Recent Kentucky Court of Appeals Decision Upholds Reduction In Medical Expense Award By Amount Written Off By Health-Care Provider; Also Upholds Zero Pain and Suffering Award

David Kramer
dkramer@dbllaw.com

In a recent decision that was designated for publication, the Kentucky Court of Appeals held that, while a plaintiff is permitted to introduce into evidence the full amount of medical bills incurred for treatment of injuries or conditions for which damages are claimed, the trial court should reduce the amount awarded for medical expenses where the expenses were written off by medical providers. In *Dennis v. Fulkerson*, 2009-CA-1367 (6/24/11), the plaintiff's medical expenses had been written off by the hospital at which he was negligently treated by an independent physician. The trial court did not permit the jury to be advised that the medical bills had been written off, and the jury awarded $4,000 for medical expenses. The defendant filed a post-trial motion to vacate the award of medical expenses, arguing that the plaintiff should not be permitted to recover for medical expenses that were written off. The trial court denied the motion. The Court of Appeals cited *Beckner v. Palmore*, 719 S.W.2d 288 (Ky. App. 1986), for the principle that the plaintiff is permitted to introduce to the jury all medical bills incurred for treatment of his or her injuries for which recovery is sought because the amount of medical expenses may help the jury in determining the amount of pain and suffering the plaintiff experienced. However, also citing *Beckner,* the Court held that the proper procedure is for the trial court to reduce the amount awarded in the judgment to avoid a "double recovery," i.e., receipt of both medical treatment that is not compensated as well as damages for the amount billed but written off for that treatment.

Arguably, in addition to pain and suffering, the amount of medical expenses incurred would be relevant to the severity of the plaintiff's injuries. Also, lawyers sometimes use the amount of medical expenses incurred as a metric for the amount of damages that the plaintiff should recover (i.e., asking for an award that is a certain multiple of the medical expenses).

The Court in *Dennis* could have cited *Thomas v. Greenview Hospital, Inc.*, 127 S.W.3d 663 (Ky. App. 2004), *overruled on other grounds, Lanham v. Com.,* 171 S.W.3d 14 (Ky. 2005). In *Thomas*, the defendant hospital asserted that the plaintiff should be limited to introducting evidence of only those medical expenses that were actually payable to the plaintiff's health-care providers after reductions were made to the bills based on contracts between the providers and the Medicare program. The Court of Appeals followed the holding in *Beckner* and upheld the submission to the jury of the full amount of bills incurred because such evidence was felt to be relevant to pain and suffering. However, the Court of Appeals held that the trial court (coincidentally, then-Warren Circuit Judge John D. Minton, Jr., now Chief Justice of the Kentucky Supreme Court) acted properly in reducing the amount of the jury's verdict for medical expenses to the amount actually payable to the health-care providers. The Court held that the collateral source rule did not apply because the reduction involved an amount that was written off and "never subject to indemnification or paid by a third-party source."

This line of cases (particularly *Thomas*) appears partially at odds with the Kentucky Supreme Court's opinion in *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676 (Ky. 2005), in which the Court held that the plaintiff was entitled to recover, not merely introduce, the full amount billed to Medicare for medical expenses even though almost 90% of the expenses billed were classified as a "Medicare adjustment or Medicare write off." The Court held that the collateral source rule applied in this situation and that the plaintiff could recover the "reasonable value" of the medical services provided in treating a compensable injury or condition "without consideration of insurance payments made to the injured party." The Court went so far as to say "it is absurd to suggest that the tortfeasor should receive a benefit from a contractual arrangement between Medicare and the health care provider." Justice Cooper's dissent in *Baptist Healthcare v. Miller* recounted the history of the collateral source rule, and suggested the majority

opinion was not consistent with the weight of authority on the issue. He asserted the rule would preclude introduction of evidence of payment of medical bills "actually incurred and either paid or owing" from a collateral source for which the plaintiff had either purchased or earned coverage, but should not permit recovery of a "phantom expense" that was never incurred. Also, the Court of Appeals had noted in *Thomas* that the collateral source rule was not pertinent to such a write-off. Nonetheless, an opinion of the Supreme Court takes precedence over a decision of the Court of Appeals.

The *Baptist Healthcare v. Miller* holding is particularly unfair when a write-off is made by a health-care provider that is itself a defendant in a medical negligence case. In that situation, not only would the defendant have its services written off, but it would also be subject to damages to the plaintiff for the amount it wrote off. In such a situation, no-one could reasonably suggest the amount written-off would provide a "benefit" to the tortfeasor. *Baptist v. Miller* deserves reexamination on that point alone.

Dennis is not inconsistent with *Miller* to the extent that a medical bill that is completely written off should not be part of the amount awarded to the plaintiff in the judgment, though the amount incurred for treatment may still be submitted to the jury to help prove pain and suffering. *Dennis* and *Thomas* do not comment on the practice of putting a "not to exceed" amount in the jury instructions (which this author commonly sees) for medical expenses. Presumably, this would include amounts that have been written off, though if such is done the trial court has authority under those decisions to make a remittitur in the final judgment.

Dennis v. Fulkerson also upheld a zero award for pain and suffering under the reasoning of *Miller v. Swift,* 42 S.W.3d 599 (Ky. 2001), and *Bayless v. Boyer,* 180 S.W.3d 439 (Ky. 2005).

Dennis was issued on June 24, 2011, and designated for publication. The online docket list for the Court of Appeals on the case does not show that either party filed a motion for discretionary review or petition for rehearing. The case should not be cited as authority until finality and publication are verified.