

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

LISA RUPP,)	
)	
Plaintiff,)	3:11-cv-00052 JWS
)	
vs.)	ORDER AND OPINION
)	
WAL-MART STORES, INC.,)	[Re: Motion at Docket 20]
)	
Defendant.)	
_____)	

I. MOTION PRESENTED

At docket 20, defendant Wal-Mart Stores, Inc. (“Wal-Mart”) moves *in limine* to exclude evidence of medical expenses in excess of amounts paid by Medicaid and Medicare. Plaintiff Linda Rupp (“Rupp”) opposes the motion at docket 29. Wal-Mart’s reply is at docket 35. Oral argument was not requested and would not assist the court.

1 **II. BACKGROUND**

2 Rupp was injured on April 24, 2009, while shopping at Wal-Mart. Rupp alleges
3 that she slipped on a trail of liquid while pushing a shopping cart down a gardening
4 aisle. Rupp maintains that she injured her back and knees.¹ Her medical care was paid
5 for by Medicare and Medicaid. The medical care providers accepted Medicaid and
6 Medicare payments as full and final payments for the services rendered. The question
7 is whether plaintiff may present evidence of the medical providers' billings in excess of
8 the amounts paid by Medicare and Medicaid.

9 **III. DISCUSSION**

10 Whether a plaintiff may present evidence of medical bills in excess of amounts
11 paid by Medicaid and accepted by a health care provider as full payment is an open
12 question under Alaska law.² Where there is no controlling precedent on a question of
13 state law, a district court "must predict how the highest state court would decide the
14 issue using intermediate appellate court decisions, decisions from other jurisdictions,
15 statutes, treatises, and restatements as guidance."³

16 The collateral source rule "prohibits the reduction of a plaintiff's damages when
17 he has received compensation from another source."⁴ "The rule is based on the
18 principle that a tort-feasor is not entitled to have his liability reduced merely because
19 plaintiff was fortunate to have received compensation for his injuries or expenses from a
20 collateral source."⁵ "The rule thus dictates that an injured plaintiff may recover from the
21 tortfeasor money an insurer has paid to medical providers on his or her behalf."⁶ The

22 ¹Doc. 1-2 at 4.

23 ²See *Lucier v. Steiner Corp.*, 93 P.3d 1052 (Alaska 2004) (dismissing a petition for
24 review of the precise question).

25 ³*Ariz. Elec., Power Coop. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995).

26 ⁴*Tolan v. ERA Helicopters, Inc.*, 699 P.2d 1265, 1267 (Alaska 1985).

27 ⁵*Ridgeway v. North Star Terminal & Stevedoring, Inc.*, 378 P.2d 647, 650 (Alaska 1963).

28 ⁶*Howell v. Hamilton Meats & Provisions*, 257 P.3d 1130, 1135 (Cal. 2011).

1 issue is whether under Alaska law a plaintiff may present evidence, in the form of bills
2 from a medical provider, that the reasonable value of his or her injury is greater than the
3 amount accepted as full payment pursuant to the medical care provider's contractual
4 arrangement with Medicaid or Medicare.

5 Defendant argues that the Alaska Supreme Court would follow *Howell v.*
6 *Hamilton Meats & Provisions*, a recent California Supreme Court case.⁷ In that case,
7 the court held that "an injured plaintiff whose medical expenses are paid through private
8 insurance may recover as economic damages no more than the amounts paid by the
9 plaintiff or his or her insurer for the medical services received or still owing at the time of
10 trial."⁸ *Howell* stands for the proposition that the amount that an injured party was not
11 obligated to pay a health care provider and which was not paid by her own insurer to the
12 health care provider are neither damages nor a collateral source.

13 A dispute more precisely on point was addressed earlier by the California Court
14 of Appeal in *Hanif v. Housing Authority*.⁹ The facts in *Hanif* more closely parallel the
15 facts in the case at bar because *Hanif* involved medical expenses covered by Medi-
16 Cal—California's implementation of Medicaid¹⁰—as opposed to medical expenses
17 covered by private insurance as in *Howell*. *Hanif* held that a trial court
18 overcompensated a plaintiff who presented evidence that the amounts paid by Medi-Cal
19 were lower than the reasonable value of his treatment.¹¹ The court determined that the
20 plaintiff's recovery should have been limited to the amount paid by Medi-Cal.¹² The
21 court reasoned that the plaintiff's loss was only what was paid on his behalf and an

22 ⁷257 P.3d 1130 (Cal. 2011).

23 ⁸*Id.* at 1145.

24 ⁹246 Cal. Rptr. 192 (Cal. Ct. App. 1988).

25 ¹⁰See *Olszewski v. Scripps Health*, 69 P.3d 927, 932 (Cal. 2003).

26 ¹¹246 Cal. Rptr. at 194, 197.

27 ¹²*Id.* at 197.

1 award of more would no longer be compensatory.¹³ The court stated that a plaintiff's
2 recovery is limited "when the evidence shows a sum certain to have been paid or
3 incurred for past medical care and services, whether by the plaintiff or by an
4 independent source."¹⁴ *Hanif* was cited with approval by the California Supreme Court
5 in both *Howell* and *Olszewski v. Scripps Health*.¹⁵

6 *Howell* extended the limit imposed by *Hanif* and similar cases to privately-insured
7 plaintiffs.¹⁶ The *Howell* court recognized that no previous California case "discussed the
8 question . . . of whether restricting recovery to amounts actually paid by a plaintiff or on
9 his or her behalf contravenes the collateral source rule."¹⁷ The *Howell* court concluded
10 that such restriction did not violate the collateral source rule.¹⁸ The court reasoned that
11 where a "plaintiff negotiates a discount and thereby receives services for less than
12 might reasonably be charged, the plaintiff has not suffered a pecuniary loss or other
13 detriment in the greater amount and therefore cannot recover damages for that
14 amount."¹⁹ The *Howell* court determined that such limitation did not constitute a windfall
15 to the tortfeasor because the price of medical service varies dramatically depending on
16 whether the patient is insured or uninsured and because insurance companies are
17 better situated to negotiate those prices.²⁰ The court rejected the plaintiff's argument
18 that the difference between the rate paid and the higher rate was recoverable under her
19 insurance policy. The court reasoned that "[h]aving never incurred the full bill, plaintiff

20 ¹³*Id.* at 195.

21 ¹⁴*Id.*

22 ¹⁵69 P.3d 927.

23 ¹⁶257 P.3d at 1145.

24 ¹⁷*Id.* at 1137.

25 ¹⁸*Id.* at 1145.

26 ¹⁹*Id.* at 1138.

27 ²⁰*Id.* at 1142. The implication is that the ensuing negotiation better reflects the
28 reasonable value of the services provided.

1 could not recover it in damages for economic loss. For this reason alone, the collateral
2 source rule would be inapplicable.”²¹

3 Plaintiff cites a dissent from a denial of a petition for review in *Lucier v. Steiner*
4 *Corp.*²² In that case, a three-justice majority dismissed a previously granted petition for
5 review of the precise question raised in the case at bar. Defendant cites the dismissal
6 as support for its position. Ultimately, however, “[a] denial of a petition for review of an
7 interlocutory order does not mean that [the Alaska Supreme Court] either approve[s] or
8 disapprove[s] of the order sought to be reviewed.”²³

9 The dissent in *Lucier* contended that “medical care . . . received at Medicaid’s
10 expense [is] a collateral source benefit and its value may not be used to reduce [a]
11 damages award, except under the conditions and procedures laid out in
12 AS 09.17.070.”²⁴ The dissent cited cases from Georgia and Virginia in support of the
13 proposition that “when a medical provider accepts payments of less than the value of
14 the care and writes off the rest, the collateral source rule covers the entire value,
15 including the amount written off.”²⁵ The dissent argued that the discounted portion of a
16 medical bill “is part of the value of [a] collateral benefit.”²⁶

17 As the dissent in *Lucier* points out, AS § 09.17.070 suggests that the correct
18 procedure is to permit a plaintiff to produce evidence of the value of his or her medical
19 treatment—regardless of whether the plaintiff actually shoulders the cost—and then to
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22 ²¹*Id.* at 1143.

23 ²²93 P.3d 1052, 1053–55 (Alaska 2004).

24 ²³*Contento v. Alaska State Housing Authority*, 398 P.2d 1000, 1001 (Alaska 1965).

25 ²⁴93 P.3d at 1053.

26 ²⁵*Id.* (citing *Olariu v. Marrero*, 549 S.E.2d 121, 123 (Ga. Ct. App. 2001); *Acuar v.*
27 *Letourneau*, 531 S.E.2d 316, 322 (Va. 2000)).

28 ²⁶*Id.* at 1054.

