The Collateral Source Rule:
A Compendium of State Law

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Kentucky

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A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Kentucky courts allow a plaintiff to recover the costs of third-party payments made by insurers for medical treatment. Kentucky caselaw states that the "collateral source rule provides that benefits received by an injured party for his injuries from a source wholly independent of, and collateral to, the tortfeasor will not be deducted from or diminish the damages otherwise recoverable from the tortfeasor." *Schwartz v. Hasty*, 175 S.W.3d 621, 626 (Ky. Ct. App. 2005); *see also Peters v. Wooten*, 297 S.W.3d 55, 62 (Ky. Ct. App. 2009) ("Generally, information regarding collateral source payments may not be introduced to the jury."). The Kentucky Supreme Court has found that it is "convinced" the collateral source rule "is sound" because "there is no logical or legal reason why a wrongdoer should receive the benefit of insurance obtained by the injured party for his own protection." *Taylor v. Jennison*, 335 S.W.2d 902, 903 (Ky. 1960).

Although not specifically addressed by Kentucky courts, this general collateral source rule would likely apply to psychological treatment as well, so long as the collateral source is "wholly independent of the wrongdoer." *Schwartz*, 175 S.W.3d at 627 (referring to this as the "main requirement for qualification as a collateral source"). "A source is wholly independent and therefore collateral when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer." *Id.* (citations omitted).

Kentucky courts do, however, allow two exceptions to the collateral source rule: the malingering exception and the financial hardship exception. First, regarding the malingering exception, when the possibility arises that "a plaintiff may be exaggerating his injury for recovery, evidence relating to a claimant's receipt of compensation may be admissible." *Peters*, 297 S.W.3d at 62. Second, regarding the financial hardship exception, "when the plaintiff has put into issue hardships and financial distress or implies financial distress caused by defendant's actions, the defendant may rebut this by showing that other financial means were available to plaintiff." *Id.*

a. If so, is there a right of subrogation for the insurer?

The Kentucky Supreme Court has recognized "insurers' equitable and contractual right to subrogation." *Schwartz*, 175 S.W.3d at 626. In *Schwartz*, the Kentucky Court of Appeals stated that the collateral source rule and subrogation "work in tandem by ensuring that the tortfeasor bears the ultimate responsibility for payment of damages without diminishment for benefits received by the injured party from collateral sources, while preventing double recovery by the injured party where the party providing the collateral source benefits seeks reimbursement through subrogation." *Id.* at 626-27.

2. Is Plaintiff permitted to recover the costs of free or charitable care donated to Plaintiff for medical or psychological treatment?

Kentucky courts have not specifically addressed free or charitable care. Kentucky courts, however, have permitted recovery of medical expenses in cases in which the injured party did not pay for the medical services or premiums for medical services. In *Daugherty v. Daugherty*, 609 S.W.2d 127 (Ky. 1980), the Kentucky Supreme Court held that the plaintiff, a dependent of her father who was in the Army, was entitled to recover the full amount of her medical expenses incurred at an Army hospital despite the father not being required to pay premiums for the medical services. *Id.* at 128. Likewise, in *Conley v. Foster*, 335 S.W.2d 904 (1960), the Kentucky Supreme Court awarded full recovery of medical expenses even though the United Mine Workers Welfare Fund reimbursed the plaintiff for his medical bills. *Id.* at 907.

reasonable but they must be incurred as a result of the accident and when the evidence is not conclusive, a jury is not required to accept the medical bills submitted by the plaintiff.").

a. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

Although not explicitly stated, the amount actually paid for the medical services provided appears to be an improper basis for the jury's consideration. In *Baptist Healthcare*, the Kentucky Supreme Court affirmed the trial court's award of the reasonable value of the medical expenses based on the amount billed for the services. *Id.* at 683-84. In doing so, the court implicitly rejected the appellant's argument that the amount actually paid should have been the basis for the plaintiff's recovery. *Id.* No Kentucky case, however, explicitly states that that the amount actually paid for the services should not be submitted for the jury's consideration.

(2) The amount billed for the services?

As stated above, a jury may consider the amount billed for the medical services because the Kentucky Supreme Court implicitly deemed the amount billed to be the proper measure of the reasonable value of the services in *Baptist Healthcare*. *Id.* at 683-84. In other words, "the Kentucky Supreme Court specifically concluded that a plaintiff may recover the full amount of medical bills even though the health insurance company negotiated to pay less than the full amount." *See Buda v. Schuler*, 352 S.W.3d 350, 356 (Ky. Ct. App. 2011) (citing *Baptist Healthcare*, 177 S.W.3d 676).

Furthermore, at least in automobile accident cases, a Kentucky statute provides a presumption that all medical bills submitted are reasonable. KRS §304.39-020(5)(a); *see also Daugherty v. Daugherty*, 609 S.W.2d 127, 128 (Ky. 1980) ("On the question of reasonableness, we feel that the medical bill alone was sufficient in light of the statutory presumption that any medical bill submitted is reasonable."). However, in addition to being reasonable, "medical bills . . . must be incurred as a result of the accident and when the evidence is not conclusive, a jury is not required to accept the medical bills submitted by the plaintiff." *See Morgan v. Morgan*, 2006 WL 3040019, at *2 (Ky. Ct. App. Oct. 27, 2006). This statutory presumption therefore "does not remove from the jury the ability to weigh the evidence and testimony and decide whether the medical expenses are reasonable and incurred as a result of the accident." *See Rogers*, 2008 WL 2219774, at *2.

(3) Provider testimony on the value of their services as compared to billed amounts?

A physician may testify as to the reasonableness of the value of a plaintiff's treatment. *See Miller v. Mills*, 257 S.W.2d 520, 523 (Ky. Ct. App. 1953); *Louisville Ry. Co. v. Schwemmer*, 205 S.W. 685 (Ky. Ct. App. 1918).

(4) Expert testimony on accuracy of provider billing rates?

Expert testimony does not appear to be required for the accuracy of medical billing rates. *Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311, 319 (Ky. 2006). In *Samples*, Cincinnati Insurance Co. argued that Samples required expert proof that medical expenses were "necessary for and related to treatment for injuries caused by this accident." *Id.* The Kentucky Supreme Court disagreed, however, citing the statutory presumption of reasonableness and stating that it had "long held that evidence such as that presented in this case is sufficient to establish that the medical bills were reasonable and were related to the accident." *Id.*

Kentucky courts have not specifically addressed this question. However, in *Dennis v. Fulkerson*, 343 S.W.3d 633 (Ky. Ct. App. 2011), a medical malpractice case, the court found it was proper to introduce the entire medical bill to help the jury in awarding damages for pain and suffering. *Id.* at 638. In that case, the hospital had written off the entire medical bill. *Id.*

D. Constitutional Issues

1. Have Collateral Source/cost of treatment issues been the subject of any decisions applying state or federal constitutional law in your State?

As mentioned above, the Kentucky Supreme Court struck down a Kentucky statute related to the admissibility of collateral source payments and subrogation rights. In 1988, the Kentucky legislature passed a bill providing that, *inter alia*, "[c]ollateral source payments, except life insurance, the value of any premiums paid by or on behalf of plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial." KRS §411.188(3).

In 1995, however, the Kentucky Supreme Court struck down this statute as violative of the Kentucky Constitution. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995). Kentucky's Constitution "vests exclusive jurisdiction in the Supreme Court to prescribe 'rules of practice and procedure for the Court of Justice.'" *Id.* at 576 (quoting Ky. Const. §116). The Supreme Court held that the Kentucky legislature had unconstitutionally infringed on this power because "responsibility for deciding when evidence is relevant to an issue of fact which must be judicially determined, such as the medical expenses incurred for treatment of personal injuries, falls squarely within the parameters of 'practice and procedure' assigned to the judicial branch." *Id.*

In addition to separation of powers grounds, the Kentucky Supreme Court held that the statute was "constitutionally defective" because it violated Section 54 of the Kentucky Constitution. *Id.* at 578. This section provides the following: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." Ky. Const. §54. Based on this section, the court held that "a substantive law change denying damages for medical expenses and wage loss in a civil action to those plaintiffs who have access to collateral source benefits would violate Section 54." *O'Bryan*, 892 S.W.2d at 578.

2. Do you see any basis under your State constitution to challenge "price spread" rules that currently exist?

As illustrated in the *O'Bryan* case, the Kentucky Supreme Court has shown resistance to the legislature limiting the amount that can be recovered in wrongful death, personal injury, or damage to personal property cases under Section 54 of the state's Constitution.