STATE COURT
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SPRING 2012

Wisconsin Supreme Court Rules Plaintiffs Entitled to Receive "Phantom Damages"

by Andrew C. Cook

In a recent decision, the Wisconsin Supreme Court has added to the growing list of cases that allow plaintiffs to recover "phantom damages" in personal injury actions for past medical expenses that were written off by the medical provider and never paid by the plaintiff or his or her insurer.

In a unanimous decision, *Orlowski v. State Farm Mutual Auto. Ins. Co.*[1] held that the collateral source rule precludes the defendant from introducing evidence of the amount actually paid for medical services in cases involving an underinsured motorist claim.

Based on the *Orlowski* decision, and the previous line of Wisconsin Supreme Court cases, plaintiffs in personal injury cases are entitled to the full amount of past medical expenses—even those amounts that were written off by the medical provider as a result of contractual agreements between medical providers and health insurers. These damages are often referred to by courts as "phantom damages"[2] because no one ever paid the medical expenses, yet the plaintiff receives the full price billed by the medical provider.

Typically, a plaintiff's health insurer has negotiated rates with the health care provider. The health care provider submits a bill for the full price, but due to these reduced contractual rates, the health insurer pays less than the full price originally billed by the medical provider. However, as the court held in *Orlowski*, the defendant must pay the full sticker price even though it was not the amount actually paid to the medical provider.

Part I begins with a discussion of previous Wisconsin Supreme Court decisions applying the collateral source rule in personal injury cases where the plaintiff's medical expenses were written off by the medical provider. Part II concludes by discussing the Wisconsin Supreme Court's latest decision in *Orlowski*, which extends the collateral source rule to underinsured motorist claims.

I. Previous Wisconsin Supreme Court Decisions Establishing Phantom Damages

A. *Ellsworth v. Schelbrock* (2000)—Medical Assistance

The first of the cases allowing plaintiffs to recover the full amount of medical

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Arkansas Supreme Court Clarifies Standard for Awarding Punitive Damages

by William S.W. Chang

On December 8, 2011, the Supreme Court of Arkansas affirmed a jury's award of approximately $5.98 million in compensatory damages and $42 million in punitive damages against a developer of genetically modified rice found to have negligently allowed the rice to contaminate the national rice supply.[1] Specifically, the court held that (1) the statutory cap on punitive damages was unconstitutional under the state constitution, (2) the economic-loss doctrine did not bar the claims,

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28 Steven L. Mayer, a lawyer for the petitioners, declined to second-guess their legal strategy to sue to overturn both provisions. "Hindsight is always 20-20, isn't it?" Mayer said. *Quoted in* Dolan et al., *supra* note 4.

29 *Id.*

30 *Id.*

31 Teri Sforza, *Undoing Redevelopment: State Slaps down O.C. Cities*, Orange County Reg., Apr. 24, 2012, *available at* http://taxdollars.ocregister.com/2012/04/24/undoing-redevelopment-state-slaps-down-o-c-cities/153778/.

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expenses billed, including amounts written off ("phantom damages") is *Ellsworth v. Schelbrock*.[3]

In *Ellsworth*, the plaintiff was injured in an automobile accident and was hospitalized for months. She sued the negligent driver and the driver's insurer. At trial, the plaintiff introduced evidence of the amount billed by her medical providers, which totaled $597,448.27. The defendant objected to the amount arguing that only the amount actually paid ($354,941) by Medical Assistance to the medical providers should have been introduced as evidence. The trial court ruled that the amount billed ($597,448.27)—the sticker price—rather than the amount actually paid ($354,941) was the proper measure of the amount of past medical expenses.

The case was appealed to the Wisconsin Supreme Court, which upheld the lower court (4-3). Finding that the collateral source rule applies to medical assistance benefits, the defendant was not allowed to introduce evidence of the amount actually paid. Instead, the plaintiff could introduce the amount that was billed by the medical providers. The court reasoned that Wisconsin's tort law "applies the collateral source rule as part of a policy seeking to 'deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor.'"[4]

Former Justice Diane Sykes—who now sits on the United States Court of Appeals for the Seventh Circuit—dissented. Justice Sykes cited to a California Supreme Court decision that reached the opposite conclusion:

> In tort actions damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring him as nearly as possible to his former position, or giving him some pecuniary equivalent. . . . The primary object of an award of damages in a civil action, and the fundamental principle of which it is based, are just compensation or indemnity for the loss or injury sustained by the complainant, and no more . . . .
>
> Applying the above principles, it follows that an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation.
>
> Thus, when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact it may have been less than the prevailing market rate.[5]

B. *Koffman v. Leichtfuss* (2001)—Contractual Write-offs

Just a year later, the Wisconsin Supreme Court decided *Koffman v. Leichtfuss*,[6] which held (5-2) that the collateral source rule applies to cases involving payments made by health insurers. Similar to *Ellsworth*, the plaintiff in *Koffman* was injured in an automobile accident and required medical treatment. The total amount billed by the plaintiff's health providers was $187,931.78. However, due to contractual relationships with the plaintiff's health care providers, the insurance company received reduced rates and only paid $62,324 of the amount billed. Another $3,738.58 was paid by an insurance company and by the plaintiff personally, bringing the total amount of past medical expenses actually paid to $66,062.58.

During trial, the defendants moved to limit the evidence regarding medical expenses to the amounts actually paid ($66,062.58), rather than the amounts billed ($187,931.78). The trial court granted the defendant's motion, and therefore ruled that the plaintiff was only entitled to the amount of medical expenses incurred ($66,062.58) rather than the full sticker price ($187,931.78).

The case was appealed to the Wisconsin Supreme Court, which reversed the trial court. Once again, the court held that the collateral source rule applied, even to "payments that have been reduced by contractual arrangements between insurers and health care providers."[7] The court reasoned that this "assures that the liability of similarly situated defendants is not dependent on the relative fortuity of the manner in which each plaintiff's medical expenses are financed."[8]

Justice Sykes again dissented, arguing that the "proper measure of medical damages is the amount reasonably and necessarily incurred for the care and treatment of the plaintiff's injuries, not an artificial, higher amount

based upon what the plaintiff might have incurred if he or she had a different sort of health plan or no health plan at all."[9]

C. *Leitinger v. DBart* (2007)—Contractual Write-offs

In 2007, the Wisconsin Supreme Court decided *Leitinger v. DBart*,[10] in which the plaintiff suffered injuries while working on a construction site. At trial, the parties argued over the reasonable value of the plaintiff's medical services.

The trial court allowed both parties to proffer evidence of the amount billed by the medical provider ($154,818.51) and the amount paid ($111,394.73) by the plaintiff's health insurance company to prove the reasonable value of medical services. The trial court awarded plaintiff the amount his health insurance company actually paid for the medical treatment, not the sticker price.

On appeal, the Wisconsin Supreme Court held (5-2) that the "collateral source rule prohibits parties in a personal injury action from introducing evidence of the amount actually paid by the injured person's health insurance company, a collateral source, for medical treatment rendered to prove the reasonable value of the medical treatment."[11]

Justice Patience Roggensack along with Justice David Prosser, Jr., dissented, arguing that the majority had "create[d] a new category of damages . . . by unnecessarily expanding the evidentiary component of the collateral source rule to prohibit the jury from hearing what was actually paid to cover all of [plaintiff's] medical care bills while admitting evidence of what was billed, even though no one will ever pay that amount."[12]

II. Wisconsin Supreme Court Further Expands Phantom Damages to Underinsured Motorist Claims in *Orlowski v. State Farm Insurance*

A. Facts of the Case

The plaintiff (Linda Orlowski) was injured in an automobile accident caused by an underinsured driver. Orlowski recovered damages up to the limits of the underinsured driver's insurance. Orlowski also had health insurance coverage which paid a portion of her medical expenses. In addition, Orlowski had an automobile insurance policy with State Farm Insurance, including underinsured motorist (UIM) coverage.

Orlowski submitted a claim to State Farm to recover under her UIM coverage. An arbitration panel awarded Orlowski $11,498.55 for the medical service provided to her as a result of the accident. This amount ($11,498.55) was the amount actually paid to the health care provider, rather than the full amount billed by the medical provider ($72,985.94).

The arbitration panel did not include in its award the amount of Orlowski's medical expenses that had been written off by her medical provider as result of discounts through her health insurance coverage. The amount written off by the medical provider was $61,487.39. No one paid this amount. In his claim, the plaintiff was seeking the full value of the medical expenses.

Orlowski appealed the arbitration panel's decision to the circuit court which modified the award. The judge awarded the plaintiff the full amount billed by the medical provider ($72,985.94), instead of the amount actually paid ($11,498.55). As a result, the plaintiff was awarded $61,487.39 in phantom damages.

B. Wisconsin Supreme Court Decision

The specific issue in *Orlowski* was whether the collateral source rule allows the recovery of written-off medical expenses in a claim under an insured's underinsured motorist coverage.

The court reaffirmed its prior decisions that "an injured party is entitled to recover the reasonable value of medical services, which, under the operation of the collateral source rule, includes written-off medical expenses."[13]

The court offered three public policy reasons for this holding: 1) to deter a tortfeasor's negligence, 2) to fully compensate a plaintiff, and 3) to allow the insured to receive the benefit of the premiums for coverage that he or she purchased.[14]

Unlike the prior cases involving the same issue, none of the justices dissented.

III. Conclusion

Under Wisconsin case law, plaintiffs in personal injury cases are entitled to the the full price of the medical expenses, even when those expenses have been written off by the medical provider (phantom damages).

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Endnotes

1 2012 WI 21.

2 Cooperative Leasing, Inc. v. Truman Roosevelt Domer, 872 So.

2d 956, 959 (Fla. 2004); Haselden v. Davis, 353 S.C. 481, 487 (2003).

3 2000 WI 63.

4 *Id.* ¶ 7 (citing Am. Standard Ins. Co. v. Cleveland, 124 Wis. 2d 258, 264 (Ct. App. 1985)).

5 *Id.* ¶ 29 (quoting Hanif v. Hous. Auth. of Yolo County, 246 Cal. Rptr. 192, 195-96 (1988).

6 2001 WI 111.

7 *Id.* ¶ 31.

8 *Id.*

9 *Id.* ¶ 69.

10 2007 WI 84.

11 *Id.* ¶ 7.

12 *Id.* ¶ 96.

13 Orlowski v. State Farm Mut. Ins. Co., 2012 WI 21, ¶ 4.

14 *Id.* ¶ 18.

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(3) the trial court did not abuse its discretion by admitting expert testimony on future damages, and (4) the developer failed to preserve its argument that the punitive damages were grossly excessive.

FACTS

In the 1990s, Defendants-Appellants Bayer CropScience LP; Bayer CropScience Holding, Inc.; Bayer CropScience AG; Bayer AG; and Bayer BioScience NV (collectively "Bayer") or its corporate predecessors developed a strain of long-grain rice that was genetically modified to be resistant to a Bayer herbicide.[2] In August 2006, the U.S. Department of Agriculture discovered trace amounts of the genetically modified rice (LLRice 601) in the domestic long-grain rice supply and in a popular long-grain rice seed known as Cheniere.[3] The next year, the USDA discovered a second strain of the rice (LLRice 604) in another variety of long-grain rice known as Clearfield 131.[4] Neither the USDA nor any foreign government had authorized that genetically modified rice for human consumption.[5]

In response, the USDA immediately banned the use and sale of Cheniere and Clearfield 131 for the 2007-2008 crop year.[6] It also granted regulatory approval of LLRice 601 in November 2006.[7] But those steps were not enough to prevent importers of U.S. long-grain rice from imposing significant restrictions on or outright banning the importation of U.S. rice.[8] That resulted in a significant drop in U.S. rice exports from 2005 to 2008—a decline that significantly impacted domestic rice farmers who export over half of their long-grain rice.[9]

PROCEDURAL HISTORY

A group of rice farmers sued Bayer in the Arkansas Circuit Court in August 2006.[10] The farmers alleged that Bayer was negligent for not taking sufficient precautions to prevent its genetically modified rice from contaminating the domestic rice supply.[11] They also alleged that Bayer knew that U.S. rice farmers depended on exports for more than half of their crops and that any contamination by genetically modified rice would cause a sharp decline in international demand for U.S. rice.[12] The farmers alleged that Bayer recklessly and wantonly disregarded those natural and probable consequences.[13] Accordingly, they requested compensatory as well as punitive damages.[14]

This appeal concerned the circuit court's ruling on four motions. First, the circuit court denied Bayer's motion in limine to exclude the testimony of the rice farmers' damages expert.[15] Bayer argued that the expert's projection of future damages using past damages was speculative.[16]

Second, the court denied Bayer's motion for summary judgment, which sought to preclude recovery of economic loss in tort actions.[17] Under the economic-loss doctrine, a plaintiff cannot recover for purely economic loss absent personal injury or injury to his or her property.[18]

Third, the court granted the farmers' motion to declare that the statutory cap on punitive damages (Ark. Code Ann. § 16-55-208) is unconstitutional under article 4, section 2, and article 5, section 32 of the Arkansas Constitution.[19] Those provisions respectively set forth the state separation-of-powers doctrine and the ability of the state legislature to limit the amount that one can recover for injuries resulting in death or for injuries to person or property.[20]

Fourth, the court denied Bayer's motion for a directed verdict on punitive damages.[21] The court found sufficient evidence that Bayer knew or should have known the probable consequences of its conduct and Bayer maliciously or recklessly disregarded those consequences.[22]

The jury found that Bayer was negligent.[23] It awarded $5,975,605 in compensatory damages and $42 million in punitive damages.[24] Bayer timely filed motions for a judgment notwithstanding the verdict, a new trial, and a remittitur.[25] In its motion for a new trial and a remittitur, Bayer contended that the punitive-damages award was