

DATE FILED: October 5, 2018 9:24 AM
FILING ID: 40D1BD0B9B48B
CASE NUMBER: 2018SC694

COLORADO SUPREME COURT

2 East 14th Avenue, Denver, Colorado 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA663

Petitioners: WALMART STORES, INC., DBA WAL-MART, DBA WAL-MART SUPERCENTER, DBA WAL-MART SUPERCENTER #, DBA WALMART MARKET, DBA WAL-MART NEIGHBORHOOD MARKET; WAL-MART STORES EAST, LP, DBA WAL-MART STORES EAST I, LP; WAL-MART ASSOCIATES, INC.; WAL-MART STORE #984; AND CASTLE ROCK WALMART SUPERCENTER,

v.

Respondents: ROBERT P. FORFAR, III.

Attorneys for amicus curiae

The Chamber of Commerce of the United States of America

Daniel D. Domenico, Atty. Reg. # 32038

Kittredge LLC

619 12th Street, Box 641

Golden, Colorado 80402

720-460-1432 | ddomenico@kittredgellc.com

Michael Francisco, Atty. Reg. #39111

Statecraft, PLLC

620 N. Tejon St., Ste 101

Colorado Springs, CO 80903

719-822-2809 | michael@statecraftlaw.com

Case No. 2018SC694

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND THE COLORADO CIVIL JUSTICE LEAGUE IN SUPPORT OF THE PETITIONERS

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

The brief complies with the length specified in C.A.R. 29(d). It contains 1,670 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 29.

 /s/ Michael Francisco

Table of Contents

	Page
Introduction.....	1
Interest of Amici Curiae.....	1
Argument.....	3
I. The court of appeals’ over-expansion of the collateral- source rule to include phantom costs is a matter of public importance that should be decided by the Supreme Court.	4
II. The court of appeals’ decision provides for overcompensation, encourages costly and inefficient litigation, and will increase costs to businesses and consumers.....	7
Conclusion	9

Table of Authorities

Page

CASES

<i>Pressey by & through Pressey v. Children’s Hosp. Colorado</i> , 2017 COA 28 (Colo. App. 2017)	5
<i>Stayton v. Delaware Health Corp.</i> , 117 A.3d 521 (Del. 2015).....	5
<i>Volunteers of Am. Colo. Branch v. Gardenswartz</i> , 242 P.3d 1080 (Colo. 2010)	7, 8
<i>Wal-Mart Stores v. Crossgrove</i> , 276 P.3d 562 (Colo. 2012)	6
<i>Waters & Rogers, Inc. v. Keelan</i> , 840 P.2d 1070 (Colo. 1992)	4

STATUTES

C.R.S. § 10-1-135(10)(a)	5
C.R.S. § 13-21-111.6.....	4, 5, 6

Introduction

Colorado's collateral source rule ensures that a liable defendant pays the actual, reasonable costs of any injury he causes. With a few exceptions, however, the trial courts must reduce a successful plaintiff's verdict by the amount of compensation the plaintiff receives from another source. This rule provides fair and just compensation to Colorado plaintiffs. The court of appeal's decision in this case rewrites the rule to expand its limited exceptions, ignore the true costs incurred by plaintiffs, encourage consideration of illusory, unenforceable agreements, and create windfalls rejected by the General Assembly. This Court should accept review.

Interest of Amici Curiae

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber

regularly files amicus curiae briefs in cases such as this that raise issues of concern to the Nation's business community.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in all fifty state capitals. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Property Casualty Insurers Association of America ("PCI") is a non-profit trade association that promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe. PCI's members write \$245 billion in annual premiums, which is 38 percent of the nation's property casualty insurance. In Colorado, PCI members write 31.5 percent of the property casualty insurance market

including 34.4 percent of the personal lines market and 27.6 percent of the commercial lines market.

The Colorado Civil Justice League (“CCJL”) is a voluntary non-profit organization dedicated to improving Colorado’s civil justice system through a combination of public education and outreach, legal advocacy and legislative initiative. It is a diverse coalition of large and small businesses, trade associations, individual citizens and private attorneys. CCJL has been actively involved in legislative reform of Colorado’s civil liability system and has submitted amicus curiae briefs to this Court on several occasions.

Amici have an interest in the case because of the important implications for the Colorado businesses and their customers who face unnecessarily increased litigation costs that will diminish Colorado’s thriving economy.

Argument

This case raises important questions about how Colorado courts will interpret and apply limitations on damages and the admissibility of evidence of medical expenses. Failure to correct the decision below may substantially increase the burdens and costs of those doing business in Colorado. The court of appeal’s decision would allow personal injury plaintiffs to recover as damages for

medical expenses the full amount billed by the plaintiff's Medicare provider, even if it is far in excess of the actual amount the provider may legally seek under Medicare. If allowed to stand, the rule below will increase litigation costs and liability insurance premiums, without improving the care and benefits available plaintiffs. These increases will be felt not only by businesses and their insurers but, ultimately, consumers.

I. The court of appeals' over-expansion of the collateral-source rule to include phantom costs is a matter of public importance that should be decided by the Supreme Court.

At issue is whether Colorado courts will embrace a rule permitting recovery of medical expenses that are illegal or unenforceable under federal law under the guise of the collateral source rule. Prior to the enactment of C.R.S. § 13-21-111.6, Colorado followed the common-law collateral source rule that barred evidence of collateral sources at trial and precluded courts from reducing damages based on collateral source benefits. *See Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1075, 1077 (Colo. 1992). But the General Assembly abrogated that rule, recognizing that it led to unnecessary windfalls to plaintiffs, in favor of a rule that generally limits recovery to the amount that would make

plaintiffs whole (*i.e.*, to compensate plaintiffs for the amount they actually incurred). C.R.S §§ 13-21-111.6, 10-1-135(10)(a).

To be sure, the General Assembly allowed courts to refrain from limiting recovery in circumstances in which a plaintiff received medical coverage that results from “a contract entered into and paid for or by or on behalf of” the plaintiff, C.R.S. § 13-21-111.6. And Colorado courts have held that amounts received from pension plans and certain Social Security Disability Insurance benefits fall under this “contract exception.” *Pressey by & through Pressey v. Children’s Hosp. Colorado*, 2017 COA 28, ¶ 13, (Colo. App. 2017) (cert. dismissed Sept. 8, 2017). But this is not such a case.

Plaintiff did not enter into a contract for his Medicare benefits, and the court of appeal’s expansion of the limited exception to reducing recovery under C.R.S. § 13-21-111.6 alone is worthy of this Court’s attention. The Delaware Supreme Court recently reviewed the issue and declined to extend Delaware’s collateral source rule, which, like Colorado, already covered private insurance write-offs, to the Medicare write-offs. *See Stayton v. Delaware Health Corp.*, 117 A.3d 521, 531 (Del. 2015). The court noted that Medicare provider write-offs are not payments made to, or benefits conferred on, an injured party. Rather, “Any benefit [the plaintiffs’]

healthcare providers conferred in writing off over ninety percent of their collective charges was conferred on federal tax payers, as a consequence of Medicare's purchasing power." *Id.* at 531. This Court should similarly clarify that Medicare benefits are not the type of contractual benefit contemplated by Colorado's collateral source rule.

But even assuming Medicare benefits could be considered a contractual benefit, the court allowed plaintiffs to recover damages for amounts his medical providers could not legally charge. Plaintiffs may generally recover amounts "incurred" from a healthcare provider even if some charges were appropriately written off. *See Wal-Mart Stores v. Crossgrove*, 276 P.3d 562, 565-66 (Colo. 2012) (applying collateral source rule after statutory reform found in C.R.S. § 13-21-111.6). This case, however, goes well beyond a lawful write-off. Due to the physician's refusal to comply with federal law for opting out of Medicare, the billed amounts exceed the Medicare fee schedule are entirely illusory. These amounts are extinguished by federal law and nobody is responsible for paying them, including the Plaintiff. *See* 42 C.F.R. §§ 405.405(c), 405.430(b). That is, the plaintiffs could not have

“incurred” those costs because they would be unenforceable if billed.

Allowing for the recovery of an unenforceable contract that violates Federal law is not what the General Assembly intended, and is not what this Court has previously condoned. The court of appeals erred in doing so here, in a manner that will have significant consequences if allowed to stand.

II. The court of appeals’ decision provides for overcompensation, encourages costly and inefficient litigation, and will increase costs to businesses and consumers.

Venerable principles of law counsel against extending the collateral source rule to the difference between billed amounts and the amounts authorized by Medicare fee schedules. “[M]aking the plaintiff whole is solely the tortfeasor’s responsibility.” *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080, 1082-83 (Colo. 2010). But making the plaintiff whole does not extend to recovery of phantom medical expenses that exist only in an unenforceable contract that violates federal law.

At issue is the difference between the amounts that plaintiffs’ healthcare providers unlawfully billed – and no one would be responsible for paying – and the lesser amounts they were entitled

to charge under Medicare. The damage award for the full amount billed allowed Plaintiffs to seek recovery *ten-fold* over what Medicare authorized based on an unenforceable (*i.e.*, illegal) medical bill. Meanwhile, due to operation of federal law, the Plaintiff did not incur liability for any billed amount in excess of the Medicare payment. Plaintiff here was never obligated to pay any amount above that Medicare payment. In this circumstance, barring recovery of phantom medical expenses is consistent with the collateral source rule's rationale, which is not to encourage the manufacture of windfalls, but to merely to prevent any that naturally arises from benefitting a tortfeasor. *See Gardenswartz*, 242 P.3d at 1083.

When deciding this issue, one must keep in mind the cumulative amount of that difference, to whom the difference would and would not go, who would pay the difference, and the effect of the payment. The amount of money at stake is significant. The Plaintiff here sought nearly \$100,000 for what was limited legally to less than a \$10,000 bill. Reversing the judgment would not leave anyone unwhole. Plaintiff would still receive the actual cost of his medical care. His medical providers would still receive everything they are legally entitled to for their services. What would be decreased is the

amount of phantom costs that exist only to increase the value of the lawsuit and the fees Plaintiff's attorneys would receive.

But the additional recovery of the phantom expenses billed but never legally obligated allowed by the court below is a windfall far beyond the excess recovery sometimes contemplated by conventional application of the collateral source rule.

The vast increase in annual windfall payments that the court of appeal's decision would cause when followed by the trial courts will be funded largely by liability insurance. These enormous new liability insurance costs likely will lead to a dramatic increase in liability insurance premiums. The cost of those increased premiums will in turn be borne by corporate insureds and, inevitably, consumers.

Conclusion

The petition should be granted.

Dated: October 6, 2018.

Kittredge LLC,

/s/

Daniel D. Domenico

CERTIFICATE OF SERVICE

This is to certify that I have duly served the forgoing amicus brief upon all parties through ICCES on October 6, 2018, addressed as follows:

**ATTORNEYS FOR
PETITIONERS:**

Mark C. Willis, #31025
Mia K. Della Cava, #39861
Lisa M. Saccomano, #45105
KUTAK ROCK LLP
1801 California Street, Suite 3000
Denver, CO 80202-2626
Telephone: (303) 297-2400
Facsimile: (303) 292-7799
E-Mail:
mark.willis@kutakrock.com
mia.dellacava@kutakrock.com

**ATTORNEYS FOR
RESPONDENT:**

Nelson Boyle, #39525
Burg Simpson Eldredge
Hersh & Jardine, P.C.
40 Inverness Drive East
Englewood, CO 80112
Telephone: (303) 792-5595
Facsimile: (303) 708-0527
Email:
nboyle@burgsimpson.com

John K. Crisham, # _____
GREENBERG TRAUIG LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Telephone: (303) 572-6500
Facsimile: (303) 572-6540
E-Mail:

/s / Michael Francisco