

The following pages are excerpted from:

The Collateral Source Rule: A Compendium of State Law.

©2012. DRI. All rights reserved.

Arkansas

Ryan Younger

Quattlebaum, Grooms, Tull & Burrow PLLC

111 Center Street, Suite 1900

Little Rock, AR 72201

(501) 379-1700

ryounger@qgtb.com

RYAN YOUNGER is a litigation attorney at Quattlebaum, Grooms, Tull & Burrow PLLC. His practice focus is business and complex commercial litigation. Mr. Younger graduated as the top-ranked student in his law school class at the University of Arkansas School of Law. Prior to joining Quattlebaum, Grooms, Tull & Burrow, Mr. Younger served as a law clerk to the Honorable Robert T. Dawson, United States District Court for the Western District of Arkansas.

A. Collateral Source Rules

1. Is Plaintiff generally permitted to recover the costs of third-party payments made by insurers for medical or psychological treatment?

Yes. Under Arkansas law, a defendant is prohibited from presenting evidence of benefits received by a plaintiff from a source wholly independent of the defendant. *Younts v. Baldor Elec. Co., Inc.*, 832 S.W.2d 832, 834 (Ark. 1992); see also *Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135, 142 (Ark. 2009). Evidence of a collateral benefit is admissible only if it is relevant to a purpose other than mitigating the defendant's damages. *Shipp v. Franklin*, 258 S.W.3d 744, 747 (Ark. 2007).

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

Arkansas recognizes contractual, equitable, and statutory subrogation. *S. Farm Bureau Cas. Ins. Co. v. Tallant*, 207 S.W.3d 468, 471 (Ark. 2005). However, Arkansas employs a strict made-whole doctrine in which the insured must recover his or her total damages before any right to subrogation for medical expenses arises. *Id.* at 472; *Franklin v. Healthsource of Arkansas*, 942 S.W.2d 837, 840 (Ark. 1997). This rule limits the utility of subrogation and dictates in favor of express contractual provisions. *Am. Pioneer Life Ins. Co. v. Rogers*, 753 S.W.2d 530, 533 (Ark. 1988).

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

Yes. Both discounted and gratuitous medical treatments are within the scope of Arkansas's collateral source rule. *Montgomery Ward & Co., Inc. v. Anderson*, 976 S.W.2d 382, 385 (Ark. 1998).

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

Arkansas courts have not addressed this issue. However, a rule governing the rights of charitable providers would likely mirror the principles governing insurer subrogation rights.

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

No. All benefits received from collateral sources are treated identically under Arkansas law. *Montgomery Ward*, 976 S.W.2d at 383-84; *McMullin v. United States*, 515 F. Supp. 2d 904, 908 (E.D. Ark. 2007) (holding collateral source rule applies to receipt of Medicaid benefits).

a. If so, what are the differences?

N/A.

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

The common law collateral source rule represents the current status of Arkansas law. *Johnson*, 308 S.W.3d at 142.

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

A windfall recovery benefits the plaintiff. *Bell v. Estate of Bell*, 885 S.W.2d 877, 880 (Ark. 1994).

B. Value of Recovery

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

- a. Amount actually paid by the third-party provider.
- b. Amount actually billed by the third-party provider.
- c. “Reasonable value” of medical services provided.

A plaintiff is entitled to recover the reasonable expense of necessary medical treatment. Arkansas Model Jury Instructions—Civil, AMI 2204 (2012 ed.). To make this showing, a plaintiff can present evidence of the amount billed by a third-party provider. *Blissett v. Frisby*, 458 S.W.2d 735, 742 (Ark. 1970); *see also* Ark. Code Ann. §16-46-107.

d. Other

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

The question of whether the cost of necessary medical treatment represents a reasonable expense is for the jury to decide. *Blissett*, 458 S.W.2d at 742.

a. If a fixed figure, is it at the amount actually paid or billed? Something else?

N/A.

b. If a question of fact for the jury, is the jury allowed to consider the following?

(1) The amount actually paid for the services?

No. This consideration is inconsistent with the collateral source rule. *Montgomery Ward*, 976 S.W.2d at 385.

(2) The amount billed for the services?

Yes. The amount billed for medical services is routinely considered by the jury. *Kay v. Martin*, 777 S.W.2d 859, 861 (Ark. 1989).

(3) Provider testimony on the value of their services as compared to billed amounts?

Treating doctors may testify about the reasonableness and necessity of the amounts billed for medical treatment. Likewise, a defendant has the general right to show the unreasonableness or unnecessary nature of medical expenses incurred by a plaintiff. *Blissett*, 458 S.W.2d at 742.

(4) Expert testimony on accuracy of provider billing rates?

Arkansas courts have not addressed the issue of expert opinion regarding the difference between the billed rate and the actual rate paid. However, medical experts may opine about the reasonableness and necessity of the amounts billed for medical treatment. Likewise, a defendant has the general right to show the unreasonableness or unnecessary nature of medical expenses incurred by a plaintiff. *Blissett*, 458 S.W.2d at 742; *see also Grant v. Meek*, 2002 WL 432881, *1 (Ark. Ct. App. March 20, 2002) (noting jury’s consideration of expert testimony that the treatment provided to the plaintiff was unnecessary).

(5) The fact that a third-party payor (a/k/a insurance company) has already paid the bill?

No. This consideration is inconsistent with the collateral source rule. *Patton v. Williams*, 680 S.W.2d 707, 708 (Ark. 1984).

(6) Any other factors?

Under the Arkansas Code, expert testimony is not required to show that medical charges were reasonable and necessary. Ark. Code Ann. §16-46-107.

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

No. Collateral source evidence is generally inadmissible. *Montgomery Ward*, 976 S.W.2d at 385.

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

Yes. The windfall received by a plaintiff is justified by the rationalization that any double recovery resulting from the payment of benefits by a collateral source should inure to an innocent plaintiff rather than a tortfeasor. *E. Texas Motor Freight Lines, Inc. v. Freeman*, 713 S.W.2d 456, 462 (Ark. 1986).

C. Use of Specials at Trial

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

Arkansas courts have not prohibited the use of the billed value of medical treatment as a basis for non-economic damages. Appellate courts often review the reasonableness of a damages award for pain, suffering, and mental anguish by comparing it to the plaintiff's medical expenses. *See, e.g., Vaccaro Lumber v. Fesperman*, 267 S.W.3d 619, 623 (Ark. Ct. App. 2007) (holding jury's award of more than ten times medical expenses and lost wages to be unreasonable). Likewise, the reasonableness of an award of punitive damages is based—*inter alia*—on comparison to the plaintiff's compensatory damages. *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361 (Ark. 2003).

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

Arkansas courts have not specifically addressed this issue. However, to the extent evidence of the amount paid for medical treatment conflicts with the collateral source rule, evidence that the amount paid was less than the amount billed would be inadmissible.

D. Constitutional Issues

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

Yes. The Arkansas Supreme Court declared the Arkansas legislature's attempt to abrogate the collateral source rule—by limiting a plaintiff's presentation of evidence for medical damages to sums actually paid by or on behalf of the plaintiff—unconstitutional. *Johnson*, 308 S.W.3d at 142. Specifically, the Supreme Court found that the legislative action violated the separation-of-powers doctrine under the Arkansas Constitution by encroaching on the Supreme Court's rulemaking authority. *Id.*

2. Do you see any basis under your State constitution to challenge “price spread” rules that currently exist?

Under Arkansas law, the “spread” is the difference between the reasonable expense of necessary medical treatment and the amount paid. AMI 2204. While a plaintiff can present the billed value of medical treatment, a defendant can present evidence that medical treatment was unnecessary or unreasonably priced. *Blissett*, 458 S.W.2d at 742. The limitation of a plaintiff’s recovery to the reasonable expense of necessary medical treatment weighs against a constitutional challenge.