IN THE COURT OF APPEALS OF THE STATE OF OREGON

SUGAR COHENS,

Plaintiff-Appellant,

vs.

DONALD MCGEE,

Defendant-Respondent.

Multnomah County Circuit Court
Case No. 0406-05826
CA No. A131253

BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL

Appeal from the Judgment of the Circuit
Court for Multnomah County

The Honorable Marilyn Litzenberger, Judge

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I. Statement of Amicus' Interest.

The Oregon Association of Defense Counsel ("OADC"), in response to this court's invitation, submits this amicus brief in aid of the court's task of analyzing and determining the correct rule of law in this matter. Although OADC is not related to any parties in this matter and has no interest of its own in this proceeding, the court's decision may affect interests of parties represented by OADC's members in this and other cases, both now and in the future.

II. Questions Presented on Appeal.

This case raises the subject of medical bill write-offs – "bills" for which no party is liable – in the context of the following questions:

1. Are written-off medical bills recoverable by an injured party as economic damages?
2. Are written-off medical bills the type of benefits that may be deducted from an award of damages pursuant to ORS 31.580, the collateral benefits statute?

No appellate court in Oregon has provided definitive guidance on those issues, and trial courts have reached varying conclusions. Considering the increasing frequency with which this issue arises, litigants would benefit from greater clarity as to the treatment of medical bill write-offs under Oregon law.[1]

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[1] For example, the case of *White v. Jubitz*, CA No. A128617, currently briefed and awaiting oral argument before this court, presents nearly identical issues.

III. Summary of Argument.

Medical bill write-offs are fictitious losses that are not recoverable as economic damages by an injured party. In Oregon, economic damages are defined by statute as "objectively verifiable *monetary losses*" and include "reasonable charges necessarily *incurred* for medical, hospital, * * * and other health care services." ORS 31.710(2)(a) (emphasis added). Medical bill write-offs are neither "monetary losses" nor "incurred" by an injured party because nobody is liable to pay them. Therefore, written off sums do not constitute economic damages recoverable in bodily injury actions. The trial court correctly held that plaintiff could not recover medical bill write-offs as damages.

Alternatively, medical bill write-offs were properly deducted from the damages award in this case because they were collateral benefits under ORS 31.580.

IV. Argument.

A. Medical bill write-offs are fictitious expenses for which no party is or will be liable.

A "medical bill write-off" is the difference between the amount actually paid to a health care provider in full satisfaction of the parties' obligations, and a higher amount identified in the provider's billings. The higher amount can be analogized to the "sticker price" of a new car, which some purchasers might pay but by no means is the minimum amount the car dealer is willing to accept.

Write-offs occur primarily in the context of third-party payment arrangements, where an insurer or a government program pays for the injured party's medical expenses. In many instances, contractual arrangements between health care providers

and insurers specify the amounts insurers will pay for various health care services, and limit providers' ability to seek additional compensation from insureds or anyone else. Thus, the limitations on reimbursement typically pre-exist any given injury, health care services, or billing for those services. In return for limitations on reimbursement amounts, health care providers often become part of a preferred provider system that increases the flow of patients with secure payment arrangements.[2]

The Medicare and Medicaid systems differ from private insurance in many respects, but share the two key attributes described in the preceding paragraph: the government pays participating health care providers according to pre-existing, prescribed reimbursement rates and the health care providers are prohibited from seeking any additional compensation from patients. 42 CFR § 447.15 (Medicaid); 42 USC § 1395cc(a)(1)(A)(i) (Medicare).

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[2] One group of commentators explained:

> "A PPO is an entity that arranges for the provision of health care services by contracting with a panel of health care providers that agree to furnish services at negotiated, discounted fees in return for prompt payment and the marketing advantage of being designated as 'preferred providers.' PPOs control costs by keeping fees down, and sometimes, through limited utilization control. Individuals with PPO health insurance are given financial incentives to utilize the PPO's preferred providers, although they may elect to receive treatment outside of the PPO network, but have higher co-payments and/or deductibles if they do. In 1991 approximately 85,400,000 Americans had access to a PPO as part of their health benefits. Marion Merrell Dow, Inc., Managed Care Digest/PPO Edition 3 (1992)."

Carl H. Hitchner, et al., *Integrated Delivery Systems: A Survey of Organizational Models*, 29 WAKE FOREST L. REV. 273, 276 n 11 (1994).

Thus, for purposes of this analysis, every medical bill write-off shares the following characteristics:

1. the health care provider has produced a bill for services in a certain amount;
2. an insurer or governmental assistance program has paid the health care provider a sum that is less than the amount billed, but which by contract or by operation of law fully satisfies the amount owed;
3. the health care provider is legally prohibited from seeking the difference between the amount billed and the amount paid (the "write-off") from the patient; and
4. no party is or will ever be liable to pay the amount of the write-off.

The amount billed by a medical provider is not necessarily the market value of those services, any more than the "sticker price" of a new automobile is the market value of that vehicle. As the Ninth Circuit Court of Appeals has observed: "in a world in which patients are covered by Medicare and various other kinds of medical insurance schemes that negotiate rates with providers, providers' supposed ordinary or standard rates may be paid by a small minority of patients." *Vencor Inc. v. National States Ins. Co.*, 303 F3d 1024, 1029 n 9 (9th Cir 2002).

In this case, plaintiff's health care providers originally billed $28,423.71 for their services. The state, through the Oregon Health Plan, paid those providers $5,259.42 in full satisfaction of the amount owed. As a result, the health care providers "wrote off" the difference – $23,164.29. It is undisputed that plaintiff is not liable for the written off amount or otherwise obligated to repay that amount to

anyone. Nevertheless, the jury's damages award included compensation for the written off amount.

Defendant disputed plaintiff's right to recover write-offs as damages by filing a post-verdict motion in the trial court pursuant to ORS 31.580, the collateral benefits statute. In the motion, defendant asked the court to reduce the jury's verdict by "the amount of collateral benefits plaintiff received for the payment of her medical bills for which she did not pay premiums and which she was not obligated to repay." ER 3-1. In the alternative, defendant sought an order "limiting plaintiff's recoverable medical expenses to those actually billed, as opposed to the total amount of the medical bills before they were discounted." ER 3-1.

Defendant's alternative approaches to medical bill write-offs are related but analytically distinct. The logical place to begin an analysis of medical bill write-offs in a typical case is with the question of whether write-offs are cognizable damages in a negligence claim. If write-offs are not cognizable damages and the trial court properly excludes them from the damages awarded at trial, there is no basis for applying the collateral benefits statute to reduce the award by the amount of those write-offs. Accordingly, the discussion below starts with the question of whether write-offs are cognizable damages and is followed by an analysis of write-offs in the context of the collateral benefits statute.

B. The expenses "written off" by plaintiff's health care providers were not recoverable as damages because they were not monetary losses incurred by plaintiff or anyone else.

Absent conduct giving rise to punitive damages, Oregon law limits damages recoverable in negligence actions to the amount necessary to compensate the plaintiff

for the injury suffered. That principle has been codified in ORS 31.710(2), which contains the statutory definitions of economic and noneconomic damages. To constitute economic damages under ORS 31.710(2), medical expenses must be "monetary losses" that are "incurred." Medical bill write-offs satisfy neither of those requirements because no person is liable to pay those amounts. In fact, permitting a plaintiff to recover write-offs as economic damages in a bodily injury case would confer a windfall on the plaintiff that is contrary to the compensatory purpose of Oregon tort law. As further explained in the following paragraphs, this court should hold that write-offs do not constitute economic damages under Oregon law.

1. Under Oregon law, damages for negligence generally are limited to the amount necessary to compensate the plaintiff for the injury suffered.

Medical bill write-offs should be considered in the broader context of Oregon's tort law. In negligence actions, "compensation is the fundamental principle of the law of damages." *Lakin v. Senco Products, Inc.*, 329 Or 62, 73, 987 P2d 463, *clarified on recons*, 329 Or 369 (1999). "For more than a century, the general rule in Oregon in assessing damages has been that a plaintiff should recover only such sums as will compensate a plaintiff for the injury suffered as a result of a defendant's wrong." *Yamaha Store of Bend, Oregon, Inc. v. Yamaha Motor Corp., U.S.A.*, 310 Or 333, 344, 798 P2d 656 (1990), *modified on recons*, 311 Or 88 (1991).

The compensatory purpose of damages is reflected in several legal doctrines applied by Oregon courts. For example, courts consistently interpret the right to recover "reasonable medical expenses" as a right to recover incurred charges, but only to the extent they are reasonable. *See, e.g., Tuohy v. Columbia Steel Co.*, 61 Or 527,

532-33, 122 P 36 (1912) (injured plaintiff may recover expenses for medical treatment, but there must be some evidence that the charges were reasonable). In other words, "reasonableness" is a limit on the amount of charges that can be recovered from a tortfeasor, not a term of aggrandizement. *Cf. Associated Oregon Veterans v. Dept. of Veterans' Affairs*, 308 Or 476, 481, 782 P2d 418 (1989) (state agency entitled to recover reasonable attorney fees by statute limited to the amount actually charged by the Department of Justice, despite possibility that the hours spent "could well have been reasonably billed at a larger amount").

Other doctrines, such as the obligation to mitigate damages and the doctrine of avoidable consequences, further advance the compensatory purpose of damages by limiting a plaintiff's ability to collect for losses that the plaintiff could have avoided by reasonable conduct. *See Blair v. United Finance Co.*, 235 Or 89, 91-92, 383 P2d 72 (1963) (describing the doctrine of avoidable consequences).

Medical bill write-offs are phantom figures that no one has paid and no one owes. Requiring a tortfeasor to pay those amounts in damages is unnecessary to compensate an injured party for a loss. Accordingly, write-offs are not proper items of compensatory damages.

2. Medical bill write-offs are not cognizable damages under ORS 31.710(2).

By statute, compensatory damages in bodily injury actions "are divided into two classes: economic and noneconomic." *DeVaux v. Presby*, 136 Or App 456, 461, 462, 902 P2d 593 (1995). The standards for economic and noneconomic damages are set out in ORS 31.710. See *Benjamin v. Wal-Mart Stores, Inc.*, 185 Or App 444, 472,

61 P3d 257 (2002), *rev den*, 335 Or 479 (2003) (ORS 18.560, *renumbered as* ORS 31.710, "sets out standards for awards of economic and noneconomic damages in civil actions.").

Write-offs do not constitute economic or noneconomic damages under ORS 31.710. No party has argued that medical bill write-offs constitute noneconomic damages such as pain and suffering. The issue in dispute, then, is whether medical bill write-offs are economic damages. The statute defines economic damages in relevant part as follows:

> "'Economic damages' means objectively verifiable *monetary losses* including but not limited to reasonable charges necessarily *incurred* for medical, hospital, nursing and rehabilitative services and other health care services * * *."

ORS 31.710(2)(a) (emphasis added).

The current statutory definition of economic damages is consistent with the measure of damages recognized by the Oregon Supreme Court over 100 years ago: "In estimating damages, it is proper to consider loss of time, money necessarily paid or debts necessarily incurred in curing the bodily injury, and whatever bodily pain it may have caused to the plaintiff." *Oliver v. North Pac. Transp. Co.*, 3 Or 84, 87 (1869). Thus, for over a century, common themes have been present in the standards for measuring damages in the form of medical expenses, including two themes bearing on this case. First, an injured party may only recover amounts "paid" or which constitute a "debt." *Id.* As explained below, that requirement is now captured in ORS 31.710(2)(a) by defining economic damages as objectively verifiable "monetary losses." Second, Oregon law has always required that unpaid medical

expenses, to be recoverable, must be "necessarily incurred." *Oliver*, 3 Or at 87; ORS 31.710(2)(a).

a. Write-offs are not "monetary losses."

The legislature defined "economic damages" as "objectively verifiable monetary losses," but left the latter phrase undefined. *See* ORS 31.710(2)(a). This court has construed half of the phrase, holding that an "objectively verifiable" monetary loss is one "in an amount that is capable of confirmation by reference to empirical facts." *DeVaux*, 136 Or App at 462.

To determine the meaning of "monetary losses," which has not been construed by an Oregon appellate court in the context of ORS 31.710, we first analyze the statutory text in context, giving words of common usage their plain, natural and ordinary meaning. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). "Monetary" and "loss" are words of common meaning and together mean the "failure to keep possession" of "money." WEBSTER'S THIRD NEW INT'L DICTIONARY 1338, 1457 (unabridged ed 2002) ("monetary" is the adjectival form of "money"; "loss" means "failure to keep possession"). In the context of insurance, "loss" also means the "amount of financial detriment caused by an insured person's death or an insured property's damage, for which the insurer becomes liable." BLACK'S LAW DICTIONARY 956 (7th ed 1999).

An amount paid or owed by an injured party or her insurer to a health care provider most certainly is a "monetary loss" in that the payor fails to keep possession of the money that is or will be paid. The same cannot be said of write-offs, which by definition do not involve either a payment or an obligation to pay on the part of an

injured party or insurer. Therefore, write-offs are not "monetary losses" that are cognizable as economic damages.

b. Write-offs are not "incurred" expenses.

To constitute economic damages, medical expenses must be "necessarily incurred." ORS 31.710(2)(a). This court recently held that the ordinary meaning of "incur," in the context of recovering attorney fees under ORS 36.425(4)(b), is to "become liable or subject to." *Anderson v. Wheeler*, 214 Or App 318, ___ P3d ___, 2007 WL 2193195 at *2 (2007), *quoting* WEBSTER'S THIRD NEW INT'L DICTIONARY 1146 (unabridged ed 2002). If a party requests a trial de novo after a court-annexed mandatory arbitration, and does not improve the party's position on the trial de novo, ORS 36.425(4)(b) provides that the party will be taxed the reasonable attorney fees "incurred by the other parties" after the arbitrator's decision was filed. In *Anderson*, an attorney who represented himself in a case that went through mandatory arbitration, a trial de novo and an appeal, sought to recover attorney fees under ORS 36.425(4)(b) for the value of his time spent after the arbitration decision. The attorney submitted a fee petition setting out the amount of time he spent on the matter and the value of that time, had the time been billed. This court denied his petition on the ground that the attorney failed to demonstrate that he "was liable to pay any expenses for his own representation" and, therefore, had not provided a record from which the court could determine that the attorney fees were actually incurred. *Anderson* at *1-3.

Similarly, in the context of an exemption for "incurred" medical expenses from the state's lien on a welfare recipient's recovery from a tortfeasor, this court held that

"incurred" "refers to only those medical, surgical and hospital expenses that the recipient has paid or is legally obligated to pay * * *." *King v. Oregon Dept. of Human Resources*, 142 Or App 444, 449, 921 P2d 1326 (1996).

Other jurisdictions have held that medical bill write-offs are not recoverable as compensatory damages because no party was liable for those expenses. *See, e.g., Hanif v. Housing Authority*, 200 Cal App 3d 635, 640-41, 246 Cal Rptr 192, 195 (1988) (so holding); *Moorhead v. Crozer Chester Med. Ctr.*, 765 A2d 786, 789 (Pa 2001). Plaintiff would be able to point to cases from other jurisdictions holding that medical bill write-offs are compensable as economic damages, but none of those jurisdictions operates under the statutory definition of "economic damages" applicable in Oregon. Moreover, a close reading of most if not all of those cases reveals that those jurisdictions measure economic damages by the "reasonable value" of medical expenses, rather than the reasonable amounts necessarily incurred. *See, e.g., Bynum v. Magno*, 101 P3d 1149, 1158-60 (Haw 2004) (adopting rule that injured party is to recoup "reasonable value" of medical services and is not restricted to recovery of amounts "incurred").

Just as an amount actually paid or owed by an injured party or her insurer to a health care provider is a "monetary loss," it also is "incurred" in that the payor was liable for that amount. That is not true for write-offs, however, for which no party has liability. Therefore, write-offs are not incurred medical expenses that are cognizable as economic damages.

3. Treating write-offs as cognizable damages would contradict the compensatory purpose of Oregon tort law.

The text and context of ORS 31.710 and the century-old treatment of economic damages under Oregon law inescapably lead to the conclusion that medical bill write-offs are not cognizable economic damages in bodily injury cases because they are neither monetary losses nor incurred expenses. Although the analysis should end there, counsel for injured parties have sought to avoid that outcome with appeals to various policy considerations. Those arguments should be rejected for several reasons, but primarily because they contradict the compensatory purpose of Oregon tort law.

For example, plaintiff in this case argues that defendant is seeking to "gain a windfall." Op. Br. at 13. That argument is common in litigation over write-offs, with injured parties defending the windfall they would receive through the recovery of fictitious medical expenses by claiming that it is the defendant who would receive a windfall if not held accountable for those fictitious expenses. The "windfall" argument fails, however, for the simple reason that defendant was not relieved of a debt he was ever obligated to pay. There is no windfall in not paying that which one does not owe.

Only one party is capable of receiving a windfall in the context of medical bill write-offs, and that is a party who is "reimbursed" for debts that do not exist.

A related argument advanced by plaintiff is that "the equities rest with Plaintiff since she should benefit from savings achieved through her OHP health insurance." Op. Br. at 13. In other words, plaintiff claims she would be denied the "benefit of the

bargain" with OHP if she is not permitted to recover written off amounts from defendant. That argument is based on a mistaken understanding of a party's "bargain" with a third party payor. Even if this were a case involving private insurance purchased by an injured party, rather than a case where plaintiff received her "OHP health insurance" at no charge to herself, plaintiff received all the benefits she was entitled to receive from the state medical assistance program. Her medical expenses were paid in full, for the amount her medical care provider was entitled to receive.

The fallacy of plaintiff's logic is evident when one considers an insured person's receipt of medical care for a routine illness, *i.e.*, for a condition not caused by the negligence of someone else. In these circumstances, the insured person has no right to recover cash from the insurance company or anyone else for any amounts written off by the health care provider. Thus, plaintiff does not seek protection of the benefit of her bargain; she is attempting to recover more than she would be entitled to receive through her insurance. Defendant has no legal obligation to provide plaintiff with that windfall.

At the core of plaintiff's arguments is the assumption that defendant would have had to pay more if she had not been enrolled in the Oregon Health Plan. That assumption might be correct, but Oregon tort law is concerned with what did happen, not what could have happened under different circumstances. Every negligence claim is based on the particular fact scenario at issue. That approach to bodily injury law often works to the disadvantage of a tortfeasor, such as application of the "eggshell skull" rule to hold a negligent party responsible for the actual damages sustained by a

plaintiff even if an "average" person would not have been injured to the same extent or injured at all. *See Winn v. Fry*, 77 Or App 690, 693, 714 P2d 269, *rev den*, 301 Or 241 (1986) ("The basic premise regarding damages is that a defendant 'takes a plaintiff as he finds him' * * *.").

If adopted, plaintiff's view of medical bill write-offs would unhinge Oregon tort law from its compensatory purpose by measuring economic damages according to what they could have been, rather than what they actually were. In the process, plaintiffs would receive windfall payments based on the faulty premise that medical expenses should be valued at their "sticker price," rather than the actual amount paid for those services. That approach should be rejected in favor of the common law rule, now codified in ORS 31.710(2)(a), limiting recovery of medical expenses in bodily injury cases to amounts actually paid or for which some party is liable.

For the reasons set out above, the trial court in this case correctly held that the medical bill write-offs were not "incurred" expenses constituting economic damages under ORS 31.710(2)(a).[3]

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[3] Although one might argue in hindsight that a better practice would be to raise the issue of write-offs before or during trial, the write-offs in this case can be deducted from the jury's award in post-trial proceedings without implicating constitutional protections of the right to jury trial because the jury awarded plaintiff all the medical expenses she claimed and the amount of the write-offs appears to be undisputed and therefore not a question of fact. Accordingly, the amounts that were awarded improperly as a matter of law can be deducted while leaving undisturbed the amounts plaintiff was entitled to recover, without intruding upon the jury's fact-finding role.

C. The trial court correctly applied ORS 31.580 to reduce the damages award by the amount of benefits received by plaintiffs.

The collateral source rule, as applied to actions for bodily injury or death, is codified at ORS 31.580:

> "**Effect of collateral benefits.** (1) In a civil action, when a party is awarded damages for bodily injury or death of a person which are to be paid by another party to the action, and the party awarded damages or person injured or deceased received benefits for the injury or death other than from the party who is to pay the damages, the court may deduct from the amount of damages awarded, before the entry of a judgment, the total amount of those collateral benefits other than:
>
> "(a) Benefits which the party awarded damages, the person injured or that person's estate is obligated to repay;
>
> "(b) Life insurance or other death benefits;
>
> "(c) Insurance benefits for which the person injured or deceased or members of that person's family paid premiums; and
>
> "(d) Retirement, disability and pension plan benefits, and federal Social Security benefits.
>
> "(2) Evidence of the benefit described in subsection (1) of this section and the cost of obtaining it is not admissible at trial, but shall be received by the court by affidavit submitted after the verdict by any party to the action."

As discussed in the preceding section of this brief, an injured party should not receive an award of economic damages for the amount of any medical bill write-offs. If that rule is followed, then the collateral benefits statute has no application with respect to those write-offs because they will not be part of the damages awarded.

If the court were to take a different view, holding that medical bill write-offs are recoverable as compensatory damages, the question then becomes whether ORS

31.580 should be applicable to those write-offs. The answer turns on whether the write-offs are a "benefit," as that term is used in the statute. The only definition of "benefit" that makes sense in the context of ORS 31.580 is "financial help in time of sickness, old age, or unemployment * * *." *Webster's at* 204. If the court determines that medical bill write-offs are items of compensatory damages, the court necessarily would have determined that write-offs are "incurred" expenses. It would follow, then, that write-offs secured through a third-party payment arrangement constitute "financial help" from a collateral source to the injured party "in time of sickness." Therefore, the amount of those write-offs should be deducted from the damages award to the extent they are not exempted under ORS 31.580(1)(a)-(d), as the trial court did in this case.

None of the exceptions in ORS 31.580(1)(a)-(d) apply in this case, as set out by defendant in his briefing. It is indisputable that: (a) plaintiff has no obligation to repay the write-offs if recovered from defendant; (b) no life insurance or other death benefits were at issue; and (c) plaintiff paid no premiums for insurance that covered the write-offs. Neither does exception (d) apply, because the government health care benefits she received were from the state's Oregon Health Plan, not from retirement, disability, pension or federal Social Security benefits. Accordingly, the trial court correctly applied the collateral benefits rule to reduce the damages award by the amount of the medical bill write-offs.

V. Conclusion.

The trial court correctly held, as a matter of law, that medical bill write-offs are not cognizable as economic damages because they do not involve the payment of

money or a debt for which a party is liable. If this court holds that medical bill write-offs are recoverable as damages, then the trial court correctly granted defendant's alternative motion pursuant to ORS 31.580 to reduce the damages award by the amount of the write-offs. The trial court judgment should be affirmed.

Respectfully submitted this 28th day of August, 2007.

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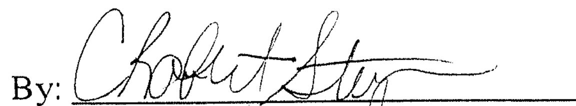
By: 

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 28, 2007, I filed the foregoing BRIEF OF *AMICUS CURIAE* OREGON ASSOCIATION OF DEFENSE COUNSEL by mailing the original and 20 copies, via certified mail, deposited in the United States Mail at Portland, Oregon, enclosed in a sealed envelope with postage prepaid, addressed to:

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