

Supreme Court Reaffirms Collateral Source Rule in Landmark Opinion in Dedmon

by Donald Capparella

On June 2, 2016, the Tennessee Court of Appeals issued its opinion in *Dedmon v. Steelman, et al.*, an opinion which was a shot heard around the State of Tennessee regarding its possible impact on the collateral source rule in Tennessee in thousands of personal injury cases. The majority opinion was authored by Judge Brandon Gibson, with a concurrence by Special Judge Joe G. Riley. Since that time, parties and lawyers took sides on the meaning of the case, and so did both federal and state trial courts. On one side were those courts who found that the collateral source rule remained in force in Tennessee, and that the *Dedmon* opinion had changed nothing. On the other side were those courts who found that the amount of medical bills that could be proven by the plaintiff as reasonable was only the amount that was actually paid, some courts took a hybrid approach, allowing the jury to hear both the full, undiscounted amount of bills as well as the discounted amount.

As more and more parties in settlement negotiations, and more and more courts took sides, the entire bench and bar waited with baited breath for the Supreme Court's opinion once it accepted the application for permission to appeal on October 21, 2016. Almost exactly 13 months later, the Supreme Court issued a unanimous opinion authored by Justice Holly Kirby in *Dedmon v. Steelman*, ___ S.W.3d ___, 2017 WL 5505409 (Tenn. Nov. 17, 2017). Its holding reaffirmed the collateral source rule completely, reinstating the law in Tennessee prior to *Dedmon*, and adopting the majority rule in the United States on the application of the collateral source rule in personal injury cases. It is a landmark decision, and the opinion was more anticipated than perhaps any tort opinion since the Supreme Court in *McIntyre v. Balentine* adopted comparative fault in 1992. Given its importance, a more fulsome analysis is justified.

BACKGROUND

All landmark tort cases start with facts involving ordinary people. Jean and Fred Dedmon filed a personal injury lawsuit against John T. Cook to recover medical expenses resulting from a car accident between the parties. Defendant Cook died during the litigation, and the co-representatives of his estate, Debbie Steelman and Danny Cates, Sr. were named as defendants in an amended complaint. The sole issue that led to an interlocutory appeal was a dispute regarding the necessity and

reasonableness of Ms. Dedmon's medical bills.

Ms. Dedmon's medical bills totaling \$52,482.87 were attached to her initial complaint. The answer filed by the defendant Cook denied that the medical bills as attached were reasonable or necessary. In a subsequent deposition by one of plaintiff's treating physicians, a neurological surgeon, the testimony was that the bills were in fact "appropriate, reasonable and necessary."

In response, Defendants filed a motion *in limine* to exclude the bills, claiming that under the then recent Tennessee Supreme Court decision, *West v. Shelby County Healthcare Corp.*, 459 S.W.3d 33 (Tenn. 2014), the medical bills were not evidence of reasonable medical charges. The defendants argued that "reasonable medical expenses are defined as that which the medical provider accepts from medical insurance, as a matter of law," and therefore, Ms. Dedmon should not be permitted to recover any amount in excess of what her medical providers accepted as full payment from her insurance company—\$18,255.42. Thus, it was Defendants' position that the amount paid by Mrs. Dedmon's insurance company should be submitted into evidence instead of the undiscounted medical bills sent to her. Defendants also argued in the alternative that if the full, undiscounted medical bills are admitted into evidence, then the discounted amounts actually accepted by the medical provider should be admissible to rebut the Plaintiffs' expert testimony that the undiscounted charges are reasonable.

Plaintiffs opposed the Defendants' motion, asserting that the *West* decision was confined to the Tennessee Hospital Lien Act (THLA) and did not define reasonableness for medical expenses in personal injury cases. The plaintiffs also argued that existing Tennessee law permitted them to use expert testimony to prove the reasonableness of their medical expenses. They claimed that this broad expansion of *West* would violate existing statutory and case law, "the Collateral Source Rule, public policy, and would lead to widely disparate, unfair results."

The trial court granted the Defendants' motion *in limine*, stating that although the *West* case only addressed THLA, the same logic used there must still apply. It held that the discounted amounts paid by Mrs. Dedmon's health insurer constituted her only reasonable medical expenses. The trial court granted the plaintiffs permission to seek an interlocutory appeal.

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RULING IN THE COURT OF APPEALS

The Court of Appeals reversed the trial court, but its holding created even more controversy because it gave support to more than one interpretation of the status of the collateral source rule in Tennessee. First, it held that the *West* decision did not apply to personal injury cases. Thus, the Court expressly rejected Defendants' argument in the trial court that *West* required the exclusion of the plaintiff's full, undiscounted medical bills. If the Court of Appeals had stopped there, the case would not have had much impact beyond its ruling for the parties in that case. But it did not stop there.

The Court of Appeals then turned to an argument raised by Plaintiffs and it is in these two final paragraphs that, in the authors' opinion--much ado about a parenthetical arose. Plaintiffs argued that Defendants should be barred from introducing evidence of any discounted medical bills based on the decision in *Fye v. Kennedy*, 991 S.W.2d 754 (Tenn. Ct. App. 1998) (holding that a medical bill that was in "some way, legally forgiven"—paid by Medicaid through no contractual basis—was a gratuity and evidence of such is barred by the collateral source rule). The *Dedmon* Court distinguished *Fye*, stating that while it was factually similar, it did not directly address "whether the amount accepted by a medical provider bears on the reasonableness of the medical expense." The Court of Appeals then restated the law in Tennessee, namely, that "a plaintiff may present the testimony of a physician who testifies that the amount of medical expenses billed or charged to a plaintiff was reasonable." In contrast, defendants "are permitted to offer proof contradicting the reasonableness of the medical expenses" as long as such proof does not "run afoul of the collateral source rule."

In summary, in *Dedmon*, the Court of Appeals held: 1.) *West* is not expanded; 2.) plaintiffs can present the testimony of a physician as to the medical expenses billed or charged and whether those expenses were reasonable; and 3.) defendants can challenge the reasonableness as long as they don't run afoul of the collateral source rule.

Again, in the author's opinion, there was nothing---yet---in *Dedmon* that really did any harm to the traditional functioning in the way medical expenses and the collateral source ruled have worked for decades in Tennessee. But then came the parenthetical and footnote that many seized upon that made the *Dedmon* opinion so divisive. In a "See, e.g." parenthetical, the Court quoted a portion of a Kansas Supreme Court case, *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 222-223 (Kan. 2010), stating: "the collateral source bars admission of evidence stating that the expenses were paid by a collateral source. However, the rule does not address, much less bar, the admission of evidence indicating that something less than the charged amount has satisfied, or will satisfy, the amount billed."

Thus, the *Dedmon* Court of Appeals opinion held that it would be permissible for the defendants on remand to rebut the plaintiffs' expert testimony that the undiscounted medical bills represented Mrs. Dedmon's reasonable medical expenses.

It allowed the discounted amount of medical payments accepted by Mrs. Dedmon's health care providers to be admitted to contradict the undiscounted bills.

Interestingly, the Court of Appeals addressed the status of the collateral source rule, which normally would not permit such collateral payments from being admissible. It cited cases from other jurisdictions that allow the discounted amounts by medical providers to be admitted to rebut plaintiff's proof of the full undiscounted bills, so long as insurance was not mentioned. Judge Joe G. Riley, who wrote the concurrence in the Court of Appeals' opinion in *Dedmon* took the position that this so-called "hybrid" approach would allow both the undiscounted and discounted bills to both be admitted. The idea was that somehow if insurance was not admitted, which was the collateral source itself for the reduction in plaintiff's medical bills, then the collateral source rule would not be violated.

The Court of Appeals in *Dedmon* expressed hope that the Tennessee Supreme Court would review this case and make a final decision on this issue, and the Supreme Court did on October 21, 2017.

SUPREME COURT RULING

In its opinion, the Court first reviewed the law on damages in personal injury cases. It also set forth the proper method for proving medical bills. This is must reading for everyone who tries personal injury cases in Tennessee, and it is nice to have all these rules in one place.

Next, the Court reviewed the history of the collateral source rule going back to England in 1823, and its adoption in the United States in 1854 by the United States Supreme Court in *The Propeller Monticello v. Mollison*, 58 U.S. (17 (How.) 152 (1854). However, the Supreme Court credited the term "collateral source" to a Vermont decision, *Harding v. Town of Townshend*, 43 Vt. 536 (1871). It referred to insurance proceeds received by the plaintiff as "collateral" to any recovery from the wrongdoer. *Dedmon*, 2017 WL5505409 at *7, citing *Harding*, 43 Vt. at 538. The Supreme Court said that it was after *Harding* that the "principle came to be known as the 'collateral source rule.'" *Id.* The "rationale for the rule was that insurance proceeds emanate from an agreement between the plaintiff and the insurer, wholly "collateral" to the defendant, so the defendant should not benefit from the plaintiff's receipt of proceeds "with which he has no concern." *Id.*

Tennessee first applied the rule in *Anderson v. Miller*, 33 S.W. 615, 617 (Tenn. 1896), and again in *Ill. Cent. R.R. Co. v. Porter*, 94 S.W. 666, 669-70 (Tenn. 1906). According to the Supreme Court, "[s]ince *Anderson* and *Porter*...the collateral source rule has become a familiar part of Tennessee jurisprudence." *Dedmon*, 2017 WL5505409 at *8. The Court also noted that the rule is well-articulated in Section 920A of the Restatement (Second) of Torts, and is now "both a substantive rule of law and an evidentiary one." *Id.* The Court discussed at length the many policy reasons supporting the rule, and concluded that "while application of the rule may at times result in compen-



sation for the plaintiff that exceeds what he spent, collateral sources intended to benefit the injured party should not be shifted so as to become a benefit for the tortfeasor. The tortfeasor is held responsible for the harm he caused, regardless of the 'net loss' of the injured party." *Id.* at *9.

The Court also discussed the policy reasons underlying the evidentiary basis for the collateral source rule, which bars any evidence that all or part of a plaintiff's losses have been covered by insurance. The Court noted the "likelihood of misuse by the jury [of evidence of insurance] clearly outweighs the probative value of the evidence of collateral benefits." *Id.* at *10, citing Kenney, 760 S.E.2d at 441. The Court concluded its discussion of the rule by observing a number of states have abrogated the rule to varying degrees, including Tennessee with respect to health care liability cases, (Tenn. Code Ann. Sec. 29-26-119 (2012)), and worker's compensation cases. *Dedmon*, 2017 WL 5505409 at *10.

The Court next discussed at length its opinion in *West v. Shelby County Healthcare Corp.*, 459 S.W.3d 33 (Tenn. 2014). Importantly, it noted the *West* opinion specifically limited its holding to application of the THLA, and that the collateral source rule was not argued or even mentioned in *West*. *Dedmon*, 2017 WL 5505409 at *13. The Supreme Court expressly held that its "holding in *West* was not intended to apply in personal injury cases...reject[ing] the Defendants' argument that *West* created a new legal standard for defining 'reasonable medical charges' in personal injury cases." *Id.* at *14.

The Court next addressed directly the question of whether the full, undiscounted bills of the injured plaintiff would be admissible to establish her reasonable medical bills as part of her damages, or whether the discounted insurance payments would be admissible instead, or in addition to the undiscounted bills. It acknowledged both the changes in the health care industry since the collateral source rule was adopted, and discussed at length the extreme complexity of health care pricing in this country. It also surveyed the approaches to changing the collateral source rule as a background for its ultimate choice of what rule to choose for Tennessee. Also important to the Court was whether other jurisdictions altered the collateral source rule by statute, by court decision, or some combination thereof.

First, the Court found difficulty in categorizing the statutory approaches, finding that they "lack any uniformity whatsoever." *Id.* at *16. Therefore, since it was modifying Tennessee's common law collateral source rule, it focused more on common law approaches in other jurisdictions, placing them in three categories, (1) actual amount paid, (2) benefit of the bargain, and (3) reasonable value. *Id.* at *17.

The actual amount paid approach "limits a plaintiff's recovery to the amount actually paid to the medical provider, either by insurance or otherwise." *Id.* The Supreme Court found that this was a minority view. The leading case championing this approach is a California case, *Howell v. Hamilton Meats & Provisions, Inc.*, 557 P.3d 1130 (Cal. 2011). In fact, it noted that "few other courts have followed the approach in *Howell*, and that it has been criticized as "schizophrenic" and "incoherent."

Dedmon, 2017 WL 5505409 at *18, citing *McConnell v. Wal-Mart Stores, Inc.*, 995 F.Supp.2d 1164, 1170-71 (D. Nev. 2014). It has also been criticized because of "the disparity that results in cases where the victim is insured as opposed to those where the victim is uninsured." *Dedmon*, 2017 WL 5505409 at *18. The prudent plaintiff who has health insurance recovers less than the person without health insurance.

The benefit of the bargain approach "permits recovery of full, undiscounted medical bills, including the negotiated rate differential, only where the plaintiff paid consideration for the insurance benefits." *Id.* at *18. Essentially, the plaintiff is held to have paid for the negotiated rate differential by virtue of their premiums. However, those with Medicaid coverage do not get the benefit of the differential because they paid no consideration for the benefit. This approach has been criticized for "protecting the rich and hurting the poor..." *Id.* at *19.

The third category, called the reasonable value approach, allows a plaintiff to "recover the 'reasonable value' of their medical expenses, regardless of whether the plaintiff is privately insured." *Id.* A minority of those courts who follow this approach define "reasonable value" as the actual amount paid, while a majority define it as the "plaintiff's full, undiscounted medical bills." *Id.* The Supreme Court observed that "a few courts use a 'hybrid' method, allowing the trier of fact to consider both the actual amount paid and the full bill in determining the 'reasonable value' of medical services provided to the plaintiff. *Id.* at *20.

Prior to the Court of Appeals' opinion in *Dedmon*, Tennessee was in the majority of jurisdictions following the "reasonable value/full bill" approach, as described by *Fye v. Kennedy*, 991 S.W.2d 754, 763-64 (Tenn. Ct. App. 1998). The *Fye* Court stated that "[t]he theory underlying the collateral source rule is that a tortfeasor should be responsible for 'all harm that he [or she] causes.'" This ended up being a prevailing theme in the Supreme Court's ultimate decision.

The Supreme Court rejected the Defendants' request that the Court adopt actual amount paid approach, and also reject the collateral source rule. It cited favorably the following comments critical of the actual amount paid approach:

"Bills sent by medical care providers are not a sham for gouging liability carriers. They are real obligations that, but for a plaintiff's private health care insurance, the patient would be responsible for satisfying....[A] privately insured patient actually incurs the medical provider's full charges and only by virtue of his private contract that he entered into in advance is he spared from paying the full amount... The enforceability of the full, undiscounted medical bills, absent intervention of insurance, "is illustrated by the number of personal bankruptcy filings in the United States due to debt resulting from medical bills." (citations omitted).

Dedmon, 2017 WL 5505409 at *22.



The Court held that to adopt the actual amount paid approach would require a wholesale abrogation of the collateral source rule, which it was not willing to do. It found that Howell's position that its adoption of that approach did not violate the collateral source rule was "specious." *Id.* It also rejected the idea that the amount paid to medical providers by health insurance companies was just the "fair market value" of those services. *Id.* at *23.

It also noted that the situation where a private insurer pays just the discounted amount is only one scenario—that involving private insurance. The Court pointed out that many personal injury cases involve plaintiffs who are covered by TennCare, Medicare, or receive veteran's benefits, or care at a charitable facility, or plaintiff's care is paid for by a gift from a relative. Under the actual amount paid approach, the awards for different plaintiffs who received "exactly the same medical services...would cause the awards to vary greatly as a matter of law." *Id.* The Court also observed that if it tried to distinguish among these various types of collateral benefits, it could result in a "possible violation of the equal protection provisions of the state and federal constitutions, as was found in Kansas, citing *Martinez*, 233 P.3d at 221, citing *Wentling v. Med. Anesthesia Servs., P.A.*, 701 P.2d 939, 951 (Kan. 1985). The *Wentling* case held that the "legislature's limitation on [the] collateral source rule was unconstitutional because it violated the equal protection provisions of the state and federal constitutions by discriminating between indigent and insured plaintiffs." *Dedmon*, 2017 WL 5505409 at *23.

The Court also noted that the "actual amounts paid" approach would conflict with Tenn. Code Ann. Sec. 24-5-113, which allows a plaintiff to introduce into evidence her full, undiscounted medical bills and create a presumption of the reasonableness of those bills under certain criteria. The Court said that "[t]o hold that the full undiscounted medical bills are inadmissible as a matter of law would conflict with... Section 24-5-113." *Dedmon*, 2017 WL 5505409 at *24.

The Court also rejected the hybrid approach, which allows the trier of fact to hear both the full, undiscounted medical bills and the amount actually paid. The Court noted that the perception that this approach was equitable belied the criticisms that it would surely allow the jury to infer the existence of insurance, and would increase the complexity of deliberations at trial by a jury. *Id.* at *25. It also rejected those views that the hybrid approach does not contravene the collateral source rule, finding it "clearly inconsistent with the rule." *Id.* Thus, it found the "weight of authority criticizing the hybrid approach...compelling." *Id.* at *26.

The Court ultimately decided that Tennessee should remain in the majority of courts that still apply the collateral source rule to collateral benefits of all types. In its view, the "rule permits plaintiffs, rather than tortfeasors, to receive the benefits of insurance that they had the foresight to purchase." *Id.* at 26. For other collateral benefits such as TennCare and Medicare, it observed that they "were intended to benefit the injured party, not the tortfeasor who inflicted the injuries. The collateral source

rule keeps the focus on tortfeasor's responsibility for paying for all of the harm they cause, not just plaintiff's net loss." *Id.*

In the end, the Court acknowledged that the collateral source rule has its "shortcomings." *Id.* However, it found no better alternative, and determined that trying to address problems with the rule would just cause even more problems. It addressed head-on the argument of Defendants---excluding evidence of the discounted medical bills may result in overcompensation to a plaintiff who did not have to pay the full amounts. In response, the Supreme Court relied upon the United States Supreme Court in saying that "The law contains no rigid rule against overcompensation. Several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation." *Dedmon*, 2017 WL 5505409 at *27, citing *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 219, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994). The Court concluded by saying that there was not a basis for departing from Tennessee's long-standing adherence to the collateral source rule in personal injury cases. It therefore reversed the trial court's holding that would have allowed Defendants to introduce evidence of lesser amounts accepted by Mrs. Dedmon's medical providers in order to rebut the Plaintiffs' proof on reasonableness.

COMMENTARY

The overriding theme that influenced the Supreme Court to reaffirm the collateral source rule was that tortfeasors should be responsible for all the harm they cause. The Court of Appeals' opinion had it been affirmed would have created so many potential problems by abandoning the collateral source rule. By re-joining the majority of the jurisdictions that still abide by the rule, the Court avoided those problems. It certainly did what you would want a Supreme Court to do—examine the problem from every angle, explore all the alternatives, and then choose what it thought was the best approach supporting the public policies around tort law.

The bench and bar waited with great anticipation for this decision. Several decisions in both state and federal courts abandoned the collateral source rule, predicting that the Supreme Court would do so as well. Such rulings unfairly punish the plaintiff for having the foresight to obtain health insurance. I believe that Defendants' windfall argument was incorrect, instead creating a windfall for tortfeasors by allowing them to benefit from the plaintiff's health insurance, something the plaintiff had paid premiums to obtain. Fortunately, after this opinion, plaintiffs will not have to pay twice—first, premiums to get health insurance, and second, a reduction in their damages because they had the foresight to buy insurance. The choice of obtaining health insurance was properly incentivized as a societal good.

The hybrid approach, which would have allowed the jury to hear both the undiscounted and discounted bills, would have introduced into the jury room the byzantine world of health care pricing negotiated between powerful health insurance com-



panies and medical providers based upon ever-changing market forces. The Court rightly acknowledged that this would over time have led to the death of the collateral source rule, a sort of death by a thousand cuts.

One final thought---the Court noted that treating plaintiffs differently under the “actual amount paid” approach could cause a potential violation of the equal protection provisions of the state and federal Constitutions. That is because plaintiffs who receive the same medical services would be treated differently solely because some have private insurance, others no insurance, some TennCare, or Medicare or Medicaid, or veteran’s benefits. It cited a Kansas case holding that a Kansas statute altering the collateral source rule violated the equal protection provisions of the state and federal Constitutions “by discriminating between the indigent and insured plaintiffs.” Of course, Tennessee has also abrogated the collateral source rule in health care liability cases by statute. Might this be a signal that the statutory limitation in Tennessee on the collateral source rule is vulnerable to such an attack?

In addition, there is a great summary of damages law in Tennessee in this opinion, showing the great latitude to juries to perform the difficult task of determining damages, especially non-economic damages. Could the *Dedmon* case be a starting point for challenging the caps on non-economic damages on constitutional grounds, since the Tennessee Constitution expressly says “that the right to a jury trial in Tennessee shall remain inviolate?” In my view, it is hard to see how a hard \$750,000 limitation on a jury’s right to award damages in every case as anything other than a violation of the constitutional right to have a jury decide the appropriate damages. The fact that our cap law prevents the jury from even being told about the existence of the cap adds a level of perverseness. That is because there is a very good chance that many jurors in Tennessee are aware that there is a cap on damages, and that what they know about the cap is probably wrong, or at least incomplete. Yet, we are forbidden from telling them about the cap in voir dire, or even asking if they know about the cap, for such a question is information about the cap in itself. See *Hiding in Plain Sight—Catch-22 on Non-disclosure of Damages Caps to Jury*, by Donald Capparella, *Tenn. Bar. Journal*, September 2011.

In conclusion, the *Dedmon* decision is a triumph of good sense and thorough analysis. I am sure that there will be a push to create a legislative “fix” that would kill, or severely limit the collateral source rule that was reaffirmed by the Supreme Court in *Dedmon*. However, a warning has been given, that such a legislative fix might not pass constitutional muster. Justice requires vigilance, as the arc of history does tend toward justice, but sometimes the arc can, for a time, turn back on itself. The *Dedmon* decision shows the arc tending towards justice. Let’s hope the great sausage mill of the Legislature does not succeed in turning it back.

ABOUT THE AUTHOR

Donald Capparella represents injured people in tort litigation, and businesses in commercial cases, and is one of Tennessee’s most respected litigators at both the trial and appellate levels in both trial appellate state and federal courts. He has secured a landmark award for a widow and child wrongly denied insurance proceeds, Morrison v. Allen, 338 S.W.3d (Tenn. 2011), and he is regularly called upon to handle complex matters including construction defects, business disputes, personal injury, and insurance matters. Highly regarded for his experience in tort litigation, Mr. Capparella has been counsel for many of Tennessee’s landmark cases over the last twenty-five years. He served as amicus counsel in McIntyre v. Balentine, which brought comparative fault to Tennessee. He was also amicus counsel in the Tennessee Supreme Court cases that established loss of consortium damages in wrongful death actions and abolished the open and obvious rule, and was lead counsel in Martin v. Norfolk Southern Railroad Company, through which the Tennessee Supreme Court clarified the summary judgment standard in Tennessee.

