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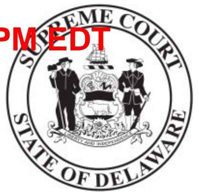

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF *AMICUS CURIAE* DELAWARE TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS/CROSS APPELLEES JENNIFER L. SMITH AND EDWARD SMITH

Raeann Warner, Esq. (#4931)
Jacobs & Crumplar, P.A.
2 E. 7th Street, Suite 400
Wilmington, DE 19801
(302) 656 5445

Patrick C. Gallagher, Esq. (#5170)
Curley, Dodge, & Funk, LLC
250 Beiser Blvd., Suite 202
Dover, DE 19904
(302) 674-3333

May 9, 2016

Attorneys for Amicus Curiae
Delaware Trial Lawyers Association

TABLE OF CONTENTS

ARGUMENT		1
1.	MEDICAL PROVIDERS' ACCEPTANCE OF MEDICAID PAYMENTS PROVIDE A BENEFIT TO PLAINTIFFS	1
II.	LETTERS OF PROTECTION BENEFIT INJURED PERSONS WHO CANNOT AFFORD MEDICAL TREATMENT	2
III.	THE SUPERIOR COURT CORRECTLY DETERMINED THAT FUTURE MEDICAID ELIGIBILITY AND WRITE-OFFS WERE SPECULATIVE	4
CONCLUSION		6

TABLE OF AUTHORITIES

CASES

In re Moore,
4 P.3d 664, 665 (N.M. 2000)……………………………………….……………2-3

James v. Nat'l Fin., LLC,
2016 Del. Ch. LEXIS 52, *30, 132 A.3d 799 (Del. Ch. 2016)…………………2

Mitchell v. Haldar,
883 A.2d 32 (Del. 2005)…………………………………………………………...1

Onusko v. Kerr,
880 A.2d 1022 (Del. 2005)…………………………………………………….....1

Smith v. Mahoney,
C.A. N12C-10-046 MMJ (Del. Super. November 20, 2015)…………………...4

STATUTES

31 Del.C. § 501……………………………………………………………………..4

CODES

16 Del. Admin. C.§13300…………………………………………………………..5

ARGUMENT

I. MEDICAL PROVIDERS' ACCEPTANCE OF MEDICAID PAYMENTS PROVIDE A BENEFIT TO PLAINTIFFS.

Appellee/Cross-Appellant claims that "Medical providers are not conferring a benefit on their patients by accepting Medicaid payments[]," (Cross-Appellant OB at 9-12, 13-15), and therefore the collateral source rule does not apply. This is not accurate because patients/plaintiffs do receive a benefit when providers accept Medicaid.

When a medical provider decides to bill and accept payment from Medicaid for services it provided to the plaintiff/patient, and foregoes the right to full recovery of the bill, it benefits the plaintiff/patient. As a result of the provider's voluntary decision to bill and accept Medicaid payment, the plaintiff pays less for medical services then he or she otherwise would have. The plaintiff receives more of his or her tort recovery as a result. This is certainly the conferring of a benefit on the plaintiff/patient.

Whether the decision to accept Medicaid is a voluntary business decision, as Appellee/Cross Appellant argues, makes no difference. The providers who agreed to write-offs as in Mitchell v. Haldar, 883 A.2d 32, 38 (Del. 2005) or in Onusko v. Kerr, 880 A.2d 1022, 1024 (Del. 2005) also made voluntary business decisions. The providers still confer a benefit on to the plaintiff/patient, and therefore the collateral source rule should apply.

II. LETTERS OF PROTECTION BENEFIT INJURED PERSONS WHO CANNOT AFFORD MEDICAL TREATMENT.

Appellee/Cross-Appellant claims that letters of protection are unconscionable contracts of adhesion that do not assist patients/plaintiffs. Neither is true.

Unconscionable contracts of adhesion are: **"**traditionally defined as a contract 'such as no man in his senses and not under delusion would make on the one hand, and no honest or fair man would accept, on the other.'" James v. Nat'l Fin., LLC, 2016 Del. Ch. LEXIS 52, *30, 132 A.3d 799 (Del. Ch. 2016). Such contracts are analyzed using the Fritz factors, see id. at *35, none of which apply with respect to letters of protection. One such factor is a gross disparity between pricing and value. Id. at *37. No such disparity exists in letters of protection. Doctors do not charge any interest on their medical bills, despite payment being delayed often for long after the service is provided. Also missing are

> provisions that deny or waive "basic rights and remedies," "penalty clauses," and "disadvantageous" clauses that are hidden or difficult to identify and understand.

Id. at *53. These provisions are not present in letters of protection.

Letters of protection most certainly assist patients/plaintiffs. The nature of tort litigation is that just compensation is delayed, for months and often years, because it takes time to file a case, litigate it, and settle or go to trial. But the patient needs to pay for the treatment he or she needs more immediately. " '**Letter**

of protection' is the customary nomenclature for 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, 665 (N.M. 2000). Letters of protection are often necessary when a client is injured in an automobile accident and the medical bills exceed the $15,000.00 in PIP benefits, and there is no other source of payment. In premises liability cases, where there is no personal injury protection (PIP) insurance, the injured client might have to go without treatment but for a letter of protection. Even where liability is not disputed, the liable party's insurance company does not typically agree to pay for ongoing treatment unless and until a settlement is reached.

Clients who have been injured by the fault of another, need medical treatment, and cannot afford it, can use letters of protection to get the treatment they need without waiting for a judgment or settlement which often take years of litigation to achieve. Doctors who accept letters of protection provide a valuable benefit to their patients. They provide service the patient needs from the provider of the patient's choice and defer payment until the patient is able to compensate them.

III. THE SUPERIOR COURT CORRECTLY DETERMINED THAT FUTURE MEDICAID ELIGIBILITY AND WRITE-OFFS WERE SPECULATIVE.

The Superior Court's decision that future medical expenses should not be reduced by speculating that the plaintiff will be Medicaid eligible and have the expenses reduced should be affirmed.

Appellee/Cross-Appellant asks that the Court assume that Smith will be enrolled in Medicaid for the rest of her life and that Medicaid will always pay providers at the same rate that it did during discovery of this case. Yet to do so would be speculative and contrary to public policy. As the Superior Court correctly noted in its decision below, "Medicaid recipients are urged 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." Smith v. Mahoney, C.A. N12C-10-046 MMJ at 8 (Del. Super. November 20, 2015); see 31 Del.C. § 501.[1] The Medicaid

[1] ("It is declared to be the legislative intent that the purpose of this chapter is to promote the welfare and happiness of all of the people of this State by providing public assistance to all of its eligible needy, unemployable and distressed, that assistance shall be administered promptly and humanely with due regard for the preservation of family life and without discrimination on account of race, religion or political affiliation and that assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society. **It is further declared to be the legislative intent that public assistance be administered, to the extent practicable, in such a way that: private sector work is more economically attractive than public assistance; public assistance recipients exercise personal responsibility in exchange for government assistance; public assistance is transitional, not a way of life, for recipients**…") (emphasis added).

program "varies widely from State to State." Smith v. Mahoney, C.A. N12C-10-046 MMJ at 8 (Del. Super. November 20, 2015) (citing 16 Del. Admin. C.§13300). Thus whether the amount Medicaid pays to providers for future services rates will be the same as it did during the discovery of this case is also uncertain.

CONCLUSION

Respectfully, the Superior Court's decision that the collateral source rule does not apply to plaintiffs whose medical services were paid for by Medicaid should be reversed. The Superior Court's decision that future medical expenses should not be reduced by speculating that the plaintiff will be Medicaid eligible and have the expenses reduced should be affirmed.

JACOBS & CRUMPLAR, P.A.
/s/Raeann Warner
Raeann Warner, Esq. (#4931)
2 E. 7th Street, Suite 400
Wilmington, DE 19801
(302) 656 5445
Raeann@JCDELaw.com

May 9, 2016

William W. Erhart, Esq. (# 2116)
William W. Erhart, P.A.
2961 Centerville Road, Suite 350
Wilmington, DE 19808
(302) 651-0113

Patrick C. Gallagher, Esq. (#5170)
Curley, Dodge, & Funk, LLC
250 Beiser Blvd., Suite 202
Dover, DE 19904
(302) 674-3333
pgallagher@curleydodgefunk.com

Attorneys for Amicus Curiae Delaware Trial Lawyers Association