Recovery of Medical Under Section 490.7 Worth a Closer Look

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Introduction

Section 490.715.5, RSMo, part of Missouri's 2005 tort reform efforts, has been described as an attempt to limit, if not eradicate, the collateral source rule in the recovery of expenses for medical treatment. Examination of § 490.715.5 reveals it: 1) follows Missouri law in limiting recovery of medical treatment expenses to those which were either incurred or actually paid; and 2) honors the collateral source rule, but does not extend it.

In 2005, the Missouri General Assembly passed tort reform measures, commonly referred to as House Bill 393, the provisions of which became effective August 28, 2005. One of its statutes, § 490.715.5, RSMo, which deals with the measure of recovery for medical treatment expenses, has been the subject of scrutiny. One seemingly undeniable purpose of this statute is codifying Missouri's long-standing precedent of a "compensatory only" measure of recovery for medical treatment expenses. That is, such expenses must be paid or incurred for a plaintiff to recover them.

Despite this observation about the purpose of the statute, it would be an understatement to say there has been a lack of consensus on the viability of its operation. Some circuit courts have interpreted the statute as limiting recovery to what has been incurred or paid, but others have not. One circuit court judge has held the statute is unconstitutionally vague. Another has held that the general assembly "came up short" in its efforts to accomplish the known purpose. *Berra v. Danter* has been cited by plaintiffs' counsel as supporting recovery of the dollar amount of medical treatment supported by affidavits under § 490.525, the amounts in which do not necessarily reflect write-offs or downward adjustments from the original amount on the bills.[2] Recently, and most importantly, the Supreme Court of Missouri in *Deck v. Teasley* has held that by enacting § 490.715.5, the general assembly intended to allow plaintiffs to recover dollar amounts stated on a bill for medical treatment, even though they were neither incurred nor paid by a plaintiff, nor by anyone.[3]

Analyzing § 490.715.5 with principles of statutory construction and against the backdrop of Missouri law dealing with recovery of medical treatment expenses, shows it is well-grounded in the latter. To fully understand the statute and its operation,

Expenses 15.5, RSMo:

we need to: 1) review longstanding Missouri precedent on the measure of damages for the recovery of medical treatment expenses; 2) examine the collateral source rule; 3) utilize maxims of statutory construction; and 4) analyze the language of § 490.715.5. It may be surprising, but for nearly a century, Missouri courts have dealt with the issue of whether a plaintiff can recover medical expenses. Time and again, courts have soundly disallowed recovery of medical expenses neither incurred nor paid by anyone.

Text of § 490.715.5 RSMo

Section 490.715, was first enacted in 1987 with subsections 1 through 4, dealing with damages and mentioning the collateral source rule. Our focus is on subsection 5, which provides as follows:

> 5. (1) Parties may introduce evidence of the value of medical treatment rendered to a party that was reasonable, necessary, and a proximate result of the negligence of any party.
>
> (2) In determining the value of the medical treatment rendered, there shall be a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered. Upon motion of any party, the court may determine, outside the hearing of the jury, the value of the medical treatment rendered based on additional evidence, including but not limited to:
>
> (a) The medical bills incurred by a party;
>
> (b) The amount actually paid for medical treatment rendered to a party;
>
> (c) The amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery.
>
> Notwithstanding the foregoing, no evidence of collateral sources shall be made known to the jury in presenting the evidence of the value of the medical treatment rendered.[4]

Maxims of Statutory Construction

Before discussing in detail the language of § 490.715.5, it is important to review tenets of statutory construction. The lodestar of statutory construction and interpretation is the determination of legislative intent in enacting the statute under scrutiny.[5] To the extent possible, that assessment must be guided by the plain language of the statute at issue.[6] Missouri has no official legislative history to rely upon in determining legislative intent.[7] Nonetheless, courts have long been able to discern legislative intent of the general assembly by utilizing the numerous canons of statutory construction.[8] In interpreting a statute, a court should give words their plain and ordinary meaning; it should not look at words in isolation, but should do so in context.[9] The court may resort to a dictionary for guidance as to the common meaning of a word.[10]

A court, if need be to determine legislative intent, can identify the problem sought to be remedied and the circumstances and conditions existing at the time of the enactment.[11] A court must also bear in mind that the general assembly is aware of existing law when it enacts a new law.[12] This includes other statutes[13] and judicial rulings.[14] Furthermore, courts will take into account whether legislation was enacted in response to public concerns.[15] This has been specifically observed in decisions about Missouri's medical malpractice tort reform statutes enacted in the mid-1980s.[16] These rules of statutory construction will serve us later herein, but now we move on to reviewing Missouri law on the measure of recovery of medical treatment expenses.

Missouri Law on Recovery for Medical Treatment Expenses General Rule is One of Compensation, But Not Windfall

In general, Missouri courts have always held a plaintiff's recovery for medical treatment expenses followed the rule of damages to compensate only for losses.[17] Therefore, such recovery must be based at least on evidence that a plaintiff incurred and was liable to pay for the medical treatment.[18] Valid evidence could include testimony by the health care provider of what he or she charged plaintiff and held them liable to pay.[19] Additionally, evidence of what the plaintiff paid for medical treatment is a valid foundation for recovery of that amount.[20]

Traditionally, Missouri courts have endorsed a plaintiff's entitlement to be

compensated for out-of-pocket losses, but have abhorred an unsupported award because it would be tantamount to punishing a defendant.[21] For example, at least two decisions have held that a plaintiff's claim for lost wages would not support a verdict for this item of damage; he suffered no loss because his employer paid his salary or wages while he was off work.[22] More than one court has held that testimony as to the dollar value of medical treatment if ever charged to the plaintiff is insufficient to support a recovery for that amount.[23]

The Amount Paid is the Best Evidence of the Value of Services

As a corollary of Missouri's rule of only compensatory awards, courts have held the actual amount paid for medical treatment will prevail over an amount which was said to be charged. For example, in *Nelson v. Metropolitan Street Railway Co*., the court stated:

> The fact alone that physicians treated the patient does not prove or tend to prove either the amount of their charges, or the reasonable value of the services rendered. The latter amount fixes the measure of damages, except when it appears that the charge made is less than the reasonable value, in which case the recovery is limited to the former amount, *for the plaintiff is not entitled to recover more on this account than his actual loss*. Proof of the *liability paid or incurred* is some evidence of the value of the services.[24]

Consistent with this position, payment of a physician's bill for medical treatment can constitute sufficient evidence of its reasonableness, under the theory that, otherwise, it would not have been paid.[25] Evidence of a plaintiff paying a charge for services can be sufficient evidence of its reasonableness, even in the absence of any direct evidence on that issue, because the presentation of the bill and its payment by plaintiff is regarded as sufficient evidence that the charge was reasonable.[26]

The preference of Missouri courts for amounts paid as the best evidence of value is not unique to claims for expenses of medical treatment. For example, one court has held that "[a]ccruing or incurring fees" for professional legal services "is not the same as paying" for them.[27]

The Collateral Source Rule in Missouri

Many of us have observed the collateral source rule in the context of cases involving an insurance company paying some or all of a plaintiff's medical expenses and the defendant trying to admit evidence at trial of that payment to reduce plaintiff's damages claim.[28] Missouri courts, however, dealt with collateral source rule arguments before insurance was commonly a part of personal injury cases. Some of those cases involved gratuitous assistance by relatives or friends of the injured plaintiff; the results were not uniform.[29]

The first Missouri case articulating the collateral source rule with respect to insurance payments appears to be *Dillon v. Hunt*, where the court solidly supported it.[30] In *Dillon*, fire caused damage to a portion of Hunt's building. Efforts to safely bring down a fire-damaged wall resulted in it falling on plaintiff Dillon's building and the goods inside, damaging both.[31] Plaintiff's insurer paid him for the losses.[32] Dillon sued building owner Hunt for the damage. Hunt was able to convince the trial court to instruct the jury that plaintiff's damages should be reduced by the amount of the insurance payments he received.[33] The jury followed the instruction. Dillon appealed.

In reversing the jury verdict, the Supreme Court of Missouri stated the instruction was erroneous: "Few propositions have been so universally accepted and settled as this. . . . [T]o permit a reduction of damages [by the amount of payments made by others]…would be to allow a wrong-doer to pay nothing, and take all benefit of a policy of insurance without paying the premium."[34] A host of cases followed *Dillon v. Hunt*.[35]

Despite the clear position of the Supreme Court of Missouri in *Dillon*, the collateral source rule continued to be a point of contention in a long line of cases, not many of which lend themselves to a good understanding of the topic. Approximately 100 years later, though, the Supreme Court of Missouri undertook a scholarly discussion of this evidentiary doctrine and accurately described it as an exception to the general rule that damages in tort cases should be compensatory for losses only.[36] *Washington v. Barnes Hospital* involved, in part, analysis of whether the collateral source rule could properly operate to bar evidence at trial of a free, publicly-available special education program for the injured minor, in opposition to plaintiff's evidence of the expense of a private school.[37] The Court articulated its unwillingness to permit the collateral source to allow a windfall recovery.[38] Because plaintiff had not entered into any agreement or bargain as to the expense of this special education, the Court held the collateral source rule could not be applied to prevent the defendant from introducing evidence of the public program: "We reject the concept that the collateral source rule should be utilized solely to punish the defendant."[39]

The dilemma posed by the collateral source rule (at least when insurance payments are involved) is the choice between two alternatives, each of which seems intuitively unfair: 1) allowing a plaintiff to recover more money than they have lost; or 2) allowing a tortfeasor to escape their full liability, even though they had no role in arranging for, or paying for, the actual reduction of the damages they caused plaintiff. The core concept of the collateral source rule when insurance payments are involved has been termed the "benefit of the bargain."[40] This concept seems to be commonly misinterpreted (unwittingly) as a court declaring some affirmative rights of a plaintiff. It is important to understand, though, that in this setting, this concept is really about precluding a tortfeasor from benefiting from something he has no involvement in, rather than enforcing a plaintiff's contractual rights against an insurance company.[41]

Collateral Source Rule in the Context of Current Billing for Medical Treatment

For more than a decade preceding Missouri's 2005 tort reform, billing for medical treatment took on a character different from that seen in the older Missouri cases. For quite some time, billing statements for medical care have had a format, which includes a description of all services and their value, but also (or later) stating a lesser amount that must be paid to satisfy the financial obligation to the health care provider.[42] Despite such reductions, some plaintiffs argue they are entitled to the total dollar amount on the original statement for medical services. This has posed a dilemma for courts on the issue of the amount a plaintiff is permitted to recover. That is, should it be the original, total amount, even though no one paid that amount and is not liable for it, or should it be the amount the plaintiff is actually liable to pay and/or the amount actually paid for the services?[43] Clearly, this issue was a driving force behind the enactment of § 490.715.5, RSMo.

Missouri Courts Have Held a Plaintiff Cannot Recover for Medical Expenses Which Were Neither Incurred Nor Paid

The collateral source rule has its limits; a plaintiff must incur or pay medical expenses to invoke this evidentiary doctrine at trial.[44] Only relatively recently have Missouri appellate courts had to deal with whether a claimant can recover the total dollar amount of medical treatment expenses set forth in a billing statement, even though there was no evidence that plaintiff was liable for, or paid, that dollar amount. Significantly, in *Farmer-Cummings v. Personnel Pool of Platte County*, the Supreme Court of Missouri expressed its view that "[t]o award [a claimant] compensation for medical expenses for which she has no liability would result in a windfall rather than compensation."[45]

Discussion of *Farmer-Cummings* is warranted because its holding must be regarded as part of the context of Missouri law at the time of the enactment of § 490.715.5.[46] In *Farmer-Cummings*, the plaintiff claimed she suffered asthma caused by the inadequate air quality in her workplace.[47] She was out sick and had medical treatment before she filed a workers' compensation claim in which she asserted she was entitled to recover the total amount originally charged ($158,219.71) for medical treatment. From that total value, the Industrial Commission subtracted the amounts that had either been written off or adjusted downward, such that $39,637.72 was taken off the original billing amount.[48] The remaining approximately $118,580 of bills were paid either by Medicaid, Ms. Farmer-Cummings, her private health insurer, or were still outstanding.[49] The Industrial Commission awarded Ms. Farmer-Cummings that remaining amount of $118,000, but did not include the $39,637.[50]

Ms. Farmer-Cummings appealed the commission's award, asserting that she was entitled to recover the dollar total on the original billing statement

and that any adjustments or write-offs should not reduce her recovery.[51] The Supreme Court of Missouri described "the real issue" in the case as being "whether the original medical bills remain 'fees and charges' [under the workers' compensation statute], collectable by the employee if they are subsequently reduced or written-off by the provider in the collection process."[52] "To award Ms. Farmer-Cummings compensation for medical expenses for which she has no liability would result in a windfall rather than compensation."[53] In reaching its conclusion that plaintiff *Farmer-Cummings* was not entitled to collect those amounts adjusted/written off, the Court recounted that two other cases had already determined that an employee was not entitled to recover dollar amounts which healthcare providers had written off and extinguished the claimant's liability for them.[54] The *Farmer-Cummings* Court observed with approval that "[i]mplicit in both decisions [was] the requirement of actual liability on the part of the employee."[55] The Court held that "Ms. Farmer-Cummings' fees and charges include only those amounts that must be paid for her healthcare for which she would otherwise be liable."[56]

Despite the obvious common foundation of Missouri precedent on recovery of medical expenses in workers' compensation matters and in civil litigation, the perceived chasm between these two areas of law proved too wide to bridge for the court in *Porter v. Toys 'R' Us- Delaware, Inc.*[57] just one year before Missouri's 2005 tort reform. There, the Missouri Court of Appeals-Western District declined the defendant's urging to apply the *Farmer-Cummings* damages holding in civil tort litigation. The plaintiff in *Porter* was injured when a stroller fell off a store shelf and hit her in the head, allegedly causing serious injuries. The collateral source rule issue there focused on approximately $33,000 of medical bills and the fact they were completely satisfied for a lesser dollar amount.[58]

On appeal, the defendant argued the trial court erred in sustaining plaintiff's objections to questions during plaintiff's cross-examination, which would have revealed to the jury that she did not pay the full $33,000 shown on the statement for medical services.[59] In a lengthy discussion of the collateral source rule in the context of Missouri's workers' compensation statutes, the *Porter* court acknowledged the *Farmer-Cummings* decision and its rejection of an award to a plaintiff for amounts which he or she had not incurred, had not paid, and was not liable.[60] In its final analysis, though, the *Porter* court stated that *Farmer-Cummings* relied solely on cases which dealt with workers' compensation claims.[61] The *Porter* court also observed the record below was not sufficiently developed as to medical treatment damages.[62] Consequently, the court said it was unwilling to "engraft our supreme court's interpretation of these workers' compensation statutes onto civil litigation cases" because the posture of the case before it did not contain a sufficient record for it to "isolate and decide the pinpoint issue framed by the Court in *Farmer-Cummings*."[63]

It may be unfair to say *Porter* should have declared the *Farmer-Cummings* holding should apply to civil tort litigation. After all, *Farmer-Cummings* dealt only with the interpretation and construction of workers' compensation statutes. The same is true for the *Mann v. Varley* and *Lenzini v. Columbia Foods* cases referred to in *Farmer-Cummings*. If we take a step back, however, and consider the foundation of the damages aspect of those workers' compensation statutes, a court must assume the statutes were based on Missouri precedent on awards being compensatory of losses only. It certainly seems to be no great leap, then, to see that the general assembly, in its 2005 tort reform efforts, wanted to ensure Missouri's "compensation only" measure of recovery was also followed for recovery of medical treatment expenses in civil litigation cases.

Analysis of § 490.715.5, RSMo

The core of this statute is its articulated measure of damages for medical treatment expenses as being the dollar value necessary to satisfy the financial obligation for the treatment. This measure should be no surprise; as we have seen, Missouri law has traditionally regarded the amount incurred or paid as the proper amount recoverable. However, modern billing practices, with more standardized charges/bills and common discounting, have unintentionally created a platform for a damages dispute between: (1) the stated dollar amount of an original charge or bill; and (2) the dollar amount actually incurred or paid. By defining the "value" of medical treatment as the dollar amount necessary to satisfy the financial obligation to the health care provider, § 490.715.5 clarifies that the evidentiary inquiry for recovery of medical treatment expenses must be in line with Missouri precedent.

Subsection 5(1) states that "[p]arties may introduce evidence of the value of the medical treatment" … "that was reasonable" and necessary and caused by "the negligence of a party." It hardly need be said at this point in our discussion that Missouri law has, as a general rule, demanded evidence of medical treatment having these two qualities. Subsection 5(1) is a starting point, which allows the parties to offer evidence of the value of medical treatment rendered. This subsection does not prescribe what

the evidence should be, other than to say it must show the treatment was necessary and the amount reasonable. This is consistent with Missouri precedent.[64] The initial evidence may merely be the total dollar amount on a billing statement, regardless of whether it is incurred or paid. As we have seen, though, a mere statement of value of medical expenses is insufficient to support a verdict.[65] This further supports subsection 5(1) as the starting point of the valuation of medical treatment rendered.

Subsection 5(2) declares the measure of damages by reciting that there is a "rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered." The statute correctly defines the value of recoverable medical treatment expenses under Missouri law because it uses the plaintiff's loss as its core. The "rebuttable presumption" phrase has been a focal point of efforts to construe this statute.[66] Unfortunately, the phrase has proven to be siren-like in drawing some courts and litigants into mistakenly declaring it supports medical expense damages awards based on the stated dollar amount of the medical bills, regardless of whether anyone incurred or paid them. This now includes the Supreme Court of Missouri in *Deck v. Teasley*.[67] Perhaps this confusion is due to an unfamiliarity with modern billing for medical treatment, where billing adjustments and write-offs reduce the originally stated amount.[68]

Frankly, the "rebuttable presumption" language seems to have two basic constructions, but realistically only one of them is viable. The first would be consistent with Missouri law and would allow subsection 5(2)(c) to prevent a plaintiff's recovery from being unfairly thwarted in a conditional reimbursement circumstance. The second construction would necessarily be based on the unimaginable conclusion the general assembly intended to punish defendants by allowing an award to plaintiffs for medical expenses neither paid for nor incurred.

As to the first construction, the rebuttable presumption phrase is merely declaring there is a rebuttable presumption *in each case* that the announced measure of damages is correct as of the presentation to the trier of fact, the trial judge. This does not mean there is a "rebuttable presumption" as to whether the Missouri law of "compensation only" applies to limit recovery of damages for medical expenses to a plaintiff's liabilities and losses – clearly it does. Rather, the presumption phrase is intended to make the damages inquiry flexible enough to accommodate the conditional reimbursement scenario contemplated by subsection 5(2)(c), where the plaintiff may actually owe nothing at the start of trial, but may owe something to satisfy an obligation to a health care provider after a recovery at trial.[69] This subjects the measure of recovery to a transitory modification, which disappears with the verdict in the case. If there is a recovery, then plaintiff is financially obligated to pay the agreed to amount; if no recovery is obtained, then plaintiff has no obligation. Therefore, this still operates consistently with the "compensatory only" tenet. Maxims of

statutory construction bind a court to treat each word or phrase in a statute as having meaning.[70]

The second possible construction would focus on the rebuttable presumption phrase as permitting a plaintiff to introduce evidence of something other than what is paid or owed as probative on the issue of the value of the medical treatment rendered.[71] This is problematic for at least a couple of reasons. First and foremost, it dramatically departs from the statute's defining "value" consistently with Missouri law – the financial liability and/or loss of the plaintiff. Second, such a construction would disconnect a plaintiff from Missouri law on damages such that they could recover for medical expenses which no one incurred or paid – neither the plaintiff himself or herself, nor anyone on their behalf. Missouri courts, including the Supreme Court, have dealt with pleas for such recoveries before and have pointedly described them as being tantamount to punishing a defendant – something those courts have said they will not allow.[72]

Third, such a construction would not only gut § 490.715.5, but it would also turn the statute into one authorizing windfall recoveries. It is axiomatic that the rules of statutory construction require a court to carry out the purpose and intent of the general assembly. Surely, no one can credibly contend the general assembly intended to punish defendants by enacting § 490.715.5.

The theme of subsections 5(2)(a), (b) and (c) is the introduction of evidence of amounts incurred or paid (as opposed to merely a stated value) for medical treatment. The omnibus phrase in subsection 5(2) – "including but not limited to" – deals with what evidence the court can consider in the medical treatment value determination. The purpose of this open-ended clause is to allow the parties to fully litigate the value of medical treatment at issue (and not to be constricted to the three categories of subsection 5(2)). For example, the statute permits a party to introduce evidence of the amount "actually paid for medical treatment." However, there may be challenges about how that amount was arrived at. Additional evidence could include write-offs or adjustments to a bill to reduce the amount owed. There could be additional evidence of a plaintiff being vulnerable to future financial obligations. To see what the general assembly was attempting to deal with on this issue, one need only review the *Farmer-Cummings* and *Porter* decisions insofar as they discuss the state of the trial court record on the evidence of medical treatment expenses in their respective cases.

Subsection 5(2)(a) allows evidence of "medical bills incurred," which, as we have seen, means an amount for which the person is liable or is obligated to pay. This can properly include amounts not yet paid.[73] Missouri law has consistently permitted a plaintiff to recover amounts incurred without proof at trial of actual payment of those amounts.[74] Additionally, there could well be conflicting evidence as to what bills the party is liable for or incurred. For example, many hospital billing statements contain a "total charges" box, the dollar amount of which is not ultimately the amount necessary to satisfy the financial obligation to the health care provider. That is, there may be amounts written off or adjusted for which no one is liable.[75]

Subsection 5(2)(b) includes in the additional evidence categories the dollar amount "actually paid for the medical treatment rendered." This phrase has no limitation or description as to who actually paid for the treatment (consistent with the subsection 1 stating "no evidence of collateral sources" is permitted other than what the section permits). Clearly, the payments would include those the plaintiff personally made and those made by any other sources, including private insurers, public agencies and seemingly even gratuitous payments. This codifies Missouri's adherence to the collateral source rule by upholding a plaintiff's recovery for amounts paid for medical treatment, with no stated restrictions on who paid them.[76]

Subsection 5(2)(c) allows a party to introduce evidence of an amount or an estimate of an amount they have not yet paid and do not yet owe, but which they will or may be obligated to pay in the event of a recovery. This is the reason the "rebuttable presumption" phrase appears earlier in subsection 5(2)(1). Without the "rebuttable presumption" phrase in the statute, it is very doubtful a plaintiff could recover the contingent liability because they neither owe it nor have paid it at the start of trial. This phrase can prevent a plaintiff from being treated unfairly in a situation where he or she does not actually owe an amount for medical treatment prior to trial, but will if there is a recovery at trial.[77] This subsection is clearly designed to account for those situations where, for example, a health care plan or governmental agency is satisfied with one level of reimbursement in the absence of recovery from a third party, but will want a larger payment if the party obtains a recovery from the tortfeasor.[78]

The last sentence of § 490.715.5 states: "Notwithstanding the foregoing, no evidence of collateral sources shall be made known to the

jury in presenting the evidence of the value of the medical treatment rendered."[79] This does not say payments from collateral sources are not considered in the valuation process, but that evidence of payment for medical treatment expenses ultimately presented to the jury should simply state the amounts paid, without mentioning who actually paid them. In this way, the plaintiff gets the benefit of the collateral source rule, while at the same time the proper evidence of value is presented to the jury.

II. Conclusion

It is clear the general assembly enacted § 490.715.5, RSMo, as part of the 2005 tort reform measures, to modify and clarify the collateral source rule with respect to the recovery of medical treatment expenses in the context of modern billing practices. Consistent with Missouri precedent, this section allows a plaintiff to recover her or his loss for an amount incurred (but not yet paid as of trial), and actually paid for the medical treatment. The statute modifies Missouri law because it allows the court to consider evidence of plaintiff's financial obligation being to some extent contingent, and possibly increased, upon obtaining a verdict.

This article shows we should not view § 490.715.5 as some groundbreaking law on the recovery of medical expenses. Nor is it some ill-conceived, poorly written statute. Rather, examined with proper perspective and context, it clearly reflects longstanding Missouri law with: 1) its evidentiary process to prevent windfall recoveries for medical treatment expenses, which no one incurred and which no one ever paid; and 2) its embrace of the collateral source rule. The statute merely brings us back – to the extent necessary – to the basics of tort damages for medical expenses, but in the context of modern billing practices, which includes adjustments, write-offs and conditional reimbursements. Its one departure is a temporary modification of the measure of recovery designed to help plaintiffs by accommodating conditional reimbursement arrangements under subsection 5(2)(c). In short, § 490.715.5 is worth a closer look.

Endnotes

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2 *Berra v. Danter*, 299 S.W.3d 690 (Mo. App. E.D. 2009). The *Berra* decision does not clearly state whether the defendant failed to offer proper evidence of the dollar amount paid. The issue of whether affidavits under § 490.525 can override the valuation procedure in § 490.715.5 is not within the scope of this article. However, many factors point to § 490.715.5 prevailing.

3 *Deck v. Teasley*, 322 S.W.3d 536 (Mo. banc 2010). Quite frankly, the Court's rationale is a surprising departure from its own decisions on the issue of recovery of medical expenses.

4 Section 490.715.5, RSMo Supp. 2010.

5 *United Pharmacal Co. of Mo., Inc. v. Missouri Bd of Pharmacy*, 208 S.W.3d 907, 910 (Mo. banc 2006).

6 *Sermchief v. Gonzales*, 660 S.W.2d 683, 688 (Mo. banc 1983); *L.C. Dev. Co., Inc. v. Lincoln Cnty.*, 26 S.W.3d 336, 340 (Mo. App. E.D. 2000).

7 But courts can examine the course of the passage of a bill to gain insight into the intent of the bill ultimately enacted into law. *Trout v. State*, 231 S.W.3d 140, 147 (Mo. banc 2001).

8 *E.g., Control Tech. & Solutions v. Malden R-1 Sch. Dist.*, 181 S.W.3d 80, 82 (Mo. App. E.D. 2005); *Holmes & Elliott v. Carr & Co.,* 1 Mo. 41 (Mo. 1821).

9 *Zimmerman v. Mo. Bluffs Golf Joint Venture*, 50 S.W.3d 907, 911-12 (Mo. App. E.D. 2001).

10 *Berra v. Danter*, 299 S.W.3d 690, 696 (Mo. App. E.D. 2009).

11 *United Pharmacal Co. of Mo. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907, 911-12 (Mo. banc 2006); *Sermchief v. Gonzales*, 660 S.W.2d 683, 689-90 (Mo. banc 1983).

12 *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001).

13 *Control Tech. & Solutions v. Malden R-1 Sch. Dist.*, 181 S.W.3d 80, 83 (Mo. App. E.D. 2005).

14 *See State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 822 (Mo. banc 1994) (Court observed that one of its earlier decisions invited the legislature to amend § 506.110.1(1)).

15 *See, e.g., Bachtel v. Miller Cnty. Nursing Home Dist.*, 110 S.W.3d 799, 801-02 (Mo. banc 2003) (Court determined the Omnibus Nursing Home "Act was enacted [in] response to public concerns about elderly residents of nursing homes and the inadequacy of state laws and regulations governing nursing home facilities").

16 *E.g., Mahoney v. Doerhoff Surgical Servs.,* 807 S.W.2d 503, 508 (Mo. 1991) (court observed requirement of health care reviewer's affidavit appropriate with objective of general assembly in attempting to protect against groundless suits).

17 *E.g., Iseminger v. Holden*, 544 S.W.2d 550, 552 (Mo. banc 1976); *Morris v. Grand Ave. Ry. Co.*, 46 S.W. 170, 171 (Mo. 1898).

18 *Cordray v. City of Brookfield*, 88 S.W.2d 161, 164 (Mo. 1935); *Zachary v. Kroger, Inc.*, 332 S.W.2d 471, 475 (Mo. App. W.D. 1960).

19 *Cordray*, 88 S.W.2d at 164.

20 *Nelson v. Metro. St. Ry. Co.*, 88 S.W. 781, 783 (Mo. App. W.D. 1905).

21 *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 621 (Mo. banc 1995)("We reject the concept that the collateral source rule should be utilized solely to punish the defendant."); *Morris,* 46 S.W. at 171 ("[The courts do] not seek to punish [a] defendant by the infliction of pecuniary damages...If plaintiff did not lose [any money], there is nothing to compensate."), *citing Ephland v. Mo. Pac. Ry. Co.*, 57 Mo. App. 147 (Mo. App. W.D. 1894).

22 *Ephland v. Mo. Pac. Ry. Co.*, 57 Mo. App. 147 (Mo. App. W.D. 1894) (court commented an award where plaintiff suffered no loss would punish the defendant); *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375 (Mo. App. E. D. 1892) (It is worth noting that both the *Ephland* and *Lee* courts distinguished their lost wage claims from a plaintiff's claim correctly not being reduced by the amount of insurance payments).

23 *Morris v. Grand Ave. Ry.* Co., 46 S.W. 170 (Mo. 1898); *Murphy v. S.S. Kresge Co.*, 205 S.W.2d 252, 255-56 (Mo. App. E.D 1947); *see also*, *Smith v. Chicago & Alton R.R. Co*. 18 S.W. 971, 973 (Mo. 1891) (evidence of physicians providing services, but no evidence they made any charges).

24 *Nelson v. Metro. St. Ry. Co.*, 88 S.W. 781, 783 (Mo. App. W.D. 1905) (emphasis added).

25 *Abbitt v. St. Louis Transit Co.*, 79 S.W. 496, 497 (Mo. App. E.D. 1904).

26 *Wyse v. Miller*, 2 S.W.2d 806, 807 (Mo. App. W.D. 1928).

27 *Berra v. Danter*, 299 S.W. 3d 690, 697 (Mo. App. E.D. 2009), *citing Next Day Motor Freight, Inc. v. Hirst*, 950 S.W.2d 676, 680 (Mo. App. E.D. 1997). For example, in *quantum meruit* claims, the courts have set the reasonable value of services as "the price usually and customarily *paid* for such services or like services at the time and in the locality where the services were rendered." (emphasis added), *Lucent Techs., Inc., v. Mid-West Elec., Inc.*, 49 S.W.3d 236, 247 (Mo. App. E.D. 2001), *citing Kinetic Energy Dev. Corp. v. Trigen Energy Corp.*, 22 S.W.3d 691, 697 (Mo. App. W.D. 1999), which quoted *Baker v. Estate of Brown,* 294 S.W.2d 22, 27 (Mo. 1956).

28 *E.g., Kickham v. Carter*, 335 S.W.2d 83, 90 (Mo. 1960).

29 *E.g., Kaiser v. St. Louis Transit Co.*, 84 S.W. 199, 200 (Mo. App. E.D. 1904) (plaintiff *entitled* to damages for value of care, even though he was nursed by his wife and daughter); *Gibney v. St. Louis Transit Co.*, 103 S.W. 43, 48 (Mo. 1907) (injured mother *not permitted* to recover for her daughter's gratuitous nursing services); *Ephland v. Mo. Pac. Ry. Co.* 57 Mo. App. 147 (Mo. App. W.D. 1894), (injured bank employee *not entitled* to recover wages his employer paid while he was off work due to injuries from railway accident because he had not lost that amount of money, but court distinguished case from insurance policy proceeds cases).

30 *Dillon v. Hunt,* 16 S.W. 516 (Mo. 1891).

31 *Id.* at 517.

32 *Id.*

33 *Id. at* 517-518.

34 *Id.* at 519.

35 *See, Wells v. Thomas W. Garland, Inc.*, 39 S.W.2d 409, 412 (Mo. App. E.D. 1931) (listing several cases).

36 *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619-21 (Mo. banc 1995).

37 897 S.W.2d at 619-20.

38 897 S.W.2d at 621.

39 *Id.*

40 *E.g., Washington v. Barnes Hospital*, 897 S.W.2d 611, 621 (Mo. banc 1995); see *Dillon v. Hunt*, at 518-19.

41 In discussing the collateral source rule, earlier cases employed the Latin phrase *res inter alios acta*, which means – "a thing done between others," Black's Law Dictionary 1424 (9th ed. 2009). Some sources interpreting this phrase say it is the equivalent of telling a defendant to "mind your own business." *E.g., Dillon v. Hunt*, 16 S.W. 516, 518-19, *citing*, 1 Sutherland on Damages 242 (1882). In terms of rationalizing this result of seeming windfall recovery to the plaintiff, some Missouri courts have stated a plaintiff presumably held the excess proceeds in trust for the payer. *E.g., Baker v. Fortney*, 299 S.W.2d 563, 566 (Mo. App. W.D. 1957); *Swift & Co. v. Wabash R.R. Co.*, 131 S.W. 124, 125 (Mo. App. W.D. 1910). However, such observations never became a component of the operation of the collateral source rule; after all, it was not for the defendant to inquire about.

42 *E.g., Farmer-Cummings v. Personnel Pool of Platte Cnty.*, 110 S.W.3d 818, 820 (Mo. banc 2003).

43 *E.g., Farmer-Cummings*, 110 S.W.3d at 820.

44 *E.g., Washington v. Barnes Hosp.*, 897 S.W.2d 611, 620-21 (Mo. banc 1995); *Ephland v. Mo. Pac. Ry. Co.*, 57 Mo. App. 147 (Mo. App. W.D. 1894).

45 *Farmer-Cummings v. Personnel Pool of Platte Cnty.,* 110 S.W.3d 818, 822 (Mo. banc 2003).

46 *E.g., State ex rel DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 822 (Mo. banc 1994).

47 110 S.W.3d at 820.

48 *Id.*

49 *Id.*

50 110 S.W.3d at 820.

51 *Id*. at 820-821.

52 *Id*. at 821.

53 *Id*. at 822.

54 *Mann v. Varney Constr.*, 23 S.W.3d 231, 233 (Mo. App. E.D. 2000) (involving a Second Injury Fund claim); *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 487 (Mo. App. W.D. 1992) (court reduced a Labor and Industrial Relations Commission award by amounts written off by health care providers because plaintiff neither incurred nor paid them).

55 110 S.W.3d at 821.

56 *Id.* at 822.

57 152 S.W.3d 310 (Mo. App. W.D. 2005).

58 *Id.* at 319-23.

59 *Id.*

60 *Id*. at 319-23.

61 *Id*. at 321.

62 *Id*. at 321-22.

63 *Id*. at 321-22.

64 *E.g.*, *Wyse v. Miller*, 2 S.W.2d 806 (Mo. App. W.D. 1928).

65 *Morris v. Grand Ave. Ry. Co.*, 46 S.W. 170 (Mo. 1898).

66 Of course, even a presumption needs

evidence to operate. Without it, how would one set up the presumption? A presumption can be rebutted with substantial evidence, which must, of course, be probative evidence for the issue at hand. *Terminal Warehouses of St. Joseph, Inc. v. Reiners*, 371 S.W.2d 311, 316-17 (Mo. 1963).

67 322 S.W.3d 536 (Mo. banc 2010).

68 Perhaps a more familiar example illustrating the concept would be negotiating to purchase an automobile for less than the MSRP and then having recovery for the car, if totally destroyed immediately after purchase, be limited to the actual amount paid, rather than the MSRP. That is, the recovery is limited to the plaintiff's loss and not the MSRP sticker amount (the original "value").

69 The prior subsection 5 was in S.B. 271, 93rd Gen. Assemb., Reg. Sess. (Mo. 2005) (earlier version for the 2005 tort reform effort), where it dealt only with the recovery of medical expenses which a plaintiff incurred or paid, but did not deal with contingent obligations to health care providers, in the event of a recovery at trial. See *Deck v. Teasley*, 322 S.W.3d at 541, fn 2, for a full text of prior subsection 5. The only substantive changes in subsection 5 are the addition of the conditional reimbursement scenario in subsection (2)(c) and the "rebuttable presumption" phrase to support it.

70 *Berra*, 299 S.W.3d at 696.

71 See *Deck v. Teasley*, 322 S.W.3d 536 (Mo. banc 2010) for this proposition. Certainly, "substantial evidence" which could properly rebut the presumption here must be probative on the issue of recovery of medical expenses. However, testimony as to the value of medical treatment without that amount being paid or owed has been held to be insufficient to support an award. *Morris v. Grand Ave. Ry.* Co., 46 S.W. 170, 171-72 (Mo. 1898) (physician's testimony of the value of his services if he was going to charge anything was insufficient); *Murphy v. S.S. Kresge Co.*, 205 S.W.2d 252, 255-56 (Mo. App. E.D. 1947) (similar physician testimony about value of services if he were to charge for them held insufficient); *see also*, *Smith v. Chicago & Alton R.R. Co.* 18 S.W. 971, 973 (Mo. 1891) (evidence of physicians providing services, but no evidence they made any charges).

72 *Washington v. Barnes Hosp.*, 897 S.W. 2d at 621; *Farmer-Cummings v. Personnel Pool of Platte Cnty.*, 110 S.W. 3d at 820.

73 *Id.*

74 See earlier discussion.

75 *E.g., Farmer-Cummings v. Personnel Pool of Platte Cnty.*, 110 S.W.3d 818, 822 (Mo. banc 2003).

76 One issue not dealt with here is whether the circumstances are such that the collateral source rule properly applies.

77 Regarding earlier subsection 5, which did not have this, but of course, at the conclusion of the trial, the incurred or paid measure of damages will properly apply. If there is no recovery, then they will be obligated to pay the smaller amount. If there is a recovery, they will be obligated to pay the larger amount. This, even though at trial, the plaintiff would be permitted to introduce evidence of an amount which they neither paid nor incurred.

78 *E.g., Farmer-Cummings v. Personnel Pool of Platte Cnty.*, 110 S.W.3d 818, 823 (Mo. banc 2003) (Court expressed concern about not being able to determine from the record whether plaintiff remained liable for write-offs or adjustments; case remanded).

79 Remember that subsection 490.715.1 states that "[n]o evidence of collateral sources shall be admissible other than" as provided therein. Clearly, this is a reference to the fact that collateral source evidence will be presented to the court for the valuation process. This does not conflict with the last sentence of § 490.715.5.