**IN THE DISTRICT COURT OF CARTER COUNTY**

**STATE OF OKLAHOMA**

JANE DOE, )

Plaintiff, )

v. ) **Case No. CJ-2017-XXX**

)

DON SMITH, )

Defendant. )

**Plaintiff’s Trial Motions**

This is a car wreck case. Plaintiff was a passenger in a truck driven by her friend. Traffic stopped in front of their truck, but Defendant Smith failed to stop, driving his truck into the back of the truck Ms. Doe was in. It was a significant impact with major damage to Smith truck and significant damage to the truck Ms. Doe was in. Ms Doe was taken by ambulance to the ER. She suffered head, neck, back, and hip injuries in the wreck.

Plaintiff submits the following Trial Motions:

**I. “Paid Versus Incurred” Medical Bills**

**A. Defendants Do Not Satisfy the “Signed Statement” Requirement of 12 O.S. § 3009.1**

State Farm has indicated it intends to limit Plaintiff to amounts paid on her behalf by Medicare. The statutory basis cited is 12 O.S. § 3009.1 the “paid versus incurred” statute. Here is the text of that statute in full (emphasis added):

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.

The two highlighted portions of the statute reveal the burden imposed on a Defendants wishing to limit a plaintiff to “paid” amounts: The first highlighted part (in subparagraph A), though poorly written, seems to set out a requirement that the one wishing to limit medical billing to the paid amount must obtain either a sworn statement or sworn testimony from the providers that they will accept the paid amounts as payment in full.

The highlighted portion of Subparagraph C, added in 2015, makes clear the Defendants who wishes to so limit damages, must, by the time of pretrial, provide the required statements to the Plaintiff. Defendants has yet to produce those statements.

**B. Absent Application of 12 O.S. § 3009.1, the Collateral Source Rule Still Applies**

Oklahoma’s collateral source rule is best described in *Denco Bus Lines v. Hargis,* which says damages are measured by the whole loss caused by the Defendants, without reduction of benefits paid to the Plaintiff from a source other than the Defendants:

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.[[1]](#footnote-1)

The question is whether Defendants shall be subject to the full extent of their liability, or rather gain a windfall simply because Ms. Doe is covered by Medicare. *Denco,* and sound public policy dictate that the tortfeasor should not be allowed to benefit from Plaintiff’s Medicare. The “credit” for a Plaintiff’s coverage must run to the Plaintiff rather than the wrongdoer:

Reducing the recovery by the amount of the benefits received by the plaintiff would grant a windfall to the defendants by allowing a credit for the reasonable value of those benefits. Such credit would result in the benefits being effectively directed to the tortfeasor and from the intended party - the injured plaintiff. If there is a windfall, it is considered more just that the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing.[[2]](#footnote-2)

Here, Plaintiff obtained the Medicare benefits by the sweat of her brow rather than that of Defendants or State Farm. Absent the application of 3009.1, the collateral source rule applies with full force. See, e.g., *C&H Power Line Const. Co. v. Enterprise Products Operating, LLC*, 2016 OK 102, ¶21, 386 P.3d 1027 (citing *Estrada v. Port City Properties, Inc.* 2011 OK 30, ¶ 27, 258 P.3d 495, 505). Plaintiff requests an instruction that Defendants not attempt to introduce evidence of paid amounts.

**\_\_\_Granted \_\_\_ Denied**

**II. Defendants Should Not Introduce Unsponsored Medical Records**

12 O.S. § 2401 defines “relevant evidence” as that which makes the existence of any fact of consequence to the determination of an action more probable or less probable than it would be without the evidence. 12 O.S. § 2402 states that irrelevant evidence is inadmissible. 12 O.S. § 2403 then prohibits admission even of relevant evidence when there is a substantial danger of confusing or unfair or harmful surprise:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise

Plaintiff anticipates Defendants may try to “confront” Plaintiff with prior medical bills. Plaintiff is not a physician and cannot be expected to interpret her medical records. Defendants have opportunity still, should they wish to do so, to introduce such evidence during the depositions of Plaintiff’s and Defendants’ medical witnesses. Plaintiff should not be confronted at trial with surprise medical “evidence” that she is not equipped to understand or explain. The Court should use its superintendent powers to exclude such surprise “evidence” which will only tend to needlessly confuse the jury and introduce unfair and harmful surprise.

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**III. Error in ER Records Regarding Prescription Abuse**

Plaintiff had previous back and neck injuries, and suffers from heart and other serious health conditions. Prior to the wreck, she was prescribed pain medication and used that medication as prescribed. She was shocked to recently learn (from her counsel) that the ER records contained a reference to abuse of prescription medications. She does not know how this reference was introduced into her ER records, nor can we ever reconstruct at this juncture how the error was made other than to speculate that the ER personnel somehow garbled whatever response she gave about her pain prescriptions.

Not only did she contest the record (obtaining amendment of the record), but she has always passed her narcotics control reviews. Defendants have not addressed this issue with Plaintiff or her attorney, nor asked Ms. Doe at her deposition about the record. Mention of this unsubstantiated error would only serve to introduce a collateral matter that will only confuse the jury and result in undue prejudice to Ms. Doe.

Even were the drug reference accurate (which it is not) evidence of previous drug use is deemed highly prejudicial–and to fall within the 404(b) prohibition of evidence of “other crimes, wrongs, or acts.” *Gust v. Jones*, 1996 WL 635703 (D. Kan. 1996)(unpublished) . Indeed, even a drug *conviction* is inadmissible under the rules. That is because evidence of a prior drug conviction is not highly relevant to veracity but *is* highly prejudicial and can arouse jury sentiment against a party. *Wilson v. Union Pac. R.R. Co.,* 56 F.3d 1226, 1331 (10th Cir. 1995).

Any reference to (unsubstantiated) drug use can only improperly inflame and prejudice the jury while adding nothing probative of the matters at issue in this case–precisely the impermissible character evidence forbidden by the rules of evidence. Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**IV. Old Check Charges and Related Misdemeanor**

Plaintiff testified that around the year 2003, she plead no contest to some charges related to some returned checks, and then ended up with a misdemeanor charge for failing to pay the resulting fines. Counsel has been unable to locate these old charges. Regardless, these are not the sort of “convictions” that fall within the scope of the rules for convictions.

First, the *nolo* pleading is *per se* inadmissible under 12 O.S. § 2410(A):

A. Except as otherwise provided in this section evidence of the following is not, in any civil or criminal proceeding, admissible against the defendants who made the plea or was a participant in the plea discussions: . . . 2. a plea of nolo contendere . . . .

Second, the charges fall outside the ten-year limitation for criminal acts set out in 12 O.S. § 2609. Nor does the evidence satisfy the requirements to ignore the 10-year rule since it cannot be said that the probative value of this evidence substantially outweighs the danger of unfair prejudice (the reverse 403 balance). That is because we do not know any of the circumstances surrounding these old charges. Defendants may argue a “bad check” charge involves dishonesty. While that may sometimes be so, it is also very possible to be a simple consequence of faulty bookkeeping. For that reason, the charges do not fall within the “moral turpitude” rule. The Court should not indulge a foray into this collateral matter so as to be able to decipher if these old check charges somehow amount to something we should be talking about at this car wreck trial.

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**V. The Lack of a Citation**

Had Defendant Smith received a citation after the wreck (but not a conviction), Defendants would rightly contest admission of the citation since the citation, absent a conviction, would not be probative of fault.[[3]](#footnote-3) In the same way, the lack of a citation tells us nothing about Defendants’ lack of fault. For this reason, Defendants should not be allowed to tell the jury Smith did not receive a citation after the collision. Alternatively, should Defendants be allowed to tell the jury the police officer did not issue a citation, Plaintiff should be allowed to elicit testimony that the police officer nevertheless put the blame for the wreck on Smith.

**\_\_\_Granted \_\_\_ Denied**

**VI. Cohabitation**

Defendants should be forbidden from discussing Plaintiff’s living arrangement because the matter has no bearing on any fact of consequence to the action. Additionally, some members of the jury might disapprove of cohabitation without the sanction of marriage. The introduction of this evidence regarding Plaintiff’s living arrangement might therefore tend to improperly inflame the prejudice of the jury against her.

Plaintiff respectfully requests this Court to instruct the Defendants, their counsel, and all their witnesses not to mention, refer to, or interrogate or attempt in any way to convey to the fact-finder in any manner, directly or indirectly, any facts regarding Plaintiff’s living arrangement.

**\_\_\_Granted \_\_\_ Denied**

**VII. Questions About When Plaintiff Retained an Attorney Should be Precluded**

Plaintiff requests that the Court enter an Order *in limine* forbidding the mention of when Plaintiff's attorney was retained, because it is not relevant and can be very prejudicial. 12 O.S. §§ 2402, 2403; *Lilly v. Scott*, 1979 OK CIV APP 29, 598 P.2d 279, **cert. denied**, (wherein court held "...question on cross-examination as to when plaintiff first saw his lawyer was improper. Improper questions having for their only purpose casting of reflections upon character of witnesses is prejudicial conduct, and such rule, a fortiori, should also shield lawyers from abuse").

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**VIII. Questions About Doctor Referral by Attorneys Should be Precluded**

Plaintiff requests that the Court enter an Order *in limine* forbidding the implication or assertion that Plaintiff has been treated per the recommendation of his counsel, during *voir dire,* opening statement, the presentation of evidence, and closing argument. First, there is no evidence to support said assertion. Second, such implication is highly improper, has no relevancy and is highly prejudicial. 12 O.S. §§ 2402, 2403; *Lilly v. Scott*, 1979 OK CIV APP 29, 598 P.2d 279, **cert. denied**,, applies, wherein the court held that the following line of questioning was "**highly improper**":

Q. Who sent you to see Dr. Freede? Mr. Lilly, wasn't it (Plaintiff's attorney) that (is) sitting right here. Isn't he the man who told you to go see Dr. Freede?

A. He told me I should see a doctor.

Q. Did he tell you which one?

A. I asked him which one was a good doctor, being my attorney I took his advice.

Q. He told you to go see Dr. Freede.

A. He called some other doctor and he couldn't get him. He wasn't there. And they was the only ones that would take me right then.

Q. Didn't Dr. Freede send your bills to your lawyers?

A. Yes.

Q. That's all.

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**IX. Discussion of a “Lawsuit Crisis” Should be Precluded**

Plaintiff requests that the Court enter an Order *in limine* forbidding the mention of a lawsuit crisis or anything related thereto, because it is not relevant to any matter of consequence and is highly prejudicial. 12 O.S. 2402, 2403. This would be akin to discussion of the fact Defendants are insured here by State Farm which is defending and will pay the judgment.

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**X. Discussion of Injuries to Others (or Lack Thereof) Should be Precluded**

Plaintiff requests that the Court enter an Order *in limine* forbidding the implication or assertion regarding the injuries or lack of injuries to any other occupant in any vehicle involved in the accident. Whether another person is injured or not injured in a wreck has no relevance at all to whether the Plaintiff was injured, so there is no practical reason to discuss whether Defendants or any other person was injured or not injured other than to prejudice Plaintiff’s claim. Said implication and/or assertion is highly improper, has no relevancy and is highly prejudicial. 12 O.S. §§ 2402, 2403.

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**XI. Challenging *limine* Rulings in Jury’s Presence**

Plaintiff seeks an Order from the Court that if the Court sustains a motion *in limine* and one of the parties wishes to still go forward and imply, assert, ask a question or do anything else which might violate the motion *in limine*, that said party must first approach the bench outside the hearing of the jury and ask the Court to reconsider its ruling on the motion *in limine* at issue.

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**XII. Argument Regarding “Jackpot Justice” or the Like**

Plaintiff requests that the Court enter an Order *in limine* forbidding the implication or assertion that the Plaintiff is trying to “ring the bell,” that this “is a courtroom, not a casino,” that the plaintiff “is treating this case as a lottery ticket,” *or any other similar implication* that Plaintiff is asking the jury to treat this matter improperly. Plaintiff is willing to try this case to the Court without a jury. To imply that Plaintiff is trying to take advantage of the jury system when Plaintiff did not even request a jury trial is improperly prejudicial to Plaintiff. Said implication and/or assertion is highly improper, has no relevancy and is highly prejudicial. 12 O.S. §§ 2402, 2403.

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

**XII. Alternative Motion in *Limine* Regarding Paid Medical Bills**

Per the Scheduling Order, Plaintiff is filing her trial motions in advance of the Pretrial Conference. 12 O.S. § 3009.1 allows the Defendants to produce the required “provider statements or testimony” up to the time of Pretrial. Should Defendants obtain those statements, Plaintiff will not seek to recover past medical bills. Should that occur, Plaintiff asks for an order precluding Defendants from discussing Plaintiff’s past medical billing or paid amounts.

**Mention of Past Medical Expenses and Past Loss of Income as well as Arguments Equating “Pain and Suffering” Damages to Past Medical Expenses and/or Past Loss of Income must be precluded**

In that case, Plaintiff will not claim, as items of damage, the amount of her past medical expenses incurred for the care and treatment of the injuries.

While there will be evidence of the medical care Plaintiff received after the collision, Plaintiff will only be pursuing damages related to the past and future pain, past and future mental anguish and suffering, future medical expense, future non-economic damages, disability and loss of enjoyment of life which Plaintiff has suffered, and will continue to suffer as a result of Plaintiff’s injuries. The plaintiff's “pain and suffering” damages will be proven up by Plaintiff’s testimony, the testimony of lay witnesses, and the testimony of various medical expert(s). Because Plaintiff is not claiming the amounts of the past medical expenses and past loss of income as items of damage at trial, and because there is no logical connection between the amount charged (or paid) for a medical service and the pain and suffering that resulted from Plaintiff's injury, the past medical bills (the documents themselves), the amounts (individually, or as a whole), and the fact that some of them may have been paid by a collateral source are all irrelevant to the claims being made in this case, as they do not have “. . . any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” 12 O.S. § 2401 et seq. Because the evidence is not relevant, it is not admissible. 12 O.S. § 2401 et seq.

This issue was considered by the Eastern District of Virginia in *Payne v. Wyeth Pharmaceuticals, Inc.,* 2008 WL 4890760 (E.D.Va 2008). In *Payne*, the plaintiff filed for Chapter 7 bankruptcy nine (9) months after being involved in an automobile collision with a vehicle owned by Wyeth Pharmaceuticals. Payne listed his pre-bankruptcy petition medical bills in his bankruptcy schedules, and Wyeth alleged that Payne omitted some of his prebankruptcy petition medical bills. The bankruptcy court discharged Payne’s debt on April 7, 2008, approximately a month after Payne filed the personal injury suit against Wyeth. Payne intended to move his medical bills into evidence, and Wyeth moved *in limine* to have them excluded on the grounds that they were not relevant to prove pain and suffering. The *Payne* court noted:

The Court holds that the medical bills are not relevant to pain and suffering. In reaching this conclusion, the Court is persuaded by the analysis of *Carlson v. Bubash,* 639 A.2d 458, 462 (Pa.Super.Ct.1994). As that court reasoned:

**It is immediately apparent that there is no logical or experiential correlation between the monetary value of medical services required to treat a given injury and the quantum of pain and suffering endured as a result of that injury.** First, the mere dollar amount assigned to medical services masks the difference in severity between various types of injuries. A very painful injury may be untreatable, or, on the other hand, may require simpler and less costly treatment than a less painful one. The same disparity in treatment may exist between different but equally painful injuries. Second, given identical injuries, the method or extent of treatment sought by the patient or prescribed by the physician may vary from patient to patient and from physician to physician. Third, even where injury and treatment are identical, the reasonable value of that treatment may vary considerably depending upon the medical facility and community in which care is provided and the rates of physicians and other health care personnel involved. Finally, **even given identical injuries, treatment and cost, the fact remains that pain is subjective and varies from individual to individual.**

(Empahsis Added) The court continued:

Furthermore, “a single figure representing the total amount of an individual's medical bills does not demonstrate the number of times the person received treatment or the nature of the treatment.” *Barkley*, 595 S.E.2d at 274-75. (Kinser, J., concurring in part and dissenting in part) (“In some instances, one noninvasive diagnostic test can cost as much as many visits to a physical therapist or chiropractor.”). Therefore, the medical bills have no tendency to establish Payne's claim that he experienced pain and suffering as a result of the accident. The Court accordingly holds that the medical bills are inadmissible pursuant to Fed.R.Evid. 401 and 402.

As noted in *Payne*, there is no logical connection between the amount of past medical bills incurred by Plaintiff and the pain and suffering associated with Plaintiff’s injuries. Even assuming, *without agreeing*, that the past medical bills were somehow relevant, the court must still preclude them pursuant to 12 O.S. § 2403 because any probative value they have is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, (or) misleading the jury...” The *Payne* court addressed this issue as well:

Even if the Court were to conclude the medical bills are relevant and admissible, the medical bills are nevertheless inadmissible pursuant to Fed.R.Evid. 403. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed.R.Evid. 403. Here, there is a substantial possibility of jury confusion if the medical bills were introduced to prove pain and suffering. The jury may be tempted to treat the medical bills as recoverable special damages rather than to only assess the medical bills as evidence that Payne experienced pain and suffering. The jury may also be confused by the medical bills' characterization of the treatment Payne allegedly underwent because the treatment is described in the bills in summary, imprecise terms. These ill-defined terms, presented right beside their cost in dollar figures, with little explanation to guide the jury, would unfairly prejudice Wyeth Pharmaceuticals. To cure this prejudice, and thus to clarify the meaning of the terms in the medical bills, Payne would likely have to call a witness from each medical office from which a bill was issued to testify regarding, among other things, the terms in the bill and whether a doctor or administrator labeled the procedures and treatments. Such a process could unduly delay the trial. Furthermore, introduction of the medical bills into evidence would be overly cumulative: whatever tendency they would have to prove pain and suffering may already be amply demonstrated by other, more probative evidence, such as the testimony of Payne and his doctors. On the other side of the scale, the medical bills are of limited probative value for many of the reasons discussed in the relevance analysis, supra. For all these reasons individually, and for all of them together, the Court holds that Payne's medical bills fail Rule 403 analysis and are therefore inadmissible to prove pain and suffering.

Because the past medical bills and past loss of income are not being claimed as an item of damage in this case, and there will be no jury instruction about them, their introduction into evidence will confuse the jury about the true issues they will have to decide, and they will not be instructed on how to consider the amounts. Further, introducing the past medical expenses would unfairly and unduly prejudice Plaintiff because of the risk that the jurors would substitute the bill amounts for the amounts for pain and suffering and/or improperly attempt to use, at the suggestion of the Defendants, the past medical expenses and the amount of medical care Plaintiff received after the incident as a basis to establish Plaintiff’s “pain and suffering” damages. As recognized by the Payne court,

“there is no logical or experiential correlation between the monetary value of medical services required to treat a given injury and the quantum of pain and suffering endured as a result of that injury.”

To this end, the defendants must also be precluded from making any statements, suggestions or arguments that the jury must base their damage award for Plaintiff's “pain and suffering” on the amount of past medical care and/or amount of past loss of income Plaintiff had following the collision. The evidence at trial will be that Plaintiff was injured in the collision. It would, therefore, be improper and prejudicial to Plaintiff if Defendants are permitted to argue, infer or suggest that “pain and suffering” damages be “anchored” to the past medical expenses incurred, and/or the past loss of income after the collision that is the subject of this action.

Therefore, both the mention of and/or introduction of any past medical bills and/or past lost wages into evidence and any suggestion of or argument based on the past medical bills and/or past lost wages must not be allowed. Simply put, it is very prejudicial, confusing and unfair for Defendants to discuss or put into evidence Plaintiff’s past medical expenses and/or past lost income when Plaintiff waives making a claim for past medical expenses and/or past lost wages.

Plaintiff asks for an order that the Defendants not raise the matter in the presence of the jury.

**\_\_\_Granted \_\_\_ Denied**

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing was served by mail this 23rd day of May, 2018, upon:

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Paul Kouri

1. *Denco Bus Lines v. Hargis,* 1951 OK 11, 204 Okla. 339, 229 P.2d 560, 561. [↑](#footnote-ref-1)
2. 22 Am. Jur. 2d Damages § 392 (2010). [↑](#footnote-ref-2)
3. *E.g., Walker v. Forrester*, 1988 OK 102, 764 P.2d 1337; *Moore v. Burlington Northern Railroad Co*., 2002 OK CIV APP 23, 41 P.3d 1029; *Neuner v. Clinkenbeard*, 466 F.Supp. 54, 55 (W.D.Okla. 1978). [↑](#footnote-ref-3)