Legal Backgrounder

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Colorado Supreme Court Decides Collateral Source Rule Does Not Apply in Workers' Compensation Subrogation Claim Cases

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As discussed in a March 6, 2020 WLF Legal Backgrounder,[1] the Colorado Supreme Court granted review in *Scholle v. Delta Air Lines, Inc.*, 486 P.3d 325 (Colo. App. 2019) in part to decide whether a plaintiff may recover medical expense damages measured by "billed" amounts far exceeding amounts actually paid or that ever would be paid. More specifically, the issue presented was "[w]hether, in an action brought by an injured worker against a third-party tortfeasor, the collateral source rule as codified at 13-21-111.6, C.R.S. (2019), precludes admission of the amount of medical expenses paid by the plaintiff's workers' compensation insurer, where (1) amounts billed in excess of scheduled healthcare fees and rates allowed under the Workers' Compensation Act are unlawful, void, and unenforceable, and (2) the third-party defendant has already extinguished the workers' compensation insurer's subrogated interest in the medical expenses paid by settling the insurer's claim." *Scholle v. Delta Air Lines, Inc.*, No. 19SC546, 2019 WL 5922201, at *1 (Colo. Nov. 12, 2019).[2]

In *Scholle*, a United Airlines employee was injured by a luggage tug driven by a Delta Air Lines employee. United paid for the employee's medical expenses under Colorado's workers' compensation system and settled a subrogation claim against Delta. The injured employee then sued Delta to recover the amount *billed* by his healthcare providers, even though that amount far exceeded the statutory maximum the providers were required to accept as payment in full for their services, and even though the injured employee was not liable for that amount. The Court of Appeals held that the injured employee was permitted to recover these billed amounts under the collateral source rule. The Colorado Supreme Court granted review.

Scholle provided the Colorado Supreme Court with the opportunity to overturn case law construing the collateral source rule to permit plaintiffs to recover inflated medical expense damages that they will never have to pay. *See Sunahara v. State Farm Mut. Auto. Ins. Co.*, 280 P.3d 649, 652 (Colo. 2012); *Smith v. Jeppsen*, 277 P.3d 224, 225 (Colo. 2012); *Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562, 564 (Colo. 2012); *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080, 1082, 1085 (Colo. 2010). However, the court instead decided the case on a narrow ground, holding that the collateral source rule does not apply in cases like *Scholle* where the workers' compensation insurer has settled its subrogation claims against the third-party tortfeasor. This result provides needed clarification in the workers' compensation context, but it leaves for another day the issue whether, outside the context of workers' compensation subrogation claims,

[1] H. Thomas Watson, Karen M. Bray & Sarah E. Hamill, *In* Scholle, *Colorado Supreme Court Should Clarify Collateral Source Rule's Application to Medical Expense Damages*, WLF Legal Backgrounder (Mar. 6, 2020), https://www.wlf.org/2020/03/06/publishing/in-scholle-colorado-supreme-court-should-clarify-collateral-source-rules-application-to-medical-expense-damages/.

[2] On the same day the Colorado Supreme Court decided *Scholle*, it also decided certified questions from the federal district court in *Gill v. Waltz*, 484 P.3d 691 (Colo. 2021), addressing the same issues presented in *Scholle*. The court majority decided *Gill* the same way it decided *Scholle*, and the same justices dissented in *Gill* for the same reason they dissented in *Scholle*. *Id.* at 694.

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the collateral source rule will continue to allow plaintiffs to recover damages based on highly inflated medical bills that they will never pay.

Scholle Majority Finds that the Collateral Source Rule Does Not Apply Because Plaintiff's Past Medical Expense Damages Claim Was Completely Extinguished

As predicted in a September 29, 2020 WLF blog post we wrote after the court heard oral argument,[3] the majority of the justices in *Scholle* decided there was no need to address the collateral source rule issue. Instead, the court held that when "a workers' compensation insurer settles its subrogation claim for reimbursement of medical expenses with a third-party tortfeasor, the injured employee's claim for past medical expenses is extinguished completely." *Delta Air Lines, Inc. v. Scholle*, 484 P.3d 695, 697 (Colo. 2021). The court further held that "[b]ecause the injured employee need not present evidence of either billed or paid medical expenses in the absence of a viable claim for such expenses, the collateral source rule is not implicated under these circumstances." *Id.* The court reversed the judgment with directions to enter a judgment consistent with its decision, explaining that the Court of Appeals erred by misapplying the collateral source rule and remanding for a new trial on medical expenses. *Id.*

The *Scholle* majority reasoned that, because a workers' compensation insurer stands in the shoes of the employee when it pursues a subrogation claim, it is settling the employee's claim to the extent the claim is coextensive with the subrogated claim. *Id.* at 700–01. The court disagreed with Scholle's argument that "United's settlement could, at most, extinguish his right to pursue the amount that it paid for medical expenses but could not extinguish his right to recover the difference between the amount his medical providers billed for the services they provided and the amount that United actually paid for those services." *Id.* at 701. Instead, the court determined that when United settled with Delta, any claim for past medical expense damages was extinguished because "there is no separate claim for the difference between amounts billed and amounts paid that can be decoupled from the underlying claim for recovery of medical expense damages." *Id.* at 702.

The court also discussed the role that the workers' compensation statute played in its determination. Under Colorado's workers' compensation statute, any amounts billed in excess of the statutory fee schedule are unlawful, void, and unenforceable. *Id.* Because any medical bill in excess of what United paid and then settled would be void under the statute, the court found it would make "little sense to conclude that Scholle retained any claim to damages for medical expenses that survived United's settlement with Delta." *Id.* The court distinguished *Gardenswartz,* which held that a plaintiff could present billed amounts as proof of the reasonable value of medical services even though the plaintiff was not responsible for the difference between the amount billed by the provider and the amount his insurer paid. *Id.* The court noted that there is a meaningful difference between amounts that cannot be collected from an injured party under the terms of a private contract and amounts that are void as a matter of law under a controlling statute. *Id.*

Scholle Dissent Argues Collateral Source Rule Should Apply and that the Amount Paid by Workers' Compensation Insurance Should Not Be Admissible

Justices Gabriel, Hood, and Berkenkotter dissented. They would have held that the collateral source rule allowed Scholle to recover a windfall in the form of medical expense damages based on inflated billed amounts that he would never pay. *See Scholle*, 484 P.3d at 703 (Gabriel, J., dissenting). The dissenting justices reasoned that the amount paid by the workers' compensation insurer is inadmissible as evidence of the reasonable value of medical services. *Id.* They noted that, in subrogation cases, the plaintiff's claims

[3] H. Thomas Watson, Karen M. Bray & Sarah E. Hamill, *Colorado Supreme Court Appears Unlikely to Resolve Question on Appropriate Measure of Medical Damages Personal-Injury Plaintiffs Can Recover*, WLF LEGAL PULSE (Sept. 29, 2020), https://www.wlf.org/2020/09/29/wlf-legal-pulse/colorado-supreme-court-appears-unlikely-to-resolve-question-on-appropriate-measure-of-medical-damages-personal-injury-plaintiffs-can-recover/.

are only partially assigned to the insurer, such that Scholle had a right to recover from Delta any damages in excess of the compensation available under the workers' compensation statute. *Id.* at 703–04. The dissent concluded that, because Scholle's claim for medical expense damages should not have been completely extinguished, the collateral source rule applied to his remaining claim. *Id.* at 704.

In applying the collateral source rule, the dissent noted that a tortfeasor typically cannot benefit from a plaintiff's purchase of insurance, including workers' compensation insurance. *Id.* at 706–07. Therefore, Delta was not entitled to take advantage of the capped workers' compensation rates, even if rates exceeding the cap were unlawful. *Id.* at 707. Accordingly, the dissent would allow Scholle to present the billed amounts as evidence of the reasonable value of medical services, even though he would never have been required to pay that amount and any attempt by the medical providers to collect payment above the workers' compensation fee would have been unlawful.

Colorado's Collateral Source Rule Going Forward

Our March 6, 2020 WLF Legal Backgrounder was optimistic regarding the potential demise of Colorado authority permitting plaintiffs to recover windfall damages based on inflated medical bills. We observed that, in the dissenting opinion in *Calderon v. American Family Mutual Insurance Co.*, 383 P.3d 676, 680 (Colo. 2016), Justice Gabriel, joined by Justice Hood, wanted to limit plaintiffs' double recovery under the collateral source rule. Moreover, Chief Justice Boatwright had dissented in three of the major cases applying the collateral source rule to allow a plaintiff to recover windfall damages. We predicted that these three justices might join together and vote to overturn that line of collateral source rule authority.

Instead, Justices Gabriel and Hood adopted a position that conflicts with their prior opinions. In *Scholle* (and *Gill*), Justices Gabriel and Hood saw no reason to constrain the recovery of damages for medical expenses a plaintiff will never have to pay. And while the majority in *Scholle* and *Gill* held that the collateral source rule is not implicated in cases involving workers' compensation subrogation claims, they left the rule intact in other contexts and expressed no inclination to restrict windfall recovery of inflated medical expense damages based on billed amounts.

However, Justice Gabriel's dissenting opinion in *Scholle* specifically called on the Colorado legislature to clarify the nature of the interests the injured employee retains in a subrogation case. *Scholle*, 484 P.3d at 709. If the Colorado legislature takes up the issue and passes legislation disagreeing with the majority holding, the issue concerning the scope of the collateral source rule likely will make its way back to the court. If it does, the Colorado Supreme Court should be prepared to revisit the collateral source rule as a general matter, keeping in mind principles of tort law and the current reality of the healthcare system in the United States. In addition, the legislature could preempt the Supreme Court's collateral source rule decision by amending Colorado's collateral source rule statute to prohibit recovery of windfall medical expense damages, relying on the rationale outlined by the California Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1135–146 (Cal. 2011).

General principles of tort law disfavor windfall damage awards that make plaintiffs better off than they were before the tort. *LeHouillier v. Gallegos*, 434 P.3d 156, 164 (Colo. 2019). When tort plaintiffs seek medical expense damages, the correct measure of those damages is the necessary and reasonable value of the medical services rendered. *Kendall v. Hargrave*, 349 P.2d 993, 994 (Colo. 1960), *holding limited by Wal-Mart Stores*, 276 P.3d at 566–67. In the United States, the reasonable value of medical services is difficult to ascertain because the amount healthcare providers bill often vastly exceeds the typical amount actually paid for those services. *See Howell*, 257 P.3d. at 1142 ("Because so many patients, insured, uninsured, and recipients under government health care programs, pay discounted rates, hospital bills have been called 'insincere, in the sense that they would yield truly enormous profits if those prices were actually paid.'").

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Colorado's collateral source rule currently prohibits defendants from introducing amounts actually paid for medical services, when paid for by insurers, and instead allows the amounts billed to be introduced as evincing the reasonable value of services. This ensures an unjustified windfall recovery for plaintiffs.

One of the concerns addressed by the collateral source rule is that admitting evidence of the amounts paid, even for the purpose of proving the reasonable value of medical services, will encourage jurors to infer the existence of a collateral source and thereby lower the damages they award. *See Crossgrove*, 276 P.3d at 567. But this concern is overstated. Under the Affordable Care Act ("ACA"), everyone in the United States is required to have health insurance, and insurers are barred from disallowing coverage based on preexisting conditions. *See* 26 U.S.C. § 5000A (2012); 42 U.S.C. §§ 300gg, 300gg-1, 300gg-3, 300gg-4, 18022, 18031, 18044 (2012). It is difficult to conceive of any juror not knowing about the ACA's health insurance mandate. Accordingly, most jurors likely (and accurately) assume that plaintiffs have health insurance covering the medical expenses for which they seek damages. Furthermore, patients who pay cash often receive a discount on medical services even lower than the insurance discounts.[4] Therefore, whether an injured plaintiff has insurance or not, the plaintiff is never expected to pay the billed amount. The amount paid, including the amount paid by insurance, remains the best evidence of reasonable value.

Colorado's collateral source rule is ripe for revision, either by the Colorado Supreme Court or the Colorado legislature. That revision should bar the type of windfall recovery of medical expense damages that the plaintiffs in *Scholle* and *Gill* sought to recover, whether or not the litigation concerns workers' compensation benefits.

[4] *See* Melinda Beck, *How to Cut Your Health-Care Bill: Pay Cash*, WALL ST. J. (Feb. 15, 2016, 10:11 PM), https://www.wsj.com/articles/how-to-cut-your-health-care-bill-pay-cash-1455592277 ("Patients who pay up front in cash often get better deals than their insurance plans have negotiated for them.").

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