

# LEX LOCI

## **Medical Bills Written Off by Medicare Are Still Recoverable by Plaintiff**

In *White v. Jubitz Corporation*, 347 Or 212, \_\_\_ P3d \_\_\_ (October 15, 2009), the Oregon Supreme Court answered the question whether plaintiff may recover from defendant the total amount of the medical providers' reasonable charges or whether his recovery must be limited to the amount that Medicare paid to those providers. The court held that plaintiff is entitled to recover the full amount.

In this case, plaintiff was injured when the stool he was sitting on collapsed. Plaintiff sought medical treatment and incurred expenses of \$38,977. However, plaintiff qualified for Medicare. Medicare paid plaintiff's providers \$13,400 and, according to federal law, the providers accepted that sum in full for their services and wrote off the remaining balance.

At trial, the jury awarded plaintiff \$37,600 in economic damages. The defendant then moved for a reduction of the verdict because plaintiff only had to reimburse Medicare what it paid — \$13,600 — and owed nothing further to his medical providers. In essence, the defense argued, plaintiff was receiving a windfall. The trial court, and ultimately the Oregon Court of Appeals and Oregon Supreme Court, held that plaintiff was entitled to receive the full amount incurred despite the write off. The reasoning behind this decision was based upon an Oregon statute, ORS 31.580(1)(d) — the so-called collateral source rule — which prevents a deduction for "federal Social Security benefits."

The court explained that ORS 31.580 applies only to civil actions where a party is awarded damages for bodily injury or death. In those actions, the statute permits, but does not require, a trial court to deduct from a plaintiff's award of damages those benefits that a plaintiff receives from a third party. However, the statute also imposes limitations and does not allow any deduction for four sets of benefits: (1) benefits that the plaintiff is obligated to repay; (2) life insurance or other death benefits; (3) insurance benefits for which the injured person paid premiums; and (4) retirement, disability and pension plan benefits, and federal Social Security benefits. In the present case, the court determined that plaintiff would have been entitled to recover and retain the jury award of \$37,600 if he had not been an eligible Medicare beneficiary, and his status as such does not permit a different result.

One justice dissented, arguing that neither plaintiff nor Medicare incurred more medical costs than the Medicare statutes permitted. As a matter of state law, the only economic damages arising from plaintiff's injury were the medical costs for which plaintiff was liable and for which Medicare reimbursed his providers. As such, the dissenting justice would hold that plaintiff cannot recover economic damages for medical costs for which no one was ever liable.

### **Equitable Doctrine of Judicial Estoppel Applied**

Under Oregon law, the equitable doctrine of judicial estoppel may preclude a party from taking a position in one judicial proceeding that is inconsistent with the position that the same party successfully asserted in a different judicial proceeding. The application of judicial estoppel depends on the existence of three predicates: (1) a benefit; (2) obtained in a different judicial proceeding; (3) by means of asserting a position inconsistent with a position asserted in a later judicial proceeding.

In *Hallberg v. City of Portland*, 230 Or App 355, 215 P3d 866 (August 19, 2009), the Oregon Court of Appeals affirmed the trial court's decision in granting summary judgment for the City of Portland based upon the doctrine of judicial estoppel. There, Hallberg had been employed by the City as a housing inspector. After inspecting residential real property and citing the homeowner with various violations, the house went into foreclosure and Hallberg himself purchased it. The homeowner sued Hallberg. Hallberg requested that the City defend and indemnify him, but the City rejected the tender on the basis that the lawsuit did not arise out of an act or omission in the performance of Hallberg's duties and that any work-related conduct associated with Hallberg's purchase of the house amounted to malfeasance in office. The City ultimately

fired Hallberg for his actions. Hallberg then asserted a cross-claim against the City for indemnity. In the meantime, Hallberg moved for summary judgment on the homeowner's claims against him, arguing that his [Hallberg's] offer to buy the house was not made in the course of his job. The court agreed with Hallberg's motion and granted it, dismissing all claims against him with prejudice. The homeowner appealed and the Ninth Circuit affirmed. Subsequently, Hallberg sued the City to recover his expenses in defending the homeowner's claims. The City moved for summary judgment arguing that Hallberg's claim for indemnity must fail because Hallberg's conduct that led to the homeowner's claim did not occur within the performance of his employment. The trial court agreed and granted summary judgment in favor of the City. In response, Hallberg appealed. Hallberg asserted that there were issues of fact about whether the circumstances that caused the homeowner's alleged damages were traceable to Hallberg's actions within the scope of his employment. After analyzing the doctrine of judicial estoppel, the Oregon Court of Appeals found that all the necessary predicates were present and affirmed the trial court's judgment for the City.

### **What Amount of Evidence is Sufficient to Survive a Motion for Directed Verdict?**

The Oregon Court of Appeals addressed this issue in the employment context in *Herbert v. Altimeter, Inc.*, 230 Or App 715, 218 P3d 542 (September 9, 2009). In this case, plaintiff had been employed as a truck driver. After experiencing various physical symptoms during a long delivery trip, plaintiff saw her physician who diagnosed carbon monoxide poisoning. Plaintiff attributed the exposure to an exhaust leak in her truck. Plaintiff brought the issue to her employer's attention and was terminated within a few days. Plaintiff filed a complaint against her former employer alleging four claims: retaliation for complaining about unsafe working conditions, retaliation for invoking the workers' compensation system, retaliation for

requesting a reasonable accommodation under the disability discrimination statutes, and perceived disability discrimination. The case went to trial and the trial court granted defendant's motion for directed verdict at the close of plaintiff's case-in-chief, and dismissed plaintiff's complaint. Plaintiff appealed, asserting that the jury could reasonably have found in her favor on all four counts based upon the evidence presented. The Court of Appeals agreed and reversed and remanded for further proceedings.

The court reminded the parties that to prove that an employee was terminated on unlawfully discriminatory grounds, it is sufficient in Oregon for the plaintiff to show that the unlawful motive was a substantial and impermissible factor in the discharge decision. Plaintiff's prima facie burden in an employment discrimination case is so minimal that it is virtually impervious to a motion based on evidentiary sufficiency. With this backdrop, the court examined the evidence presented in the context of each of the four claims. On the OSHA retaliation claim, the court found sufficient circumstantial evidence that defendant had an impermissible retaliatory motive because she was terminated just days after she complained about an unsafe working condition that was affecting her health. Additionally, there was evidence that the employer was unhappy about the mounting repair costs to her truck. This was sufficient, according to the court, to avoid a directed verdict on this claim. Note that there is no prerequisite here for plaintiff to actually make a complaint to OSHA.

Similarly, with regard to plaintiff's claim of workers' compensation retaliation, the court found sufficient evidence that plaintiff invoked the workers' compensation system even though she did not file a workers' compensation claim. It was sufficient that plaintiff put her employer on notice that she suffered an on-the-job injury. The court

found that a jury could reasonably infer that the employer perceived that plaintiff would report an injury.

On plaintiff's claim of retaliation for requesting a reasonable accommodation for a disability, the court found that plaintiff's request to drive a different truck constituted a request for a reasonable accommodation under the disability statutes. The court further found that whether plaintiff had a disability or not was beside the point because the statute protects from retaliation an employee who seeks benefits or accommodations even if the employee proves not to be disabled. Accordingly, the court rejected the employer's contention that plaintiff's lack of disability defeated this claim.

Finally, the court examined plaintiff's claim of perceived disability discrimination and found sufficient evidence that the employer regarded plaintiff as substantially impaired in the major life activity of employment. As a result, the court concluded that a jury could reasonably draw inferences from the evidence to defeat the motions for directed verdict on all four claims. The case was reversed and remanded.

### **Around the Water Cooler**

Join us in welcoming Diana Fedoroff, our newest attorney. Diana graduated from Lewis & Clark Law School in 2008. During law school, Diana clerked for the Oregon Department of Justice in the Natural Resources Section and was the Editor in Chief of the *Lewis & Clark Animal Law Review*. Before joining Bodyfelt Mount, Diana practiced at another local firm, where she focused on insurance defense and environmental litigation.

Molly Jo Mullen has been appointed to the Multnomah County Arbitration Commission. Ms. Mullen, along with Richard Lee, Deanna Wray, and Pam Stendahl, serves as an arbitrator on the Multnomah County Circuit Court panel. Ms. Mullen also serves as an arbitrator for Columbia and Washington

County Circuit Courts. Additionally, Mr. Lee serves as an arbitrator on the Clark County Superior Court panel.

*Happy New Year! We wish you and yours a prosperous 2010!*

Deanna Wray participated in a panel presentation on Electronic Discovery at the Oregon Association of Defense Counsel ("OADC") Fall Seminar on November 6, 2009.

Vicki Smith will be serving as Chair of the OADC New Lawyers Practice Group.

Molly Jo Mullen has been nominated to serve as a director for the OADC.

Ms. Mullen was also a speaker at the October 30, 2009 CLE sponsored by OLI entitled "Tips and Traps for the Civil Litigator."

Bodyfelt Mount has been "Recycle at Work Certified" by the City of Portland Bureau of Planning and Sustainability. This certification recognizes the firm's efforts in its recycling practices and reduction of waste.

Bodyfelt Mount is pleased to once again participate in the KGW Holiday Toy Drive.

### **Bodyfelt Mount**

Bodyfelt Mount consists of eleven lawyers, three paralegals, six legal assistants, project assistants, accounting and office management personnel. We litigate a variety of cases, from the very small garden variety negligence case to the multi-million dollar complex product or professional liability case. We intend this newsletter to be interesting and informative to our clients and colleagues. If you would prefer not to receive this newsletter, just let us know. Your comments and suggestions are always welcome: 503-243-1022.

This newsletter is not intended to be and should not be used as a substitute for specific legal advice. We recommend that questions be addressed to the attorney of your choice.

