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United States District Court,
N.D. Georgia, Atlanta Division.

Jeffrey GADDY, Plaintiff,
v.
TEREX CORPORATION, Terex South Dakota, Inc., and Terex Utilities, Inc., Defendants.

1:14–cv–1928–WSD
|
Signed 07/21/2017

Attorneys and Law Firms

Andrew Steven Ashby, Lance Alan Cooper, The Cooper Firm, Marietta, GA, Kurt G. Kastorf, The Summerville Firm, LLC, Atlanta, GA, for Plaintiff.

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OPINION AND ORDER

WILLIAM S. DUFFEY, JR., UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on Plaintiff Jeffrey Gaddy's ("Plaintiff") Motion to Exclude Certain Opinion Testimony of Henry Miller, Ph.D. [373] ("Motion").

I. BACKGROUND

Defendants Terex Corporation, Terex South Dakota, Inc., and Terex Utilities, Inc. (collectively, "Defendants") offer Dr. Miller to testify as an expert regarding: (1) options for lowering the costs of Plaintiff's Life Care Plan; (2) lowering the costs of Plaintiff's necessary medical treatment/equipment through private health insurance under the Affordable Care Act ("ACA") and Medicare; and (3) calculating the present value of these analyses.

Plaintiff seeks to exclude the following of Dr. Miller's opinions: (1) opinions regarding insurance and Medicare, because such opinions are "in direct violation of Georgia's collateral source rule," (Mot. at 2); (2) opinions regarding the "market rate" of medical services, because the opinions are unreliable and are a "backdoor" violation of the collateral source rule, (id. at 3); and (3) opinions that Plaintiff contends are improper medical judgments

II. DISCUSSION

A. Legal Standard

Under the Federal Rules of Evidence, expert testimony is admissible if: (1) the expert is qualified to testify regarding the subject matter of her testimony; (2) the methodology that the expert used to reach his or her conclusions is sufficiently reliable; and (3) the expert's testimony will assist the trier of fact in understanding the evidence or in determining a fact at issue. United States v. Scott, 403 Fed.Appx. 392, 397 (11th Cir. 2010) (citing United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004)) (en banc); Fed. R. Evid. 702.

B. Analysis

1. Collateral Source Rule

Plaintiff contends that Georgia's collateral source rule prohibits Dr. Miller's opinions regarding insurance, Medicare, and the "market rate" of medical services. The Court must apply Georgia substantive law to this diversity action. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938); see also Southern v. Plumb Tools, 696 F.2d 1321, 1323 (11th Cir. 1983) (per curiam) (holding that Alabama's common law collateral source rule was substantive law to be applied by federal courts in diversity cases). The Georgia collateral source rule "bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments." Hoeflick v. Bradley, 637 S.E.2d 832, 833 (Ga. Ct. App. 2006). The rationale for this rule is that "a tortfeasor is not allowed to benefit by its wrongful conduct or to mitigate its liability by collateral sources provided by others." Kelley v. Purcell, 686 S.E.2d 879 (Ga. Ct. App. 2009). Collateral sources include payments made by Medicare and Medicaid. See Bunyon v. Burke Cty., 306 F. Supp. 2d 1240, 1263 (S.D. Ga. 2004) (citing Candler Hosp., Inc. v. Dent, 491 S.E.2d 868 (Ga. Ct. App. 1997)).

In Mallette v. Nash, the Middle District of Georgia considered, where the plaintiff intended to introduce evidence of future medical expenses proximately caused by the defendant's negligence, whether Georgia's collateral source rule barred the defendant from presenting evidence of "discounted rates" offered by the plaintiff's physician or other evidence of expected future payments of the plaintiff's medical bills. No. 4:10–CV–13 CDL, 2011 WL 720201, at *1 (M.D. Ga. Feb. 22, 2011). The court noted that, while there are no Georgia cases directly on point, "the Georgia law that does exist on this issue ... strongly suggests that the Georgia courts would exclude the proffered evidence as inadmissible under the Georgia collateral source rule." Id. at *3. "In several instances, the Georgia Court of Appeals has excluded evidence that is similar to Defendant's 'discounted payment plan' evidence as derivative of a collateral source." Id. (citing Bennett v. Haley, 208 S.E.2d 302, 312 (Ga. Ct. App. 1974) (holding trial court did not err in refusing to permit cross examination of doctor as to his having accepted payment in full for his services in accordance with Medicaid regulations); Olariu v. Marrero, 549 S.E.2d 121, 123 (Ga. Ct. App. 2001) (affirming trial court's exclusion of any reference to hospital's write-off of plaintiff's medical bill)). The court concluded that, under Georgia law, the defendant's "discounted payment plan" evidence could not be used to prove the reasonable value of the plaintiff's alleged future medical expenses. The court's reasoning in Mallette is sound.

***2** The Court finds Dr. Miller's opinions regarding private insurance and Medicare here are similar to the opinions not allowed in Mallette. Here, as in Mallette, Plaintiff seeks to offer evidence regarding the amount of his future medical expenses, and Defendants seek to challenge Plaintiff with evidence of "discounted rates" they contend he could receive through private insurance or Medicare. These opinions are barred by the collateral source rule, and Plaintiff's Motion is granted with respect to these opinions.[1] The Court next considers whether Dr. Miller's opinion regarding the market rate of medical services violates the collateral source rule.

Plaintiff contends that, because Dr. Miller's opinion regarding the market rate or "reasonable rate" of medical services relies exclusively on Medicare and private insurance rates, Dr. Miller's opinion is an impermissible attempt to "backdoor" information about insurance and Medicare coverage. Defendants rely on Bowden v. The Med. Ctr., Inc., 773 S.E.2d 692 (Ga. 2015) to argue that Dr. Miller's opinion regarding reasonable value is admissible. Defendants' reliance is misplaced. In Bowden, the Georgia Supreme Court considered a discovery dispute in which the plaintiff, who was uninsured when she received hospital care and who sought to invalidate the hospital's subsequent lien for the charges of its care, requested information and documents regarding the amounts that the hospital charged insured patients for the same type of care. Id. at 692–93. The court concluded that, "where the subject matter of a lawsuit includes the validity and amount of a hospital lien for the reasonable charges for a patient's care, how much the hospital charged other patients, insured or uninsured, for the same type of care during the same time period is relevant for discovery purposes." Id. at 693. The court observed that the "fair and reasonable value of goods and services is often determined by considering what similar buyers and sellers have paid and received for the same product in the same market, with adjustments upward or downward made to account for pertinent differences, and we see no reason why the same cannot be true of health care." Id. at 291–92.

Defendants contend that Bowden is in tension with collateral source rule cases such as Oliariu and Dent, and Defendants urge the Court to "resolve this tension, and explicitly hold that the reasonableness determination can be made ... based on market evidence without violating the collateral source rule." ([392] at 5). As Defendants concede, however, Bowden decided a question regarding the discoverability of evidence relating to pricing agreements and other information relating to charges to insured and uninsured patients. The subject matter of the case was the validity and amount of a hospital lien—it was not, as here, a products liability action alleging that the defendant proximately caused the plaintiff's injuries. Bowden does not address the collateral source rule, and the circumstances of the case were wholly different than the circumstances here. There is thus no "tension" to resolve. Even if there were, the Court is required to strictly apply Georgia law and has no power to "resolve" any tension in Georgia law. See Erie, 304 U.S. at 78–80; State Farm Mut. Auto Ins. Co. v. Duckworth, 648 F.3d 1216, 1224 (11th Cir. 2011). Bowden does not apply here.

***3** Defendants next rely on Houston v. Publix Supermarkets, Inc., No. 1–13–cv–206–TWT, 2015 WL 4581541 (N.D. Ga. July 29, 2015). Defendants argue that the Court in Houston found that evidence regarding how much providers were paid by a litigation investment company that purchased the plaintiff's medical bills was admissible to determine the reasonable value of the medical services provided. Houston, however, also does not apply here. The facts in Houston were that a litigation investment company purchased the plaintiff's medical bills from the healthcare providers at a discount, then the providers billed the company for an increased amount, which the plaintiff then sought to recover. The Court concluded that "evidence of the relationship between [the litigation investment company] and the Plaintiff's physicians was relevant for the jury to consider in determining the reasonable value of medical services provided." Id. at *1. These facts are not present here. Even if they were, the evidence allowed by the Houston court was limited to the evidence of the relationship between the company and the plaintiff, and that the investment company paid "some of the Plaintiff's medical bills." Id. Defendants here, by contrast, seek to offer a competing expert analysis, relying on private insurance and Medicare rates, to contest the rate of Plaintiff's future medical expenses. Finally, the Houston court noted that the litigation investment company "is not in the nature of a traditional collateral source[, because u]nlike an insurance company, to which the Plaintiff would pay premiums, [the litigation investment company] serves as an investor in the lawsuit and receives no payment from the Plaintiff until after the lawsuit." Id. at *2. Here, medical insurance and Medicare are traditional collateral sources. Houston does not apply here.

Plaintiff's recovery for the costs of future medical care is, of course, limited to the "reasonable" cost of his care, and Defendants may introduce evidence limited to the reasonability of the costs claimed by Plaintiff. See Allen v. Spiker, 689 S.E.2d 326, 329 (Ga. Ct. App. 2009) ("The law requires proof that the medical expenses arose from the injury sustained, and that they are reasonable and necessary before they are recoverable." (internal quotation marks omitted)). The Court finds, that, to the extent Dr. Miller will offer opinions as to the reasonable value of Plaintiff's future medical care based on the average rates paid in the market by all payers —rather than the discounts Plaintiff purportedly could receive were he to take advantage of certain insurance or government programs—these opinions are not barred by the collateral source rule. See Johnson Martinrea Int'l, Inc., No. 3:15–CV–1318, 2016 WL 9149586, at *5 (M.D. Tenn. Nov. 3, 2016) (applying Tennessee collateral source rule and finding that, while opinion that the plaintiff's future medical care might be decreased were she to take advantage of insurance or government benefits was barred, opinion of reasonableness of future medical care based on analysis of rates paid by "*all* payers in the market" may be admissible).

Dr. Miller offers his report to rebut the opinions of Plaintiff's expert, Ms. Gragg–Smith, regarding the costs of Plaintiff's future medical care. Dr. Miller challenges Ms. Gragg–Smith's use of the billed or charged rate to determine Plaintiff's future medical expense needs. Dr. Miller's opinion considered the rates paid by private insurers and government entities to determine the reasonable value of Plaintiff's future care, using these rates as a benchmark and recognizing that the large proportion of the marketplace comprised of Medicare payments has an impact on prices. He opines that, based on a study by a national healthcare actuarial firm, private sector professional fees are paid at a rate equal to 128 percent of the Medicare rate for various services and items, including therapies, catheter placement, laboratory tests, and surgical procedures. Defendants state that, when discussing the market value of Plaintiff's claimed future care, Dr. Miller will not reference any private health insurance or government benefits available to Plaintiff. The Court finds these opinions of the market rates paid for care by all market payers do not violate the collateral source rule, because they are not offered as evidence of payments by a third party to reduce the defendant's liability for damages—they are instead offered to establish the reasonableness of the amount of damages.

The Court also finds that Dr. Miller is qualified to opine on this matter. His methodology is sufficiently reliable, because it relies on his economic analysis of government-regulated fee schedules and reputable studies performed by a well-established actuarial firm. Finally, Dr. Miller's opinion will assist the trier of fact in determining the reasonableness of Plaintiff's claimed future medical expenses. Dr. Miller's testimony regarding the reasonable rate of Plaintiff's future medical expenses is admissible.

2. "Medical Judgment" Opinions

***4** Plaintiff next seeks to exclude opinions he characterizes as medical judgments. The opinions Plaintiff characterizes as medical judgments, however, are nothing of the sort. Dr. Miller simply applied a cost to the services that Plaintiff's expert, Ms. Gragg–Smith, opined that Plaintiff will require. Ms. Gragg–Smith stated that Plaintiff will require someone to perform a bowel program and catheter change, and that these services could be performed by Plaintiff himself if he lost weight. Dr. Miller, based on this opinion, concluded that the services could be provided by an unlicensed home care attendant. Just as Ms. Gragg–Smith's opinion that Plaintiff could perform the services himself is not an improper medical judgment, Dr. Miller's opinion is not an improper medical judgment. Plaintiff's Motion is denied on this ground.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Plaintiff Jeffrey Gaddy's Motion to Exclude Certain Opinion Testimony of Henry Miller, Ph.D. [373] is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff's Motion is **GRANTED** with respect to Dr. Miller's opinions regarding private insurance and Medicare, which are barred by Georgia's collateral source rule. Plaintiff's Motion is **DENIED** (1) with respect to Dr. Miller's opinions regarding the reasonable rate of Plaintiff's future medical care, to the extent such opinions are based upon average rates paid in the market by all payers; and (2) with respect to Dr. Miller's purported "medical judgment" opinions.

SO ORDERED this 21st day of July, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 3473872

Footnotes

1 Defendants also argue that evidence of insurance coverage or Medicare coverage for Plaintiff's future medical care should be allowed to show Plaintiff failed to mitigate his damages. The reasonable cost of care, however, for which Defendants are liable, is the same regardless whether it is paid for by a private insurer, the government, or Plaintiff himself. That different insurance carriers may have different rates does not mitigate the damages for which Defendants are liable. Defendants do not provide any authority beyond general legal principles to support their position, and the Court rejects Defendants' argument.