STATE OF IDAHO )
County of KOOTENAI )ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE**

**STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**WILLIAM MILLSAP**, )
)
*Plaintiff*, )
vs. )
)
**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,** )
)
*Defendant*. )
)
)

Case No. **CV 2014 2534**

**MEMORANDUM DECISION AND ORDER ON PLAINTIFF'S MOTIONS IN LIMINE**

## I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on "Plaintiff's Motion in Limine" filed by plaintiff William Millsap (Millsap) on September 30, 2015. Among other things, Millsap seeks an order:

> 1.) Allowing Plaintiff to present evidence at trial regarding the full invoiced amount of his medical bills;
> 2.) Excluding any evidence regarding medical insurance coverage, insurance payments and write-offs[.]

Plaintiff's Motion in Limine/Notice of Hearing/Declaration of Counsel (Motion in Limine), p. 1. In defendant State Farm Mutual Automobile Insurance Company's (State Farm) response entitled, "Defendant's Memorandum in Opposition to Plaintiff's Motion in Limine", filed October 7, 2015, State Farm contends "…by this response [State Farm] hereby moves for an order limiting Plaintiff to submitting evidence only of medical expenses for which he was actually responsible to pay. In other words, Plaintiff should be precluded from offering evidence of the full, unadjusted amounts of his medical

bills." Defendant's Memorandum in Opposition to Plaintiff's Motion in Limine, p. 2. The Court ignores State Farm's failure to comply with I.R.C.P. 7(b)(1) by failing to file a motion because State Farm simply seeks the opposite of that which Millsap seeks in his Motion in Limine. Oral argument on these motions in limine was held on October 14, 2015. At the conclusion of that argument, the Court announced its rulings, but indicated the Court would issue a written decision setting forth its reasoning.

## II. STANDARD OF REVIEW.

Trial Courts have broad discretion when ruling on motions in limine; they are reviewed under an abuse of discretion standard. *Puckett v. Verska,* 144 Idaho 161, 167, 158 P.3d 937, 943 (2007). Importantly, where a trial Court has unqualifiedly ruled on the admissibility of evidence in response to a motion in limine prior to trial, no further objection is necessary at trial and the issue is preserved for appellate review. *State v. Hester,* 114 Idaho 688, 700, 760 P.2d 27, 39 (1988); *Evans v. State,* 135 Idaho 422, 429, 18 P.3d. 227, 234 (Ct. App. 2001). However, where a trial judge elects to hear the foundation for evidence instead of definitively ruling on a motion in limine, the counsel opposing the evidence must object as the evidence is presented. *Kirk v. Ford Motor Co.,* 141 Idaho 697, 701, 116 P.3d 27, 31 (2005); Hester, 114 Idaho at 699.

## III. ANALYSIS

This case is scheduled for a jury trial to begin on November 2, 2015. In any jury trial, there are different tasks to be performed by the jury and by the Court. In the State of Idaho, in a personal injury trial, one of the jury's tasks is to determine, "[t]he reasonable value of necessary medical care received and expenses incurred as a result

of the injury, and the present cash value of medical care and expenses reasonably certain and necessary to be required in the future." IDJI 9.01. That is the instruction the Idaho Supreme Court has directed this Court give to the jury.

Millsap argues the full invoiced amount of medical bills he incurred reflects the reasonable amount of medical expenses. Plaintiff's Memorandum in Support of Motion in Limine Re Medical Bill Evidence, p. 3. Millsap contends the total amount of medical bills incurred should be introduced to the jury and "[e]vidence of medical insurance, insurance payments and write-offs should be excluded". *Id.,* p. 6. Millsap argues that following the rationale in *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003), the write-offs in this case should be treated as a collateral source under Idaho Code § 6-1606. *Id.* Pursuant to I.C. § 6-1606, such evidence would only be introduced in post-trial proceedings to the Court, where the Court would then determine whether the award "should be reduced to account for insurance payments and write-offs." *Id.*, p. 3.

In response, State Farm maintains adjustments and write-offs are not collateral sources and, as such, I.C. § 6-1606 is inapplicable to this case. Defendant's Memorandum in Opposition to Plaintiff's Motion in Limine, p. 5. Moreover, it purports "*Dyet* likely lost its vitality when it was disavowed by the Idaho Supreme Court in *Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 151 Idaho 889, 265 P.3d 502 (2011)." *Id*, p. 4. State Farm argues the adjustments and write-offs should be deducted from the total amount of medical bills incurred by Millsap and only the adjusted amount should be presented to the jury. *Id.*, p. 5. State Farm alleges "with the complexities of the health care system and charges implemented by hospitals and physicians, billed amounts likely do not reflect the reasonable value of the treatment received." *Id.*, p. 7. "[S]ince Plaintiff did not actually incur an obligation to pay the unadjusted medical charges, a

more reasonable value for the services provided would be the adjusted charges." *Id.*

Idaho Code § 6-1606, entitled "Prohibiting double recoveries from collateral sources", sets forth Idaho's "collateral source" rule as follows:

> In any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage, whether from private, group or governmental sources, and whether contributory or noncontributory. For the purposes of this section, collateral sources shall not include benefits paid under federal programs which by law must seek subrogation, death benefits paid under life insurance contracts, benefits paid by a service corporation organized under chapter 34, title 41, Idaho Code, and benefits paid which are recoverable under subrogation rights created under Idaho law or by contract. Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages which have been compensated independently from collateral sources.

I.C. § 6-1606. The Idaho Supreme Court has stated, "Neither the language of I.C. § 6-1606 nor its Statement of Purpose specifically deal with write-offs." *Dyet v. McKinley*, 139 Idaho 526, 529, 81 P.3d 1236, 1239 (2003). However, the Idaho Supreme Court went on to state, "[a]lthough the write-off is not technically a collateral source, it is the type of windfall that I.C. § 6-1606 was designed to prevent . . . [because] it is not an item of damages for which the plaintiff may recover because plaintiff has incurred not liability therefore." *Id*. (internal citations omitted).

The following year, in *Slack v. Keller*, 140 Idaho 916, 104 P.3d 958 (2004), the Idaho Supreme Court specifically refused to overrule *Dyet*, holding the district court erred when it refused to reduce the judgment amount by the Medicare write-offs under I.C. § 6-1606. *Id*. at 925, 104 P.3d at 967.

In 2011, the Idaho Supreme Court decided *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 265 P.3d 502 (2011). For three reasons this Court

specifically finds *Verska* did not "disavow" the substantive holding in *Dyet* as claimed by State Farm. First, within *Verska* is the following quote: "We have recited the language from the *Willys Jeep* case or similar language numerous times, usually without even addressing whether we considered the unambiguous statute absurd as written." *Id.* at 895, 265 P.3d at 508. Following that quote is a string cite of thirty-seven cases, including *Dyet*. *Id.* And, just as the Idaho Supreme Court noted in *Verska,* "Thus, we have never revised or voided an unambiguous statue on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so." 151 Idaho 889, 896, 265 P.3d 502, 509. At no point in *Dyet* did the Idaho Supreme Court ever find I.C. § 6-1606 to be an "unambiguous statue absurd as written." Second, *Verska* is not even a case about I.C. § 6-1606, the collateral source rule at common law, offsetting jury awards, or any other fact relevant to this case or the substantive issues in *Dyet.* Third is the fact that *Slack v. Keller* is not included in the aforementioned string cite. Despite State Farm's assertion, the Court finds *Verska* did not "disavow" the substantive holding in *Dyet.* But even if it had, this Court could still rely on *Slack,* which was in no way abrogated or overruled by *Verska.*

It is clear that the jury's function is to determine "[t]he reasonable value of necessary medical care…", and the amounts actually billed by the provider are the most probative evidence as to what the provider felt was the "reasonable value of necessary medical care" provided. IDJI 9.01. It is equally clear under I.C. § 6-1606, that, "[e]vidence of payment by collateral sources is admissible to the court after the finder of fact (the jury in this case) has rendered an award." In fact, I.C. § 6-1606 does not mention the word "jury" at any time. Instead, I.C. § 6-1606 only addresses the Court. In the first sentence, I.C. § 6-1606 mentions the word "judgment". The jury does not

enter a "judgment"; the Court does. In the last two sentences, I.C. § 6-1606 addresses exactly to whom evidence of collateral sources is presented (the Court), and exactly what the Court is to do with that evidence: "Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award. Such award shall be reduced by the court to the extent the award includes compensation for damages which have been compensated independently from collateral sources."

Idaho's "collateral source" statute does not in any way require the adjusted or written off charges to be submitted to the jury. The fact that the patient turns the bill over to an insurance company, self-insured employer, Medicaid or Medicare, does not change what amount was billed by the provider in the first place. The fact that Medicaid and Medicare are so huge and insure so many people in the United States, and thus have the clout to negotiate payment of those bills for a fraction of the charges billed, does not change the fact that the "full price" medical bill was sent to the patient and provider, and does not change the fact that the charge on that bill is the most probative evidence of the "reasonable value of necessary medical care."

There are two practical considerations why the jury should not be presented evidence as to collateral sources, adjustments or write-offs. First, collateral sources are fairly straightforward; the amount paid by another responsible party should be easily ascertained and in amount certain…and even that task is specifically delegated to the Court, not the jury, by I.C. § 6-1606. On the other hand, "adjustments" by a third party between the provider and that third-party payer, and write-offs by the provider are far from straightforward. Keeping in mind the finder of fact in the present case is a jury. That jury would, as to <u>each</u> third-party payer (and there could be several in any given case), need to be presented with evidence of: the third-party payer's relative size, financial clout, policies regarding adjustments, reasons for those policies in order to for

the jury to fairly decide the "reasonable value of necessary medical care" just from the payer's perspective. That jury would also, as to each provider (and there will be several in every personal injury case), need to be presented with that provider's financial strength, its policies regarding adjustments and write-offs, and the reasons behind those policies, and those policies might vary with the given third-party payer. Second, if a jury is only presented with adjusted amounts as evidence of the "reasonable value of necessary medical care", and yet the jury is not instructed as to the amount of the adjustment or the reasons for the adjustment because the jury is still instructed that insurance is not to be considered by the jury (IDJI 1.04), then the fact that the adjustment was due to the bargaining power of insurance companies is kept from the jury. The jury is instructed that each of them brings into "…this courtoom all of the experience and background of your lives." IDJI 1.00. One of the twelve reasonable jurors, bringing all the experience and background of their lives, may mention that in their experience, medical bills are always discounted by health care providers accepting reduced reimbursement for their billed services. Thus, in determining the "reasonable value of necessary medical care", the jury could well reduce a second time the already reduced amount State Farm wants presented to the jury as evidence of the "reasonable value of necessary medical care." Third, State Farm wants to pick and choose what incomplete information is given to the jury. State Farm wants the jury to only be given the evidence about the adjusted or reduced medical bills, but State Farm wants the jury to be kept in the dark that the only reason there were adjustments or reductions is due to negotiations between the payer (insurance company) and the various health care providers.

The fact that amounts were adjusted between the provider and the insurance company, does not necessarily mean that the "reasonable value of the necessary

medical care" was lower than the amount billed, any more than a write-off by the provider does not mean that the service was never performed. All of these things happen between the provider and the insurance company after the service has been performed and after the value of that service has been set in writing by the provider in its initial billing.

State Farm's claim that, "In other words, Plaintiff should be precluded from offering evidence of the full, unadjusted amounts of his medical bills" (Defendant's Memorandum in Opposition to Plaintiff's Motion in Limine, p. 2) finds no support in the Idaho Rules of Evidence, Idaho appellate case law or pertinent Idaho statutes. Even if this Court were to find that the jury should be presented evidence of adjusted amounts (this Court does not make that finding), the jury would still be entitled to receive evidence as to "the full, unadjusted amounts of his medical bills." It is clear that the jury's function is to determine "[t]he reasonable value of necessary medical care…", and the amounts actually billed by the provider are the most probative evidence as to what the provider felt was the "reasonable value of necessary medical care" provided. IDJI 9.01. It is equally clear under I.C. § 6-1606, that, "[e]vidence of payment by collateral sources is admissible to the court after the finder of fact (the jury in this case) has rendered an award." Idaho's "collateral source" statute I.C. § 6-1606 does not in any way require the adjusted or written-off charges to be submitted to the jury. That statute is silent on adjustments and write-offs. However, as mentioned above, the Idaho Surpeme Court in *Dyet v. McKinley*, 139 Idaho 526, 529, 81 P.3d 1236, 1239, made it clear that, "[a]lthough the write-off is not technically a collateral source, it is the type of windfall that I.C. § 6-1606 was designed to prevent . . . [because] it is not an item of damages for which the plaintiff may recover because plaintiff has incurred no liability therefore."

Finally, State Farm cited a District Court decision in *McMurtrey v. Gaige,* Ada County Case No. CV-PI-2013-14092. Counsel for State Farm provided the Court and counsel with a copy of that "Memorandum Decision and Order on Motions in Limine", filed June 25, 2014. Affidavit of Randall L. Schmitz in Opposition to Plaintiff's Motion in Limine, Exhibit F. This Court has read that opinion. That opinion is on point, but this Court finds it not persuasive in light of the Idaho Supreme Court's decision in *Dyet*. The District Judge in *McMurtrey* held:

> Accordingly, the Court will grant Gaige's motion in limine to preclude McMurtrey from offering evidence of the full, unadjusted amounts of her medical bills, and the Court will deny McMurtrey's cross-motion to allow her to present that evidence. McMurtrey instead will need to offer evidence of the adjusted amounts of her medical bills.

Affidavit of Randall L. Schmitz in Opposition to Plaintiff's Motion in Limine, Exhibit F, Memorandum Decision and Order on Motions in Limine, pp. 4-5. The District Judge in *McMurtrey* decided he would not apply *Dyet* (in which the Idaho Supreme Court stated "the district court correctly refused to allow [the defendant] McKinley to present evidence to the jury regarding the amounts actually paid to [the plaintiff's] Dyet's medical providers", 139 Idaho 526, 528-529, 81 P.3d 1236, 1238-39) as Medicare write-offs were to be treated as collateral sources under I.C. § 6-1606, even though the write-offs are not collateral sources, 139 Idaho 526, 529, 81 P.3d 1236, 1239) to "private insurance adjustments", for three reasons.

> First, section 6-1606's protocol for post-verdict consideration of "collateral sources" does not apply to non-"collateral sources," such as insurance adjustments. The Court will apply the statute as written, as the Idaho Supreme Court has not extended *Dyet* to insurance adjustments.

Affidavit of Randall L. Schmitz in Opposition to Plaintiff's Motion in Limine, Exhibit F, Memorandum Decision and Order on Motions in Limine, p. 3. The first sentence quoted ignores the Idaho Supreme Court's holding in *Dyet*. To be accurate with *Dyet*,

that first quoted sentence should read: "First, section 6-1606's protocol for post-verdict consideration of "collateral sources" does not apply to non-"collateral sources," such as Medicare write-offs, but the Idaho Supreme Court in *Dyet* mandates we should treat those Medicare write-offs as collateral sources for purposes of I.C. § 6-1606." While I.C. § 6-1606 does not apply to non-collateral sources such as Medicare write-offs, the Idaho Supreme Court in *Dyet* made it clear that evidence of write-offs (via the amount actually paid by Medicare to the plaintiff's medical care providers), should not come before the jury, and that those write-offs should be treated as collateral sources under I.C. § 6-1606, even though they were not collateral sources. The second sentence quoted above, "The Court will apply the statute as written, as the Idaho Supreme Court has not extended *Dyet* to insurance adjustments", to be understood, requires the reasons why that District Judge felt insurance adjustments are *different* than Medicare write-offs; it needs that District Judge's explanation why he felt he should come to a different conclusion than the Idaho Supreme Court mandated in *Dyet*. The District Judge in *McKinley* provided no such reasoning, no basis for the implicit assumption that "insurance adjustments" are *different* than "Medicare write-offs" under *Dyet*.

The second reason the District Judge in *McMurtrey* decided he would not apply *Dyet* was, "Second, *Dyet* appears to have lost vitality after *Verska v. Saint Alphonsus Regional Medical Center,* 151 Idaho 889, 265 P.3d 502 (2011)." Affidavit of Randall L. Schmitz in Opposition to Plaintiff's Motion in Limine, Exhibit F, Memorandum Decision and Order on Motions in Limine, p. 3. The District Judge in *McMurtrey* came to a finding which is exactly the same argument that State Farm makes in the present case that *Verska* "disavowed" the substantive holding in *Dyet.* Defendant's Memorandum in Opposition to Plaintiff's Motion in Limine, pp. 3-5. State Farm claims, "*Dyet*….was

disavowed by the Idaho Supreme Court in *Verska*…" *Id.,* p. 4. This has already been discussed above. It is simply not true that, "*Dyet* appears to have lost vitality after *Verska",* just as it is not true that "*Dyet*….was disavowed by the Idaho Supreme Court in *Verska*…" As noted by this Court above, *Verska* only cited *Dyet* as being one of thirty-seven cases where, in the past, the Idaho Supreme Court had used a throw-away quote from the *Willys Jeep* case, such quote now being recognized by the Idaho Supreme Court in *Verska* as a "misstatement". 151 Idaho 889, 895, 265 P.3d 502, 508. It was a throw-away quote in those thirty-seven cases because in those thirty seven cases, the Idaho Supreme Court in *Verska* admits we never even addressed "…whether we considered the unambiguous statute absurd as written." *Id.* Also, as noted above, *Verska* is not a case about I.C. § 6-1606, the collateral source rule at common law, offsetting jury awards, or any other fact relevant to this case or the substantive issues in *Dyet.* And, as mentioned above, *Slack v. Keller* is not included in the aforementioned string cite in *Verska,* and in *Slack* the Idaho Supreme Court specifically refused to overrule *Dyet*, holding the district court erred when it refused to reduce the judgment amount by the Medicare write-offs under I.C. § 6-1606. The District Judge in *McMurtrey* did not discuss *Slack*. Accordingly, this Court finds *Dyet* has neither "lost vitality" as proclaimed by the District Judge in *McMurtrey*, nor has it been "disavowed" by the Idaho Supreme Court as now claimed by State Farm.

The third reason the District Court Judge in *McMurtrey* decided he would not apply *Dyet* was:

> Third, and most important, ***Dyet's*** rationale can be respected without deferring the taking of evidence of insurance adjustments until after the jury is discharged. The jury can be informed of the adjusted amounts of the medical bills without also being told that McMurtrey has health insurance or that the amounts reflect insurance adjustments. One of two approaches to conveying that information to the jury should work:

> (i) redacting McMurtrey's medical bills before they are offered into evidence so that references to or other indicia of insurance coverage or adjustments are eliminated; or (ii) offering a summary of McMurtrey's medical bills under I.R.E. 1006 instead of the medical bills themselves.

Affidavit of Randall L. Schmitz in Opposition to Plaintiff's Motion in Limine, Exhibit F, Memorandum Decision and Order on Motions in Limine, pp. 3-4. (underlining in original). This reason ignores the concern articulated above by this Court that the jury would be presented with "adjusted" amounts of medical bills, and then the jury could infer, based on the life experiences of any of those twelve jurors, that all providers accept reductions in exchange for payment from insurance companies, and the jury then makes a downward "adjustment" of its own on those already downwardly "adjusted" amounts they were allowed to hear as evidence. This reason also ignores the real question the jury is being told to answer: to determine "[t]he reasonable value of necessary medical care received and expenses incurred as a result of the injury, and the present cash value of medical care and expenses reasonably certain and necessary to be required in the future." IDJI 9.01. By presenting the jury only "adjusted" amounts, the jury does not receive evidence of what the various care providers originally determined were "[t]he reasonable value of necessary medical care received and expenses incurred as a result of the injury". Instead, the jury only receives evidence of the "adjusted" amounts of what the various providers originally determined were "[t]he reasonable value of necessary medical care received and expenses incurred as a result of the injury", without ever being told these amounts have been "adjusted", without ever being told what the provider originally determined the reasonable amounts were, and when those "adjustments" have absolutely nothing to do with "[t]he reasonable value of necessary medical care received and expenses incurred as a result of the injury". These adjustments are market-driven and have little, if anything, to do with "[t]he

reasonable value of necessary medical care received and expenses incurred as a result of the injury." The "adjustments" are made by the insurance company (the existence of which is kept from the jury), because of the insurance company's clout, and the "adjustments" are accepted by the provider because the provider is willing to take a lesser amount now rather than trying to obtain a greater amount later. The "adjustments" are market-driven contractual arrangements made in which the plaintiff has absolutely no part.

## IV. OTHER MOTIONS IN LIMINE BY MILLSAP.

Millsap also moved for an order in limine;

> 3.) Allowing Plaintiff's testimony regarding the reasonable and necessary nature of his medical bills and treatment as sufficient foundation for the admissibility of his medical bills as reasonable and necessary consequences of the car crash of 11/21/10; and
>
> 4.) Excluding any testimony or opinions offered by defense experts beyond the scope of the specific opinions set forth in the Defendant's Expert Witness Disclosures filed herein on September 15, 2015.

Plaintiff's Motion in Limine/Notice of Hearing/Declaration of Counsel, pp. 1-2. The Court stated at the October 14, 2015, hearing that, as of that time, the Court lacked sufficient detailed evidence in order to make such a ruling.

## IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED that plaintiff Millsap's first two motions in limine, "1.) Allowing Plaintiff to present evidence at trial regarding the full invoiced amount of his medical bills; 2.) Excluding any evidence regarding medical insurance coverage, insurance payments and write-offs[.]", are GRANTED. Any motion in limine made by defendant State Farm to the contrary of this ruling is DENIED.

IT IS FURTHER ORDERED that all other motions in limine by plaintiff Millsap are DENIED at the present time due to insufficient information being made to the Court for determination of those motions.

Entered this 21st day of October, 2015.

_____
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the _____ day of October, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

| **Lawyer** | **Fax #** | **Lawyer** | **Fax #** |
|---|---|---|---|
| David Ducharme | 765-6795 | Trudy Hanson Fouser/Randall L. Schmitz | 208-336-9177 |

_____
Jeanne Clausen, Deputy Clerk