IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02559-MSK-MEH

ENRIQUEZ L. ORTIVIZ,

Plaintiff,

v.

RALPH E. FOLLIN, and
NATIONAL FREIGHT, INC., a/k/a National Freight and Logistics, Inc.,

Defendants.

ORDER

Michael E. Hegarty, United States Magistrate Judge.

Movant Marrick Medical Finance, LLC seeks to quash National Freight, Inc.'s subpoena. ECF No. 29. Marrick's motion is fully briefed, and the Court finds that oral argument will not assist in its adjudication. Because the information the subpoena seeks is arguably not subject to the collateral source rule, and it is relevant and proportional to this case, the Court denies Marrick's motion to quash.

BACKGROUND

On August 23, 2016, Plaintiff Enriquez Ortiviz filed the operative Amended Complaint in state court against Ralph Follin and National Freight and Logistics, Inc. ECF No. 5. Mr. Ortiviz asserts he was injured in an automobile collision on February 8, 2014. *Id.* at ¶ 6. According to Mr. Ortiviz, while Mr. Follin was driving in his capacity as an employee of National Freight, Mr. Follin changed lanes on Interstate 25 and collided with Mr. Ortiviz's vehicle. *Id.* at ¶¶ 8–21, 25. As a result, Mr. Ortiviz suffered physical injuries, and his vehicle was damaged. *Id.* at ¶¶ 24–31, 44.

To pay for his substantial physical injuries, Mr. Ortiviz entered into an agreement with Marrick. ECF No. 29-5. Pursuant to this agreement, Marrick paid Mr. Ortiviz's medical bills at a discounted rate it negotiated with the providers. *Id.* In return, Mr. Ortiviz granted Marrick a lien for the full amount of his medical bills on any future damages he recovers from Defendants. *Id.*

Mr. Ortiviz asserts causes of action for negligence and negligence per se against Mr. Follin. *Id.* at ¶¶ 42–55. Additionally, Mr. Ortiviz pleads a respondeat superior claim against National Freight. *Id.* at ¶¶ 56–59. Defendants removed the case to this District on October 13, 2016. ECF No. 1. The parties have been participating in discovery since they made their initial disclosures on November 15, 2016. Scheduling Order 4, ECF No. 26.

On March 4, 2017, National Freight served a subpoena on Marrick, which requests documents that include the discounted amount Marrick paid to Mr. Ortiviz's medical providers. Marrick's Mot. to Quash 3, ECF No. 29; Subpoena to Produc. Docs., ECF No. 29-1. National Freight seeks to use this information to show the reasonable value of Mr. Ortiviz's medical expenses. *See* National Freight's Resp. to Marrick's Mot. 11, ECF No. 41. Marrick contends the amount it pays medical providers is inadmissible collateral source information. Marrick's Mot. to Quash 7–9. According to Marrick, it is a collateral source, because it is wholly independent from the tortfeasor, and it paid for Mr. Ortiviz's medical expenses after the accident. *Id.* Therefore, Marrick contends the information is not discoverable under Colorado law. *Id.* Additionally, Marrick argues the information is irrelevant and unduly prejudicial. *Id.* at 8–13.

National Freight asserts Marrick is not a collateral source, because Marrick did not provide a benefit to Mr. Ortiviz. National Freight's Resp. to Marrick's Mot. to Quash 5–11. Unlike an insurance company, Mr. Ortiviz remains liable to Marrick for the full cost of his medical bills. *Id.*

at 6. Therefore, according to National Freight, there is no concern that the information will cause the jury to reduce the amount of any judgment Mr. Ortiviz receives. *Id.* Additionally, National Freight argues that amount paid for medical expenses is relevant to the reasonable value of the medical care, and disclosure of the information does not unduly prejudice Marrick. *Id.* at 11–17. Marrick filed a Reply in Support of its Motion on June 26, 2017. ECF No. 42. Marrick contends it provides a benefit to its clients, because it "sometimes negotiates its lien balances." *Id.* at ¶ 3.

LEGAL STANDARDS

I. Rule 26(b)(1)

"[T]he scope of discovery under the federal rules is broad." *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995). Federal Rule of Civil Procedure 26(b)(1) permits discovery regarding any nonpriviliged matter that is relevant to a party's claim or defense and proportional to the needs of the case. Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." In considering whether the discovery is proportional to the needs of the case, Rule 26(b)(1) instructs courts to analyze "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). The party objecting to discovery must establish that the requested information does not fall under the scope of discovery as defined in Fed. R. Civ. P 26(b)(1). *Simpson v. University of Colo.*, 220 F.R.D. 354, 359 (D. Colo 2004).

II. Rule 45

A subpoena served on a third party pursuant to Rule 45 of the Federal Rules of Civil Procedure is subject to the same standards that govern discovery between the parties—it must seek relevant information and be proportional to the needs of the case. *Segura v. Allstate Fire & Cas. Ins. Co.*, No. 16-cv-00047-NYW, 2016 WL 8737864, at *5 (D. Colo. Oct. 11, 2016) (citing *Rice v. United States*, 164 F.R.D. 556, 556–57 (N.D. Okla. 1995)). Rule 45 requires courts to quash a subpoena that "(i) fails to allow a reasonable time to comply, (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c), (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A). Additionally, a court may quash a subpoena if the subpoena requires disclosure of a trade secret or other confidential information. Fed. R. Civ. P. 45(d)(3)(B).

ANALYSIS

The Court will first analyze whether National Freight's subpoena seeks information prohibited by Colorado's collateral source rule. The Court holds that there is at least a fair basis for a holding that the amount Marrick paid Mr. Ortiviz's medical providers is not subject to the collateral source rule. Because the information is potentially admissible, it would be improper to quash the subpoena on these grounds. The Court then finds that the amount Marrick paid is relevant, and any prejudice to Marrick is cured by the presence of the Protective Order.

I. Collateral Source Rule

"Colorado's collateral source rule consists of two components: (1) a post-verdict setoff rule, codified at section 13-21-111.6; and (2) a pre-verdict evidentiary component . . . ." *Wal-Mart Stores, Inc. v. Crossgrove*, 276 P.3d 562, 565 (Colo. 2012). Only the pre-verdict evidentiary

component is relevant to the present motion. This rule requires courts to exclude evidence of "compensation or indemnity received by an injured party from a collateral source, wholly independent of the wrongdoer and to which the wrongdoer has not contributed." *Id.* at 565 (quoting *Colo. Permanente Med. Grp., P.C. v. Evans*, 926 P.2d 1218, 1230 (Colo. 1996)). The rule exists, because "a tortfeasor should not benefit, in the form of reduced damages liability, from an injured party's receipt of collateral source benefits." *Id.* Indeed, admitting collateral source information "could lead the fact-finder to improperly reduce the plaintiff's damages award on the grounds that the plaintiff already recovered his loss from the collateral source." *Id.* The Colorado Supreme Court has made clear that the pre-verdict component applies even when a collateral source pays a discounted amount directly to the medical providers and the defendant seeks to use the information to prove the reasonable value of medical services. *Id.*

Therefore, the issue before the Court is whether Marrick is a collateral source. If it is, the collateral source rule applies, and discovery of the information is improper. However, if it is at least arguable that Marrick is not a collateral source, then the collateral source rule should not bar discovery of the information. Marrick argues the collateral source rule applies to the amount it paid Mr. Ortiviz's medical providers, because it is wholly independent of Defendants, and Defendants did not contribute to the funds Marrick paid. Marrick's Mot. to Quash 8. National Freight contends the rule is inapplicable here, because Marrick did not compensate Mr. Ortiviz or reimburse him for any medical expenses. National Freight's Resp. to Marrick's Mot. to Quash 6. Instead, Marrick simply became Mr. Ortiviz's creditor. *Id.*

The Court holds that there is at least a fair basis for a finding that Marrick is not a collateral source. Importantly, the collateral source rule applies only when the third party compensates or

indemnifies the plaintiff. *See Smith v. Jeppsen*, 277 P.3d 224, 228 (Colo. 2012) (defining a collateral source as a person or company "that compensates an injured party for that person's injuries."); *Crossgrove*, 276 P.3d at 566 (stating that indemnity received by an injured party from a collateral source will not diminish the injured party's damages). Indeed, when the plaintiff does not receive at least partial indemnification for his injuries, there is no concern that the jury will reduce the verdict by the amount the plaintiff has already recovered.

Marrick's agreement with Mr. Ortiviz specifically provides that Mr. Ortiviz is to pay Marrick the full amount of his billed medical expenses, regardless of what he recovers in this case. ECF No. 29-5, at 4 ("Obligor is in no way absolved, excused, released, relieved, or discharged of or from his or her obligation to pay the full amount of the Debt to Marrick."). Therefore, Marrick does not compensate Mr. Ortiviz or allow him to recover a portion of his medical bills. Instead, Marrick steps into the shoes of the medical providers and becomes Mr. Ortiviz's creditor. As stated by a court in the Southern District of Georgia:

> Key Health, a medical lien funding company, is not a traditional collateral source. Key Health has not paid or even reduced Plaintiff's medical bills. Rather, Key Health has essentially fronted Plaintiff the money for her treatment, and then Key Health intends to recover that money from Plaintiff after the lawsuit. Thus, unlike an insurance company, Key Health's payments do not reduce Plaintiff's financial obligations. Indeed, Defendant pointed out at the Motions Hearing that one of the bills Plaintiff seeks to introduce to prove her damages is a bill from Key Health. Likewise, Plaintiff pointed out that, if she loses at trial, she still owes Key Health for the costs of her treatment.

Rangel v. Anderson, 202 F. Supp. 3d 1361, 1373 (S.D. Ga. 2016). If the jury learns what Marrick paid Mr. Ortiviz's medical providers, it will also be told that Mr. Ortiviz remains fully liable for the amount the providers billed. Therefore, unlike in the insurance context, the jury will not be misled

into reducing Mr. Ortiviz's damages.[1] *See Smith v. Marten Transport, Ltd.*, 10-cv-00293-RBJ-KMT, ECF No. 65 (holding that the amount Marrick pays medical providers is not subject to the collateral source rule, because "[t]he plaintiffs are not even one penny partially indemnified on these medical bills").

Marrick argues that it has provided a benefit to Mr. Ortiviz; namely, permitting him to receive prompt and extensive medical care. Marrick's Mot. to Quash 8. Although obtaining treatment certainly benefitted Mr. Ortiviz, receipt of a benefit does not automatically implicate the collateral source rule. The benefit must compensate or indemnify Mr. Ortiviz or allow him to recover his medical expenses. It is undisputed that Mr. Ortiviz's receipt of prompt medical care did not reduce his payment obligation. Therefore, the District Court could plausibly find that this benefit will not cause the jury to reduce Mr. Ortiviz's damages.

To be sure, it is also possible the District Court will rule that this information is inadmissible under the collateral source rule. Three judges in this District have held that the amount paid by litigation finance companies is subject to the collateral source rule. *Seely v. Archuleta*, No. 08-cv-02293-LTB-KMT, 2011 WL 2883625, at *4 (D. Colo. July 18, 2011); *Robinson v. Terwilleger*, No. 09-cv-02775-CMA-BNB, 2011 WL 1987619, at *2–3 (D. Colo. May 12, 2011); *Romero v. Allstate Fire & Cas. Ins. Co.*, No. 14-cv-01522-NYW, 2015 WL 5321441, at *3 (D. Colo. Sept. 14, 2015). However, none of these orders discussed whether the plaintiff remained liable for the billed amount of the medical expenses. To the contrary, the orders assumed the plaintiffs received a "benefit" or

[1] The Court recognizes that Mr. Ortiviz would likely receive some compensation if Marrick's agreement did not require Mr. Ortiviz to repay the full amount of the billed medical expenses. In that case, there would be a risk that the jury would decrease the damages by the amount of the discount that Mr. Ortiviz received. However, here, Mr. Ortiviz is liable for the same amount of medical expenses as he was prior to entering into the agreement with Marrick.

"gift" when the litigation financing company negotiated bills on the plaintiffs' behalf. *Seely*, 2011 WL 2883625, at *4 ("I find that the discounted and written off bills negotiated by Injury Finance on Plaintiff's behalf constitute collateral sources. Under the common law rule, any third party benefits or gifts obtained by a plaintiff are collateral."); *Romero*, 2015 WL 5321441, at *5 (stating that "evidence of the fact that [the plaintiff] received benefits from Injury Finance" will be excluded from trial). Therefore, although the District Court may choose to follow the precedent from this District in determining whether the amount paid is admissible, the District Court may also determine that the lack of a discussion on the amount of compensation the plaintiffs received renders these opinions of little persuasive value.

In sum, the Court holds that there is at least a fair basis for a holding that Marrick is not a collateral source. Importantly, unlike an insurance carrier, Marrick did not compensate or indemnify Mr. Ortiviz. Because the amount Marrick paid Mr. Ortiviz's medical providers may be admissible, it would be improper to deny National Freight the benefit of discovery on these grounds. After having an opportunity to view the evidence, the District Court will decide at the appropriate time whether the amount paid is admissible under the collateral source rule. Accordingly, the Court refuses to apply the collateral source rule to quash the subpoena.

II. Relevance and Proportionality

That the collateral source rule does not bar discovery of this information does not, by itself, make the documents discoverable. The information must still be relevant and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Marrick argues that the amount it paid Mr. Ortiviz's medical providers is irrelevant, because "the discounted factoring price Marrick pays is evidence of the value of the receivable and nothing more." Marrick's Mot. to Quash 9. Additionally, Marrick

contends the information is confidential financial information, which, if disclosed, could cause Marrick substantial harm. *Id.* at 5–7. According to Marrick, not only would disclosure damage its competitive advantage in the marketplace, it would also harm Marrick's standing in future lien negotiations with Mr. Ortiviz. *Id.* at 5; Marrick's Reply 2. Finally, Marrick contends the factors articulated in Rule 26(b)(1) do not support discovery of the requested information. Marrick's Mot. to Quash 11–13. National Freight asserts that the amount paid is relevant to the reasonable value of the medical care, and Marrick's trade secrets are adequately protected by the protective order in this case. National Freights Resp. to Marrick's Mot. to Quash 11–16.

The Court holds that under Rule 26(b)(1), the amount Marrick paid to Mr. Ortiviz's medical providers is discoverable. Regarding relevance, Colorado courts have held at least since 1960 that the amount paid to medical providers constitutes some evidence of the reasonable value of the services. *See, e.g.*, *Kendall v. Hargrave*, 349 P.2d 993, 994 (Colo. 1960). In *Crossgrove*, the Colorado Supreme Court held that, as long as the collateral source rule does not apply, "*Kendall* allows trial courts to admit evidence of the amount paid for healthcare for the purpose of ascertaining the reasonable value of those medical expenses." 276 P.3d at 566–67. Therefore, the amount Marrick paid is relevant to Mr, Ortiviz's claim for damages and Defendants' rebuttal of the reasonable value of those damages.

Marrick contends the amount it paid to medical providers is a trade secret that, if disclosed, would subject it to substantial harm. Marrick's Mot. to Quash 5–7. Specifically, Marrick argues it would be harmed by the potential for public dissemination of its trade secret and the leverage that Mr. Ortiviz would have in negotiating the amount of the lien post-judgment. *Id.* at 5.

When a party opposes discovery on the basis of a trade secret,

> it 'must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful.' If the party makes such a showing, 'the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to the action.' The need for the trade secrets should be balanced against the claim of harm resulting from the disclosure.

In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1190 (10th Cir. 2009) (quoting *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981)) (internal citations omitted). "It is within the sound discretion of the trial court to decide whether trade secrets are relevant and whether the need outweighs the harm of disclosure." *Centurion Indus., Inc.*, 665 F.2d at 326.

Even assuming the pricing information is a trade secret, the Court finds that adequate mechanisms exist to cure any prejudice to Marrick. Regarding the potential harm from public dissemination of the information, this Court has already issued a Protective Order in this case. ECF No. 37. Although Marrick states that the Protective Order will not eliminate the risk of inadvertent leaks, Marrick's Mot. to Quash 5, Marrick offers nothing to suggest that the risk of accidental disclosure is any greater here than it is in the countless other cases where courts issue protective orders to guard trade secrets. *See Netquote, Inc. v. Byrd*, No. 07-cv-00630-DME-MEH, 2007 WL 2438947, at *4 (D. Colo. Aug. 23, 2007) ("While pricing options and forecasts should be subject to additional protection, general financial information, including earnings reports, is properly protected by a simple protective order . . . .").

The Court is also not concerned with Marrick's contention that the information may give Mr. Ortiviz leverage in future negotiations with Marrick. Marrick's agreement with Mr. Ortiviz makes clear that Marrick has no obligation to negotiate the lien balance. ECF No. 29-5, at 4 (stating that Mr. Ortiviz is obligated to pay Marrick the full amount of the medical bills, regardless of the outcome of the present case). Moreover, Marrick's founding member admits that it only sometimes

negotiates liens with plaintiffs. Aff. of Naul H. Manthe ¶ 12, ECF No. 29-4 ("[M]edical liens are sometimes negotiated and settled at the end of a case . . . ."). If Marrick believes Mr. Ortiviz's knowledge of the amount paid provides him with too much leverage, it can simply choose not to negotiate the lien amount.[2] Therefore, the Court is not concerned with leverage Mr. Ortiviz may have in these optional discussions. Accordingly, the Court holds that any potential harm to Marrick is diminished by the presence of the Protective Order in this case and outweighed by the relevance of the information to Mr. Ortiviz's claim for damages.

Marrick also contends that, considering the factors articulated in Rule 26(b)(1), discovery of the information is not proportional to the needs of the case. Marrick's Mot. to Quash 10–13. The Court disagrees. Marrick admits that National Freight has no other method to obtain the information than through the subpoena. *Id.* at 11. Although the information is only "some evidence" of the reasonable value of the medical expenses, it will still help the finder of fact resolve the amount by which the tortfeasor damaged Mr. Ortiviz. *See Crossgrove*, 276 P.3d at 566–67 (holding that, as long as the information is not subject to the collateral source rule, courts may consider amount paid as an indication of the reasonable value of medical expenses). Finally, the burden or expense to Marrick is slight. As the Court already explained, Marrick will not be subject to substantial prejudice from disclosure of the information. Moreover, Marrick does not contend that it will incur substantial financial costs from the production of the requested documents. Therefore, the Court holds that the amount Marrick paid Mr. Ortiviz's medical providers is relevant, and its disclosure

[2] Similarly, the Court does not find that Marrick will be prejudiced by any leverage the tortfeasor may gain in settlement negotiations with Mr. Ortiviz. By its very nature, discovery that is useful to the requesting party gives that party leverage in settlement discussions. Therefore, this does not provide a basis by which to forbid the party from receiving the requested information.

is proportional to the needs of this case.

CONCLUSION

In sum, the Court holds that discovery of the amount Marrick paid Mr. Ortiviz's medical providers is not barred by the collateral source rule. Furthermore, the Court finds that the information the subpoena seeks is relevant and proportional to the needs of the case. Accordingly, Marrick's Motion to Quash Subpoena and for Protective Order [filed May 25, 2017; ECF No. 29] is **denied**.

Entered and dated at Denver, Colorado, this 19th day of July, 2017.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge