ERISA, Anti-subrogation, and Collateral Sources

January 12, 2021

6:00 p.m. – 7:30 p.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

CT: 1.0 CLE Credits (General)
NY: 1.0 CLE Credits (AOP)

Table of Contents

LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer's conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

ERISA, Anti-subrogation, and Collateral Sources (SIL210112)

Agenda

1. What are collateral sources (10-15 mins)
    a. 52-225a (collateral source recovery)
    b. 52-225b (defining collateral sources)
    c. How are collateral source reductions treated in CT (Madsen v. Gates, 85 Conn. App. 383, 390 n.4, 857 A.2d 412, 418 (2004))
2. Subrogation rights in CT (10-15 mins)
    a. Define subrogation
    b. 52-225c – CT's anti-subrogation statute covers insures
3. ERISA 29 USC 1001 et seq (10-15 mins)
    a. Definition 29 USC 1002
    b. Employer-sponsored health plans
    c. ERISA pre-emption – preempts state law (e.g. CT anti-subrogation statute)
    d. ERISA health policies typically contain contractual right to subrogation
4. *Marciano* (Conn. 2016) (10-15 mins)
    a. No collateral source reduction
5. *Kelly v Annunziata* Non-ERISA health policy with contractual right of subrogation, pre-empted by CT anti-subrogation statute
6. Q&A (10 mins)

JOHN C. PITBLADO

Shareholder
Hartford
860.392.5024

jpitblado@carltonfields.com

John Pitblado has extensive experience representing the insurance industry – with a focus on commercial, financial, title, and cyber lines – from complex claim investigations, to coverage and other corporate litigation, including class action, ERISA, bad faith, statutory unfair insurance and trade practices, RICO, fraud, and misrepresentation claims. John also has experience handling regulatory matters, including market conduct examinations and complaints before state insurance regulatory authorities.

In addition, John specializes in commercial premises liability defense and indemnity issues, particularly for the sports and entertainment and educational institution industries. John has handled numerous high profile, high-value matters for concert and sports venues, prep schools, colleges, and universities.

John regularly handles cases before Connecticut's state and federal trial and appellate courts, including matters on the complex litigation docket, and in bankruptcy court. In addition, he handles cases in numerous other state and federal trial and appellate courts as pro hac vice counsel, in pretrial proceedings, at trial, and on appeal. His extensive experience also includes alternative dispute resolution. He has represented insurance companies and other commercial clients in numerous private and court-annexed mediations, appraisals, and arbitrations.

John is a member of the firm’s Insurance Industry Group, Property Casualty, Real Property Litigation, and Privacy and Cybersecurity practice teams. He counsels clients, speaks, and writes on a range of insurance issues, and is an editor of the firm’s property casualty and reinsurance blogs.

John has been recognized for his pro bono work, including civil rights matters, educational outreach in underserved communities, and representation of minor children subject to neglect and abuse petitions brought by the Connecticut Department of Children and Families (DCF) in Connecticut’s juvenile courts. Since 2013, John has served on the board of directors of Lawyers for Children America Inc., a nonprofit

Credentials

Education:

- University of Connecticut School of Law (J.D., 2003)
  - Associate Editor, *Connecticut Law Review*
- University of Vermont (B.A., 1999)

Admissions:

- Connecticut

organization providing legal representation to children subject to DCF proceedings.

John is co-chair of the firm's national Cannabis Group, with an emphasis on insurance issues in the cannabis space.

Experience

- *Daconto v. Howard*, 68 Conn. L. Rptr. 3, 2018 WL 7821676 (Conn. Super. Ct. Sept. 19, 2018) (granting summary judgment to insured client on premises liability claim arising from soccer-related traumatic brain injury claim).
- *Mason v. Liberty Mutual Ins. Co.*, 64 Conn. L. Rptr. 809, 2017 WL 3481533 (Conn. Super. Ct. July 12, 2017) (granting motion to strike all counts against insurer staff counsel law firm on bad faith/subrogation/assignment of legal malpractice claim).
- *Snyder v. ACORD Corp.*, No. 1:14-cv-01736, 2016 WL 192270 (D. Colo. Jan. 15, 2016), *aff'd*, 684 F. App'x 710 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 392 (Oct. 30, 2017).
- *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998 (8th Cir. 2016) (amicus) (drafted brief on behalf of amicus ACLI in support of prevailing party in excessive fee 401(k) dispute between plan sponsor and insurer)
- *Bozelko v. Webster Bank, N.A.*, 123 A.3d 1250 (Conn. App. Ct. 2015), *cert. denied*, 128 A.3d 954 (Conn. 2015).
- *Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364 (6th Cir. 2015) (drafted brief on behalf of amicus ACLI in support of prevailing party in participant denial of benefits disability claim)
- *Chen v. Hopkins Sch., Inc.*, 86 A.3d 482 (Conn. App. Ct. 2014).
- *Merrimon v. Unum Life Ins. Co. of Amer.*, 758 F.3d 46 (1st Cir. 2014) (amicus counsel in support of appellant/cross-appellee/prevailing party insurer in retained asset account class action against service provider/insurer).
- *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905 (7th Cir. 2013) (amicus counsel in support of appellee/prevailing party plan service provider in 401(k) fee dispute).
- *Nationwide Life Ins. Co. v. Haddock*, 460 F. App'x 26 (2d Cir. 2012) (amicus counsel in support of appellant/prevailing party plan service provider in 401(k) fee dispute).
- *Nw. Mut . Life Ins. Co. v. Gil*, No. 3:07-cv-00303, 2009 WL 276086 (D. Conn. Feb. 5, 2009), *aff'd*, 351 F. App'x 515 (2d Cir. 2009).
- *Phones Plus, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 3:06-cv-01835, 2008 WL 11376616 (D. Conn. Sept. 30, 2008) (denying plaintiff's motion to dismiss counterclaims in 401(k) fee dispute between plan sponsor and service provider).
- *Royal Indem. Co. v. King*, 512 F. Supp. 2d 117 (D. Conn. 2007).
- *Nichols v. Salem Subway Rest.*, 912 A.2d 1037 (Conn. App. Ct. 2006).

- *Waldman v. Jayaraj*, 874 A.2d 860 (Conn. App. Ct. 2005), *cert. denied*, 882 A.2d 680 (Conn. 2005).

Insights

- "Sixth Circuit Weighs in on Coverage for Marijuana-related Property Loss," *PropertyCasualtyFocus*, Carlton Fields (October 29, 2018) (October 5, 2018)
- "Eleventh Circuit Reverses Order Compelling Arbitration Between Non-Signatories," Carlton Fields Reinsurance Focus Blog (September 26, 2018).
- "New Opinions From Second and Sixth Circuit Courts Rock Phishing Loss Coverage Landscape," *PropertyCasualtyFocus*, Carlton Fields (July 16, 2018)
- "Eleventh Circuit Affirms No Coverage Under Computer Fraud Provision of Insurance Policy," *PropertyCasualtyFocus*, Carlton Fields (May 11, 2018)
- "Fidelity Coverage for Social Engineering Scams: The Ninth Circuit Upholds an Authorized Use Exclusion," *PropertyCasualtyFocus*, Carlton Fields (April 20, 2018)
- "Phishing for Fidelity Coverage," Carlton Fields (February 2, 2018)
- "Eleventh Circuit to Weigh in on ‘Business Email Compromise’ Coverage Under Fidelity Bond," Expect Focus Life Insurance (June 2017).
- Co-Author, "As TCPA Class Actions Soar, Issues Emerge in TCPA Coverage for Claims," PropertyCasualtyFocus (December 7, 2015).
- Co-Author, "Hot Topics in Cyber Coverage," Carlton Fields on Cyber Podcast (October 2015).
- Property Casualty Focus Blog
- Co-Author, "Cyber Risk as a Regulatory Issue: Tales of Encryption," PropertyCasualtyFocus (February 2015).
- Co-Author, "Life Insurer Prevails in First Circuit Appeal in ERISA Class Action Challenging Retained Asset Accounts," ABA Tort Trial & Insurance Practice (October 2014).
- Co-Author, "First Circuit Finds for Life Insurer in ERISA Class Action Challenging Retained Asset Accounts to Pay Life Insurance Benefits," Carlton Fields Client Alert (July 2014).
- Co-Author, "Connecticut District Court Again Certifies Nationwide Class in 401(k) Revenue Sharing Case," ExpectFocus, Vol. IV (Fall 2013).

- Co-Author, "Seventh Circuit Rejects Novel DOL Position in Affirming Summary Judgment for Retirement Plan Service Provider in 'Revenue Sharing' Class Action," Carlton Fields Client Alert (May 2013).
- Co-Author, "Second Circuit Vacates Class Certification Order in Long-Running ERISA Retirement Plan 'Revenue Sharing' Case," Carlton Fields Client Alert (February 2012).

Speaking Engagements

- "A Practical Look at Directors and Officers Insurance," Connecticut Legal Conference, Hartford, CT (June 11, 2018)
- "Have You Been Robbed? Fidelity and Crime Insurance in a Nutshell," Connecticut Bar Insurance Association, Hartford, CT (May 8, 2017)
- "Cyber Security, Wire Transfers, and Insurance," The Regulatory Fundamentals Group (February 28, 2017)
- "Cybersecurity Issues for the Contract Examiner and Market Conduct Examiner," Career Development Seminar and Regulatory Skills Workshop, Insurance Regulatory Examiners Society, Scottsdale, AZ (August 8, 2016)
- "Latest Developments in Cyber Risk," IRI Cybersecurity Forum 2016, Washington, D.C. (July 19, 2016)
- "Fifty Shades of Indemnity," Connecticut Valley RIMS Chapter Meeting, Hartford CT (October 14, 2015)
- "What Insurance Lawyers Need to Know About Claims Handling Software," ExecSense Webinars (July 7, 2011)
- "What Insurance Lawyers Need to Know About the New Generation of Pollution Legal Liability and Related Environmental Insurance Policies and the Potential for Litigation Over Duty to Defend Under These Policies," ExecSense (December 3, 2010)
- "The Instant Impact on Insurance Lawyers of *Baker v. National Interstate Insurance Co.* (Cal. Ct. App. Jan. 11, 2010) on Products and Completed Hazards Exclusions and Negligent Service Claims," ExecSense (February 5, 2010)

Recognition

- Connecticut Super Lawyers, *Super Lawyers Magazine* (2019–2020)
- New England Rising Stars, Insurance, *Super Lawyers Magazine* (2009–2013)
- Pro Bono Honor Roll, *Connecticut Lawyer* (2010)

Professional & Community Involvement

- American Bar Association
  - Co-editor, *Class Action and Derivative Suits Quarterly Newsletter*

- Connecticut Bar Association
  - Insurance Law Committee (2010–present)
  - Insurance Law Executive Committee, Secretary (2019-present)
  - Co-Chair, Appellate Committee, Young Lawyers Section (2007–2009)
- Lawyers for Children America Inc.
  - Board of Directors (2013–present)
  - Interim Treasurer (2020-present)

Court Admissions

- U.S. Court of Appeals, First Circuit
- U.S. Court of Appeals, Second Circuit
- U.S. Court of Appeals, Tenth Circuit
- U.S. District Court, District of Colorado
- U.S. District Court, District of Connecticut
- U.S. Supreme Court

§ 52-225a. Reduction in economic damages in personal injury and wrongful death actions for collateral source payments.

Connecticut Statutes

Title 52. CIVIL ACTIONS

Chapter 900. COURT PRACTICE AND PROCEDURE

Current through the 2020 Third Special Session

§ 52-225a. Reduction in economic damages in personal injury and wrongful death actions for collateral source payments

(a) In any civil action, whether in tort or in contract, wherein the claimant seeks to recover damages resulting from (1) personal injury or wrongful death occurring on or after October 1, 1987, or (2) personal injury or wrongful death, arising out of the rendition of professional services by a health care provider, occurring on or after October 1, 1985, and prior to October 1, 1986, if the action was filed on or after October 1, 1987, and wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant, the court shall reduce the amount of such award which represents economic damages, as defined in subdivision (1) of subsection (a) of section 52-572h, by an amount equal to the total of amounts determined to have been paid under subsection (b) of this section less the total of amounts determined to have been paid, contributed or forfeited under subsection (c) of this section, except that there shall be no reduction for (A) a collateral source for which a right of subrogation exists, and (B) the amount of collateral sources equal to the reduction in the claimant's economic damages attributable to the claimant's percentage of negligence pursuant to section 52-572h.

(b) Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment. For purposes of this subsection, evidence that a physician or physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, an emergency medical technician, optometrist, or advanced practice registered nurse, accepted an amount less than the total amount of any bill generated by such physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse, or evidence that an insurer paid less than the total amount of any bill generated by such physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or

advanced practice registered nurse, shall be admissible as evidence of the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment.

(c) The court shall receive evidence from the claimant and any other appropriate person concerning any amount which has been paid, contributed or forfeited, as of the date the court enters judgment, by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he has received as a result of such injury or death.

Cite as Conn. Gen. Stat. § 52-225a

Source:
(P.A. 85-574, S. 1; P.A. 86-338, S. 4; P.A. 87-227, S. 4; P.A. 07-217, S. 191; P.A. 10-36, S. 9; P.A. 12-142, S. 2; P.A. 14-37, S. 2.)
History. Amended by P.A. 14-0037, S. 2 of the Connecticut Acts of the 2014 Regular Session, eff. 10/1/2014.
Amended by P.A. 12-0142, S. 2 of the the 2012 Regular Session, eff. 10/1/2012.
Amended by P.A. 10-0036, S. 9 of the February 2010 Regular Session, eff. 7/1/2010.

Case Notes:

Cited. 203 Conn. 607; 206 Conn. 16; 212 C. 217; 214 Conn. 1; 218 C. 531. Collateral source payments under section are applicable to determine amount of damages but not to determine amount of coverage. 225 C. 566. Cited. 229 C. 99. Application and interpretation of section discussed; deemed not unconstitutionally vague. 231 Conn. 77. Cited. 235 C. 107. Intent to prevent plaintiffs from obtaining double recoveries. 248 C. 409. Only payments specifically corresponding with items of damages included in jury's verdict are to be deducted as collateral sources from the economic damages award, not total amount paid by collateral sources for the medical bills, and burden is on defendant to submit interrogatories to jury concerning specific items of damages included within verdict. 269 C. 1. When any right of subrogation exists, whether in full or in part, for a collateral source, section precludes trial court from ordering any collateral source reduction at all. 324 C. 70.

Cited. 29 Conn.App. 484; 31 Conn.App. 584; Id., 806; 33 CA 99; 34 CA 444; 37 CA 784; 38 Conn.App. 685; 46 CA 76; 47 CA 365. Statute requires reduction of economic damages by the total of all collateral source payments received, less the total of premiums paid to secure the collateral sources. 77 CA 238.

Subsec. (a):

When the amount of collateral sources received by plaintiff is less than or equal to the amount of reduction in claimant's economic damages attributable to claimant's own negligence, there shall be no collateral source reduction in the award. 55 CA 150.

Subsec. (b):

Trial court did not improperly allow evidence of collateral sources to be admitted to jury. 102 CA 93.

Subsec. (c):

Where the only collateral source benefit that plaintiff received as result of automobile accident was medical payments under plaintiff's automobile insurance policy, plaintiff was entitled to offset the collateral source reduction of her economic damage award by the cost of her medical payments coverage only. 263 C. 93.

Connecticut Statutes

Title 52. CIVIL ACTIONS

Chapter 900. COURT PRACTICE AND PROCEDURE

Current through the 2020 Third Special Session

§ 52-225b. "Collateral sources" defined

For purposes of sections 52-225a to 52-225c, inclusive: "Collateral sources" means any payments made to the claimant, or on his behalf, by or pursuant to:

(1) Any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others; or

(2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services. "Collateral sources" do not include amounts received by a claimant as a settlement.

Cite as Conn. Gen. Stat. § 52-225b

Source:
(P.A. 85-574, S. 2; P.A. 86-338, S. 5; P.A. 87-227, S. 5.)

Case Notes:

Cited. 203 Conn. 607; 214 Conn. 1; 218 Conn. 531; 225 Conn. 566; 231 Conn. 77; 235 Conn. 107. Trial court improperly applied provisions adopted in P.A. 87-227 instead of those adopted in P.A. 86-338. 247 C. 638. Social Security disability benefits are not a collateral source. 259 C. 325.

Cited. 31 Conn.App. 806; 38 Conn.App. 685; 46 Conn.App. 76.

Debts voluntarily forgiven by medical care provider and amounts paid by employer pursuant to wage continuation plan are not collateral sources. 49 CS 7.

Connecticut Statutes

Title 52. CIVIL ACTIONS

Chapter 900. COURT PRACTICE AND PROCEDURE

Current through the 2020 Third Special Session

§ 52-225c. Recovery of collateral source benefits prohibited

Unless otherwise provided by law, no insurer or any other person providing collateral source benefits as defined in section 52-225b shall be entitled to recover the amount of any such benefits from the defendant or any other person or entity as a result of any claim or action for damages for personal injury or wrongful death regardless of whether such claim or action is resolved by settlement or judgment. The provisions of this section shall apply to insurance contracts issued, reissued or renewed on or after October 1, 1986.

Cite as Conn. Gen. Stat. § 52-225c

Source:
(P.A. 85-574, S. 3; P.A. 86-338, S. 6; P.A. 87-227, S. 6; P.A. 93-297, S. 24, 29.)

Case Notes:

Cited. 214 Conn. 1; 218 Conn. 531; 231 Conn. 77; 235 Conn. 107.

Cited. 46 Conn.App. 76. Subrogation provision of health insurance policy deemed unenforceable due to conflict with statutory prohibition against recovery by insurers of collateral source payments. 47 Conn.App. 365.

Page 412

857 A.2d 412 (Conn.App. 2004)

85 Conn.App. 383

William A. MADSEN et al.

v.

Michael G. GATES et al.

No. 23917.

Appellate Court of Connecticut.

October 5, 2004.

Argued April 23, 2004

Page 413

[Copyrighted Material Omitted]

Page 414

[Copyrighted Material Omitted]

Page 415

Brian W. Prucker, Stafford Springs, for the appellants (plaintiffs).

Frank J. Szilagyi, Hartford, with whom, on the brief, was Josephine A. Spinalla, for the appellees (defendants).

DRANGINIS, FLYNN and BISHOP, Js.

FLYNN, J.

The plaintiffs, William A. Madsen and Jacqueline Madsen, appeal from the judgment rendered following the trial court's denial of their motion to set aside the jury's verdict. The jury returned its verdict after a trial was held on the negligence action brought by the plaintiffs against the defendants, Michael G. Gates and the town of Enfield (town). [1] The jury found the defendants liable to William Madsen, and awarded him both economic and noneconomic

damages, but found that the defendants were not liable to Jacqueline [85 Conn.App. 386] Madsen and returned a verdict in favor of the defendants. The plaintiffs claim on appeal that the court improperly (1) permitted the jury to consider the amount of payments made by collateral sources that were accepted by William

Page 416

Madsen's medical providers in making its determination of the fair, just and reasonable value of the medical services rendered to the plaintiff, (2) failed to set aside inconsistent jury verdicts on negligence arising out of the same incident, (3) found that the failure of the defendants to file a notice pursuant to General Statutes § 7-465(a) was waivable, (4) ruled that the plaintiffs' counsel could not argue a specific amount of future economic damages with respect to William Madsen although evidence of such damages was Before the jury and (5) abused its discretion with respect to certain evidentiary rulings. We affirm the judgment of the trial court.

The following facts reasonably could have been found by the jury and are relevant to our resolution of this appeal. The vehicle in which the plaintiffs were riding was rear-ended by the truck that Gates was operating when Gates' foot slipped off the brake while the vehicles were stopped at a red light. Gates admitted that his foot had slipped off the brake of the truck he was operating, which caused him to strike the plaintiffs' vehicle and push it into the vehicle in front of it. At the time of the accident, Gates, an employee of the town, was operating a truck owned by the town in the course of his employment.

Both plaintiffs refused medical attention at the scene of the accident, but claimed to have experienced pain later that evening. Jacqueline Madsen claimed to have injured her neck, and William Madsen claimed to have injured both of his knees and his left shoulder. The plaintiffs were treated by various physicians for their injuries. William Madsen's medical bills totaled approximately $53,500, of which approximately $11,200 had [85 Conn.App. 387] been paid by Medicare and his insurance provider by the time of trial.

The plaintiffs brought an action against Gates sounding in negligence and against the town pursuant to General Statutes § 52-183 and in compliance with § 7-465. The case was tried Before a jury, which returned a verdict in favor of William Madsen, finding the defendants liable for his injuries and awarding him economic damages in the amount of $11,315 and noneconomic damages in the amount of $1000. As to Jacqueline Madsen's claims, the jury returned a verdict in favor of the defendants. The plaintiffs timely filed a motion to set aside the verdict on December 11, 2002, arguing that the verdict was against the evidence, inadequate and contrary to law. The court denied the plaintiffs' motion on January 27, 2003. This appeal followed.

I

The plaintiffs first claim that the court improperly permitted the jury to consider the amount of

payments made by third parties on behalf of William Madsen that were accepted by his medical providers, rather than the full amount that was billed, in making its determination of the fair, just and reasonable value of the medical services rendered to William Madsen. [2] The plaintiffs argue that the determination of the fair and reasonable value of medical services requires expert testimony regarding usual and customary fees, and not simply evidence of what amount the medical providers accepted as payment. We conclude that the plaintiffs have not preserved this issue for our review.

The plaintiffs contend that their counsel "objected to the ruling and the trial judge gave a directive from the bench that he would make collateral source deductions

Page 417

[85 Conn.App. 388] after the jury had determined what was the fair and reasonable value of the medical services related to the accident." The record indicates that the plaintiffs' counsel objected when the defendants' counsel asked William Madsen whether he had paid his medical bills "out of his own pocket." The objection pertained to the specific issue of collateral sources. The court then gave a curative instruction regarding the collateral source rule in this state. [3] The defendants' counsel subsequently sought to admit into evidence William Madsen's interrogatory responses relating to his medical bills. The plaintiffs' counsel stated that he did not have an objection to the admission of the complete interrogatories. The court stated, "Well, these are interrogatories and [the defendants' counsel is] offering that portion in which [he] got answers as to what bills were paid." The court asked if there was an objection to this admission, to which the plaintiffs' counsel replied, "No objection to that, Your Honor." The exhibit contained information regarding third party payments.

Shortly thereafter, the court gave another instruction to the jury, stating: "[T]he numbers you heard, the mere numbers is what we are told was billed for services. The lower number is what [William Madsen] has said was paid, and there is no indication that there is a further bill coming. To the extent that any money was [85 Conn.App. 389] actually paid, I am going to take it off as I already told you. To the extent that there might be a difference between the bill and the payment that was extended, you're going to have to decide what the fair, just and reasonable value of services rendered in this case." The court then inquired whether either side wanted to object to that instruction. The plaintiffs' counsel stated, "Well, I think we, it opened up who paid for them and all that is collateral." The court responded, "Well, that is different. I am asking is there an objection limited to the instructions." The plaintiffs' counsel stated, "Just my same objection, Your Honor."

Although the plaintiffs' counsel generally objected to the revelation of the existence of collateral sources to the jury, which we agree was not proper, the court gave several curative instructions informing the jury that it was not entitled to make any deductions for payments made by third parties. The plaintiffs' counsel did not object, however, to the admission of the interrogatory responses as a full exhibit, which detailed the payments made on behalf of William

Madsen by Medicare and also by his insurance agent, Allstate Insurance Company.

Regardless, the plaintiffs' claim in this appeal is not that the court improperly permitted payments from collateral sources to be revealed to the jury, but rather that it improperly instructed the jury that "the amount of payment tendered by a third party ... is admissible not as to the value of the claim for economic loss by [William Madsen] in a negligence

Page 418

claim, but rather [is] admissible as to what is the fair, just and reasonable value of those services." The plaintiffs' counsel, however, voiced no objection to the instruction on those grounds at trial, although he had been given the opportunity. When the court asked the plaintiffs' counsel whether he objected to its instruction, he replied that he objected on the ground that it opened up the issue of payments from collateral sources in that it revealed [85 Conn.App. 390] who paid for them. He did not object on the ground that the jury would be permitted to consider that lesser amounts were paid by third parties. In other words, he objected to who paid, rather than what was paid. He also did not object on that ground to the court's comprehensive jury charge, in which the court repeated its earlier instruction to the jury regarding the determination of the reasonable value of medical services. The plaintiffs also point to the defendants' closing argument, in which the defendants' counsel submitted his theory that the reasonable value of the medical services was what the medical provider had been paid. However, the plaintiffs did not object to this statement either.

"In order to preserve a claim related to the giving of or failure to give a jury instruction, a party is obligated either to submit a written request to charge covering the matter or to take an exception immediately after the charge is given." *Mauro v. Yale-New Haven Hospital,* 31 Conn.App. 584, 591, 627 A.2d 443 (1993). "If counsel follows the latter course, he or she must state distinctly the matter objected to and the ground of objection." (Internal quotation marks omitted.) *Pestey v. Cushman,* 259 Conn. 345, 373, 788 A.2d 496 (2002). "Proper preservation of claims for appellate review requires that the trial court [be] effectively ... alerted to a claim of potential error while there [is] still time for the court to act." (Internal quotation marks omitted.) *United Technologies Corp. v. East Windsor,* 262 Conn. 11, 31, 807 A.2d 955 (2002).

The plaintiffs were required to make a proper objection to the instructions at trial on the same ground that they now raise on appeal. The failure to do so renders this claim unpreserved, and, therefore, we decline to review it. [4]

[85 Conn.App. 391] II

The plaintiffs next claim that the court improperly denied their motion to set aside the jury's verdict because the verdict was inconsistent and the jury could not "reasonably and legally" have reached its conclusion. We disagree.

As a preliminary matter, we note the standard of review. "The court is vested with wide discretion in such matters,

and we will not disturb the court's decision unless it has abused that discretion.... Generally, the court should not set aside a verdict where the jury reasonably could have found as it did from the evidence Before it. The court's refusal to set aside a verdict is entitled to great weight, and every reasonable presumption should be indulged in favor of its correctness.... On appeal, the evidence in the record is to be considered in a light most favorable to the parties who prevailed at trial." (Citations omitted; internal quotation marks omitted.) *Mojica v. Benjamin,* 64 Conn.App. 359, 361-62, 780 A.2d 201 (2001).

The plaintiffs' principal argument in support of this claim is that, even if the jury found that Jacqueline Madsen had not suffered any damages as a result of the accident, the jury could not have found that the defendants were liable only to William Madsen because Gates had admitted he was at fault. The defendants [85 Conn.App. 392] contend that the verdicts were not inconsistent. We agree.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury.... If a plaintiff cannot prove all of those elements, the cause of action fails." (Citation omitted; internal quotation marks omitted.) *Roach v. Ivari International Centers, Inc.,* 77 Conn.App. 93, 99, 822 A.2d 316 (2003). As the defendants correctly note in their brief to this court, if the jury concluded that Jacqueline Madsen had not suffered damages, or Gates' negligence was not the proximate cause of her injuries, then her common-law negligence claim necessarily would fail. Jacqueline Madsen testified that she had been injured in an automobile accident less than a year prior to the accident at issue in this case. Whether the injuries she claimed to have sustained as a result of the accident in the present case were proximately caused by Gates' negligence was called into question.

The jury reasonably could have found that William Madsen had proven that some of his injuries were proximately caused by the defendants' negligence, but that Jacqueline Madsen did not prove that her injuries were so proximately caused. The court did not abuse its discretion by denying the plaintiffs' motion to set aside the verdict. [5]

[85 Conn.App. 393] III

The plaintiffs next claim that the court improperly denied their objection to the defendants' untimely notice of compliance with § 7-465(a). They argue that the town denied liability, whereas Gates admitted liability, and, therefore, the untimeliness of the notice prevented them from filing a motion for a directed verdict. We disagree.

General Statutes § 7-465(a) provides in relevant part that "[i]n any such action the municipality and the employee may be represented by the same attorney if the municipality, at the time such attorney enters his appearance, files a statement with the court, which shall not become part of the pleadings or judgment file, that it will pay

any verdict rendered in such action against such employee." In the present case, the town filed a § 7-465(a) statement after both defendants had filed separate appearances. Even if we assume without deciding that the court improperly found that the § 7-465(a) notice was waivable, the plaintiffs have failed to show how they were prejudiced by the defendants' untimely filing of that notice. The only cause of action that the plaintiffs were permitted to bring against the town was under § 7-465, which holds the town liable for indemnification for Gates' negligence. Except for indemnification actions, which are expressly authorized, the statute does not permit a separate cause of action to be brought against the town. Furthermore, Gates' admission that his negligence caused the collision could not be extended to constitute an admission by him that he had caused the injuries that the plaintiffs claimed arose from the collision. Therefore, the plaintiffs would not have been entitled to receive a directed verdict as to the town prior to a determination of Gates' liability for the claimed injuries and resulting damages.

"Where the claim of error on appeal is nonconstitutional, the burden is on the appellant to show that the [85 Conn.App. 394] error was harmful." *State v. Beckenbach,* 198 Conn. 43, 49, 501 A.2d 752 (1985). The plaintiffs have not met this burden. We therefore reject this claim.

IV

The plaintiffs next claim that the court improperly refused to allow their counsel to argue a specific amount of future economic damages in his closing arguments even though such evidence was Before the jury. The plaintiffs also contend that the court improperly prevented their counsel from establishing a claim for worry or fear of future medical treatment for William Madsen.

A

The plaintiffs argue that the amount of William Madsen's future damages was admitted into evidence and, therefore, the court improperly prevented the plaintiffs' counsel from discussing this amount in his rebuttal closing argument. We disagree.

As a preliminary matter, we note that "[i]n general, the scope of final argument lies within the sound discretion of the court ...." (Internal quotation marks omitted.) *State v. Rios,* 74 Conn.App. 110, 119, 810 A.2d 812 (2002), cert. denied, 262 Conn. 945, 815 A.2d 677 (2003). However, it is well established that "in closing argument Before the jury, counsel may comment upon facts properly in evidence and upon reasonable inferences drawn therefrom." (Internal quotation marks

omitted.) *Raybeck v. Danbury Orthopedic Associates, P.C.,* 72 Conn.App. 359, 369, 805 A.2d 130 (2002). Further, General Statutes § 52-216b (a) provides, in relevant part: "In any civil action to recover damages resulting from personal injury ... counsel for any party to the action shall be entitled to specifically articulate to the trier of fact during closing arguments, in lump sums or by mathematical formulae, the amount of past and [85 Conn.App. 395] *future* economic and noneconomic damages claimed to be recoverable." (Emphasis added.) "It is only when compliance with § 52-216b would require a trial court to disregard its constitutional obligation to guarantee a fair trial to the litigants that the statutory mandate may be deemed to be superseded by that higher law." *Bleau v. Ward,* 221 Conn. 331, 336-37, 603 A.2d 1147 (1992).

The following facts are relevant to our analysis. William Madsen's physician,

Page 421

Carmine Ciccarelli, submitted a letter to the plaintiffs' counsel, in which he stated: "In my estimation, [William Madsen] *may need* a conversion to a revision total knee replacement based on this loosening at some point in time with an overall expected cost of somewhere between $30,000 and $35,000 in terms of hospital and rehabilitation costs." (Emphasis added.) This letter was included in Dr. Ciccarelli's medical records, which was admitted into evidence as a full exhibit. The text of the letter also was read aloud to the jury. Dr. Ciccarelli did not testify at trial.

The plaintiffs argue that because this evidence had been admitted without objection and read to the jury, their counsel was entitled to argue a specific monetary amount of future damages in his closing argument. When the plaintiffs' counsel broached the plaintiffs' claim for future damages in his closing argument, the defendants' counsel objected on the ground that the plaintiffs' counsel was "misstating what the evidence was that was presented to the jury with regard to future [damages]." The court responded, "I will allow him [to argue] generally about future [damages]. There's been no specific numbers as to the future." The plaintiffs' counsel resumed his argument and mentioned not only that William Madsen may have to undergo future surgeries but also stated the cost of the surgeries as estimated by Dr. Ciccarelli. The defendants' counsel again made [85 Conn.App. 396] an objection, which the court sustained, noting: "We specifically discussed [that] those numbers were not in the case, counsel. The objection is sustained and the jury should disregard that reference."

We recognize that "[i]n awarding future medical expenses, a jury's determination must be based upon an estimate of reasonable probabilities, not possibilities.... Such evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable." (Citation omitted; internal quotation marks omitted.) *Seymour v. Carcia,* 24 Conn.App. 446, 449, 589 A.2d 7 (1991), aff'd, 221 Conn. 473, 604 A.2d 1304 (1992), overruled in part on other grounds, *Marchetti v. Ramirez,* 240 Conn. 49, 688 A.2d 1325 (1997). Further, "where a claim is made for future damage, it is restricted to such as is shown to have been caused by the wrongful act and which, with reasonable probability, will result from it in the future." *Mourison v. Hansen,*

128 Conn. 62, 66, 20 A.2d 84 (1941).

Dr. Ciccarelli's letter established only that William Madsen *may* need to undergo knee surgery at some point in time. The standard for admission of future economic damages is that it must be shown to be reasonably probable that the plaintiff will require such treatment in the future as a result of the defendant's conduct. The only evidence presented by William Madsen regarding the need for any future medical treatment was the letter written by Dr. Ciccarelli, which stated only that William Madsen *may* need knee surgery in the future. We also note that the plaintiffs' complaint, which frames the claims to be proved at trial, alleged only that the plaintiffs " *may* continue to incur expenses for hospitalization, medical care and treatment ...." (Emphasis added.) The evidence presented was inadequate to establish that there was a reasonable probability, as contrasted with a reasonable possibility, that William Madsen would incur future economic damages. [85 Conn.App. 397] Therefore, even if we were to determine that the court improperly precluded the plaintiffs' counsel from arguing specific monetary figures in his closing argument regarding future damages, we conclude that this was harmless because the jury

Page 422

could not reasonably have concluded that those damages should have been awarded.

B

The plaintiffs also contend that the court improperly prevented their counsel from establishing a claim for worry or fear of future medical treatment for William Madsen. The plaintiffs cite *Petriello v. Kalman,* 215 Conn. 377, 389-90, 576 A.2d 474 (1990), in support of this claim. They argue that *Petriello* establishes that a claim for fear associated with future consequences of an injury is proper even when there is only a possibility, rather than a probability, that such consequences will develop. We need not decide this particular claim, however, because the plaintiffs attempted to show only Jacqueline Madsen's worry or fear about William Madsen's future medical treatments, and, further, because neither William Madsen nor Jacqueline Madsen alleged this claim in their complaint.

Our Supreme Court has held that "a plaintiff may recover for the fear of future medical treatment and disability, as distinguished from a recovery for the future disability itself, even if there is only a possibility that such future treatment or disability will take place." *Goodmaster v. Houser,* 225 Conn. 637, 645, 625 A.2d 1366 (1993). To recover for fear of future medical treatment, a plaintiff must first present evidence that he has experienced such a fear. William Madsen did not testify that he had experienced any worry or fear regarding possible future medical treatments. Although the plaintiffs argue that they attempted to lay a foundation for this claim through the testimony of Jacqueline Madsen, [85 Conn.App. 398] her testimony pertained only to *her* worry or fear about her husband's future surgeries, which does not establish that William Madsen had similar fears.

It is also significant that the plaintiffs did not make an allegation of fear of future medical treatments in their complaint through a claim for emotional distress. In *Petriello,* our Supreme Court emphasized the fact that the plaintiff had made an emotional distress claim in her complaint. *Petriello v. Kalman,* supra, 215 Conn. at 389, 576 A.2d 474. The *Petriello* court specifically noted that "evidence concerning an increased risk of injury, although insufficient to justify an award of damages based upon the occurrence of that injury in the future, may ... be presented to the jury as evidence of emotional distress." Id. Because "[t]he failure to include a necessary allegation in a complaint precludes a recovery by the plaintiff under that complaint"; (internal quotation marks omitted) *Pergament v. Green,* 32 Conn.App. 644, 655, 630 A.2d 615, cert. denied, 228 Conn. 903, 634 A.2d 296 (1993); we conclude that the plaintiffs were not entitled to recover damages for fear of future medical treatments. See *Sampiere v. Zaretsky,* 26 Conn.App. 490, 492-93, 602 A.2d 1037, cert. denied, 222 Conn. 902, 606 A.2d 1328 (1992) (plaintiff's failure to allege in complaint that future medical expenses were anticipated or that she continued to suffer continuing mental pain and anguish precluded recovery for such claims).

V

The plaintiffs finally claim that the court abused its discretion in making improper evidentiary rulings. Specifically, the plaintiffs argue that the court improperly (1) excluded evidence that the town had paid the plaintiffs' property damage bill and (2) admitted into evidence a videotape of William Madsen performing various activities.

[85 Conn.App. 399] The standard of review we apply to a trial court's evidentiary rulings is well settled. Such rulings "are entitled

Page 423

to great deference.... The trial court is given broad latitude in ruling on the admissibility of evidence, and we will not disturb such a ruling unless it is shown that the ruling amounted to an abuse of discretion.... Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial.... In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful.... Finally, the standard in a civil case for determining whether an improper ruling was harmful is whether the ... ruling [likely] would [have] affect[ed] the result." (Citations omitted; internal quotation marks omitted.) *Daley v. McClintock,* 267 Conn. 399, 403, 838 A.2d 972 (2004).

A

The plaintiffs first evidentiary claim relates to the court's ruling that the town's payment of their property damage bill constituted hearsay and was, therefore, inadmissible. The plaintiffs argue that the town's payment of their bill constituted an implied admission of liability, which is an

exception to the hearsay rule.

The plaintiffs cite only an evidentiary treatise in support of their argument. Specifically, the plaintiffs argue that "[t]he payment of property damage by the town of Enfield was an exception to the hearsay rule as an implied admission of liability. (Tait and LaPlante, Handbook of Connecticut Evidence, Second, § 11, 5, 4(e) Consciousness of Liability)." The plaintiffs provide no case law or analysis to support their claim nor do they present any argument on the harmfulness or possible effect of this ruling. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate [85 Conn.App. 400] brief.... Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Connecticut Light & Power Co. v. Dept. of Public Utility Control,* 266 Conn. 108, 120, 830 A.2d 1121 (2003); see also *Advanced Financial Services, Inc. v. Associated Appraisal Services, Inc.,* 79 Conn.App. 22, 43, 830 A.2d 240 (2003). On the basis of the plaintiffs' inadequate analysis of this issue, we deem this claim abandoned and decline to review it.

B

The plaintiffs next claim that the court improperly admitted into evidence a short videotape of William Madsen performing various activities. The plaintiffs argue that the videotape was not a fair and accurate depiction of William Madsen's activities, and the court abused its discretion in admitting it because it was not properly authenticated. We disagree.

"A photograph offered to prove the appearance of ... [something] which cannot itself be inspected by the jury must first be proved accurate. The accuracy sufficient for its admission is a preliminary question of fact to be determined by the trial judge.... Ordinarily ... [a photograph] should be substantiated by testimony that it is a correct representation of the conditions it depicts, and in so far as it is properly so authenticated it becomes evidence of those conditions." (Citation omitted; internal quotation marks omitted.) *Tarquinio v. Diglio,* 175 Conn. 97, 98, 394 A.2d 198 (1978).

In the present case, the individual who videotaped William Madsen testified that it was a fair and accurate representation and that it had not been altered or edited in any way. The plaintiffs' counsel objected to the admission of the videotape on

Page 424

the ground that it was not a fair and accurate depiction of William Madsen's typical day and that the videotape had been edited selectively. [85 Conn.App. 401] The court overruled the objection and found that it had been authenticated and was relevant to show William Madsen's ability to perform certain activities. On the basis of the record, we conclude that the court did not abuse its discretion in admitting the videotape into evidence.

The judgment is affirmed.

In this opinion the other Judges concurred.

Notes:

[1] At oral argument Before this court, the issue was raised as to whether a final judgment had been entered in this case because no collateral source hearing had been held. As this issue called into question the jurisdiction of this court to hear the appeal, we ordered the parties to submit supplemental briefs on the issue. We conclude that there was a final judgment in this case. The defendants waived their right to a collateral source hearing by failing to file a motion for a collateral source reduction within ten days after the verdict was accepted, as required by Practice Book § 16-35.

[2] Because the jury found in favor of the defendants on Jacqueline Madsen's claims, this issue relates only to William Madsen.

[3] The court instructed the jury as follows: "Ladies and gentlemen, Connecticut has what is called [the] collateral source rule. Collateral source is if someone pays money other than the person who is injured. Under some circumstances those payments are subtracted from anything that you could collect in a case like this. But that subtraction is not made by the jury. It's made by the Judge. So after you determine what the fair [and] reasonable value of any services are related to the accident or if somebody has paid part of the bill, after your verdict, I would take any part off. We are not going to go into detail with you about who was paying what nor do we reveal if they have insurance or absence of it. Now, I am going to allow certain testimony about what the bills were but it's not [for] the purpose of you later saying, well, somebody else paid it and we will subtract that. That's for me to do if it's appropriate."

[4] We decline to review the plaintiffs' claim for lack of preservation. However, our opinion should not be considered an imprimatur to use such an instruction in the future unless the evidence shows a windfall recovery would otherwise result because statutory or contractual provisions prevent a medical provider from billing the patient for any uncovered excess, and no subrogation rights against the plaintiff could be exercised for the amount actually paid by the third party payer. The jury should not be permitted to consider the fact that bills are partially paid in determining the reasonable value of medical services. Permitting juries to hear evidence as to partial payment without more could be unfair. For example, evidence that an impoverished individual paid only $10 toward his $10,000 medical bill, without evidence that the medical provider had accepted the $10 as payment in full, would not support an inference that that was all the services were worth. Such an inference clearly would be improper as $10 could not fairly be deemed the reasonable value of those services simply because that was all the patient could afford to pay until that point.

[5] We also note that no special interrogatory was given to the jury. Rather, the verdict form that was provided to it combined the issues of breach of the duty of care constituting negligence and proximate cause, thereby subsuming the issue of proximate cause into the verdict for liability. The jury was instructed to fill out a defendants' verdict form if it found that the defendants were neither liable nor responsible for the plaintiffs' injuries. Conversely, the jury was instructed to fill out a plaintiffs' verdict form if it found that the defendants were both liable and responsible for the plaintiffs' injuries. None of the parties objected to the use of the verdict forms.

---

151 A.3d 1280 (Conn. 2016)

324 Conn. 70

JAMES MARCIANO

v.

DIEGO JIMENEZ ET AL

SC 19547

Supreme Court of Connecticut

December 22, 2016 [*]

Argued October 20, 2016.

Superior Court in the judicial district of New Britain, and tried to the jury before Swienton, J.

SYLLABUS

Pursuant to statute (§ 52-225a [a]), in any civil action where damages have been awarded to compensate a claimant, a trial court shall reduce the amount of such award that represents economic damages by an amount equal to the total amounts determined to have been paid from collateral sources for the benefit of the claimant less the total amount paid by the claimant or on his behalf to secure his right to any collateral source payment, " except there shall be no reduction for . . . a collateral source for which a right of subrogation exists . . . ."

The plaintiff sought to recover damages for personal injuries sustained in a motor vehicle accident caused by the defendants' negligence and, following a trial, the jury awarded the plaintiff economic and noneconomic damages, totaling more than $124,283. The defendants subsequently moved for a collateral source reduction to the award pursuant § 52-225a, claiming, inter alia, that the plaintiff had paid only approximately $1900 toward his medical expenses and the remainder had been paid by his employer's health insurance coverage. The plaintiff objected to any reduction on the ground that § 52-225a precluded a collateral source reduction because a right of subrogation existed. He further claimed that even if such a reduction was appropriate, the defendants had not met their burden of proving that the expenses at issue were deductible collateral sources. During a hearing on the defendants' motion for a collateral source reduction,

the defendants contended that because the plaintiff had presented as evidence correspondence that his employer had an enforceable lien or subrogation rights upon payment of the judgment and that the employer would accept a payment of approximately $6940 in full satisfaction of the right to subrogation, the right of subrogation had been " extinguished." The defendants urged the court to order a collateral source reduction of more than $60,653. The plaintiff countered that the correspondence merely indicated a willingness to accept a lesser amount than full reimbursement in the event of a settlement and did not extinguish the right to subrogation. The court ultimately ordered a collateral source reduction of approximately $24,300 from the jury's award of economic damages and, thereafter rendered judgment for the plaintiff in the amount of approximately $99,983, from which the plaintiff appealed. Held that the trial court improperly ordered a collateral source reduction, this court having strictly construed the language of § 52-225a because it is in derogation of common law and having concluded that the plain and unambiguous language of the statute provides that when a right to subrogation exists, whether in full or in part, a trial court is precluded from ordering any collateral reduction; the legislature, in enacting § 52-225a, sought to achieve an equitable balance between barring plaintiffs from recovering twice for the same loss, on the one hand, and preventing defendants from benefiting from reduced judgments due to collateral source payments, on the other, and this court could not conclude, as contended by the defendants, that the possibility of a windfall for a plaintiff under the circumstances of this case was a bizarre result necessitating consultation of the legislative history of the statute.

Karen L. Dowd, with whom was Brendon P. Levesque, for the appellant (plaintiff).

Christopher P. Kriesen, with whom, on the brief, was Kaelah M. Smith, for the appellees (defendants).

Palmer, Zarella, Eveleigh, McDonald, Robinson and Vertefeuille, Js. VERTEFEUILLE, J. In this opinion the other justices concurred.

OPINION

Page 1281

VERTEFEUILLE, J.

[324 Conn. 71] When a plaintiff receives an award of damages in a civil action for personal injuries, [324 Conn. 72] General Statutes § 52-225a[1] requires the trial court to reduce the award to reflect collateral source payments received by the plaintiff. Section 52-225a makes an exception to the required deduction, however, for collateral source payments for which a right of subrogation, or reimbursement, exists. The sole issue in this appeal is whether § 52-225a precludes the trial court from making any collateral

Page 1282

source reduction, either in full or in part, when a right of subrogation exists. We conclude that it does.

The following facts and procedural history are relevant to the present appeal. The plaintiff, James Marciano, [324 Conn. 73] was injured in a motor vehicle accident and brought a personal injury action against the defendants, Diego Jiminez and Phoenix Limousine Service, LLC.[2] Following trial, the jury returned a verdict in favor of the plaintiff and awarded him $84,283.67 in economic damages and $40,000 in noneconomic damages, for a total of $124,283.67. Subsequently, the defendants moved for a collateral source reduction to the award pursuant to § 52-225a. In their motion and during a hearing before the court, the defendants argued that the economic damages award should be reduced to account for the fact that the plaintiff had paid only $1941.49 toward his medical expenses, and his health insurance coverage had covered the remainder. The plaintiff's health insurance coverage was provided by a self-funded plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. (plan). The plan was offered through his employer, United Parcel Service (UPS), and was managed by Aetna Insurance Company.

In response to the defendants' motion for a collateral source reduction, the plaintiff objected [3] to any reduction on the ground that § 52-225a precludes a collateral source reduction when a right of subrogation exists, as it does in the present case. The plaintiff further claimed that even if a reduction was appropriate under § 52-225a, the defendants had not met their burden of proving that the expenses at issue were deductible collateral sources.[4] See footnote 1 of this opinion.

[324 Conn. 74] The plaintiff provided the court with a copy of the plan[5] and an e-mail to the plaintiff's counsel from an agent on behalf of UPS establishing " [t]hat UPS will have a valid, enforceable lien or subrogation rights upon payment of the judgment . . . ." Another letter from an agent handling the plan's liens further indicated that UPS would accept $6940.19 in full satisfaction of the right of subrogation in the event of a settlement of the case for $120,000. The plaintiff further contended that if the court decided that a reduction was appropriate, the amount of the reduction should be offset by the cost to obtain the collateral source benefits, which was calculated to be $58,042.43.[6]

During the hearing on the defendants' motion for a collateral source reduction,

Page 1283

the defendants argued that the plaintiff's reading of § 52-225a to prohibit any collateral source reduction when a right of subrogation exists is contrary to the purpose of the statute, which is to preclude plaintiffs from obtaining double recoveries. Contending that the letter established an agreement to accept $6940.19 and therefore " extinguished" the right of subrogation, the defendants urged the court to order a collateral source reduction of $60,653.75.[7]

[324 Conn. 75] In response, the plaintiff argued that the letter merely indicated a willingness to accept a lesser amount than full reimbursement in the event of settlement and did not extinguish the right of subrogation. The plaintiff further contended that § 52-225a plainly provides

that if any right of subrogation exists, as it does in the present case, no collateral source reduction may be made.

In its memorandum of decision, the court ordered a collateral source reduction, which it calculated by subtracting the cost to secure the collateral source benefits--$58,042.43--from the payments made to the plaintiff--$82,342.18. This amounted to a collateral source reduction of $24,299.75. To calculate the judgment amount, the court subtracted the collateral source reduction of $24,299.75 from the verdict of $124,283.67. The court then rendered judgment of $99,983.92, plus costs, from which the plaintiff now appeals.[8] He claims that the trial court improperly ordered a collateral source reduction when there was a right of subrogation, in violation of § 52-225a.

In order to address the plaintiff's claim, we must interpret and apply the provisions of § 52-225a. In considering this question of statutory construction, we apply plenary review. *Jones v. Kramer*, 267 Conn. 336, 343, 838 A.2d 170 (2004). Moreover, because we have previously determined that § 52-225a is in derogation of common law; see id., 345-49; it must be strictly construed and may not be " extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction." (Internal quotation marks omitted.) Id., 348. Finally, it is well established that we interpret statutes in accordance with the plain meaning rule and will not consider extratextual evidence of the meaning of [324 Conn. 76] a statute unless the text is ambiguous or would yield an absurd or unworkable result. General Statutes § 1-2z.

We start our analysis with the text of § 52-225a (a), which provides in relevant part that " [i]n any civil action . . . wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant, the court shall reduce the amount of such award which represents economic damages . . . *except that there shall be no reduction for . . . a collateral source for which a right of subrogation exists*. . . ." (Emphasis added.)

The plaintiff contends that the language of § 52-225a is plain and unambiguous and clearly provides that " [i]f there is a right of subrogation, whether for all or part of the collateral source amount, there shall be

Page 1284

no collateral source reduction." We agree. First, in the phrase " a right of subrogation exists," the legislature chose to use the expansive term " a," which commonly means " any." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). This court has interpreted the term " any" to mean " all or every" and has " presume[d] that the legislature, in using the word any to modify [another] term . . . intended that term to be broad, rather than restrictive, in scope." (Internal quotation marks omitted.) *Gipson v. Commissioner of Correction*, 257 Conn. 632, 640, 778 A.2d 121 (2001). Here, the legislature's use of the broad term " a" to modify the term " right," coupled with the lack of any restrictive or qualifying language, supports the plaintiff's contention that if there

is *any* right of subrogation, a reduction is precluded.

Section 52-225a (a) further provides that if there is a right of subrogation for a collateral source, " there *shall be no reduction* " of the damages award. (Emphasis added.) The phrase " *no reduction* " in § 52-225a (a) leaves no doubt that if a right of subrogation exists, the trial court cannot order a collateral source reduction [324 Conn. 77] of any amount. There is no qualifying language to suggest that a partial reduction is appropriate or within the trial court's discretion. The defendants do not dispute that the use of the term " shall" in § 52-225a indicates that the provision is mandatory rather than directory and, thus, precludes a reduction. See *State v. Banks*, 321 Conn. 821, 840, 146 A.3d 1 (2016) (generally, use of term " shall" connotes mandatory command).[9]

In the absence of restrictive or qualifying language, and in view of our mandate to strictly construe the statute, we reject the defendants' claim that § 52-225a requires a partial collateral source reduction even when a right of subrogation exists. As this court has emphasized, " a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) *Cruz v. Montanez*, 294 Conn. 357, 370, 984 A.2d 705 (2009). Construing the language of § 52-225a strictly, as we must, we conclude that when any right of subrogation exists, whether in full or in part, for a collateral source, § 52-225a precludes the trial court from ordering any collateral source reduction at all.

[324 Conn. 78] We are not persuaded by the defendants' claim that such a construction of § 52-225a would lead to the absurd result of a windfall for the plaintiff. Pointing to our decision in *Jones v. Riley*, 263 Conn. 93, 103, 818 A.2d 749 (2003), the defendants argue that the legislature's purpose in adopting § 52-225a was to preclude

double recoveries for plaintiffs. They contend that because the foregoing construction of § 52-225a contravenes this intent and leads to a bizarre result, we must consult the legislative history of § 52-225a to ascertain its meaning. See General Statutes § 1-2z. We disagree.

This court has explained that the legislature, in enacting § 52-225a, sought to achieve an " equitable balance . . . between barring plaintiffs from recovering twice for the same loss, on the one hand, and preventing defendants from benefiting from reduced judgments due to collateral source payments, on the other." (Internal quotation marks omitted.) *Pikulski v. Waterbury Hospital Health Center*, 269 Conn. 1, 7, 848 A.2d 373 (2004). We have also recognized, in discussing the historical underpinnings of the collateral source rule, that " [t]he reason for the [collateral source]

rule . . . is that a windfall ought not to be granted to a defendant . . . [and that] [i]f there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing." (Internal quotation marks omitted.) *Saint Bernard School of Montville, Inc. v. Bank of America*, 312 Conn. 811, 841, 95 A.3d 1063 (2014). In addition, we have emphasized that characterizing " insurance proceeds as pure double recovery overlooks the fact that the plaintiff presumably paid premiums to obtain those proceeds." Id., 841-42. In enacting § 52-225a, the legislature has attempted to achieve an " equitable balance . . . ." *Pikulski v. Waterbury Hospital Health Center*, supra, 7. In view of this history, we cannot conclude that the possibility of [324 Conn. 79] a windfall for a plaintiff is a bizarre result. We therefore reject the defendants' claim that we must consult the legislative history of § 52-225a to determine its meaning.

Applying the provisions of § 52-225a to the facts of the present case, we conclude that the trial court improperly ordered a collateral source reduction. At trial and during argument before this court, the defendants acknowledged that the health insurance plan that covered the plaintiff contains a right of subrogation.[10] In addition, the trial court's memorandum of decision refers to " $6940.19 (amount agreed to accept in satisfaction of UPS' right to reimbursement)," thus acknowledging the existence of a right of subrogation. Under the plain and unambiguous meaning of § 52-225a, the trial court, having found that a right of subrogation exists, improperly ordered a collateral source reduction of the award of economic damages to the plaintiff.

The judgment is reversed and the case is remanded to the trial court with direction to reinstate the original verdict and

Page 1286

to render judgment in accordance with the verdict.

In this opinion the other justices concurred.

Notes:

[*]December 22, 2016, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1]General Statutes § 52-225a provides in relevant part: " (a) In any civil action . . . wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant, the court shall reduce the amount of such award which represents economic damages . . . by an amount equal to the total of amounts determined to have been paid under subsection (b) of this section less the total of amounts determined to have been paid, contributed or forfeited under

subsection (c) of this section, except that there shall be no reduction for (A) a collateral source for which a right of subrogation exists . . . .

" (b) Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment. . . . [E]vidence that an insurer paid less than the total amount of any bill generated by [a provider] . . . shall be admissible as evidence of the total amount of collateral sources which have been paid for the benefit to the claimant as of the date the court enters judgment.

" (c) The court shall receive evidence from the claimant and any other appropriate persons concerning any amount which has been paid, contributed or forfeited, as of the date the court enters judgment, by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he has received as a result of such injury or death."

Under General Statutes § 52-225b, " '[c]ollateral sources' means any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant . . . or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services. 'Collateral sources' do not include amounts received by a claimant as a settlement."

[2]Kevin Bailey was named as a defendant in an apportionment complaint that was withdrawn before trial. He is not a party in the present appeal.

[3]The plaintiff filed an objection and three supplemental objections to the defendants' motion for a collateral source reduction.

[4]Because the plan is subject to ERISA, the plaintiff also argued that a collateral source reduction under § 52-225a was preempted by ERISA. The plaintiff has raised that issue on appeal as well, but we need not consider it because we conclude that the trial court improperly ordered a collateral source reduction under § 52-225a.

[5]The plan provides in relevant part that it includes a " right to seek reimbursement of expenses that are paid by the [p]lan on behalf of you or your covered dependents . . . if those expenses are related to the acts of a third party . . . . The [p]lan may seek reimbursement of these expenses from any recovery you may receive from the third party or another source, including from any insurance proceeds, settlement amounts or amounts recovered in a lawsuit."

[6]The cost of $58,042.43 was comprised of the plaintiff's contribution to the plan of $14,748.24,

UPS' contribution to the plan of $36,354, and the agreement to accept $6940.19 to satisfy the right of subrogation in the event of a settlement of $120,000.

[7]The total figure urged by the defendants was derived from the award of economic damages, $84,283.67, minus $1941.49, the plaintiff's payment toward his medical expenses, minus $6940.19, the amount UPS would accept in full satisfaction of the right to subrogation, and minus $14,748.24, the plaintiff's contribution to the plan. It did not include the $36,354 amount of UPS' contribution to the plan.

[8]The plaintiff appealed to the Appellate Court and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[9]The defendants do not dispute that the term " shall" is mandatory in the phrases " the court shall reduce the amount of such award which represents economic damages," and " there shall be no reduction . . . for a collateral source for which a right of subrogation exists . . . ." General Statutes § 52-225a (a). They argue, however, that in the present case, where the right of subrogation was either " extinguished" or limited to $6940.19, the trial court was required to reduce the economic damages award by the total of the collateral source payments to the plaintiff minus the amount paid to secure that benefit. For the reasons set forth in this opinion, we disagree and conclude that no collateral source reduction was permitted in this case.

[10]We are not persuaded by the defendants' argument that the right of subrogation ceased to exist with the letter indicating that UPS would accept $6940.19 in satisfaction of the right of subrogation. First, the trial court made no such finding. Second, there is no evidence that the plaintiff had agreed to the terms set forth in the letter. Finally, the letter discusses the potential satisfaction of the right of subrogation in the context of a possible settlement. As the facts of this case indicate, there was no settlement and the matter proceeded to trial and verdict.

In addition, we are not convinced by the defendants' alternative argument that because the letter indicated that the right of subrogation would be satisfied with payment of $6490.19, the trial court was required to make a collateral source reduction to the extent that the collateral source payment exceeded that amount. As we have concluded previously in this opinion, § 52-225a does not permit a collateral source reduction, either in part or in full, if there is a right of subrogation.

NO. HHD CV 17-6076135-S	:	SUPERIOR COURT
MICHAEL K. KELLY	:	J.D. OF HARTFORD
VS.	:	AT HARTFORD
JOSEPH R. ANNUNZIATA	:	APRIL 16, 2019

MEMORANDUM OF DECISION RE: COLLATERAL SOURCE SET OFF AND JUDGMENT

General Statutes § 52-225a[1] mandates that economic damages in personal injury cases be reduced by insurance payments, referred to as collateral source payments, except where a right of subrogation exists for such "a collateral source." The motion for collateral source set off

---

[1]General Statutes § 52–225a, entitled "Reduction in economic damages in personal injury and wrongful death actions for collateral source payments," provides in relevant part: "(a) In any civil action ... wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant, the court shall reduce the amount of such award which represents economic damages ... by an amount equal to the total of amounts determined to have been paid under subsection (b) of this section less the total of amounts determined to have been paid, contributed or forfeited under subsection (c) of this section, except that there shall be no reduction for (A) a collateral source for which a right of subrogation exists ....
"(b) Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment. ... [E]vidence that an insurer paid less than the total amount of any bill generated by [a provider] ... shall be admissible as evidence of the total amount of collateral sources which have been paid for the benefit to the claimant as of the date the court enters judgment.
"(c) The court shall receive evidence from the claimant and any other appropriate persons concerning any amount which has been paid, contributed or forfeited, as of the date the court enters judgment, by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he has received as a result of such injury or death."

Under General Statutes § 52–225b, " '[c]ollateral sources' means any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant ... or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services."

cc: Rptr. Judicial Decisions
4/16/19 elp

before the court requires it to determine if a defendant is entitled to a reduction in economic damages for payments made by one insurer – not entitled to subrogation - if the plaintiff's medical bills have also been paid by another insurer that is entitled to subrogation. The court concludes that such a reduction is, under the present facts, mandated by § 52-225a.

The following facts are relevant to this decision. Following the trial of this motor vehicle claim in which the plaintiff, Michael Kelly, sought damages for personal injuries, the jury returned a verdict in favor of the plaintiff against the defendants, Joseph and Karen Annunziata, in the amount of $231,023.28, of which $20,036.28 was awarded for past economic damages. The defendant filed a timely motion for a collateral source reduction pursuant to §52-225a. At the post trial collateral source hearing, the court received evidence that the plaintiffs past medical bills were paid by two sources, a motor vehicle insurance policy containing a medical payments provision issued by the Peerless Insurance Company (the Peerless policy) and a Blue Cross Blue Shield of Rhode Island (Blue Cross Blue Shield policy) self-funded health plan governed by the Employee Retirement Income Security Act of 1974 (ERISA). The parties agree that medical bills in the amount of $12,606.72 were paid pursuant to the Peerless policy and that medical bills in the amount of $516.31 were paid under the Blue Cross Blue Shield policy. The defendant concedes that the Blue Cross Blue Shield policy is in fact an ERISA qualified plan for

which a right of subrogation exists.[2] The parties have also stipulated that the combined amount of premiums paid to secure both sources of benefits was $18,499.98 of which $75 is attributable to the medical payments portion of the Peerless automobile policy.[3] Further facts will be set forth as necessary.

Section 52-225a, et seq., sets forth the statutory scheme by which economic damages in a personal injury action are addressed. In general, economic damages[4] awarded to a plaintiff are to be reduced by accident or tort related medical bills paid by an insurance policy or similar plan. § 52-225a(a). Collateral source payments are in turn subject to offset by amounts paid by or on behalf of the plaintiff or immediate family members to secure "his right to any collateral source benefit which he has received as a result of such injury or death." § 52-225a(c). General

---

[2] At oral argument counsel for the defendants initially asserted that there was a dispute as to whether there was a valid right of subrogation by Blue Cross and Blue Shield. However, counsel later clarified that Blue Cross Shield has a valid right of subrogation and that they are only making a claim for a collateral source reduction for those payments made pursuant to the Peerless policy.

[3] See *Jones v. Riley*, 263 Conn. 93, 818 A.2d 749 (2003) (Automobile accident victim's insurance premiums for medical payments coverage, not the amount paid for the entire automobile policy, constitutes credit against the reduction in economic damages award due to collateral source payments under the medical payments coverage.)

[4] Economic damages are defined in General Statutes § 52-572h(a)(1), incorporated by reference in § 52-225a, as "compensation determined by the trier of fact for pecuniary losses including, but not limited to, the cost of reasonable and necessary medical care, rehabilitative services, custodial care and loss of earnings or earning capacity."

Statutes §52-225c provides in relevant part that "[u]nless otherwise provided by law, no insurer or any other person providing collateral source benefits . . . shall be entitled to recover the amount of any such benefits from the defendant or any other person or entity as a result any claim or action for damages for personal injury..." The basis for the parties disagreement in the present case is found in the provision in § 52-225a(a) that "there shall be no reduction for ...a collateral source for which a right of subrogation exists."

The parties dispute whether the Peerless policy contains a valid claim to subrogation for accident related medical payments. If valid, the medical payments (collateral source benefits) fall within the exception to payments otherwise available to reduce economic damages. Alternatively, the plaintiff asserts that even if no valid right of subrogation exists for the Peerless policy, the plaintiff is entitled to offset the amount by which the economic damages are reduced by premiums paid for both sources of benefits, in the present case $18,499.98. If the plaintiff is correct then there would be no collateral source reduction because the premiums paid for both sources of medical bill payments exceed the amount of the Peerless policy's payments, $12,606.72. In the view of the defendants, the policy does not contain an enforceable subrogation clause and a fair reading of § 52-225a does not entitle the plaintiff to set off the reduction from economic damages for medical bills paid pursuant to the Peerless policy by the amount of premiums paid by or on behalf of the plaintiff to secure the BlueCross Blue Shield benefits.

The court must first resolve whether the Peerless policy contains an enforceable right of subrogation and it concludes that it does not. The parties agree, and the court's review confirms, that the Peerless policy contains provisions providing for subrogation and requiring an insured to reimburse the insurer for medical payments it made out of the proceeds of any third party tort recovery. Peerless policy, PART E – YOUR DUTIES AND RESPONSIBILITIES, § 3. The parties further agreed at oral argument that while the policy was issued in Rhode Island to the plaintiff's father, a Rhode Island resident, the vehicle was provided by the father to the plaintiff who worked in Connecticut, lived in Connecticut, used the vehicle to travel back and forth from work to home and the vehicle was garaged principally in Connecticut. These facts bring the case within the ambit of *Pajor* v. *Town of Wallingford*, 47 Conn. App. 365, 704 A.2d 247 (1997) in which the Supreme Court held Connecticut's collateral source scheme bars a Rhode Island health insurer from recovering medical payments paid to an insured who had subsequently obtained a judgment against a third party tortfeasor. In *Pajor,* the plaintiff, who obtained a verdict against the defendant as a result of a tort related injury, appealed the trial court's conclusion that the subrogation provisions of plaintiff's insurance policy, issued in Rhode Island, was ineffective because it conflicted with the prohibition against recovery of collateral source benefits contained in § 52-225c. *Pajor* v. *Town of Wallingford*, supra, 47 Conn.App. 383. The Appellate Court noted the general rule that the validity and construction of a contract are determined by the law of the place where the contract was made unless it is to have its operative

affect or place of performance in a jurisdiction other than the place where it was entered into. Rhode Island, then as now, had no prohibition against subrogation or reimbursement from an insured's third party tort recover. The court found controlling the fact that the plaintiff resided in Connecticut and that was where all of his medical treatment was provided. Id.

This court is mindful that the evidence in the present case demonstrates that the Peerless policy was made in Rhode Island. However, the plaintiff's use of the motor vehicle involved in the accident was principally in Connecticut, where he lived, and a review of the medical bills and reports, revealed that all of the plaintiff's medical care and treatment was provided in Connecticut. Accordingly, Connecticut law is applicable and § 52-225c operates to bar a contractual right to either subrogation or to reimbursement of collateral source benefits from a third party tort recovery. Section 52-225a would thus nominally require a reduction from economic damages for medical payments made pursuant to the Peerless policy.

The plaintiff asserts, however, that the collateral source reduction is not permissible because the Blue Cross Blue Shield policy provides for a valid right of subrogation. In the plaintiff view, the plain language of the statutory scheme compels this conclusion. The plaintiff relies principally on *Marciano* v. *Jimenez*, 324 Conn. 70, 151 A.3d 1280 (2016) which held that § 52-225a precludes a trial court from making any collateral source reduction, either in full or in part, when a right of subrogation exists. Id. 73. In *Marciano* the plaintiff's medical bills were paid by an ERISA funded health plan whose contractual right to subrogation under federal law

preempted the collateral source reduction pursuant to § 52-225a. After a plaintiff's verdict, the trial court reduced the verdict by $24,299.75 which represented the difference between $82,342.18, the payments made for medical bills on behalf of the plaintiff, and $58,042.43, which represented the amounts paid by or on behalf of the plaintiff to secure the collateral source benefits. The Supreme Court reversed the trial court holding that § 52-225a, a statute in derogation of common law, must be strictly construed and it clearly and unambiguously provides that where there is a right of subrogation, whether for all or part of the collateral source amount, there shall be no collateral source reduction. Id. 76.

In the plaintiff's estimation, this holding prevents this court from applying a collateral source reduction for the collateral source benefits paid pursuant to the Peerless policy because the Blue Cross Blue Shield payments are subject to subrogation. The court is not persuaded.

The controlling distinction between the facts in *Marciano* and the present case is that here there are two distinct collateral source providers, that is, two insurers, rather than one. Neither party disputes that the defendant would be entitled to a collateral source reduction if the Peerless policy were the only source of collateral source benefits. A strict construction of § 52-225a compels the conclusion that the Peerless and Blue Cross Blue Shield payments are to be treated differently.

The operative statutory provisions of §52-225a provide that in personal injury actions where "damages are awarded to compensate the claimant, the court shall reduce the amount of

such award which represents economic damages...by an amount equal to the total of amounts determine to have been paid [for medical bills] less the total of amounts determined to have been paid, contributed or forfeited [for premiums], except that there shall be no reduction for (A) a collateral source for which a right of subrogation exists." The phrase "for which a right of subrogation exists" is an adjectival prepositional phrase which modifies the subject "collateral source" and serves to limit the collateral sources which may not be used to reduce the economic damages. The plaintiff does not dispute that the Peerless policy payments are a "collateral source." Neither does he dispute that no right of subrogation exists for the Peerless policy payments. Therefore, a strict construction of the plain and unambiguous language of § 52-225a compels the conclusion that while no collateral source reduction may be had for the Blue Cross Blue Shield collateral source benefits a reduction is required for the Peerless policy collateral source benefits. This conclusion is consonant with the purpose of the collateral source statutory scheme, to "prevent plaintiffs from obtaining double recoveries, i.e., collecting economic damages from a defendant and also receiving collateral source payments." *Jones* v. *Riley*, 263 Conn. 93, 103, 818 A. 2d 749 (2003).

The appropriate collateral source reduction in the present case is $12,561.72 which represents the stipulated to collateral source payments by the Peerless policy of $12,636.72 less

$75.00,[5] the medical payment premium under the Peerless automobile policy. The total verdict of $231,023.28 is reduced by $12,561.72 with a remainder of $218,461.56.

For the foregoing reasons, the motion for collateral source reduction is granted and judgment enters in the amount of $218,461.56 in favor of the plaintiff as against the defendants.

BY THE COURT,

CESAR A. NOBLE, J.

[5] The plaintiff argued at oral argument that the premium set off should be $300 reflecting four years' worth of premiums at $75.00 per year. The four years represents the number of policy periods following the March 4, 2015 accident during which the plaintiff received medical treatment, the plaintiff's last date of treatment having been June of 2018. A review of the Peerless policy, however, yields the conclusion that the single year premium payment for the policy period covering the date of the accident triggered medical payments coverage through February 15, 2018, the last date of treatment covered. This is so because the Peerless policy provided that "We will pay...those expenses incurred for services rendered within 3 years from the date of the accident." Peerless policy, Personal Auto Policy, Part B, Insuring Agreement.

CHECKLIST FOR CLERK

Docket Number CV 17-6076135-S

Case Name Michael K. Kelly v. Joseph R. Annunziata

Memorandum of Decision dated 4-16-19

File Sealed: **yes**_____ **no** X

Memo Sealed: **yes**_____ **no** X

This memorandum of Decision may be released to the Reporter of Judicial Decisions for publication. X

This Memorandum of Decision may NOT be released to the Reporter of Judicial Decisions for publication. _____

State of Connecticut Judicial Branch
Superior Court Case Look-up

Superior Court Case Look-up
Civil/Family
Housing
Small Claims

Attorney/Firm Juris Number Look-up

Case Look-up
By Party Name
By Docket Number
By Attorney/Firm Juris Number
By Property Address

Short Calendar Look-up
By Court Location
By Attorney/Firm Juris Number
Motion to Seal or Close
Calendar Notices

Court Events Look-up
By Date
By Docket Number
By Attorney/Firm Juris Number

Pending Foreclosure Sales

Understanding Display of Case Information

Contact Us

Comments

HHD-CV17-6076135-S KELLY, MICHAEL K v. ANNUNZIATA, JOSEPH R Et Al

Prefix/Suffix: [none] **Case Type:** V01 **File Date:** 03/07/2017 **Return Date:** 03/14/2017

Case Detail | Notices | History | Scheduled Court Dates | E-Services Login | Screen Section Help

To receive an email when there is activity on this case, click here.

Information Updated as of: 04/16/2019

Case Information

Case Type: V01 - Vehicular - Motor Vehicles - Driver and/or Passenger(s) vs. Driver(s)
Court Location: HARTFORD JD
List Type: JURY (JY)
Trial List Claim: 10/11/2017
Last Action Date: 12/17/2018 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

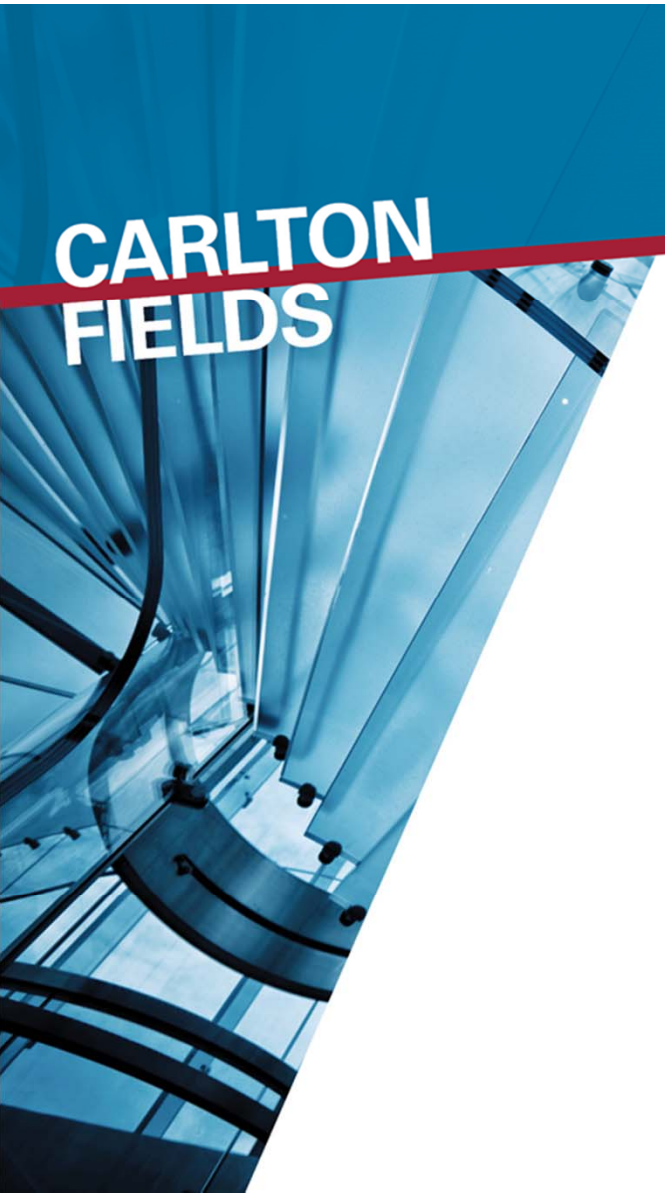
Party		No Fee Party	Category
P-01	MICHAEL K KELLY **Attorney:** THE HAYMOND LAW FIRM P.C. (406642) File Date: 03/07/2017 999 ASYLUM AVE PENTHOUSE SUITE HARTFORD, CT 061052450		Plaintiff
D-01	JOSEPH R ANNUNZIATA **Attorney:** MANTELL RODD J LAW OFFICE OF (429873) File Date: 03/15/2017 433 SOUTH MAIN STREET SUITE 224 WEST HARTFORD, CT 06110		Defendant
D-02	KAREN ANNUNZIATA *REMOVED*		Defendant

Viewing Documents on Civil, Housing and Small Claims Cases:

If there is an in front of the docket number at the top of this page, then the file is electronic (paperless).

- Documents, court orders and judicial notices in electronic (paperless) civil, housing and small claims cases with a return date on or after January 1, 2014 are available publicly over the internet.* For more information on what you can view in all cases, view the Electronic Access to Court Documents Quick Card.
- For civil cases filed prior to 2014, court orders and judicial notices that are electronic are available publicly over the internet. Orders can be viewed by selecting the link to the order from the list below. Notices can be viewed by clicking the **Notices** tab above and selecting the link.*
- Documents, court orders and judicial notices in an electronic (paperless) file can be viewed at any judicial district courthouse during normal business hours.*
- Pleadings or other documents that are not electronic (paperless) can be viewed only during normal business hours at the Clerk's Office in the Judicial District where the case is located.*
- An Affidavit of Debt is not available publicly over the internet on small claims cases filed before October 16, 2017.*

*Any documents protected by law Or by court order that are Not open to the public cannot be viewed by the public online And can only be viewed in person at the clerk's office where the file is located by those authorized by law or court order to see them.



Collateral Source Reduction, Subrogration, and ERISA

A look at the interplay of
state insurance law and ERISA
on collateral source reduction

Presented by John Pitblado
Carlton Fields, P.A.P.C. 1 State Street, Hartford CT 06103 860-392-5000 jpitblado@carltonfields.com

Collateral Source Reduction

The right to collateral source reduction in Connecticut: Conn. Gen. Stat. sec. 52-225a

- (a) In any civil action. . . resulting from … personal injury or wrongful death … and wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant, **the court shall reduce the amount of such award . . . by an amount equal to the total of amounts determined to have been paid under subsection (b)** of this section less the total of amounts determined to have been paid, contributed or forfeited under subsection (c) of this section, except that **there shall be no reduction for . . . a collateral source for which a right of subrogation exists**. . .

- (b) . . . the court shall receive evidence . . . concerning the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment. . . .

- (c) The court shall receive evidence from the claimant and any other appropriate person concerning any amount which has been paid, contributed or forfeited . . . by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he has received as a result of such injury or death.

Collateral Sources Defined

52-225b “Collateral Sources” defined

“Collateral sources” means any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others; or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services.

“Collateral sources” do not include amounts received by a claimant as a settlement.

CT Anti-Subrogation Statute

Conn. Gen. Stat. § 52-225c – Connecticut's Anti-subrogation Statute

Unless otherwise provided by law, **no insurer** or any other person **providing collateral source benefits** as defined in section 52-225b **shall be entitled to recover the amount of any such benefits from** the defendant or **any other person or entity as a result of any claim or action for damages for personal injury** or wrongful death regardless of whether such claim or action is resolved by settlement or judgment.

Write-downs and the *Madsen* Exception

Conn. Gen. Stat. § 52-174 and the *Madsen* "write downs" exception

- Conn. Gen. Stat. § 52-174(b): "In any action to which this subsection applies, the total amount of any bill generated by such physician, [etc.] shall be admissible in evidence on the issue of the cost of reasonable and necessary medical care. The calculation of the total amount of the bill shall not be reduced because such physician, [etc.] accepts less than the total amount of the bill or because an insurer pays less than the total amount of the bill."

- *Madsen v. Gates*, 85 Conn. App. 383, 390 (2004): No collateral source reduction for "write downs" …. "[U]nless the evidence shows a windfall recovery would otherwise result because statutory or contractual provisions prevent a medical provider from billing the patient for any uncovered excess, and **no subrogation rights against the plaintiff could be exercised** for the amount actually paid by the third party payer."

ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) 29 USC 1001 et seq

Originally created to protect pension plans, and create uniform law for multi-state plans

401(k) plans created a few years later

Most employee benefits come within purview of ERISA, especially insurance benefits

- 401(k)
- Life Insurance
- Health insurance
- Disability insurance

Most ERISA plans include an explicit right of subrogation

ERISA plans defined

Hartford Hosp. Med. Plan v. State Farm Mut. Auto. Ins. Co., 2010 WL 2365657 (Conn. Super. Ct. May 5, 2010)

29 U.S.C. § 1002(1): "The terms 'employee welfare benefit plan' and 'welfare plan' mean *any* plan, fund, or program which was heretofore or is hereafter established or maintained by an employer…."

"Here, the Plan explicitly provides that it is an ERISA plan, and, while that is not controlling, it also meets all the requirements of an ERISA plan, as it is:

(1) a plan, fund or program;
(2) established or maintained;
(3) by an employer or employee organization;
(4) for the purpose of providing certain benefits;
(5) to participants or beneficiaries.

Hartford Hosp Med. Plan, *supra* (citing *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 738, (7th Cir. 1986).

ERISA preemption

ERISA preemption – very broadly pre-empts state law:

29 U.S.C. § 1144(a) "this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...."

Two prong analysis for preemption:

- First, preemption applies where a state law refers to ERISA plans in the sense that it acts solely upon such plans or depends upon the existence of an ERISA plan as an essential part of its operation.
- Second, preemption applies even if a state law does not refer to ERISA but has a clear connection with a plan by mandating employee benefit structures and administration or by providing alternative enforcement mechanisms. ERISA preempts all state laws that relate to a benefit plan, not just state laws that purport to regulate an area expressly covered by ERISA.

Strohmeyer v. Metro. Life Ins. Co., 365 F. Supp. 2d 258, 260 (D. Conn. 2005)

McCarran-Ferguson and ERISA "saving" and "deemer" clauses

McCarran-Ferguson Act (15 U.S.C. § 1012)

(a) *State regulation*

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) *Federal regulation*

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . .

ERISA's "deemer" clause: Employee Benefit Plans are Deemed not to be engaged in insurance "Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company . . . engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies."

29 U.S.C. § 1144(b)(1)(B)

ERISA's "saving" clause: Unless exempt from state regulation by deemer clause, state insurance regulation still controls "Except as provided in [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

29 U.S.C. § 1144(b)(2)(A)

"These provisions "are not a model of legislative drafting." FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990) (Pennsylvania antisubrogation statute pre-empted by ERISA)

ERISA and CT anti-subrogation statute

Connecticut courts have held ERISA preempts CT anti-subrogation law:

> Section 52-225c is Connecticut anti-subrogation statute which would prevent an ERISA health plan from independently pursuing its right of subrogation against a defendant, . . . § 52-225c is the type of state law contemplated by the U.S. Supreme Court which "might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and ... might indeed be pre-empted under [29 U.S.C. 114(a)]

Bonsanti v. Newman, 2006 WL 413011, at *3 (Conn. Super. Ct. Feb. 3, 2006)

Marciano v Jimenez (Conn 2016)

Marciano v. Jimenez, 324 Conn. 70, 77, 151 A.3d 1280, 1284 (2016)

The Connecticut Supreme Court broadly reads the collateral source statute to mean that "when *any* right of subrogation exists, whether *in full or in part*, for a collateral source, [Connecticut's collateral source statute] precludes the trial court from ordering any collateral source reduction at all."

In *Marciano*, an ERISA lien had been compromised prior to adjudication. In other words, the insurer accepted less than the full amount, in compromise of its lien. Nevertheless, the Court still held that a theoretical right of subrogation still existed, despite that the compromised lien extinguished any obligation by the injured plaintiff to pay back those medical bills after judgment.

However, *Marciano* involved an ERISA plan, and thus there was no analysis of the impact of Connecticut's anti-subrogation statute on the determination of whether the insurer had "any right of subrogation" because state law is pre-empted in favor of the terms of an ERISA plan.

Result: double recovery by injured plaintiff. However, not a "windfall" per *Madsen* exception.

Pending legislative response to *Marciano*: CT HB 5053 (pending 2020) [proposed changes in bold]

- ~~[(A) a collateral source for which a right of subrogation exists, and (B) the amount]~~ the amount **(A) subject to a right of subrogation, (B) agreed upon in full satisfaction of any right of subrogation, (C) to which a right of subrogation has not been waived, limited or extinguished, or** (D) of collateral sources equal to the reduction in the claimant's economic damages attributable to the claimant's percentage of negligence pursuant to section 52-572h.
- (b) Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount: [of] (1) Of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment, **(2) subject to a right of subrogation, (3) agreed upon in full satisfaction of a right of subrogation, and (4) to which a right of subrogation has not been waived, limited or extinguished.**

Kelly v Annunziata, 2019 WL 2303928 (Conn. Super. Apr. 16, 2019) (Noble, J.)

Injured Plaintiff's bills paid under two insurance policies:

(1) a motor vehicle insurance policy containing a medical payments provision issued

(2) a self-funded health plan governed by the Employee Retirement Income Security Act of 1974 (ERISA).

Both policies included subrogation rights.

However, Defendant was only entitled to collateral source reduction for payments made under the auto policy, which is not subject to ERISA, and therefore subject to CT's anti-subrogation statute, which supersedes the policy language purporting to create a right of subrogation.

On the other hand, the health benefits paid under Plaintiffs' employer-based health plan were governed by ERISA, which preempts the CT anti-subrogation statute, and therefore the policy's subrogation rights controlled, barring collateral source recovery under CT statute.

Q&A

Questions?

"[T]he law is an ass" *In re Sawyer*, 360 U.S. 622, 634 (1959)