UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 02-80925-CIV-HURLEY/LYNCH

DONNA MIDGETT and
ROBERT MIDGETT, her Husband,

Plaintiffs,

vs.

MARSHALLS OF MA., INC.

Defendant.

MOTION IN LIMINE AND MEMORANDUM OF LAW

The Defendant, MARSHALLS OF MA., INC., move this Court for entry of an Order prohibiting the parties from offering any argument, testimony, evidence or proof of the following matters for the reasons hereinafter set forth:

1. The amount of medical bills over and above the amount paid by any insurance company, Medicare, or any collateral source payor to the extent the medical bills have been "written off" by insurance companies, Medicare or any collateral source payor (hereinafter "payors.").

2. While it is a question for a jury to decide wether medical bills represent reasonable and necessary medical expenses, and it is in the plaintiff's burden to prove the reasonableness and necessity of all medical expenses, any evidence of medical bills which have been written off, is inadmissable evidence. The law is clear that such medical bills are neither reasonable nor necessary, and may result in an unlawful and improper windfall to the plaintiff. That is, when a payor agrees to pay a specified reduced amount for services provided, and a healthcare provider agrees to accept a reduced amount and either agrees to or is required to "write off" the unpaid remainder, the patient then owes nothing to the provider. Thus, the amount

"written off" either by agreement or requirement of the patient, provider and payor, is no longer "reasonable" or "necessary."

3. An expense can be incurred only when one has paid or one has become legally obligated to pay the expense. In order for the collateral source rule to apply, an injured person must be responsible for making payment, even if a collateral course actually makes the payment on behalf of the injured party. For example, if a third party payer negotiates a reduced fee for medical services, the injured party is obligated to pay only the reduced fee, and not the written off difference, the collateral source rule does not apply to this difference.

4. The collateral source rule was meant to insure that a plaintiff is fully compensated by a tortfeasor for his or her loss. When a third party payer has negotiated a fee for services that is lower than that is normally charged by the healthcare provider, the plaintiff's "loss" is only the amount actually charged by the provider, not the provider's "usual fee." To permit a plaintiff to recover the amount that has been written off by the healthcare provider, if this amount is higher then the amount paid by the third party payer, will permit a plaintiff to obtain an undeserved windfall.

5. In Horton v. Channing, 6998 So.2d 865 (Fla. [st] DCA 1997), the First District found that the trial Court erred in admitting evidence that the plaintiff had sustained $872,915.12 in medical expenses when the payments made totaled $425,824.42 and the insurance companies and medical providers reached an agreement not to seek any further reimbursement. The Court recognized that "the amount of economic damages awarded should be reduced to reflect the amounts paid," Id. at 869.

6. Other jurisdictions have reached similar conclusions. In McAmis vs.

Wallace, 980 F. Supp. 181. (W.Va. 1997), healthcare providers contracted with Medicaid to accept a fixed fee for services discounted from their customary charge. The Court ruled that since no one had paid the written-off amount of the Medicaid recipient's healthcare's cost, the plaintiff had not legally incurred this fee, 980 F. Supp. @ 181. The collateral source rule was therefore inapplicable to the amount of the write-off, since neither the plaintiff or the payer was responsible for payment. Also, in Terrell vs. Nada, 759 So.2d 1026 (LA App. 2000), the court held that a plaintiff was not entitled to recover as damages medical expenses that had been contractually adjusted or written-off under the Medicaid program because such expenses were not damages actually incurred by the plaintiff. Also, in McAmis v. Wallace, 980 F.Supp. At 183. The collateral source rule was inapplicable to the amount of the write-off because neither the plaintiff nor his third-party payor was responsible for payment of that amount. Write-offs in the managed care context, where health insurers, rather than Medicaid, negotiate fixed rates below a physician's usual fees. Id.

7. McAmis v. Wallace, 980 F.Supp.181 (W.D..Va 1997). An expense can be incurred only when one has paid or becomes legally obligated to pay it. A third party payor negotiates a reduced fee for medical services, the injured party is obligated only to pay the reduced total, not the written-off difference. Because no party is responsible for paying the difference between the original fee and the negotiated reduced fee, the collateral source rule is inapplicable to the difference. Plaintiff's "loss" is only that amount actually charged by the provider. To permit a plaintiff to recover the amount that has been written off by a health care provider.

8. Medical bills over and above the amount paid after having been "written off" are inadmissable, as the plaintiff cannot demonstrate that these medical bills are

either reasonable or necessary as the amounts "written off" are not owed by the plaintiff to the payer. Additionally, any probative value of such testimony would be outweighed by its unduly prejudicial effect. See § 90.403, Fla. Stat. (2001). As such, any argument, testimony, evidence or proof of these bills should be prohibited.

WHEREFORE, the Defendant, MARSHALLS OF MA., INC., move this court for entry of any order prohibiting the use of such argument, testimony or proof in the trial in this matter.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 20 day of June, 2003, to:

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