STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0806

David Swanson,
Respondent,

vs.

Rebecca Brewster, et al.,
Appellants.

Filed March 3, 2009
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-07-4159

Wilbur W. Fluegel, Fluegel Law Office, 150 South 5th Street, Suite 3475, Minneapolis, MN 55402; and

Mark S. Genereux, Genereux Law Office, 101 East 5th Street, Suite 800, St. Paul, MN 55101 (for respondent)

Kay Nord Hunt, Reid R. Lindquist, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South 8th Street, Minneapolis, MN 55402 (for appellants)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellants challenge the district court's determination of a collateral-source offset for past medical expenses following a jury's award of damages to respondent. Appellants argue that under the collateral source statute, Minn. Stat. § 548.36, subd. 2 (2006), they are entitled to a full offset of respondent's past medical expenses, including amounts the medical providers wrote off. We affirm.

FACTS

Respondent David Swanson was injured when his motorcycle collided with a car driven by appellant Rebecca Brewster. Respondent incurred medical expenses in the amount of $62,259.93. His health-care insurer, HealthPartners, Inc., paid his medical providers $17,643.76 in full satisfaction of his medical expenses. It is undisputed that respondent is not required to pay any portion of the amounts his medical providers wrote off pursuant to their contracts with HealthPartners.[1]

Respondent sued appellants to recover damages for the injuries he sustained in the accident. The only trial issue was the extent of respondent's damages directly caused by the accident. The jury awarded respondent damages of $38,000 for past pain and suffering, $4,230 for past wage loss, $62,259.30 for past medical expenses, and $30,300 for future pain and suffering.

[1] Appellants, through their automobile insurer, purchased HealthPartners' subrogation rights in order to "tak[e] the subrogation issue out of the case."

Following the jury verdict, appellants moved the district court to reduce the award of past medical expenses by both the amount HealthPartners paid and the amount by which the medical providers discounted their bills. The district court denied appellants' motion and instead determined that appellants were entitled to a collateral-source offset only in the amount HealthPartners actually paid on respondent's behalf. The district court further reduced the offset by the amount that respondent paid for premiums and deductibles in the two years prior to the accrual of this action. The district court entered judgment for respondent. This appeal follows.

D E C I S I O N

The sole issue on appeal is whether the collateral source statute, Minn. Stat. § 548.36 (2006), entitles appellants to an offset of both the amounts HealthPartners paid and the expenses respondent's medical providers wrote off pursuant to their insurance contracts.[2] Statutory construction and the application of statutes to undisputed facts present questions of law, which this court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998); *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

Under the common-law collateral-source rule, the fact that a plaintiff's medical expenses were paid pursuant to a contractual obligation did not prevent the plaintiff from recovering this item of damages from a defendant. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990). The legislature enacted Minn. Stat. § 548.36 in 1986 to

[2] Appellants agree that the amounts respondent paid for health insurance premiums and deductibles are not subject to a collateral-source offset.

"abrogate a plaintiff's common law right to be over-compensated and . . . prevent double recoveries in many circumstances by requiring the deduction from the verdict of certain benefits received by a plaintiff." *Id*. The legislature's primary purpose is a legitimate one—preventing double recovery by plaintiffs. *Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 614 (Minn. 1988); *Buck v. Schneider*, 413 N.W.2d 569, 572 (Minn. App. 1987) (purpose of the collateral source statute is to prevent "windfalls by plaintiff at the expense of defendants").

The collateral source statute provides, in pertinent part:

> Subd. 1. Definition. For purposes of this section, "collateral sources" means payments related to the injury or disability in question made to the plaintiff, or on the plaintiff's behalf up to the date of the verdict, by or pursuant to . . .
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> . . . .
>
> (3) a contract or agreement . . . to provide, pay for, or reimburse the costs of hospital, medical, dental or other health care services[.]
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> . . . .
>
> Subd. 2. . . . [W]hen damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. If the motion is filed, . . . the court shall determine:
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> (1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted[.]
>
> . . . .
>
> Subd. 3. . . . (a) The court shall reduce the award by the amounts determined under subdivision 2, clause (1)[.]

Minn. Stat. § 548.36 (2006). The collateral source statute does not define "payment."

The supreme court has never addressed the issue of whether medical expenses charged but written-off by the medical providers constitute collateral sources that must be deducted from a damage award under the collateral source statute. We have considered the issue in several cases and we turn to our own jurisprudence for guidance.

This court first addressed how write-offs are treated under the collateral source statute in *Mikulay v. Dial Corp.*, No. C9-89-1711, 1990 WL 57530, at *1 (Minn. App. May 8, 1990). There, the district court reduced the jury award of damages by more than $68,000, the amount appellant's treating hospital was required to write off in accordance with Medicare regulations. The appellant argued that such write-offs are not "payments" within the meaning of the collateral source statute. 1990 WL 57530, at *3. We rejected the appellant's claim, noting that the "write-off was made on appellant's behalf" and she "certainly received a benefit from the services provided by [the hospital]." *Id.* In affirming the district court, we concluded that "[a]llowing appellant to receive the medical services at no cost and recover the cost of the services from respondent would result in a double recovery and contravene the purpose of the statute." *Id.*

We addressed this issue again in *Foust v. McFarland*, 698 N.W.2d 24, 27 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). Foust sustained severe injuries as a result of a collision with the appellants' truck. 698 N.W.2d at 27. The jury awarded substantial damages to Foust, and the appellants sought multiple collateral-source offsets. *Id.* at 29. The parties agreed to an offset for payments made by Foust's health insurer, and the appellants requested an additional offset for amounts billed but discounted by the

medical providers pursuant to their agreements with the health insurer—in other words, the gap between the amount billed and amount paid. *Id*.

On appeal, we rejected this argument, relying primarily on *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108 (Minn. 2002), in which the supreme court held that a no-fault insurer was not entitled to an offset for medical provider write-offs made pursuant to medical care insurance contracts. *Id*. at 35-36. Although we observed that *Stout* involved the Minnesota No Fault Automobile Insurance Act rather than the collateral source statute, we found that the two statutes have similar purposes. *Id.* at 36. We concluded that the appellants in *Foust* were not entitled to deduct the write-offs because "[t]hat amount was never paid, but rather represents an amount which the medical insurance providers billed Foust but did not attempt to collect pursuant to Foust's employer's medical plan."[3] *Id*.

Contemporaneous with *Foust*, we specifically held in *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. App. 2005), *review denied* (Minn. Aug. 24, 2005), that the collateral source statute does not apply to the gap between the amount of the medical bills and the discounted amount paid by the health insurer because the gap is not a "payment" under the statute. Tezak was injured when he was struck by the appellants' automobile. Tezak incurred medical expenses and later died of unrelated causes. 698 N.W.2d at 39. Tezak's health insurer paid $32,000 to satisfy the medical bills which exceeded $100,000. *Id.* The trustee for Tezak's heirs purchased the health insurer's subrogation

[3] The dissent in *Foust* stated that "[t]his court should not add to the surreal world of healthcare billing by giving the discounted portion of a bill asset status. I would limit recovery to what is payable. We cannot afford the luxury of windfalls." 698 N.W.2d at 37 (Minge, J., dissenting).

rights and initiated an action against the appellants for special damages, including the full amount of the medical expenses billed to Tezak. *Id*. The district court determined that the trustee could claim the full amount of medical expenses billed. *Id.*

On appeal, the appellants argued that under general principles relating to compensatory damages, the trustee's recovery should be limited to damages for which a person has sustained actual losses and that a party should not receive double recovery for damages. *Id*. at 39-40. Without expressly defining the term "payment" within the context of the collateral source statute, we affirmed the district court, finding that the gap amount "was not a payment made to anyone" and therefore not a collateral source. *Id.* at 41. We cited our decision in *Smith v. Am. States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999), in which we held that amounts not yet received because an insurance company denied or discontinued payment of medical expense benefits are not "payments," to support our conclusion that discounts do not constitute payments. *Id.* at 42.

We further analyzed the meaning of "payment" under the collateral source statute in *Davis v. St. Ann's Home*, No. A06-1968, 2008 WL 126607, at *5 (Minn. App. Jan. 15, 2008). *Davis* involved significant write-offs that Davis's medical providers made pursuant to their Medicare contracts. We turned to a dictionary for guidance on the meaning of "payment" and "pay," stating that "[t]he dictionary definition of payment is 'an amount paid' and pay is defined as 'to give money to in return for goods or services rendered.'" 2008 WL 126607, at *5 (quoting *The American Heritage Dictionary of the*

English Language 1291-92 (4th ed. 2000)).[4] We concluded that, because "no money was paid or exchanged when the medical providers wrote-off" a portion of Davis's medical expenses, "the [collateral source] statute does not apply." *Id.* (citing *Tezak*, 698 N.W.2d at 41). Because the collateral source statute did not apply to the write-offs, we held Davis was entitled to receive double recovery under the common law.[5]

Appellants acknowledge *Foust* and *Tezak*, but argue that our decisions in both cases are inconsistent with *Mikulay* and fail to appropriately analyze the meaning of "payment" within the collateral source statute. Appellants urge us to depart from *Foust* and *Tezak*, and they contend that under the plain meaning of the statute, the gap between the amount the medical providers billed respondent and the amount HealthPartners paid to fully satisfy the bills constitutes a "payment" or amount "paid for the benefit of the plaintiff or . . . otherwise available to the plaintiff as a result of losses." Minn. Stat. § 548.36, subd. 2(1).

In support of their argument, appellants cite a case in which the Florida Supreme Court held that "contractual discounts fit within the statutory definition of collateral sources." *Goble v. Frohman*, 901 So. 2d 830, 833 (Fla. 2005). Similar to the Minnesota statute, Florida's collateral source statute defines "collateral sources" as "any payments

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[4] As appellants in this case point out, we did not, in *Davis*, reference the third entry in the *American Heritage Dictionary* that defines "pay" as "[t]o discharge or settle (a debt or obligation)."

[5] We reached the same conclusion in *Fischer v. W. Nat'l Mut. Ins. Co.*, No. A07-1895, 2008 WL 3290064, at *4 (Minn. App. Aug. 12, 2008) (holding collateral source statute inapplicable to gap between the amount of medical bills and the discounted amount paid by the insurer).

made to the claimant, or made on the claimant's behalf." *Id.* at 832. The *Goble* court held that "payment" includes the discharge of a debt or obligation. *Id.* at 833. Appellants urge us to follow this analysis, as we did in a different context in *Raddatz v. Gustafson Fin. Group Ltd.*, where we defined "payment" as "'the performance of a duty, . . . or discharge of a debt . . . where the money or other valuable thing is tendered and accepted as extinguishing the debt or obligation in whole or in part.'" No. C5-93-1127, 1993 WL 515806, at *2 (Minn. App. Dec. 14, 1993) (quoting *Black's Law Dictionary* 1016 (5th ed. 1979)).

We recognize the logic in appellants' assertion that the discharge of a debt may function in the same way as an actual expenditure of funds for purposes of the collateral source statute. We also note the Florida appellate court's expressed concern that permitting a plaintiff to recover damages for medical expenses for which she will never be held responsible "completely undermines the purpose of the [collateral source] Act by requiring insurers to pay damages based on a billing fiction, especially when the insurers will be sure to pass the cost for these phantom damages on to Floridians." *Goble v. Frohman*, 848 So. 2d 406, 410 (Fla. Dist. Ct. App. 2003).

We also recognize the public policy the common-law collateral-source rule advances. The common-law rule reflects the fact that a "tortfeasor's responsibility to compensate for all harm that he causes [is] not confined to the net loss that the injured party receives." *Duluth Steam Coop. Ass'n v. Ringsred*, 519 N.W.2d 215, 217 (Minn. App. 1994) (quoting Restatement (Second) of Torts § 920A(2) (1979)).

The legislature's failure to define "payment" or "paid" in Minnesota's collateral source statute has created uncertainty and led to inconsistent decisions in this court. The doctrine of stare decisis directs us to adhere to our prior published decisions to promote stability in the law. *State v. DeShay*, 645 N.W.2d 185, 189 (Minn. App. 2002), *aff'd*, 669 N.W.2d 878 (Minn. 2003). Because we addressed the issue presented here in our published decisions in *Tezak* and *Foust* and expressly determined that write-offs are not subject to deduction under the collateral source statute, we affirm the district court.

Affirmed.