V. **Evidence: Overcoming Admission Hurdles with Social Media, Texts, Medical Bills and Records**

**C. The Collateral Source Rule.**

Oklahoma has long applied the Collateral Source Rule:

Upon commission of a tort it is the duty of the wrongdoer to answer for the damages

wrought by his wrongful act, and that is measured by the whole loss so caused and the

receipt of compensation by the injured party from a collateral source wholly independent

of the wrongdoer does not operate to lessen the damages recoverable from the person

causing the injury. *Denco Bus Lines v. Hargis,* 1951 OK 11, 229 P.2d 560.

Oklahoma still adheres to the collateral source rule. See: *C&H Power Line Const. Co. v. Enterprise Poducts Operating, LLC*, 2016 OK 102, ¶21, 386 P.3d 1027: Oklahoma still recognizes rule that insurance payment evidence violates collateral source rule, citing Estrada v. Port City Properties, Inc., 2011 OK 30, ¶ 27, 258 P.3d 495,505.

The rule seems contrary to rules against double recovery and “windfall,” but public policy dictates if there is to be a “windfall,” the windfall is to go to the innocent (or more innocent) plaintiff, than to the responsible party. That is particularly so when the injured plaintiff has had the foresight to purchase insurance coverage. The injured party’s insurance premium should not flow to the benefit of the tortfeasor. The rationale is also explained as a mechanism to offset rules that prevent a plaintiff from ever fully recovering all damages.

The Rule applies to workers compensation benefits, health insurance (subject to 12 O.S. 3009.1, discussed below), disability coverage, life insurance, uninsured motorists coverage, sick and vacation leave, salary paid during convalescence, etc. If the payment is not made by the Defendant, then the jury is not entitled to hear evidence of the payment.

There is a “special” abrogation of the rule in medical negligence cases, under 63 O.S. 1-1708:

A.  In every medical liability action, the court shall admit evidence of payments of medical bills made to the injured party, unless the court makes the finding described in paragraph B of this section.

B.  In any medical liability action, upon application of a party, the court shall make a determination whether amounts claimed by a health care provider to be a payment of medical bills from a collateral source is subject to subrogation or other right of recovery.  If the court makes a determination that any such payment is subject to subrogation or other right of recovery, evidence of the payment from the collateral source and subject to subrogation or other right of recovery shall not be admitted.

Looks like a special law indeed.

There is an exception under the OGTCA in 51 O.S. 155, which absolves governmental entities where there is workers’ compensation available to the injured party. This rule applies whether the comp is provided by the at-fault governmental entity, or by some other entity.

The rule even keeps out evidence of remarriage of the injured party. *Kimery v. Public Service Co.,* 1980 OK 187, 622 P.2d 1066.

Beware, though, the collateral source rule has been eroded (even apart from “paid versus incurred”) where the collateral benefit is not tied in some manner to the plaintiff’s efforts. So, while payment of bills by Medicare is a collateral source where the Medicare is a benefit of the plaintiff’s years of employment, a few courts have held the same is not so with respect to gratuitous benefits such as Medicaid. See, e.g., *Bozeman v. Louisiana,* 879 So.2d 692 (La. 2004).

**D. Getting Medical Bills Into Evidence**

We have a statute that lets the patient/plaintiff introduce medical bills:

12 O.S. 3009:

Upon the trial of any civil case involving injury, disease or disability, the patient, a member of his family or any other person responsible for the care of the patient, shall be a competent witness to identify doctor bills, hospital bills, ambulance service bills, drug bills and similar bills for expenses incurred in the treatment of the patient upon a showing by the witness that such bills were received from a licensed practicing physician, hospital, ambulance service, pharmacy, drug store, or supplier of therapeutic or orthopedic devices, and that such expenses were incurred in connection with the treatment of the injury, disease or disability involved in the subject of litigation at trial. Such items of evidence need not be identified by the person who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary.

So, we can get the bills into evidence with the patient’s testimony that “these are the bills.” No need to have an expert testify that the bills were reasonable and necessary. This works well by itself if you have an “objective injury” of the kind that does not require expert testimony regarding causation (broken bones and such). See, *Reed v. Scott,* 1991 OK 113, 820 P.2d 445.

But, if you need the expert testimony anyway, you may want to get a treating doctor the sponsor the bills as well, showing the jury they were necessary, related, and reasonable.

**Future Medical Bills**

Beware, expert testimony is needed to introduce the topic of future medical bills, whether the injury is objective or subjective. *Reed v. Scott,* 1991 OK 113, 820 P.2d 445.

**Paid versus Incurred Statute**

**12 O.S 3009.1 hurdle:**

A. Upon the trial of any civil action arising from personal injury, the actual amounts paid for any services in the treatment of the injured party, including doctor bills, hospital bills, ambulance service bills, drug and other prescription bills, and similar bills shall be the amounts admissible at trial, not the amounts billed for such expenses incurred in the treatment of the party. If, in addition to evidence of payment, a party submits a signed statement acknowledged by the medical provider or an authorized representative or sworn testimony that the provider will accept the amount paid as full payment of the obligations, the statement or testimony shall be admitted into evidence. The statement or testimony shall be part of the record as an exhibit but need not be shown to the jury. If a medical provider has filed a lien in the case for an amount in excess of the amount paid, then the bills in excess of the amount paid, but not more than the amount of the lien, shall be admissible.

B. If no payment has been made, the Medicare reimbursement rates in effect when the personal injury occurred, not the amounts billed, shall be admissible if, in addition to evidence of nonpayment, a party submits a signed statement acknowledged by the medical provider or an authorized representative or sworn testimony that the provider will accept payment at the Medicare reimbursement rate less cost of recovery as provided in Medicare regulations as full payment of the obligation. The statement or testimony shall be admitted into evidence and shall be part of the record as an exhibit but need not be shown to the jury. If a medical provider has filed a lien in the case for an amount in excess of the Medicare rate, then the bills in excess of the amount of the Medicare rate, but not more than the amount of the lien, shall be admissible.

C. If no bills have been paid, or no statement acknowledged by the medical provider or sworn testimony as provided in subsections A and B of this section is provided to the opposing party and listed as an exhibit by the final pretrial hearing, then the amount billed shall be admissible at trial subject to the limitations regarding any lien filed in the case.

D. This section shall apply to civil actions arising from personal injury filed on or after November 1, 2015.

This statute adds a twist to the collateral source rule where medical bills have been paid by health insurance, workers compensation, Medicare/Medicaid, or the like. The billed amount is not admissible, but only the part that is (or will be) paid.

The first question is to what claims does it apply: “**any civil action arising from personal injury**.”

The obvious target would be third party liability claims. But what about UM claims? It should since a UM claim “arises out of personal injury.” But how does a UM carrier, which has an obligation to evaluate a claim “on the front end,” determine whether it will ever be able to apply the statute?

What about medpay? Perhaps.

**Burden of Proof**

Don’t assume because some of the medical bills have been paid by health insurance that the statute automatically applies. The paid amounts, as opposed to the billed amounts, seem only to be admissible if someone (presumably only the defendant would have an interest in so limiting damages) obtains written statements or sworn testimony, that the paid provider accepts the paid amount as payment in full. The current version of the statute makes more clear that the party wishing to limit evidence to the paid amount has the burden of obtaining the statements from the providers:

C. If no bills have been paid, or no statement acknowledged by the medical provider or sworn testimony as provided in subsections A and B of this section is provided to the opposing party and listed as an exhibit by the final pretrial hearing, then the amount billed shall be admissible at trial subject to the limitations regarding any lien filed in the case.

This raises the question, touched upon earlier, whether a UM carrier, which owes damages an insured is “legally entitled to recover” from the liable party, can apply the statute at the claim evaluation stage, making an assumption that it would be able to obtain the statements set out in the statute. Some think it constitutes bad faith to do so. I’m not so sure. But we don’t yet have an answer.

**Don’t put any Medicals into Evidence**

Given the “Paid versus Incurred” dichotomy, consider another option for “getting medical bills into evidence”—don’t. Many believe medical bills, particularly after health insurance discounts are applied create only a “low anchor” that drives verdicts downward. See, e.g., <http://www.gigaxlaw.com/medical-bills-in-personal-injury-trials-ask-the-jury-to-award-them-the-low-anchoring-effect-of-medical-expenses/>.

Beware, though, you will likely have to fight the defendants’ efforts to introduce the medical bills as going to the extent of plaintiff’s injury or bearing on the claim for pain and suffering. See, e.g., <http://www.iadclaw.org/assets/1/19/TrialTechniquesTactics_April_2015.pdf>.

**The $25,000 hearsay exception (12 O.S. 2803(24))**

This is a nice tool for use where damages don’t exceed $25,000. This statute is useful in small claims matters, and now particularly so, with the increased small claim limit of $10,000:

24. A verified or declared written medical report signed by a physician, provided:

a. the report is used in an action not arising out of contract in which the claim of the plaintiff is not in excess of Twenty-five Thousand Dollars ($25,000.00),

b. the report contains a history of the plaintiff, the complaints of the plaintiff, the physician’s findings on examination, and any diagnostic tests, description and cause of the injury, and the nature and extent of any permanent impairment. All opinions expressed in the report must be based upon a reasonable degree of medical probability, and

c. the medical report must be verified or contain a written declaration, made under the penalty of perjury, that the report is true.

**E. Medical Records: Overcoming Objections**

Physician/patient privilege found in 12 O.S. 2503, but subparagraph D provides limited waiver of the privilege “as to any communication relevant to the physical, mental, or emotional condition of the patient” in any legal proceeding where the patient has made the condition an element of a claim or defense. This waiver is also codified in the discovery code at 12 O.S. 3235, which allows for a medical examination of a plaintiff. There is a much broader waiver of privilege in med mal actions, under 76 O.S. 19(B).

For a long time, though the privilege was waived, it was difficult for a defendant to force disclosure of medical records. Two cases, *Nitzel v. Jackson,* 1994 OK 49, 879 P.2d 1222, and *Higginbotham v. Jackson,* 1994 OK 8, 869 P.2d 319, said that while there was a qualified waiver of the privilege, the courts did not have power to enforce that waiver by way of an order forcing the patient to execute a medical authorization. The cases hold that the defendant was limited to “statutory” means of discovery. That meant subpoena of the medical providers, or in some cases, court order of release.

These case also limit disclosure to relevant medical information. Accordingly, appropriate limits to the time and scope of disclosure are proper.

Discovery Code (12 O.S. 3226(A)(2)(a) now requires that we provide medical (and other) authorizations in appropriate cases, in our initial disclosures:

Subject to subsection B of this section, in any action in which physical or mental injury is claimed, the party making the claim shall provide to the other parties a release or authorization allowing the parties to obtain relevant medical records and bills, and, when relevant, a release or authorization for employment and scholastic records.

Though I’m not aware of any cases on the topic, I would still argue appropriate limitations to scope and time are appropriate.

This also the question of *ex parte* communication with the providers. *Holmes v. Nightingale,* 2007 OK 15, 158 P.3d 1039, is the seminal case. There, a med mal plaintiff refused to execute a med auth, so the Judge issued an order releasing the medical records. The order stated that the providers were authorized to speak *ex parte* with the defendant. The order was unauthorized since it failed to advise the doctors that they did not have to engage in *ex parte*  communication. *Holmes* is still good law.

**F. Creatively Using Motions *in Limine***

“At the threshold”—these are motions filed before trial, to get a preliminary ruling about the admissibility (or not) of certain evidence. Purpose is to get a ruling outside the jury’s hearing so as not to taint the jury or anger the judge (maybe avoiding a mistrial).

We tend to think of motions *in limine* for keeping evidence out. But also can be used to preauthorize evidence you think may otherwise be excluded. In this regard, they can serve as a final negotiating tool. Once the parties know what the court will and will not allow, it may be possible to resolve a previously unresolvable case.

Use MILs to educate judge in advance of trial regarding both easy call and difficult evidentiary issues. *Limine* rulings can help you in preparing your opening, if you know certain evidence will or will not come in, you know whether you can discuss that evidence in opening.

Avoid the generic motions asking the court, essentially, to enforce the rules of evidence.

We do see some rather strange motions *in limine.* One recently asked the court to forbid “all reptile techniques.” Another, filed by a plaintiff, asked the court to preclude the defendant from suggesting plaintiff’s claim defied “common sense.” As my old boss put it to the fellow asking for that sample motion, “you want the judge to rule that the defendant can’t say your claim makes no sense?—good luck with that.”

Generally, broad, expansive requests will not get you very far. Motions directed at a specific bit of evidence tend to be more effective.

A good starting point for your MILs is to read the depositions. Was your client asked about something that might be inadmissible (lack of license, convictions, drug use, prior “bad” acts, collateral source evidence, etc.) or did another witness raise a topic that should not be discussed in front of the jury. Usually these are short, and to the point—cite the applicable evidentiary rule and articulate why the evidence is outright inadmissible, or why you think the probitive value is substantially outweighed by the prejudicial effect.

I like to use MILs to educate the judge in advance about something I think will be a difficult evidentiary ruling. For instance, I might file one asking court to rule in advance that the billed medicals come in since the defendant has not produced the required provider statements. This give me a better opportunity to educate the judge, in writing, on the specifics of the statute, rather than hope to convey, orally, in the midst of battle, that the statute is not self-executing.

I have used them often to exclude evidence of convictions. For instance, there is a case that says “[a] conviction for drug possession is not necessarily relevant to credibility and is potentially prejudicial in arousing sentiment against a witness.” *Wilson v. Union Pacific R.R. Co*., 56 F.3d 1226, 1231 (10th Cir.1995). We often get otherwise admissible drug convictions excluded by citing this case in a MIL.

I have not seen, but read of MILs being used by a defendant dispositively, like a summary judgment on the eve of trial. This works by getting the court to exclude some important bit of evidence and then asking the court to grant judgment on the basis that the case lacks merit without the evidence. Most courts do not like this use of MILs.

Remember MIL does not preserve error, since they really are only preliminary rulings that stand or fall based upon the actual evidence at trial. Must reassert at trial by way of objection to the evidence when offered, or offer of proof at the appropriate time.