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Comment [MJH1]: Ready to include in court records

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI

MARCEL BRADFORD, a minor, by his)
next friend, Trust of the Ozarks,)
)
Plaintiff,)
)
vs.) Case No. 104CC0091
)
HILLCREST MEDICAL CENTERS,)
)
Defendant.)

**DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST MOTION IN LIMINE
CONCERNING FREE PUBLIC BENEFITS**

In point 3 of his first motion in limine, plaintiff seeks to preclude evidence of collateral source payments. Plaintiff attempts to categorize the evidence into two groups:

- Group 1: Medicaid
- Group 2: Goods and services provided by the public schools.

Plaintiff claims that evidence of Medicaid is subject to the rule, while the Missouri Supreme Court in *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619-21 (Mo. banc 1995) has held that evidence of programs and therapies available through the public schools are not subject to the collateral source rule.

While defendant does not agree that any Missouri appellate court has directly held that Medicaid is subject to the collateral source rule, defendant does not plan to introduce evidence that Medicaid has paid for certain medical expenses in this case.¹

¹The only case cited by plaintiff concerning Medicaid payments is *Cornelius v. Gipe*, 625 S.W.2d 880, 882 (Mo. App. 1981). In that case, the court expressly said: "Even assuming **without deciding** that the argument [that mentioned the availability of Social Security, Medicare, and Medicaid] violated the collateral source rule, the argument clearly bore on damages, and by reason of the defendant's verdict, Cornelius was not prejudiced." In *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 620 (Mo. banc 1995) the court specifically noted this was dicta.

Defendant also agrees that goods and services provided by the public schools is not subject to the rule. However, to the extent plaintiff is attempting to recast *Washington v. Barnes Hospital* as holding that the availability of free public school programs is the only exception to the collateral source rule, defendant disagrees. There are other free public programs and therapies that are available outside the public school programs that will be available to Marcel that should also not be considered collateral sources. Programs that will likely be at issue in this case are those provided through the Missouri Department of Mental Health, Division of Mental Retardation and Developmental Disabilities ("MRDD") after Marcel turns 18.

The State of Missouri has an extensive system of care and treatment options for individuals with developmental disabilities. The only criteria for eligibility is they have a developmental disability which is defined as attributable to:

1. A. Mental retardation, cerebral palsy, epilepsy, head injury, autism or a learning disability related to a brain dysfunction;
2. Is manifested before the person attains age twenty-two (22);
3. Is likely to continue indefinitely;
4. Results in substantial functional limitations in two (2) or more of the following six (6) areas of major life activities: self care, receptive and expressive language development and use, learning, self-direction, capacity for independent living or economic self sufficiency and mobility; and
5. Reflects the person's need for a combination and sequence of special, interdisciplinary or generic care, habilitation and sequence of special, interdisciplinary or generic care, habilitation or other services which may be of lifelong or extended duration and are individually planned and coordinated.

9 CSR 45-2.010(2)(F). Eligibility is not conditioned on indigence.²

In this case, Marcel will meet this criteria. He has already been documented as having cerebral palsy prior to the age of twenty-two. Plaintiff's own experts state this is likely to continue indefinitely, and results in substantial functional limitations in more than two of the six areas of major life. Evidence that these public programs are available as an alternative to Dr. Elam's private one-on-one attendant care projections in his life care plan are relevant and admissible.

²If the recipient has annual adjusted gross income exceeding one hundred thousand dollars (\$100,000) he shall be assessed a charge for case management services, and the charge shall be the lesser of actual cost or one-fourth (1/4) their monthly ability to pay. 9 CSR 10-31.011(3). This has no application in this case as plaintiff's experts state Chavon will be permanently unemployable.

In *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619-21 (Mo. banc 1995), the Missouri Supreme Court extensively re-examined the collateral source rule. The court began its analysis with the statement that "the collateral source rule is not a single rule but rather, a combination of rationales applied to a number of different circumstances to determine whether evidence of mitigation of damages should be precluded from admission." *Id.* In analyzing the rationales that supported the rules application, the court reviewed decisions from other states. In reaching its decision that public school benefits were not subject to the collateral source rule, the court rejected contrary views from other states, and adopted the reasoning of the Florida Supreme Court in *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So.2d 514, 515-16 (Fla. 1984), emphasizing:

The policy behind the collateral source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation. This is further made apparent upon comparison of the present case with a situation in which the collateral source rule is frequently applied, that of the defendant who seeks a reduction in damages because the plaintiff has received insurance benefits. It is a well-settled rule of damages that the amount recoverable for tortious personal injuries is not wholly or partially indemnified for the loss by proceeds from accident insurance where the tortfeasor did not contribute to the payment of the premiums of such insurance. This rule is usually justified on the basis that the wrongdoer should not benefit from the expenditures made by the injured party in procuring the insurance coverage. **In a situation in which the injured party incurs no expense, obligation, or liability, we see no justification for applying the Collateral Source rule.** We refuse to join those courts which, without consideration of the facts of each case, blindly adhere to the collateral source rule, permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact upon the defendant.

Id. at 620-21 (Emphasis added). The Missouri Supreme Court also stated: "[w]e reject the concept that the collateral source rule should be utilized solely to punish the defendant. *Id.* at 621.

While the specific issue addressed in *Washington v. Barnes Hospital* was evidence relating to the availability of public special education services, the issue in *Florida Physician's Insurance Reciprocal v. Stanley*, the Florida case adopted by the Missouri Supreme Court, also included the "availability and effectiveness of free or low-cost charitable and governmental programs available in the community." 452 So.2d at 515. In the Florida case, the plaintiff "brought a medical malpractice action against the [defendants] for the retardation and cerebral palsy [plaintiff] has suffered from birth." *Id.* Defendant cross-examined plaintiff's damage experts on the availability of free or low cost services from governmental and charitable organizations that were available to people that had mental retardation and

cerebral palsy as children. *Id.* These are the same benefits that are at issue in the present case. The

Florida court held:

[Defendants] claim that evidence of free or low cost services from governmental or charitable agencies available to anyone with specific disabilities is admissible on the issue of future damages. We agree.... Governmental or charitable benefits available to all citizens, regardless of wealth or status, should be admissible for the jury to consider in determining the reasonable cost of necessary future care. Keeping such evidence from the jury may provide an undeserved and unnecessary windfall to the plaintiff.

Id. at 515. As the Missouri Supreme Court adopted the Florida court's reasoning in *Washington v. Barnes Hospital*, it is apparent it would reach the same result with regard to the admissibility of evidence of other public programs, in addition to the public school special education programs, available to anyone with specific disabilities on the issue of future damages.

The public programs available through MRDD are, in effect, an extension of those available through the public schools. They replace those provided by the public school after the child turns 18. Just as in the case of public school benefits, the plaintiff did not purchase the benefits available through MRDD, nor work for them as an employment benefit, nor contract for them. Hence, the "benefit of the bargain" rationale does not apply. Just as in the case of public school benefits, the MRDD programs are funded by tax dollars. As the Missouri Supreme Court stated in *Washington v. Barnes Hospital*, "[w]hile to some extent public schools are funded by plaintiffs' tax dollars, they are also funded by defendants' tax dollars and no windfall results to either." *Id.* at 621. The same is true for MRDD benefits. As the court emphasized in *Washington v. Barnes Hospital*: "[a]s the injured party [Marcel] incurs no expense, obligation, or liability, we see no justification for applying the Collateral Source rule." Moreover, these free public programs are available to any child that has been documented to have a developmental disability before age 22, and is not contingent on indigent status (as in Medicaid benefits) or having been earned through military service (as for veteran's benefits), or through work credits (as for social security or medicare benefits.)

Accordingly, these free public benefits available to people, like Marcel, after they turn eighteen and have cerebral palsy can be considered by the jury as alternatives to Dr. Elam's private one-on-one attendant care projections in his life care plan. Plaintiff's motion in limine to this extent should be

denied. "Plaintiffs, of course, may respond to this evidence with arguments of its inadequacy, the risk of its continued availability, etc." *Washington v. Barnes Hosp.*, 897 S.W.2d at 621.

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