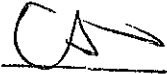


FILED

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

2010 JAN -8 PM 4: 12

RICHARD R. ROOKER, CLERK



D.C.

RAYNOR DUNNAM and LYDA DUNNAM, )

Plaintiffs, )

vs. )

No. 08C2817

ROBIN WILLIAMS, M.D. and ROBIN )

WILLIAMS, M.D., PLC, )

Defendants. )

**PLAINTIFF'S RESPONSE TO DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT  
ON THE ISSUE OF DISCOUNTED MEDICAL EXPENSES**

Defendants have moved this Court for partial summary judgment, seeking to obtain judgment as a matter of law that Plaintiff Raynor Dunnam may not recover for any fractions of his medical expenses that were not paid by either Plaintiffs' insurer (Medicare) or Mr. Dunnam himself. Specifically, Defendants ask the Court to interpret Tenn. Code Ann. § 29-26-119 to bar recovery for actual charges of medical expenses, and instead limit damages in this medical malpractice case to the amount paid by the Plaintiff's health care coverage. Although the statute has been in effect for thirty years, no appellate court has ever interpreted it in the manner that Defendants suggests.

Defendants base their Motion on a mistaken interpretation of Tenn. Code Ann. § 29-26-119, which provides:

*In a malpractice action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) actual economic losses suffered by the claimant by reason of the personal injury including, but not limited to cost of reasonable and necessary medical care, rehabilitation services, and custodial care, loss of services and loss of earned income, but only to the extent that such costs are not paid or payable and such losses are not replaced, or indemnified in whole or in part, by insurance provided by an employer either governmental or private, by social security benefits, service*

benefit programs, unemployment benefits, or any other source except the assets of the claimants or of the members of the claimant's immediate family and insurance purchased in whole or in part, privately and individually.

Tenn. Code Ann. § 29-26-119 (emphasis added). The highlighted language from the statute is the heart of the issue before the Court.

The statute provides an exception to the collateral source rule in medical malpractice cases, and provides that a plaintiff cannot recover for an expense to the extent that it is paid by certain collateral sources. That is all the statute says, and because it is in derogation of the common law, that is all the statute may be interpreted to do. Other than a simple exception for certain collateral sources that are not present in this case, the statute has no effect on common law damages.

In this case, the defendants' summary judgment motion sets forth the amounts actually billed and paid by Medicare and Mr. Dunnam for his medical expenses. Plaintiffs hope that, in the interest of judicial economy, the parties will also stipulate to the amounts billed and amounts paid for the Plaintiff's medical expenses. The issue before the Court is whether Plaintiff may recover his actual damages as provided by the statute and common law based on the amounts billed. As set out more fully below, Defendants' motion should be denied.

I. **Plaintiff's medical expenses are admissible because they were paid by Plaintiff and Medicare, to whom Plaintiff contributed to and has an obligation to repay from any recovery in this suit.**

Based on the statute and case law interpreting it, in a medical malpractice suit a plaintiff can prove and recover actual damages paid by a collateral source if either: (1) the plaintiff made payments towards the collateral source; or (2) the plaintiff is required to reimburse the collateral source. The plain language of the act clearly permits a plaintiff to introduce medical expenses when the plaintiff has paid part of the insurance premium. *Steele v. Ft. Sanders Anesthesia*

*Group, P.C.*, 897 S.W.2d 270, 282 (Tenn. Ct. App. 1994). In addition, where benefits carry a right of subrogation and a legal obligation on the part of the tort victim to repay the collateral source, the tort victim's losses have not been replaced or indemnified. *Hughlett v. Shelby County Health Care Corp.*, 940 S.W.2d 571, 574 (Tenn. Ct. App. 1996) (quoting *Nance by Nance v. Westside Hosp.*, 750 S.W.2d 740, 743 (Tenn. 1988)). Therefore, if the collateral payor has subrogation rights, the collateral payments are excluded from the statute's general operation. *Richardson v. Miller*, 44 S.W.3d 1, 32 (Tenn. Ct. App. 2000) (citing *Nance* at 743).

In the case *sub judice*, Plaintiff has paid towards his health care benefits and has an obligation to repay the collateral sources from any recovery. Plaintiff's medical expenses have been paid by Medicare and Plaintiff. *See Def.'s Mot. for Partial S.J. on the Issue of Discounted Medical Expenses*, p. 1. Plaintiff has paid for his health care benefits from each of those programs through contributions from his lifetime earnings. Moreover, federal and state statutes require the Plaintiff to repay each of those collateral sources from any recovery Plaintiff receives. *See Hughlett*, 940 S.W.2d at 572-573. Because Plaintiff's medical expenses have been paid by collateral sources to which his has contributed and is required to repay, Plaintiff may prove and recover those medical expenses under Tenn. Code Ann. § 29-26-119.

**II. Tenn. Code Ann. § 29-26-119 limits the collateral source rule only as expressly provided in the Act: a plaintiff cannot recover an expense if the plaintiff was reimbursed by certain collateral sources.**

The collateral source rule permits plaintiffs to prove and recover medical expenses, whether paid by insurance or not. *Steele v. Ft. Sanders Anesthesia Group, P.C.*, 897 S.W.2d 270, 282 (Tenn. Ct. App. 1994) (citations omitted). Tennessee Code Annotated section 29-26-119 is in derogation of the common law and is therefore to be strictly construed. *Id.* at 282 (Tenn. Ct. App. 1994) (citations omitted). The common law may not be altered any further by

statute than the statute expressly declares and necessity requires. *Id.* at 282 (citations omitted).

The only limitation on damages expressed in the statute is that a plaintiff cannot recover for amounts paid by certain collateral sources. § 29-26-119 is referred to as a “collateral source statute” because of its objective: reducing the damages recoverable by the amount the tort victim receives from collateral sources. *See Nance*, 750 S.W.2d at 742. The statute provides a set off for collateral sources that the legislature thought would constitute a double recovery: those to which the plaintiff has not contributed and is not required to repay. *See generally Nance* at 742; *Steele*, 897 S.W.2d at 282. In order to mitigate the damages, the statute requires that the benefits be paid or payable and also indemnify or replace the tort victim's losses. *Nance*, 750 S.W.2d at 743.

In other words, the statute’s only application is to preclude damages for expenses *to the extent that they have been paid* by certain collateral sources. Unless an expense is paid by a collateral source covered by the statute, Tenn. Code Ann. § 29-26-119 has no effect.

Defendants latch on to the term “actual economic losses” and insists that this term, by itself, further erodes the common law on personal injury damages. However, nothing in the statute states that the actual damages are available to a plaintiff in a personal injury suit should be circumscribed in the manner suggested by Defendants. To the contrary, by its own terms the statute says that “the damages awarded may include (*in addition to other elements of damages authorized by law*) actual economic losses” except to the extent the plaintiff would receive a double recovery from a collateral source. Tenn. Code Ann. § 29-26-119. Any other manner of altering the damages available to a tort victim under Tennessee common law would need to be expressly stated in the statute, and that simply is not the case.

Importantly, Defendants do not cite to one appellate decision in the thirty-year history of

the statute that supports Defendants' position. There is no such decision.

In short, § 29-26-119 precludes a plaintiff in a medical malpractice action from recovering damages only to the extent that they are paid by collateral sources designated in the statute. Unless an expense is paid by one of the collateral sources covered by the statute, then the plaintiff can recover it as she would any other expense under the common law. Because the statute is in derogation of the common law, any other restrictions must be expressly stated and strictly construed, which they are not.

In this case, all of Plaintiff's medical expenses were paid either by Medicare or by Plaintiff himself, both of which are not excluded by Tenn. Code Ann. § 29-26-119. Some of Plaintiff's health care providers accepted payment for less than the billed amount. The reductions are not an expense "paid or payable" by a collateral source under § 29-26-119. Accordingly, Plaintiff is entitled to prove the full extent of his damages as in any other personal injury case.

**III. Because Plaintiff's health care coverage providers are not covered by Tenn. Code Ann. § 29-26-119, Defendants do not receive the benefit of the payments by the coverage providers or the benefit of payment adjustments negotiated by the coverage providers.**

Defendants ask the Court to move further than Tenn. Code Ann. § 29-26-119 provides, and to grant Defendants the benefit of any reductions to the Plaintiff's medical expenses through Medicare. One reason that individuals pay for health care coverage is to receive the benefit of the coverage provider's leverage, so that health care providers are willing to accept payment of less than the full cost of the service. Negotiating with health care providers to accept reduced payment is a service that insurance companies and third-party payors are paid to perform. Under the common law, a defendant does not receive the benefit of such reductions obtained by a tort

victim's health care coverage.

Defendants wish to garner the benefits of the plaintiff's health care coverage by relying upon § 29-26-119. As discussed above, the statute is in derogation of the common law and must be strictly construed to its express terms. *See Steele*, 897 S.W.2d at 282. The statute only applies to certain collateral source payments. Plaintiff's health care coverage providers are not collateral sources covered by the statute. Therefore, all of the benefits of that coverage – payment and negotiated acceptance of reduced payment – accrue to Plaintiff, not Defendants. Any other result would grant Defendants a right they does not have at the common law.

### Conclusion

Tenn. Code Ann. § 29-26-119 eliminates the collateral source rule in medical malpractice cases for payments made by certain collateral sources – those that the plaintiff has not contributed to and is not required to repay. If an expense is paid by a source that is not covered by the statute, then the plaintiff is entitled to prove her damages consistently with Tennessee tort law. The statute does not state any other restrictions on a plaintiff's ability to recover damages under the common law.

Defendants ask the Court to draw the inference that the statute is also meant to restrict a plaintiff's actual damages for reasons other than a collateral source payment. Because the statute is in derogation of the common law, no such inference expanding the statute beyond its express terms is permissible. Tenn. Code Ann. § 29-26-119 addresses collateral source payments, and nothing else.

Accordingly, Plaintiffs ask the Court to deny Defendants' Motion and permit proof of the Plaintiff's damages as allowed by Tennessee law.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing was sent via hand delivery,  
this 8 day of January, 2010, to the following:

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