Georgia

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Warner S. Fox has practiced with Hawkins Parnell Thackston & Young LLP for more than 20 years, focusing his practice on catastrophic accident litigation of all types, including matters arising from transportation, retail, and product liability. He has tried numerous cases involving all types of tort matters and frequently is called upon to handle catastrophic cases in various jurisdictions. Mr. Fox has represented numerous businesses, insurance companies, and insureds in all types of cases.

Martin A. Levinson has been an associate at Hawkins Parnell Thackston & Young LLP since 2007. Mr. Levinson represents businesses and individuals in various types of matters, including premises liability, product liability, trucking and transportation, and business litigation. He handles matters in all phases of litigation, including advising clients on litigation avoidance, pre-suit liability, coverage analysis, handling matters in active litigation, mediation and settlement, trial, and appeals.

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?

In Georgia, "[t]he collateral source rule bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments." *Kelly v. Purcell*, 301 Ga. App. 88, 91, 686 S.E.2d 879, 882 (Ga. Ct. App. 2009); *Hoeflick v. Bradley*, 282 Ga. App. 123, 124, 637 S.E.2d 832, 833 (2006). The oft-cited rationale for the continued application of the collateral source rule in Georgia is that "a tortfeasor is not allowed to benefit by its wrongful conduct or to mitigate its liability by collateral sources provided by others." *Id.*

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

Yes. Insurers and workers' compensation providers have a right of subrogation against their insured's or employee's recovery in tort, but only to the extent that the insured or employee has been fully compensated for his injuries. *See North Bros. Co. v. Thomas*, 236 Ga. App. 839, 513 S.E.2d 251 (Ga. Ct. App. 1999); O.C.G.A. §34-9-11.1(b).

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

Yes. Georgia's appellate courts have held repeatedly that the collateral source rule is applicable even where the benefit bestowed is gratuitous. *See Hoeflick*, 282 Ga. App. at 124; 637 S.E.2d at 833 ("The collateral source rule applies to payments made by various sources, including insurance companies, beneficent bosses, or helpful relatives."); *Bennett v. Haley*, 132 Ga. App. 512, 522-25, 208 S.E.2d 302, 310-12 (Ga. Ct. App. 1974); *Cincinnati Ry. Co. v. Hilley*, 121 Ga. App. 196, 201-02, 173 S.E.2d 242, 246 (Ga. Ct. App. 1970); *Nashville Ry. Co. v. Miller*, 120 Ga. 453, 455, 47 S.E. 959, 960 (Ga. 1904).

3. Does the State treat Plaintiffs differently with respect to recovery of the costs of treatment if the payor is Medicare vs. Medicaid vs. a private insurer, or some other third-party source?

No. "Collateral source" has been defined very broadly by Georgia courts and specifically includes payments made by Medicare and Medicaid. *See Bunyon v. Burke County*, 306 F. Supp. 2d 1240, 1263 (S.D. Ga. 2004) (Medicare); *Bennett v. Haley*, 132 Ga. App. 512, 522-25, 208 S.E.2d 302, 310-12 (Ga. Ct. App. 1974) (Medicaid).

4. Are collateral source matters governed by statute, common law, or a combination of both?

In Georgia, the collateral source rule is a creation of common law. *See Olariu v. Marrero*, 248 Ga. App. 824, 549 S.E.2d 121 (Ga. Ct. App. 2001).

5. If State law allows the Plaintiff to recover more than was paid, who keeps the windfall?

The Plaintiff. See Section B below.

B. Value of Recovery

1. When permitted to recover payments for medical or psychological treatment, what is the stated basis for recovery?

The amount actually billed by the third-party provider.

2. If Plaintiff is permitted to recover the "reasonable value" of the medical services provided, is the concept of "reasonable value" firmly defined or for the jury to decide?

Not applicable.

3. Does the amount of damages a Plaintiff is permitted to recover for cost of treatment vary based on whether a collateral source is involved?

No. The Georgia Court of Appeals has expressly held that a defendant "is not entitled to use a third party's write-off of medical expenses as a set-off against [a plaintiff's] recovery of past medical expenses." *Olariu v. Marrero*, 248 Ga. App. 824, 826, 549 S.E.2d 121, 123 (Ga. Ct. App. 2001).

4. Have your Courts addressed the fairness of allowing a Plaintiff to recover more than was actually paid for treatment?

Yes. The Georgia Court of Appeals has explained its rationale by stating that "the existence of a collateral source will not accrue to [the defendant's] benefit and allow him to avoid these otherwise payable damages. Georgia does not permit a tortfeasor to derive any benefit from a reduction in damages for medical expenses paid by others, whether insurance companies or beneficent boss or helpful relatives." *Olariu*, 248 Ga. App. at 826, 549 S.E.2d at 123, *citing Bennett v. Haley*, 132 Ga. App. 512, 522, 208 S.E.2d 302 (1974).

C. Use of Specials at Trial

1. Is Plaintiff permitted to use the billed value at trial as a basis for a non-economic damages award?

The Georgia Court of Appeals has specifically held that a plaintiff is entitled to claim and blackboard at trial the full amount of reasonable medical expenses billed, notwithstanding that portions of the expenses billed have been written off as a result of contractual rate reductions or those required by statute (*e.g.*, Medicare benefits). *Olariu v. Marrero*, 248 Ga. App. 824, 549 S.E.2d 121 (Ga. Ct. App. 2001); *Candler Hosp., Inc. v. Dent*, 228 Ga. App. 421, 491 S.E.2d 868 (Ga. Ct. App. 1997).

2. Is Plaintiff permitted to use the billed value of specials at trial as a basis for a non-economic damages award, even if that was not the amount paid for the treatment services?

Yes. However, a defendant is at least entitled to a post-verdict set-off in the amount of any write-offs, provided that the jury makes a specific award for medical expenses. *See*, *e.g.*, *Candler Hosp. v. Dent*, 491 S.E.2d 868, 869 (Ga. Ct. App. 1997).

3. Exception to the Collateral Source Rule for medical bills discharged in bankruptcy.

An exception to the collateral source rule exists in Georgia where some of the medical bills claimed by the plaintiff have been discharged in bankruptcy. In that instance, the discharged portion of the plaintiff's medical bills is not recoverable. *Olariu*, 248 Ga. App. at 826, 491 S.E.2d at 123.

D. Constitutional Issues

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

Yes. In 1987, the Georgia General Assembly enacted a statute abrogating the collateral source rule and permitting juries to consider evidence of benefits or payments available with respect to any claimed special damages:

> In any civil action, whether in tort or in contract, for the recovery of damages arising from a tortious injury in which special damages are sought to be recovered or evidence of same is otherwise introduced by the plaintiff, evidence of all compensation, indemnity, insurance (other than life insurance), wage loss replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments shall be admissible for consideration by the trier of fact. The trier of fact, in its discretion, may consider such available benefits or payments and the cost thereof but shall not be directed to reduce an award of damages accordingly.

O.C.G.A. §51-12-1(b).

Just four years later, however, the Georgia Supreme Court declared O.C.G.A. §51-12-1(b) to be an unconstitutional violation of the equal protection clause of the Georgia Constitution. *Denton v. Con-Way S. Express, Inc.*, 261 Ga. 41, 402 S.E.2d 269 (Ga. 1991). Specifically, the Georgia Supreme Court held in *Denton* that:

> O.C.G.A. §51-12-1 (b), allows a jury to consider inherently prejudicial evidence which could be misused. There can be no equal justice where the kind of trial [or the damages] a man gets depends on the amount of money he has. Because inherently prejudicial evidence is allowed only to show the plaintiff's sources, juries will be misled. If for example, both the plaintiff and the defendant are insured, but the jury is only informed of the plaintiff's coverage, it may assume that only the plaintiff has insurance and the plaintiff's insurance should pay for the loss caused by the tortfeasor. Allowing such evidence against the plaintiff, who exercises the statutory right to prove all necessary expenses in the estimate of damages . . . could defeat the plaintiff's statutory right to recover the damages that result from another's tortious acts . . . and also defeat the "prophylactic" factor of preventing future harm.

Denton, 261 Ga. at 45-46; 402 S.E.2d at 272 (internal citations omitted; brackets in original).