forbid use of a dispositive rule to render the value of medical services to be the amount

actually paid by Medicaid. Instead, federal law obliges the state to assure equal value in the medical treatment of Medicaid patients with non-Medicaid patients and suggests that the collateral source rule must apply to both equally.

III. ABROGATION OF THE COLATERAL SOURCE RULE IN THIS AND SIMILAR CASES WILL CLOSE THE COURTHOUSE DOOR TO INDIGENT PLAINTIFFS.

A. Question Presented

Does abrogation of the collateral source rule as applied to cases like this one unconstitutionally abridge the open courts guarantee of the Delaware Constitution? Plaintiff raised this issue in Plaintiff Smith's Answering Brief in Opposition to Defendant Mahoney's Motion to Alter or Amend the Judgment 25-26.

B. Scope of Review

Claims alleging the infringement of a constitutionally protected right are reviewed *de novo*. *Capano v. State*, 781 A.2d 556, 607 (Del. 2001).

C. Merits of Argument

1. The Open Courts Guarantee assures that access to the courts will not be denied based on financial ability.

Article I, section 9 of the Delaware Constitution provides in pertinent part:

> All courts shall be open; and every man for an injury done him in his reputation, person, moveable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense.

This right, found in the constitutions of at least 37 other states, *Helman v. State*, 784 A.2d 1058, 1071 (Del. 2001), comprises "one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Moreover, "it is the right conservative of all other rights, and

lies at the foundation of orderly government." *Id*. The provision derives from Chapter 40 of *Magna Carta*, which also prohibited the sale, denial, or delay of justice[10] and was understood to comprise "a promise of full and equal justice for all." David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 39 (1986). Upon *Magna Carta*'s reissue in 1225, Chapter 40 was combined with Chapter 39, the antecedent of our due process guarantee, to form a new Chapter 29, a provision that indisputably had the most significant impact on later American constitutional thinking. Hon. William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 356, 350 (1997).

As construed by Sir Edward Coke, Chapter 29 embraced "the entire body of the common law of the seventeenth century." William S. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 178 (2d ed. 1914). Moreover, *Magna Carta* expressly guaranteed that "every subject of this realm, for injury done to him . . . by any other subject . . . without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." 1 Edward Coke,

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[10] *Magna Carta*, ch. 40 (1215) ("To no one will we sell, to no one deny or delay right or justice.").

The Second Part of the Institutes of the Laws of England *55 (London, E. & R. Brooke 1797). *See also* Edward Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 365, 393 (1929).

The jurisprudential seeds Coke planted in his writings found fertile soil in the American colonies. *See* A.E. Dick Howard, *The Road from Runnymede* 119-25 (1968). Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton v. New York*, 445 U.S. 573, 594 (1980). His gloss on *Magna Carta* "was widely accepted and imported by early American colonists who incorporated it into state constitutions." Jennifer Friesen, *State Constitutional Law* § 6.2(a), at 349 n.16 (1996). *See also Smothers v. Gresham Transfer Co.*, 23 P.3d 333, 340 (Or. 2001) (footnote omitted) (noting that "phrasing of remedy clauses that now appear in the Bill of Rights of the Oregon Constitution and 38 other states traces to Edward Coke's commentary, first published in 1642"). When America's constitution writers read *Magna Carta* and adopted it in their state constitutions, "they almost certainly understood it as Coke did." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring).

Of equal influence was Sir William Blackstone, who, emphasized that under the common law and consistent with *Magna Carta*, "every Englishman" has the right to "apply[] to the courts of justice for redress of injuries." 1 William Blackstone, *Commentaries on the Laws of England* 141 (1765). He added that, when the law

recognized rights, such recognition would be "in vain" without "the remedial part of the law that provides the methods for restoring those rights when they wrongfully are withheld or invaded." *Smothers*, 23 P.3d at 343 (characterizing 1 Blackstone, *Commentaries*, at 56). The remedial "part" in common-law negligence claims is found in compensatory damages, the objective of which is "to provide just and full compensation to a plaintiff who suffers injury or loss by reason of the conduct of a tortfeasor." *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997) (citation omitted).

This conception of open and accessible courts became an American birthright and an article of faith that found expression in the nation's seminal constitutional decision:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

Americans had a practical reason to find Coke's and Blackstone's writings consistent with right and reason: their arguments provided a legal brief against the "unconstitutional tax" imposed by the Stamp Act, which effectively closed the civil courts because of the cost associated with obtaining stamps for legal filings. *See* Laurence H. Tribe & Roger L. Pardieck, *Indiana's Medical Malpractice Reform*, 31 Ind. L. Rev. 1089, 1090-92 (1998).

Delaware's embrace of this right makes it "the duty of the courts to afford a remedy and redress for every substantial wrong." *Robb v. Penn. R.R. Co.*, 210 A.2d 709, 714 (1965). In addition, due process supplements that right by requiring, "at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie*, 401 U.S. at 377. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances").

As in *Boddie*, which held that Connecticut could not impose a fee that blocked access to civil judicial recourse to indigent plaintiffs, the vast majority of courts have held that their open-courts guarantees prohibit unreasonable financial barriers to court access. *See*, *e.g.*, *Cent. Appraisal Dist. v. Lall*, 924 S.W.2d 686, 689 (Tex. 1996).

In this case, the Superior Court limited compensation for past medical expenses to $5,198.71, the amount of the Medicaid lien, reduced from the jury's finding of $24,911. Court Op 10 (Docket Entry 78) (attached in addendum). Beyond that, the court issued judgment on the jury's verdict of $15,000 for pain and suffering and $10,000 for future medical expenses, for a total of $30,198.71. With more than a sixth of that total due to Medicaid as reimbursement for the medical expenses it

covered, the Superior Court's ruling would have Medicaid recipients in this situation pursue a tort action for $25,000 in damages, less litigation costs and attorney fees,[11] when non-Medicaid recipients in these precise circumstances would collect nearly twice that amount because the insurance write-off would not be credited to the tortfeasor.

2. Limiting the recovery of Medicaid patients unconstitutionally burdens access to the courts and undermines the deterrent effect of tort law and taxpayer interests.

In order to be eligible for Medicaid assistance, patients must have very limited incomes. As a result, their compensation claims for lost earnings when recovering for injuries resulting from the conduct of a tortfeasor will always be small. The result, as it was here, is that a successful lawsuit will result in a small verdict. Here that verdict was barely $50,000. When reduced by the Medicaid write-off and then further reduced by the Medicaid lien, costs and attorney fees, the total recovery is a very small figure compared to the effort to achieve the result.

Because most people do not sue,[12] imposing an additional artificial limit on recovery will render these lawsuits uneconomic to pursue and effectively burden the

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[11] As the California Supreme Court observed, a "plaintiff rarely actually receives full compensation for his injuries as computed by the jury," so the "collateral source rule partially serves to compensate for the attorney's share and does not actually render 'double recovery' for the plaintiff." *Helfend v. S. Cal. Rapid Trans. Dist.*, 465 P.2d 61, 68 (Cal. 1970).

[12] After surveying the empirical literature, Professor Richard Abel concluded that "[v]ast numbers of accident victims fail to seek and thus to recover any compensation whatever." Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 Ohio St. L.J. 443, 467 (1987).

right of access to the courts. The marginal utility of bringing a lawsuit, the success of which is generally a fifty-fifty proposition, when costs are high and damages will be limited, will remove incentives to sue. *See generally*, A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Welfare Implications of Costly Litigation for the Level of Liability*, 17 J. Legal Stud. 151 (1988). When, as here, a plaintiff is likely to receive such low compensation for bringing the lawsuit if the collateral source rule is not applied, there will be little incentive to pursue the case, largely due to the imposition of an additional cost: abrogation of the collateral source rule in cases involving Medicaid patients. Imposition of that cost runs afoul of the promise contained in the open courts guarantee, as much as the cost at issue in *Boddie*.

The result will also afflict society in two distinct ways. The disappearance of a lawsuit that would otherwise be brought undermines the deterrence effect of tort law. *See Stayton*, 117 A.3d at 527 ("a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall."). *See also State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71, 73 (Del. 1989) (recognizing the collateral source rule's rule in the "deterrent and quasi-punitive functions of tort law."); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L.J. 513, 527 (2003) ("the injured person is compensated by means of a payment that, because it comes from the pocket of the antisocial actor, will deter such acts in the future."). Thus, the safety and deterrence purpose of lawsuits will be lost.

Second, taxpayers will be adversely affected. Medicaid is a cooperative state-federal insurance program "paid for by taxes collected from society in general." *Pardee v. Suburban Propane, L.P.*, 2003 WL 21213413, at *2 (Del. Super. May 22, 2003) (citation omitted). The Medicaid statute mandates that the state agency administering the program seek reimbursement from third parties liable for the care and services paid for by Medicaid "where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery." 42 U.S.C. § 1396(a)(25). When neither the Medicaid-eligible tort victim will bring the lawsuit and the state will not find it economically viable to bring a lawsuit to recover its $5,197.71 lien, the taxpayers will foot the bill without any potential for recovery, further depleting the funds available through Medicaid.

Thus, the constitutional injunction that the courts must be freely available, as well as public policy, supports application of the collateral source rule to plaintiffs whose medical services were paid for by Medicaid.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court in this case should be reversed with instructions to enter judgment on the jury's verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff-Appellant's Second Corrected Opening Brief was served via e-file File & Serve Xpress on this 7th day of March, 2016 upon the following counsel:

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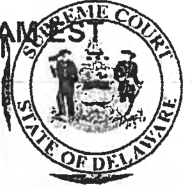

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JENNIFER SMITH and EDWARD SMITH, Plaintiffs, v. DELAINE MAHONEY and NICOLE MARIE RICHARDS, Defendants.	))))))))))	C.A. No.: N12C-10-046 MMJ TRIAL BY JURY OF TWELVE DEMANDED

ORDER

IT IS HEREBY ORDERED this 21st day of May, 2015 that Defendant Nicole Marie Richards' Motion in Limine to Limit Plaintiff's Presentation of Her Past Medical Expenses and to Strike Evidence of Her Future Medical Expenses is hereby ~~GRANTED~~. DENIED.

The Honorable Mary M. Johnston

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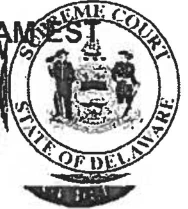

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JENNIFER SMITH,	)	
	)	C.A. No. N12C-10-046-MMJ
Plaintiff,	)	
	)	
v.	)	(CONSOLIDATED)
	)	
DELAINE MAHONEY and	)	
NICOLE MARIE RICHARDS,	)	TRIAL BY JURY OF
	)	TWELVE DEMANDED
Defendants.	)	

POST-TRIAL ORDER

WHEREAS this combined action went to trial on June 1, 2015; and

WHEREAS the jury returned a verdict awarding Plaintiff Twenty-Four Thousand Nine Hundred Eleven Dollars ($24,911.00) for past medical expenses, Ten Thousand Dollars ($10,000.00) for future medical expenses, and Fifteen Thousand Dollars ($15,000.00) for pain and suffering; and

WHEREAS the jury apportioned each of the categories of damages as being ninety percent (90%) due to Defendant Mahoney and ten percent (10%) due to Defendant Richards; and

WHEREAS the jury's apportionment constitutes an award for Plaintiff against Defendant Mahoney in the amounts of Twenty-Two Thousand Four Hundred Nineteen Dollars and Ninety Cents ($22,419.90) for past medical expenses, Nine Thousand Dollars ($9,000.00) for future medical expenses, and Thirteen Thousand Five Hundred Dollars ($13,500.00) for pain and suffering; and

WHEREAS the jury's apportionment constitutes an award for Plaintiff against Defendant Richards in the amounts of Two Thousand Four Hundred Ninety One Dollars and Ten Cents

($2,491.10) for past medical expenses, One Thousand Dollars ($1,000.00) for future medical expenses, and One Thousand Five Hundred Dollars ($1,500.00) for pain and suffering; and

WHEREAS pursuant to the Delaware PIP statute Plaintiff cannot board Two Thousand Two Hundred Forty-Four Dollars and Thirty-Five Cents ($2,244.35) of past medical bills against Defendant Richards as that amount remained available under Plaintiff's PIP for Defendant Richards' accident; and

WHEREAS the past medical expenses award against Defendant Richards is therefore reduced to Two Hundred Forty-Six Dollars and Seventy-Five Cents ($246.75);

NOW, THEREFORE, Judgment is hereby entered effective June 3, 2015, in favor of Plaintiff Jennifer Smith and against Defendants jointly and severally in the amount of $49,911.00, with judgment apportioned as aforesaid.

Post-trial interest shall apply as a matter of law beginning with the date of the verdict, June 3, 2015. The parties shall submit any post-trial applications consistent with the Court's Rules.

IT IS SO ORDERED this 16th day June, 2015.

J. JOHNSTON

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JENNIFER L. SMITH and EDWARD SMITH, Plaintiff, v. DELAINE MAHONEY, NICOLE MARIE RICHARDS, and THEOPHIL M. HOLLIS, Defendants.	))))))))))))))	C.A. No. N12C-10-046 MMJ

Submitted: October 16, 2015
Decided: November 20, 2015

Upon Defendant Mahoney's Motion to Alter or Amend the Judgment
GRANTED in part and DENIED in part

OPINION

Robert C. Collins II, Esq. (Argued), Schwartz & Schwartz, Attorney for Plaintiff

Thomas P. Leff, Esq. (Argued), and Rachel D. Allen, Esq., Casarino Christman Shalk Ransom & Doss, P.A., Attorneys for Defendant Mahoney

Aman K. Sharma, Esq., Chrissinger & Baumberger, Attorney for Defendant Hollis and Defendant Richards

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

On October 5, 2010, plaintiff Jennifer L. Smith ("Plaintiff") was involved in a motor vehicle accident with defendant Delanie Mahoney ("Mahoney"). Plaintiff subsequently was involved in a second motor vehicle accident with defendant Nicole Marie Richards ("Richards") on January 6, 2011. Plaintiff was enrolled in Medicaid at the time of the motor vehicle accidents, and continues to be enrolled in Medicaid.

On May 6, 2015, Richards filed a Motion in Limine to limit Plaintiff's past medical expenses and to strike Plaintiff's future medical expenses. On May 15, 2015, Mahoney filed a Notice of Joinder with Richards' Motion in Limine on Plaintiff's medical expenses. On May 21, 2015, the court denied the Motion.

At trial, Plaintiff introduced a redacted medical bill showing total charges of $22,911.00, and a $2,000 bill from MRI Consultants. Plaintiff's medical expert testified that Plaintiff would require future medical treatment totaling approximately $3,300 a year. Plaintiff's doctor's appointments and prescribed medications were estimated to be approximately $1,800 a year. Possible injections would cost approximately $1,500 per injection. The jury was not informed that a portion of the medical bills had been paid by Medicaid, and that the remaining balance was written-off. The Medicaid lien is $5,197.71.

On June 3, 2015, the jury returned a verdict for Plaintiff in the amount of $15,000 for pain and suffering, $24,911 for past medical expenses, and $10,000 for future medical expenses. On June 17, 2015, Mahoney filed a Motion to Alter or Amend the Judgment regarding Plaintiff's awards for past and future medical expenses.

STANDARD OF REVIEW

"Law courts in Delaware have long had the inherent power to vacate, modify or set aside their judgments or orders during the term in which they were rendered."[1] To succeed on a Motion to Alter or Amend Judgment,[2] the moving part must establish one of the following: "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct clear error of law or to prevent manifest injustice."[3]

ANALYSIS

Delaware's Collateral Source Rule

The collateral source rule provides that damages are not reduced by compensation received by the plaintiff from a source independent of the tortfeasor.[4] The rule balances "two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make [the plaintiff] whole, but no more;

[1] *Tyndall v. Tyndall*, 214 A.2d 124, 125 (Del. 1965).
[2] Super. Ct. Civ. R. 59(d).
[3] *Kostyshyn v. Comm'rs of Town of Bellefonte*, 2007 WL 1241875, at *1 (Del. Super.).
[4] *Stayton v. Delaware Health Corp.*, 117 A.3d 521, 523 (Del. 2015) ("*Stayton II*").

and (2) a defendant is liable for all damages that proximately result from [the] wrong."[5] Delaware has applied this rule to provider write-offs as well as to independent sources.[6] The "tortfeasor cannot reduce its damages because of payments or compensations received by the injured person from an independent source."[7] The collateral source rule operates to allocate any resulting windfall to the plaintiff, rather than to the defendant.[8]

Defendants' Contentions

Mahoney contends that, pursuant to Delaware Superior Court Civil Rule 59(d), there has been an intervening change in the controlling law entitling her to an amendment of Plaintiff's $24,911 award for past medical expenses. Specifically, Mahoney contends that the award should be reduced to $5,197.71 - the Medicaid lien for payments made for Plaintiff.

In Richard's Motion in Limine, Mahoney and Richards ("Defendants") argued that pursuant to *Stayton v. Delaware Health Corp.*,[9] the collateral source rule did not apply because Plaintiff's post-PIP bills were paid by Medicaid. Defendants argued that Plaintiff could only recover the amount that actually was paid by Medicaid. The Court was not persuaded by Defendants' arguments, and the Motion was denied. However, following this Court's denial, the Delaware

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[5] *Stayton II*, 117 A.3d at 523.
[6] *Id.* at 529.
[7] *Id.* at 527.
[8] *Id.*
[9] 2014 WL 4782997 (Del. Super.) ("*Stayton I*").

Supreme Court affirmed the trial court's decision in *Stayton I*, and held that the collateral source rule did not extend to write-offs from medical bills paid by Medicare.[10] Mahoney contends that this Court must extend *Stayton II* to this case, and reduce Plaintiff's $24,911 award for past medical expenses to $5,197.71.

Mahoney also argues that Plaintiff's $10,000 award for future medical expenses must be vacated as pure speculation because there was no calculation for the deductions that Medicaid would have made. Relying on *Russum v. IPM Development Partnership, LLC*,[11] Mahoney seeks to extend *Stayton II* to future medical expenses, arguing that the amount of future medical expenses should be reduced by the amount that would be written-off by Medicaid. To arrive at this amount, Mahoney proposes that expert testimony, and not an estimate based on past Medicaid payments, would be required to make this calculation.

Discussion

Past Medical Expenses

Delaware case law is clear that the collateral source rule does not apply to Medicaid or Medicare write-offs.[12] In *Rice v. The Chimes, Inc.*,[13] the plaintiff was charged with two hospital bills totaling $960,000.00. Medicare paid $59,000 towards one bill, and Medicaid paid $60,000 towards the other bill. The Court

[10] *Stayton II*, 117 A.3d at 531 (Del. 2015).
[11] 2015 WL 4594166 (Del. Super.).
[12] *Rice v. The Chimes, Inc.*, C.A. No. 01-03-260 CLS, at *4 (Del. Super. 2005).
[13] *Id.*

found that the collateral source rule did not apply to the $841,000 write-off "since that amount was not paid by any collateral source."[14] The Court reasoned that the plaintiff was entitled to recover only the $119,000 that was paid by Medicare and Medicaid because the "[p]laintiff never had and never will incur the remaining expenses."[15] The issue in *Rice* was application of the collateral source rule to past, not future, medical expenses.

In *Stayton I* and *II*, the plaintiff was a rehabilitation center resident who brought a medical negligence claim against the rehabilitation center for serious burn injuries. The plaintiff's medical bills totaled $3,683,797.11. Medicare paid $262,550.17, and the rest was written-off. The plaintiff contended that she was entitled to the entire billed amount, including the written-off portions of her bills, under the collateral source rule. The defendant argued that the plaintiff should be able to claim only the past medical bills paid by Medicare.

The trial court concluded that Stayton could only recover $262,550.17, the amount paid by Medicare, and the Delaware Supreme Court affirmed. The Supreme Court held that the collateral source rule applies only to "provider write-offs as benefits conferred on plaintiffs by providers, in the form of services

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[14] *Id.* at *3-4.
[15] *Id.* at *4.

gratuitously rendered at a price below the standard rate."[16] Medicare "provider write-offs are not payments made to or benefits conferred on the injured party."[17]

In accordance with the holdings in *Rice* and *Stayton II*, Plaintiff's award for past medical expenses shall be reduced to $5,197.71 - the amount of the Medicaid lien.

Future Medical Expenses

Plaintiff's medical expert testified that Plaintiff would require future medical treatment totaling $3,300 a year. Medication and appropriate medical follow-up appoints would cost approximately $1,800 per year. Cervical spine injections would cost approximately $1,500 per injection. Plaintiff's medical expert testified as to the full amount of required future medical treatment, and not Medicaid reimbursement amounts.

In *Stayton II*, the Supreme Court applied the collateral source rule to provider write-offs and third-party payments. The Court distinguished Medicare and Medicaid from third-party payments, but declined to distinguish Medicare and Medicaid from each other. Concerned with speculative or conjectural damages, the Court applied a reasonable probability standard to determine future consequences of tortious injury. The Court held that "a plaintiff cannot recover speculative or conjectural damages because the law 'refuses to allow a plaintiff

[16] *Stayton II*, 117 A.3d at 527.
[17] *Id.* at 531.

damages relating to the future consequences of a tortious injury unless the proofs establish with reasonable probability the nature and extent of those consequences.'"[18]

In *Russum*, this Court held that "'damages relating to future consequences of a tortious injury' be 'established with reasonable probability [as to] the nature and extent of those consequences.'"[19] Consequently, expert testimony is required to "account for any appropriate Medicare write-off relating to such projected expenses."[20] However, the *Russum* Court only addressed Medicare, not Medicaid write-offs in the context of future medical expenses.

Relying on *Russum*, Mahoney seeks to extend *Stayton II*. Mahoney argues that Plaintiff's $10,000 award for future medical expenses should be vacated as pure speculation.

Policy Considerations

There are substantial differences between Medicare and Medicaid.

> Both programs were created by the Social Security Act in 1965. Medicaid (Title XIX) is funded by both the Federal government and State that administers the program. Because of options for coverage, the Medicaid program varies widely from State to State. Medicare (Title XVIII) is a Federally funded and administered health insurance program which has uniform rules, regulations, and benefits in every state.[21]

[18] *Id.* at 534 (quoting *Laskowski v. Wallis*, 205 A.2d 825, 826 (Del. 1964)).
[19] 2015 WL 4594166, at *3 (quoting *Laskowski*, 205 A.2d at 826).
[20] *Russum*, 2015 WL 4594166, at *7.
[21] 16 *Del. Admin. C.* § 13300.

Medicare enrollment is mandatory.[22] Eligibility is based on age, permanent disability, and work history.[23] Those conditions are, by definition, immutable. There is a reasonable probability that a person will remain covered by Medicare in the future. A provider that accepts Medicare "cannot seek reimbursement for its medical services from anyone other than Medicare."[24]

Medicaid enrollment is optional.[25] Eligibility is based on income and resources.[26] Medicaid recipients are encouraged to exit Medicaid as soon as possible. It is not uncommon for a Medicaid-eligible recipient to exit Medicaid due to an increase in income or resources, or by obtaining private health insurance coverage. Providers that accept Medicaid must first bill other potential sources of third-party coverage before submitting a bill to Medicaid.[27]

For purposes of future medical expenses, the Court finds that future Medicaid eligibility is purely speculative and conjectural. Therefore, Plaintiff's $10,000 award for future medical expenses will not be reduced by estimates of future Medicaid write-offs. The Court recognizes that the Delaware General Assembly may determine that a contrary result should be enacted by statute.

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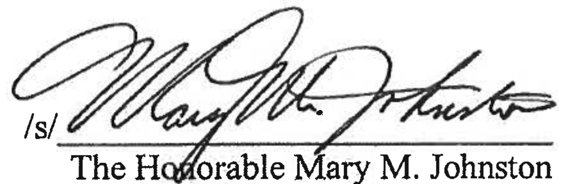
[22] *Stayton II*, 117 A.3d at 523.
[23] 42 U.S.C. § 1395c.
[24] *Stayton II*, 117 A.3d at 524 (citing 42 U.S.C. § 1395cc).
[25] 16 *Del. Admin. C.* § 14000.
[26] 16 *Del. Admin. C.* §§ 13400-70.
[27] 42 C.F.R. §§ 433.139, 433.145.

CONCLUSION

Plaintiff's award for past medical expenses shall be reduced to $5,197.71 - the amount of the Medicaid lien. The collateral source rule applies only to the past amounts actually paid by Medicare or Medicaid. Plaintiff's $10,000 award for future medical expenses shall not be reduced by any anticipated future Medicaid write-offs. While the collateral source rule applies to the amount of estimated future payments by Medicare, future Medicaid eligibility is speculative and recovery of future medical expenses should not be reduced by estimated Medicaid write-offs.

THEREFORE, Defendants Motion to Alter or Amend the Judgment is hereby **GRANTED IN PART, AND DENIED IN PART**.

IT IS SO ORDERED.



/s/

The Honorable Mary M. Johnston