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Meek v. Montana Eighth Judicial District Court: Whether Medical Write-offs Can Be Considered in Post-trial Hearings Under Montana's Collateral Source Rule

Carolyn Gibadlo

No: OP 14-0786
Montana Supreme Court

Oral Argument: Wednesday, March 11, 2015 at 9:30 AM in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. The matter was taken into advisement at about 10:45 AM.

I. PETITIONER'S ARGUMENT TO THE COURT

Jeffrey Winter argued that Justice Oldenburg's Order violated Montana's common law collateral source rule and Montana law¹ and that the Defendants' argument attempts to avoid the collateral source rule. Several justices asked Winter to clarify how lower courts should reduce damages to a reasonable value if juries consider the full amount charged. Winter reminded the Court that under Montana common law, unlike some other jurisdictions, a victim incurs liability for medical expenses at the time of service. Therefore, the full amount charged is the amount that should be used by juries to determine the reasonable value, and that amount can be reduced post trial by the amount actually paid. However, the difference in the amount charged and the amount paid should not be offset because the injured party suffered harm for that amount when they incurred liability. Furthermore, the difference in the amount paid and the amount charged is not a payment—it is a write-off.

Write-offs are not subject to Montana's collateral source statute, which allows for damages to be reduced in post-trial reduction. According to Montana common law, the collateral source rule should be interpreted narrowly. Both the *Restatement*² and Montana common law support a finding for the plaintiff when an application of the collateral source rule will reduce damages. The Court asked Winter to clarify the approach taken by the *Restatement* which addresses damages in multiple sections in different contexts. The Court noted that according to § 911 a person cannot receive damages for an amount greater than the amount paid, unless the reduced amount is intended to be a gift. Winter agreed that some courts have relied on § 911, but he argued that in this case § 920 and § 924 are more appropriate because they address when medical

¹ Mont. Code Ann. § 27-1-308 (2013).

² *Restatement (Second) of Torts* §§ 911, 920, 924 (1965).

expenses are incurred, rather than the amount of damages paid. Winter argued that § 920 and § 924, as well as the Court's holding in *Winter v. State Farm*,³ correctly find that the victim incurs medical expenses at the time of service, which should therefore be the reasonable value of damages.

Anders Blewett argued on behalf of amicus Montana Trial Lawyers Association. He encouraged the Court to focus on the evidentiary exclusion of the amount charged rather than the collateral source reductions lower courts impose post trial per the collateral source rule. When asked by Justice McKinnon why the jury should not receive all of the information—the amount paid as well as the amount charged—Blewett argued that the collateral source statute prohibits the jury from considering evidence of collateral sources. He conceded that in a minority of jurisdictions the evidence of the amount paid as well as the amount charged is considered by the jury. However, according to Blewett, Montana common law and statutes support the approach adopted by the majority of jurisdictions which excludes from evidence the amount paid.

The justices asked Blewett to explain how defense counsel could challenge the reasonable value of medical damages without submitting evidence of the amount accepted by the provider. Blewett suggested defenses including fraud, mistake, code errors, or using cross examination to question the amounts. Blewett agreed with the Court that if defense counsel established the proper foundation, and did not introduce evidence of write-offs, pre-negotiated terms, or amounts accepted, an expert could testify that the market value of the billed services is actually less. However, he encouraged the Court to ask the question in the reverse: how can the plaintiff prove the reasonable value of medical expenses when only the amount paid is allowed into evidence? When asked if the Court should adopt § 920, Blewett answered affirmatively. He reasoned that § 920 prevents the collateral source benefit from flowing away from the tort victim and to the tortfeasor resulting in a windfall for the tortfeasor.

II. RESPONDENT'S ARGUMENT TO THE COURT

Cathy Lewis argued on behalf of the Defendants that no party ever incurred liability for the charged amount and the only liability incurred was for the amount later paid. Under Montana law, damages are limited to an amount which compensates for detriment. Detriment must be a loss or harm suffered. In this case, the only liability incurred, and therefore detriment suffered, was the amount paid and damages must be limited to this amount.

³ 328 P.3d 665 (Mont. 2014).

Justice Cotter asked Lewis if the Defendants' argument violated the collateral source statute since the payments were a collateral source. Lewis agreed that the amount paid was a collateral source. However, she argued that under Montana law damages must be limited to the amount otherwise recoverable. For damages to be otherwise recoverable the injured party must have incurred liability for the entire amount. Therefore, under Montana law the damages must be limited to the amount paid—the amount for which the injured party incurred liability. Laws limiting damages can still comply with Montana's collateral source rule because the identity of the payers could be redacted, or the amount could be stipulated by lower courts.

Justice Shea stated that under Lewis's logic the only detriment suffered by the injured party would be the premiums paid to Blue Cross Blue Shield and payroll taxes paid for Medicare, because those are the only losses the injured party actually incurred. Lewis disagreed with Justice Shea and noted that Meek incurred liability and therefore suffered detriment for the amount paid because third party payers could enforce liens or subrogation rights against the injured party. Justice Shea suggested that damages could be reduced post trial by the amount paid as well as the difference in the amount charged and the amount paid, which would limit damages to the otherwise recoverable amount. However, according to Lewis, Montana's collateral source rule cannot apply to the differing amount because a write-off is not otherwise recoverable—it was never incurred. She noted that other courts, including the California Supreme Court, have applied this logic.

Justice Baker asked if the amount charged could be relevant to establish the noneconomic damages or the severity of the injury. Lewis argued that if the plaintiff is not going to pay or be liable for the full amount then the amount charged would not be relevant, but that the services provided would be admissible. Therefore, the services could be submitted into evidence with the cost and sources of payment redacted. Lewis rejected Justice McGrath's suggestion of using a plaintiff's expert to establish the amount of future or noneconomic damages for amounts greater than the amount paid. Lewis argued that it was unreasonable as a matter of law to argue that an amount greater than the amount paid was a reasonable value of medical expenses in situations where the provider accepted less. In today's medical market, bills are misleading and only 1–3% of bills charging the full amount are ever collected. Instead, the most reliable source of reasonable value is the amount accepted as payment.

Lewis was asked if persons with insurance or access to third party payers, like Native Americans using Indian Health Services, would be treated differently than persons without insurance. Lewis agreed that in a small amount of cases the amount charged would be admissible but only when the plaintiff has suffered a concrete economic loss. However,

she rejected the idea that different evidentiary standards caused injured parties to be treated differently and instead noted that parties would all be treated equally because they would all be allowed to recover damages for the amount they actually incurred.

III. PREDICTION

The Court seemed persuaded that Judge Oldenburg's Order excluding the amount billed from evidence violated Montana's common law. Several Justices also seemed to agree with the Petitioner that allowing the jury to consider the amount billed contradicted Montana's collateral source rule. However, the Court suggested alternatives that would allow damages to be reduced by both the amount paid and the write-off in post-trial hearings. The Court will have to decide if it has the authority to include write-offs in Montana's collateral source statute. Both parties argued that write-offs are not subject to the collateral source rule. The Petitioner argued they are not payments and the Respondent argued they are not otherwise recoverable. If the Court accepts either argument, it seems likely that damages will not be reduced by the write-off amount. A decision to include the write-off amount in Montana's collateral source statute, and therefore subject it to post-trial reductions, is a difficult decision for the Court and may better be left for the legislature, as Justice Cotter suggested.