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LAW SUMMARY

Missouri Revised Statutes Section 490.715: A Toothless Attempt to Limit the Recovery of Medical Expense Write-Offs

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I. INTRODUCTION

Well-established case law in Missouri provides that damages should be compensatory only¹ and a plaintiff is entitled to only *one* satisfaction for the same injury.² However, the collateral source rule operates in contravention of otherwise well-accepted tort principles in that it often results in *double* recovery.³ Under the collateral source rule, proving a plaintiff already received compensation from a collateral source cannot reduce the amount of damages awarded.⁴ Thus, an injured plaintiff can recover twice: once from his or her own insurance provider and again from the defendant.

In the context of medical expenses, insurers can reach contractual agreements with medical service providers to satisfy the plaintiff's original obligation with a reduced amount.⁵ As a result, plaintiffs are able to present evidence to the jury of the original amount billed even though that amount was never actually paid by the plaintiff or any other entity.⁶ The difference

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1. See *Porter v. Toys 'R' Us – Del., Inc.*, 152 S.W.3d 310, 319 (Mo. App. W.D. 2004) (per curiam) (quoting *Washington ex rel. Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619 (Mo. 1995) (en banc) (“The collateral source rule is an exception to the general rule that damages in tort should be compensatory only.”)).

2. *Walihan v. St. Louis-Clayton Orthopedic Group, Inc.*, 849 S.W.2d 177, 180 (Mo. App. E.D. 1993).

3. RESTATEMENT (SECOND) OF TORTS § 920(A) cmt. b (1979).

4. *Kelley v. Kelly Residential Group, Inc.*, 945 S.W.2d 544, 552 (Mo. App. E.D. 1997).

5. *Porter*, 152 S.W.3d at 320.

6. See *id.*

between the amount billed and the amount actually paid for medical services rendered is known as a “write-off” amount – an illusory damage award.⁷

Allowing the recovery of write-off amounts conflicts with the fundamental Missouri policy of lowering litigation costs and insurance premiums, increasing affordable access to healthcare, and improving the state’s economy.⁸ To address this discrepancy, the Missouri legislature enacted section 490.715 as a part of its 2005 tort reform in an attempt to reduce the effect of the collateral source rule and limit the recovery of write-off amounts.⁹ Section 490.715 creates a presumption that the amount actually paid represents the reasonable value of medical expenses received.¹⁰

Limiting the collateral source rule usually draws less attention than other tort reform enactments.¹¹ However, it actually has greater practical importance because “the application of the collateral source doctrine . . . potentially affects nearly *every lawsuit in America* to some extent.”¹² The broad-

7. *Rose v. Via Christi Health Sys., Inc.*, 78 P.3d 798, 805 (Kan. 2003); *id.* at 808 (Luckert, J., dissenting).

8. Preventing the admission of collateral sources, and thus permitting write-off amount recovery, perpetuates growing problems in Missouri. In 2008, Missouri had over \$2.4 billion in tort losses. LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, PAC. RESEARCH INST., U.S. TORT LIABILITY INDEX: 2010 REPORT 36 (2010), *available at* http://www.pacificresearch.org/docLib/20100525_Tort_Liability_Index_2010.pdf. Further, write-off amounts also indirectly decrease access to healthcare. A study indicated that an alarming ninety-two percent of Missourians believe the number of people without healthcare coverage in Missouri is a serious problem and, consequently, “[a]ccess to affordable health insurance and coverage’ is the number one social and domestic issue” on which Missourians believe the legislature should focus. MO. FOUND. FOR HEALTH, VIEWS OF MISSOURI VOTERS ON HEALTH CARE COVERAGE 1 (2005), *available at* www.mffh.org/mm/files/POSFindings.pdf.

9. *See* MO. REV. STAT. § 490.715 (Supp. 2009) (“Damages paid by defendant prior to trial may be introduced but is waiver of credit against judgment (collateral source rule modified).”).

10. *Id.*

11. Like most other jurisdictional tort reforms, Missouri’s reform included other limits of damages, including caps on non-economic and punitive damages. Paul J. Passanante & Dawn Mefford, *The Effect of Tort Reform on Medical Malpractice*, 61 J. MO. B. 236, 242-44 (2005). While damage caps often garner much more attention, such statutory caps do not impact the majority of lawsuits because most damage amounts never actually reach that limit. Jamie L. Wershba, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 350 (2008).

12. Wershba, *supra* note 11, at 350 (emphasis added); *accord* David T. Ahlheim, Berra v. Danter – *Can You Still Keep Total Medical Charges from a Jury?*, CAC ADVISOR: MISSOURI AND ILLINOIS UPDATES (Childress Ahlheim Cary LLC, St. Louis, Mo.), 2009, at 1, *available at* <http://jchildresslaw.com/CACWebFile2.pdf> (last visited Feb. 17, 2011) (noting that a recent Missouri appellate court’s interpretation of section 490.715 “could have *major* effects on valuation of claims in Missouri personal injury claims”) (emphasis added).

reaching doctrine impacts every lawsuit by potentially creating a difference of hundreds of thousands of dollars in recoverable damages depending upon which set of medical bills are presented to the jury.¹³ Retaining the collateral source doctrine invariably favors plaintiffs who want to represent the larger damage amount to the jury, while abolishing the doctrine necessarily benefits defendants who want to avoid over-compensating plaintiffs. As a result, any discussion of the collateral source doctrine is usually coated in self-interest and skewed towards a partisan viewpoint.

This Article focuses objectively on whether the decision to limit the application of the collateral source rule in Missouri is in accord with modern trends and whether Missouri courts' recent interpretation of section 490.715 is consistent with the legislature's original intent. Part II reviews the history of the collateral source doctrine and the justifications supporting its retention. In Part III, this Article outlines the Missouri legislature's decision to modify the rule and analyzes subsequent court decisions applying section 490.715. In response to the recent legislative and judicial activity, Part IV concludes that modification of the collateral source doctrine was warranted and suggests additional statutory changes to limit the enigmatic recovery of write-off damages in Missouri. While the recent interpretation of section 490.715 has effectively abrogated the collateral source doctrine with respect to medical bill admissibility, for the recovery of write-off damages to be truly limited, the collateral source rule must be abolished *and* correspondingly the amount billed must be withheld from the jury.

II. LEGAL BACKGROUND

The collateral source rule has an English common law origin that can be traced back to 1823.¹⁴ The rule was first embraced by American courts in 1854 when the United States Supreme Court held in *Propeller Monicello v. Mollison* that the amounts paid by a plaintiff's insurance could not reduce a defendant's liability.¹⁵ The doctrine obtained its current name in 1871 when

13. See, e.g., *Terrell v. Nanda*, 33-242 (La. App. 2 Cir. 5/10/00); 759 So. 2d 1026, 1028 (illustrating that illusory write-off damages can be significant in that the plaintiff's medical expenses were originally billed at \$1,110,922.82, but the actual amount paid to the medical service provider was only \$164,084.82).

14. Dag E. Ytreberg, Annotation, *Collateral Source Rule: Injured Person's Hospitalization or Medical Insurance as Affecting Damages Recoverable*, 77 A.L.R.3d 415, § 2(a) (1977).

15. 58 U.S. 152, 155 (1854). The conflict between the parties arose when the *Propeller Monticello* and a schooner named the *Northwestern* collided. *Id.* at 153. After the shipwreck and prior to the filing of the suit, the plaintiff's insurer paid for the loss of the schooner. *Id.* at 154. The owner of the *Propeller Monticello* argued that the insurance benefits received by the plaintiff released it from liability. *Id.* at 155. The Court disagreed with the defendant's argument and held instead that "[t]he

the Vermont Supreme Court noted that “[t]he policy of insurance is *collateral* to the remedy against the defendant.”¹⁶

A. *The Collateral Source Rule Defined*

Since those early decisions, the collateral source doctrine became a staple of American jurisprudence.¹⁷ In its current form, the collateral source rule provides that “if an injured party receives compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay.”¹⁸ The Restatement (Second) of Torts describes four general categories of independent sources: insurance policies,¹⁹ employment benefits,²⁰ gratuities,²¹ and social legislation benefits.²²

From its inception, the doctrine acted as “an exception to the general rule that damages in tort should be compensatory only.”²³ The purpose of awarding compensatory damages is to make the injured plaintiff whole.²⁴ Missouri courts have recognized that while plaintiffs are entitled to be made

insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others.” *Id.*

16. *Harding v. Town of Townshend*, 43 Vt. 536, 538 (1871) (emphasis added).

17. Robert Hernquist, *Arthur v. Catour: An Examination of the Collateral Source Rule in Illinois*, 38 LOY. U. CHI. L.J. 169, 176 (2006) (noting that after the United States Supreme Court recognized the collateral source rule in *Propeller Monticello*, the doctrine was “adopted to some degree in every state”).

18. BLACK’S LAW DICTIONARY 279-80 (8th ed. 2004).

19. RESTATEMENT (SECOND) OF TORTS § 920(A) cmt. c (1979). Insurance policies are maintained by the plaintiff or a third party, and upon payment for a loss incurred by the insured, an insurer’s right to subrogation arises. *Id.* Subrogation is defined as “[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.” BLACK’S LAW DICTIONARY, *supra* note 18, at 1467.

20. RESTATEMENT (SECOND) OF TORTS § 920(A) cmt. c. These include benefits that “aris[e] out of the employment contract” and primarily concern unemployment pay where the employer “continues to pay the employee’s wages during his [or her] incapacity.” *Id.*

21. *Id.* (providing that gratuities may take the form of cash payments from third parties and services rendered by medical professionals who do not seek some or all of the value of their services).

22. *Id.* (listing “[s]ocial security benefits, welfare payments, [and] pensions under special retirement acts” as legislative benefits subject to the collateral source rule).

23. *Washington ex rel. Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619 (Mo. 1995) (en banc) (quoting *Overton v. United States*, 619 F.2d 1299, 1306 (8th Cir. 1980)).

24. *BMK Corp. v. Clayton Corp.*, 226 S.W.3d 179, 197 (Mo. App. E.D. 2007).

whole, they should not be awarded a double recovery.²⁵ Such recovery would result in a windfall for the plaintiff²⁶ and has the incidental effect of punishing the tortfeasor, which is not the intended purpose of compensatory damages.²⁷ Thus, the collateral source doctrine operates as an exception to compensatory damages because it can result in double recovery and is punitive in nature.²⁸

It was not long after its adoption in *Propeller Monticello* that courts began to recognize exceptions to the collateral source rule in an effort to limit its effect.²⁹ Today, most states have either substantially modified or completely abrogated the common law collateral source doctrine by legislative action.³⁰ However, states vary in the degree and manner they have altered the collateral source rule, illustrating the fact that many conflicting rationales exist regarding the purpose and utility of the doctrine.³¹

25. *Kincaid Enters., Inc. v. Porter*, 812 S.W.2d 892, 900 (Mo. App. W.D. 1991) (citing *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. App. E.D. 1982) (stating that an injured plaintiff “may not be made more than whole or receive more than one full recovery for the same harm”).

26. *Ameristar Jet Charter, Inc. v. Dodson Int’l Parts, Inc.*, 155 S.W.3d 50, 54 (Mo. 2005) (en banc) (“The goal of awarding damages is to compensate a party for a legally recognized loss. . . . A party should be fully compensated for its loss, but not recover a windfall.” (citations omitted)).

27. *Washington*, 897 S.W.2d at 621 (“Damages in our tort system are compensatory not punitive.”).

28. See RESTATEMENT (SECOND) OF TORTS § 920(A) cmt. b (1979) (stating that “to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff’s injury” and that “there is an element of punishment of the wrongdoer involved”).

29. See, e.g., *Morris v. Grand Ave. Ry. Co.*, 46 S.W. 170, 170 (Mo. 1898) (holding that a plaintiff should not as a matter of course be able to recover the equivalent of the value of services of the attending physician, but instead a “more logical rule is that, to entitle a plaintiff to recover for medical services . . . he must show either that he has paid for the services, or is liable therefor . . . plaintiff ought not to be permitted to recover for a loss which he has never sustained”).

30. *Wershale*, *supra* note 11, at 351 & n.49 (identifying Arkansas, the District of Columbia, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, South Carolina, Texas, Vermont, Virginia, and Wyoming as the only states which currently have not enacted a statutory modification to the common law collateral source doctrine).

31. *Id.* For example, some jurisdictions allow the admission of collateral benefits in all personal injury actions, while others limit the admission to cases involving medical malpractice. *Id.* Compare OHIO REV. CODE ANN. § 2315.20 (LexisNexis 2010) (“In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based . . .”), with NEB. REV. STAT. § 44-2819 (LexisNexis 2010) (permitting admission of evidence relating to “nonrefundable medical reimbursement insurance benefits, less all premiums paid by or for the claimant” in actions involving

B. Rationales Underlying the Collateral Source Rule

The “benefit of the bargain theory” is the most common justification of the collateral source doctrine for both courts in and outside of Missouri.³² The theory is based upon the rationale that a defendant should not benefit from a plaintiff’s investment in insurance benefits.³³ Instead, the theory argues that courts should give any benefit derived to the plaintiff who had the foresight to purchase and maintain insurance.³⁴ The logical extension is that any windfall should favor the injured party rather than the party who caused the injury.³⁵ If a windfall shifted to the defendant, such an approach would produce the inequitable result of relieving the defendant of the full responsibility of his or her wrongful conduct.³⁶ Courts favoring the collateral source rule also point out that not allowing collateral benefits to reduce a tortfeasor’s liability preserves the deterrent effect of tort damages, which is one of the common purposes of tort law.³⁷ A contrary approach of allowing collateral

“damages for bodily injuries or for wrongful death when it is alleged that the claimant suffered damages for the cost of medical care, custodial care or rehabilitation services”).

32. See, e.g., *Kickham v. Carter*, 335 S.W.2d 83, 90 (Mo. 1960) (holding that insurance payments received by a plaintiff cannot be used by a tortfeasor to reduce his or her damages because a defendant should not be entitled to “receive the benefit of hospitalization payments (in the nature of insurance) made by an organization . . . to which plaintiff had no doubt made contributions in accordance with a membership agreement”); see also *Muranyi v. Turn Verein Frisch-Auf*, 719 N.E.2d 366, 369-70 (Ill. App. Ct. 1999) (stating as the general view recognized by many courts that “reducing a plaintiff’s damages by the amount of his insurance proceeds would deprive him not of a mere gratuity, but of the benefit of his bargain”).

33. 22 AM. JUR. 2D *Damages* § 408 (2010) (“This rule is justified on the basis that the wrongdoer should not benefit from the expenditures made by an injured to procure insurance coverage.”).

34. See *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 66 (Cal. 1970) (en banc) (“The collateral source rule as applied here embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift.”).

35. See *Olivas v. United States*, 506 F.2d 1158, 1163-64 (9th Cir. 1974) (“The philosophy underlying the [c]ollateral [s]ource [r]ule [is] that either the injured party or the tort feisor is going to receive a windfall, if a part of the pecuniary loss is paid for by an outside source and that it is more just that the windfall should inure to the benefit of the injured party than that it should accrue to the tort feisor.”).

36. For a court noting this anomalous result, see *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958) (“No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act. If 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.”).

37. See, e.g., *La. Dep’t of Transp. & Dev. v. Kan. City S. Ry. Co.*, 2002-C-2349; 846 So. 2d 734, 739 (La. 2003) (“It is also clear that the collateral source rule pro-

benefits to reduce a tortfeasor's liability would lessen the deterrent effect that providing a windfall to the plaintiff serves.³⁸

C. Collateral Source Rule and Medical Expense Write-Offs

Despite the historical justifications of the collateral source doctrine, a number of criticisms have surfaced. Critics commonly argue that the rule is a substantial deviation from the compensatory nature of tort damages by "enabl[ing] a plaintiff to reap a double recovery in certain circumstances."³⁹ Since the plaintiff was already made whole by an independent source, forcing a defendant to compensate a plaintiff's injury a second time "serve[s] solely as a punishment to the [defendant]."⁴⁰ The collateral source rule thus frustrates the principle purposes of compensatory damages in two respects: it enables over-compensation of the plaintiff, and it requires damage awards that "punish the defendant rather than compensat[e] the injured [plaintiff]."⁴¹

Preventing the admission at trial of collateral source payments often significantly impacts the calculation of the value of medical services provided to a plaintiff and ultimately his or her recoverable damages.⁴² With the growth of the health care industry, it is now commonplace for independent sources like private health care insurers and public healthcare benefactors to receive financial concessions from medical care providers.⁴³ Medical providers often receive a discounted amount of the initial amount billed to the patient.⁴⁴ The discrepancy between the initial amount billed and the amount eventually received is "written off" as a loss by the health care provider, the original debt is discharged, and the balance is never paid.⁴⁵

notes tort deterrence and accident prevention."); *see also* RESTATEMENT (SECOND) OF TORTS § 901(c) (1979) (noting that "the law of torts . . . has within it elements of punishment or deterrence").

38. Christian D. Saine, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RES. L. REV. 1075, 1078 (1997) (including as a justification of the collateral source rule that "unless the defendant is made to pay for the damages caused, the deterrent purposes of tort liability will be undermined" (footnote omitted)).

39. Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 524 (1991) (citing *Chenoweth v. Schaaf*, 576 F. Supp. 1556, 1558 (W.D. Pa. 1984)).

40. Hernquist, *supra* note 17, at 182.

41. *Id.*

42. *See* Wershale, *supra* note 11, at 350.

43. *Id.*

44. Stephen L. Olson & Pat Wasson, *Is the Collateral Source Rule Applicable to Medicare and Medicaid Write-Offs? Defense Practitioners Must Be Alert to the Effort to Collect "Phantom" Damages Through Claims for the Amounts Written Off by Providers*, 71 DEF. COUNS. J. 172, 172 (2004).

45. Wershale, *supra* note 11, at 350.

In most circumstances, insurance write-offs are merely a product of our healthcare system whereby medical providers give up the ability to receive the full amount billed in return for an increase in patients and guaranteed payments.⁴⁶ However, write-off amounts can create complications when tortious conduct causes the need for treatment.⁴⁷ In such an instance, the injured party becomes a plaintiff seeking to recover damages rather than just a recipient of medical services.⁴⁸ In the interest of maximizing recoverable damages, plaintiffs want to “represent the unadjusted medical bills as expenses actually owed” even though write-off amounts would be “phantom” damage awards.⁴⁹ Therefore, the question that arises is whether a plaintiff should be permitted to recover as a medical expense the amount billed or the amount paid.⁵⁰ Courts generally use one of three measures to answer that question: (i) the “benefit of the bargain,” (ii) the “actual amount paid,” or (iii) the “reasonable value of services.”⁵¹

The “benefit of the bargain” approach allows plaintiffs to recover “the full [amount] of their medical expenses, including the ‘write-off’ amount, [when] the plaintiff has paid some consideration for the benefit of the ‘write-off’ amounts.”⁵² The write-off amount is not a windfall to the plaintiff because the benefit is a result of the contractual bargain between the plaintiff and his or her insurance provider.⁵³ This is not a pure recitation of the collateral source rule because that amount is unrecoverable if the plaintiff has not paid consideration for the write-off amount.⁵⁴

This approach is most clearly illustrated in its application to payments made by private insurers and Medicare versus those made by Medicaid. When medical expenses are paid by Medicaid, courts applying the benefit of the bargain approach do not allow plaintiffs to recover the full amount billed; they can only collect up to the Medicaid payment.⁵⁵ Medicare premiums are funded through compulsory payroll taxes in which a portion of the employee’s wages deducted from his paycheck helps fund the system.⁵⁶ Medicaid, on the other hand, is a social welfare system not directly funded by the

46. Hernquist, *supra* note 17, at 184-85.

47. Ben Bridges, Note, *Clarifying “King Arthur’s Court:” Making Sense of the Collateral Source Rule in Illinois After Wills v. Foster*, 892 N.E.2d 1018 (Ill. 2008), 34 S. ILL. U. L.J. 747, 747 (2010).

48. *Id.*

49. Olson & Wasson, *supra* note 44, at 173.

50. *Id.* at 176.

51. For a summary of the different approaches jurisdictions have applied in determining whether the collateral source rule applies to write-offs, see *Bozeman v. State*, 2003-1016 (La. 7/2/04); 879 So. 2d 692, 701.

52. *Id.* at 703.

53. *Id.* at 703-04.

54. *Id.* at 704.

55. *See, e.g., Wills v. Foster*, 892 N.E.2d 1018, 1026 (Ill. 2008).

56. *Id.*

employee.⁵⁷ Therefore, in keeping with the theory of the benefit of the bargain approach, only Medicare benefits are seen as bargained for insurance benefits paid for by the employee.⁵⁸

Unlike the benefit of the bargain approach, courts that determine damage awards for medical expenses based on the “actual amount paid” do not distinguish between payments made by private insurers, Medicaid, and Medicare in ascertaining the value of medical services.⁵⁹ Courts following the actual amount paid approach do not look to the source of the write-off because the write-off amount is never incurred by the plaintiff, regardless of who made the payment.⁶⁰ The write-off amount is not recoverable because “it is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefore [sic].”⁶¹

The “reasonable value” approach does not adopt a categorical view of medical expenses and instead considers both the amount paid and the amount billed.⁶² It may result in the same amount of damages being considered as the actual amount paid approach; however, the reasonable value approach does not compel the same outcome as the actual amount paid approach.⁶³ The actual amount paid is just one of a number of factors that are considered when determining the reasonable value of medical services.⁶⁴ Thus, “reasonable value” is merely a term of art representing a measure of one of three factors: (i) the full amount of medical services billed, including the write-offs; (ii) the actual amount paid without considering the write-offs; or (iii) a combination of both.⁶⁵

57. For a decision explaining the Medicare system, see *Hodge v. Middletown Hosp. Ass'n*, 581 N.E.2d 529, 532 (Ohio 1991) (“Medicaid payments, however, are significantly different from benefits paid as Medicare. . . . Medicaid is a system for providing payment of medical costs for the poor. Neither the beneficiary nor his employer pays premiums or underwrites the cost of the program.”).

58. *Id.*

59. See, e.g., *Dyet v. McKinley*, 81 P.3d 1236, 1239 (Idaho 2003).

60. See *id.*

61. *Id.* (citing *Kastick v. U-Haul Co. of W. Mich.*, 740 N.Y.S.2d 167, 169 (N.Y. App. Div. 2002)).

62. *Haselden v. Davis*, 579 S.E.2d 293, 295 (S.C. 2003).

63. See, e.g., *Koffman v. Leichtfuss*, 630 N.W.2d 201, 209 (Wis. 2001) (“[W]hile the actual amount paid for medical services may reflect the reasonable value of the treatment rendered, the focus is on the reasonable value, not the actual charge.”).

64. *Haselden*, 579 S.E.2d at 295 (other factors considered include “the amount billed to the plaintiff[] and the relative market value of those services”).

65. Guillermo Gabriel Zorogastua, Comment, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs*, 55 U. KAN. L. REV. 463, 474-75 (2007).

In recent years, many legislatures have attempted to modify the collateral source doctrine. In 2005, one such legislative attempt occurred in Missouri with the enactment of Missouri Revised Statutes section 490.715.⁶⁶

III. RECENT DEVELOPMENTS

Historically, Missouri courts adhered to the common law collateral source doctrine that “a wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source.”⁶⁷ However, even prior to Missouri’s statutory modification, whether the collateral source rule applied in a given case depended on the specific facts.⁶⁸ As a result, Missouri never had “a single rule but rather, a combination of rationales applied to a number of different circumstances to determine whether evidence of [collateral sources] should be precluded from admission.”⁶⁹

Prior to Missouri’s most recent statutory modification of the collateral source rule,⁷⁰ in 2003, the Supreme Court of Missouri handed down *Farmer-Cummings v. Personnel Pool of Platte County*, which greatly limited the application of the collateral source rule in workers’ compensation cases.⁷¹ In *Farmer-Cummings*, the plaintiff recovered medical expenses incurred as a result of a health condition that resulted from her work environment.⁷² However, the plaintiff appealed her damage award because she was not allowed to recover the amounts adjusted or written-off by her healthcare providers.⁷³ Thus, the Supreme Court of Missouri determined whether the collateral source of the plaintiff’s reduced medical bills could be considered in order to

66. MO. REV. STAT. § 490.715 (Supp. 2009).

67. *Iseminger v. Holden*, 544 S.W.2d 550, 552 (Mo. 1976) (en banc).

68. *See* *Washington ex rel. Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619-20 (Mo. 1995) (en banc) (citing Missouri cases which held that the collateral source rule was not applicable to evidence of gratuitous services rendered to the plaintiff, while insurance policies contracted for and governmental benefits received by the plaintiff were subject to the collateral source rule).

69. *Id.* at 619.

70. The statutory modification in 2005 was not the first time Missouri reduced the application of the collateral source rule. *Passanante & Mefford, supra* note 11, at 241. “In 1987, the Missouri legislature modified the collateral source rule set forth in [section] 490.715.” *Id.*

The modification provided that “[i]f prior to trial a defendant or his insurer or [his] authorized representative” had paid “any part of a plaintiff’s special damages, the defendant [could] introduce evidence that some other person than the plaintiff has paid those amounts,” but “not identify [the] person having made such payments.”

Id. (alteration in original) (quoting MO. REV. STAT. § 490.715 (2000)).

71. 110 S.W.3d 818 (Mo. 2003) (en banc).

72. *Id.* at 820.

73. *Id.*

prevent collection of the initial fees.⁷⁴ The court noted that medical bills are often written-off as a result of medical providers reducing billed amounts as a matter of bookkeeping to reflect the amount they have actually received or amounts they have deemed bad debts.⁷⁵ Accordingly, the court held that if “healthcare providers allowed write-offs and reductions for their own purposes and [the plaintiff] is not legally subject to further liability, [the plaintiff] is not entitled to any windfall recovery.”⁷⁶ Despite the reasoning equally supporting a limitation of the collateral source doctrine in the context of civil litigation, Missouri courts have declined to decide whether *Farmer-Cummings* extends beyond actions involving workers’ compensation statutes.⁷⁷

Although *Farmer-Cummings* was confined to workers’ compensation actions, a limitation of the collateral source doctrine to civil actions in Missouri soon followed with its 2005 tort reform.⁷⁸ In response to complaints by business groups and insurance companies claiming they were forced to pay damages for medical bills never actually collected by medical providers, the Missouri legislature enacted Missouri Revised Statutes section 490.715, which creates a presumption that the value of medical services is the amount actually accepted by healthcare providers in satisfaction of a debt.⁷⁹ This legislation has significantly impacted tort law in Missouri,⁸⁰ of special note is the legislature’s *attempt* to reduce the recovery of write-off damages. In relevant part, section 490.715 provides:

5. (1) Parties may introduce evidence of the value of the medical treatment rendered to a party that was reasonable, necessary, and a proximate result of the negligence of any party.

74. *Id.* at 821.

75. *Id.* at 822.

76. *Id.* at 823.

77. *See, e.g.,* Porter v. Toys ‘R’ Us – Del., Inc., 152 S.W.3d 310, 321-22 (Mo. App. W.D. 2004) (per curiam) (“Even if we were inclined to engraft our supreme court’s interpretation of these workers’ compensation statutes onto civil litigation cases, the posture of this particular case does not allow us to isolate and decide the pinpoint issue framed by the Court in *Farmer-Cummings*.”).

78. Passanante & Mefford, *supra* note 11 (providing that on March 29, 2005, House Bill 393 was signed into law).

79. David J. Deterding & Bharat Varadachari, *Missouri Courts Are Re-Examining the Collateral Source Rule and its Effect on the Admissibility of Medical Bills: Adopting the Illinois Rule Will Increase the Value of Bodily Injury Claims in Missouri*, (HeplerBroom, LLC, St. Louis, Mo.), 2009, at 3, <http://www.heplerbroom.com/pdfs/medical-bills-article.pdf> (last visited Feb. 20, 2011) (discussing the historical context and events that preceded the legislature’s modification of the collateral source rule).

80. *Id.* at 4-5.

(2) In determining the value of the medical treatment rendered, there shall be a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered. Upon motion of any party, the court may determine, outside the hearing of the jury, the value of the medical treatment rendered based upon additional evidence, including but not limited to:

- (a) The medical bills incurred by a party;
- (b) The amount actually paid for medical treatment rendered to a party;
- (c) The amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery.⁸¹

Section 490.715.5(2) applies “a rebuttable presumption that the [dollar amount] necessary to satisfy the financial obligation of the plaintiff” is the *value* of the medical treatments rendered by the health care provider and is thus admissible under section 490.715.5(1).⁸² While the medical bill represents the amount that would technically satisfy the plaintiff’s financial obligation, partial payments or adjustments to the bill may ultimately reduce the amount actually required to satisfy the plaintiff’s medical expenses.⁸³ Essentially, Missouri courts must decide whether the actual payments by the patient, insurer, Medicare, or Medicaid represent the value of medical services or whether the amount billed by the health care provider determines that amount.

The typical application of the statute begins with the defendant possessing evidence of the actual amount paid on behalf of the plaintiff for medical services.⁸⁴ The evidence provides the basis for the rebuttable presumption of the value of the medical services.⁸⁵ One of the parties then files a motion *in limine* or a motion to consider the value of medical services in order to confirm (for the defense) or rebut (for the plaintiff) the true value of the medical services.⁸⁶ In order to rebut the presumption that the value of the services is

81. MO. REV. STAT. § 490.715.5 (Supp. 2009).

82. See Robert H. Dierker & Richard J. Mehan, *Personal Injury and Torts Handbook*, 34 MO. PRAC. § 13:12(b) (2010).

83. See *id.*

84. See, e.g., *Deck v. Teasley*, 322 S.W.3d 536, 538 (Mo. 2010) (en banc).

85. See *id.* at 537-38.

86. The plaintiff has the burden of producing substantial evidence because the rebuttable presumption of the value of medical services rendered lies with the defendant (the amount actually paid). See *Berra v. Danter*, 299 S.W.3d 690, 697 (Mo. App. E.D. 2009) (citing *Terminal Warehouses of St. Joseph, Inc. v. Reiners*, 371 S.W.2d

the amount actually paid, a plaintiff will likely introduce medical bills and affidavits under section 490.525⁸⁷ from his or her medical providers attesting that the medical bills are necessary and reasonable.⁸⁸ According to multiple courts, affidavits are sufficient to rebut the presumption that the amount paid is the value of the treatment rather than the amount billed.⁸⁹

Berra v. Danter addresses the admissibility of medical expenses under section 490.715.⁹⁰ In *Berra*, the trial court found that the plaintiff's medical bills reflected the reasonable value of the medical services.⁹¹ Leading up to the decision, the parties motioned the court for a hearing.⁹² Attached to his motion, the plaintiff presented copies of his medical bills, affidavits from health care providers, and a Medicare payment summary.⁹³ The plaintiff's billing statement totaled \$90,062.52, but he only paid \$28,734.37.⁹⁴ The trial court accepted the billing amount of \$90,062.52 as the reasonable value and allowed that amount to go to the jury.⁹⁵ The defendant appealed, arguing that the trial court only should have considered the amount actually paid.⁹⁶ The trial court erred, the defendant claimed, by including the plaintiff's billing statements in its calculation because they were not the "medical bills incurred" under section 490.715.5(2)(a).⁹⁷ The court rejected this argument, stating that limiting evidence of medical expenses to the amount actually paid would render the language used in section 490.715.2(b) superfluous.⁹⁸ The court noted that the statute specifically allows evidence of the amount actual-

311, 316-17 (Mo. 1963)). Only upon production of substantial evidence does the presumption fall away, allowing the trial court judge to determine the reasonable value by considering both parties' evidence. *Id.*

87. Section 490.525.2 provides:

Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

MO. REV. STAT. § 490.525.2 (Supp. 2009). Importantly, not all courts permit introduction of these affidavits as evinced by the trial court order in *Kotopka v. City of Kansas City*, where it classified them as inadmissible hearsay. No. 0716-CV14256, 2009 WL 3405574 (Mo. Cir. May 12, 2009).

88. *See, e.g., Wheeler v. Phenix*, No. SD 30371, 2011 WL 446238, at *1 (Mo. App. S.D. Feb. 8, 2011).

89. *See infra* notes 106-08 and accompanying text (interpreting section 490.715).

90. 299 S.W.3d 690, 695-99 (Mo. App. E.D. 2009).

91. *Id.* at 695.

92. *Id.*

93. *Id.*

94. *Id.* at 695-96.

95. *Id.* at 696.

96. *Id.*

97. *Id.*

98. *Id.* at 697-98.

ly paid as a consideration of the value of medical services and determined there would be no need to specifically include that as a factor if the value of medical bills referred exclusively to the amount paid.⁹⁹

In *Klotz v. St. Anthony's Medical Center*, the defense similarly argued on appeal that the trial court erred in admitting into evidence unpaid or adjusted medical bills that, consequently, did not reflect the lesser amount that the plaintiff actually paid.¹⁰⁰ The Supreme Court of Missouri disagreed.¹⁰¹ The court noted that the defendants sought a motion *in limine* to establish that the value of medical services was the actual amount paid, and the trial court subsequently held a hearing on the issue.¹⁰² At that hearing, the plaintiffs introduced evidence of liens and agreements making them responsible for the unpaid portion.¹⁰³ Accordingly, the court found substantial evidence supporting the trial court's ruling to admit the plaintiffs' total bill, including the unpaid portion, into evidence as the value of the services.¹⁰⁴ The Supreme Court of Missouri thus held that the plaintiffs had rebutted the presumption that only the amount paid was the value of the services and allowed testimony concerning the billing statements during trial.¹⁰⁵

As shown by *Berra* and *Klotz*, affidavits under section 490.525 can sufficiently rebut the reasonable value presumption in section 490.715; however, they do not require that result. For instance, in *Willman v. Wal-Mart Stores East, LP*, the trial court considered the plaintiff's affidavits attesting the reasonableness of the billing statement as well as the defendant's affidavits illustrating that some of the expenses had been written-off and were no longer payable by the plaintiff.¹⁰⁶ In response to arguments from both parties that the affidavits require certain results, the judge emphasized that the evidence presented in the affidavits simply acts as a factor to be weighed in the determination.¹⁰⁷ Because the plaintiff's affidavits were reasonable and the defendant clearly showed that some of those billings were contractually reduced in lieu of full payments, the judge only included as the "reasonable value" those billings that the plaintiff maintained responsibility to pay.¹⁰⁸

99. *Id.*

100. 311 S.W.3d 752, 770 (Mo. 2010) (en banc) (per curiam).

101. *Id.* at 771.

102. *Id.*

103. *Id.*

104. *See id.*

105. *Id.*

106. No. 4:09CV00009 ERW, 2010 WL 1692312, at *5 (E.D. Mo. Apr. 27, 2010).

107. *Id.*

108. *Id.* at *5-6. In addition, *Hall v. Wal-Mart Stores East, LP* further supports this conclusion. 316 S.W.3d 428, 430-31 (Mo. App. S.D. 2010) (holding that section 490.525 does not require a finding of reasonableness and suggests that "counter-affidavits" by a defendant showing unreasonableness of charges can negate the plaintiff's affidavits to the contrary).

Considering the significance of the trial court hearing on the question of admissibility, the court's approach in *Willman* sheds light on various considerations. First, showing that the plaintiff is no longer responsible for the payment of medical expenses billed as a result of contractual agreements may reduce the determined reasonable value of medical services accordingly.¹⁰⁹ Next, presenting counter-affidavits that contravene any or all of the plaintiff's affidavits concerning the reasonableness of the charges – a so-called battle of the experts – can reduce the amount of damages the judge considers reasonable.¹¹⁰

As is apparent from the text of the statute and emphasized by the above cases, the evidence admissible to the trial court judge for purposes of the pre-trial hearing differs from that admissible at trial to the jury. Accordingly, parties can submit evidence of the reasonable value of medical services to the trial court judge, but his or her decision in the hearing ultimately determines what is presented to the jury.¹¹¹ Until the Supreme Court of Missouri's decision in *Deck v. Teasley*,¹¹² the judge's decision was comprised of two determinations: (1) whether the presumption under section 490.715.5(2) was rebutted; and (2) if rebutted, what amount represented the reasonable value of medical services to be submitted to the jury.¹¹³

Berra v. Danter provided guidance as to the first determination. The Missouri Court of Appeals held that the rebuttable presumption disappears if "substantial evidence" is introduced by the plaintiff that the amount billed is the reasonable value of the medical services rendered.¹¹⁴ However, the court left the second determination – what amount will be submitted to the jury – to the discretion of the trial court judge.¹¹⁵

109. See *Willman*, 2010 WL 1692312, at *5 (lessening the "reasonable value of medical treatment" by those billings contractually reduced).

110. See *Hall*, 316 S.W.3d at 431 ("The lack of counter-affidavits may have allowed the trial court to consider Hall's medical bills [reasonable under section 490.525], but did not end the [section] 490.715.5 analysis.").

111. See *Berra v. Danter*, 299 S.W.3d 690, 695-96 (Mo. App. E.D. 2009) (judge allowing only the determined reasonable value based on the amount originally billed to be presented to the jury); see also *Dierker & Mehan*, *supra* note 82 (presuming, without reference to case authority, that the jury can only hear the determined or presumed reasonable value). But see *Deck v. Teasley*, 322 S.W.3d 536, 543 (Mo. 2010) (en banc) (changing the trial court's role in determining the reasonable value of medical services).

112. 322 S.W.3d 536.

113. See, e.g., *Berra*, 299 S.W.3d at 696-97.

114. *Id.* at 697. The court was criticized for creating a low hurdle for plaintiffs to rebut the statutory presumption because, in *Berra*, the plaintiff only needed to submit an affidavit from a custodian of records acknowledging the reasonableness of the amount billed at the time it was generated. See, e.g., *Deterding & Varadachari*, *supra* note 79.

115. See Donna Walter, *Plaintiffs' Bar Wins Fight Over Medical Bills Statute in Missouri*, MO. LAW. MEDIA, Oct. 28, 2009, http://findarticles.com/p/articles/mi_

Although parties submitted nearly identical evidence, trial court judges often reached differing conclusions as to whether the reasonable value of the medical services was the amount billed or the amount paid.¹¹⁶ This was due to the multiple factors that the trial judge considered under section 490.715.¹¹⁷ In response to the growing concern about inconsistent rulings across Missouri,¹¹⁸ the Supreme Court of Missouri provided some much needed guidance to circuit court judges in the 2010 case of *Deck v. Teasley*.¹¹⁹

In *Deck*, the plaintiff argued on appeal that “the trial court erred in limiting evidence of the value of her medical treatment” to \$9,904.28, which was the amount that the plaintiff, Medicare, and her supplemental insurance actually owed.¹²⁰ Instead, the plaintiff argued that she should have been permitted to submit to the jury the original bill of her medical care, which totaled \$27,991.¹²¹ The Supreme Court of Missouri agreed and reversed the trial court’s finding that the evidence submitted by the plaintiff was not sufficient to rebut the presumption under section 490.715.5.¹²² The court found that the plaintiff provided “substantial evidence” to rebut the presumption of the amount paid representing the value of her medical services.¹²³

7992/is_20091028/ai_n39380983/ (stating that the *Berra* decision “reaffirms the submittal of the medical bills themselves with the affidavits authorized under statute is sufficient to rebut the presumption” but the decision does not provide direction as to “[h]ow the trial court’s discretion will be applied after rebuttal of the presumption” (quoting David Damick, Attorney of Plaintiff/Appellant James Berra)).

116. See cases cited *infra* note 117.

117. See, e.g., *Hall v. Wal-Mart Stores E., LP*, 316 S.W.3d 428, 430-31 (Mo. App. S.D. 2010) (affirming the trial court’s decision that the statutory presumption was not rebutted even though the plaintiff submitted medical bills and affidavits supporting their reasonableness and the defendant did not submit any counter-affidavits); *Simpson v. Morris*, No. 0716-CV29178, 2008 WL 2855913 (Jackson County Cir. Ct. June 24, 2008) (sustaining plaintiff’s motion *in limine* and allowing full medical bills to be submitted to the jury when defendant failed to submit any counter-affidavits under section 490.525); *Hazard v. Ortmann Stair Co.*, No. 06CC3012, 2007 WL 5442267 (St. Louis County Cir. Ct. Oct. 29, 2007) (granting plaintiff’s motion and providing that the reasonable value for medical services rendered was established by medical bills and excluding payments of write-offs and adjustments).

118. See Allison Retka, *Mixed Opinions: Lawyers Call for Clarity on Missouri’s Collateral-Source Rule*, MO. LAW. WKLY., Nov. 17, 2008, available at <http://www.allbusiness.com/legal/torts-tort-reform/14473709-1.html> (“We’re seeing 180 degrees of difference in judges’ [rulings]’ . . . ‘What will happen in one courtroom will be completely different across the hall.’” (first alteration in original) (quoting Rep. John Burnett, a Missouri plaintiff’s attorney)).

119. 322 S.W.3d 536 (Mo. 2010) (en banc).

120. *Id.* at 537.

121. *Id.*

122. *Id.*

123. *Id.* at 541. At the pretrial hearing, the plaintiff submitted her medical bills and testimony from medical providers that the amount she was billed was customary

While the Supreme Court of Missouri agreed that the plaintiff rebutted the presumption, it did not instruct the trial court to *exclusively* submit the amount billed to the jury on remand.¹²⁴ The court reasoned that in the context of section 490.715, when the plaintiff rebuts the presumption that the amount paid represents the reasonable value of medical services, the amount billed as well as the amount paid is admitted at trial as if no presumption existed.¹²⁵ However, the court noted that if the presumption is not rebutted, then evidence of the reasonable value of medical services rendered is limited to the amount paid, and the amount billed is not submitted to the jury.¹²⁶

Based on the court's analysis in *Deck*, two potential outcomes emerge at a pretrial hearing to determine the value of medical services. First, if the presumption is rebutted, the amount billed *and* the amount paid will be submitted to the jury to determine damages.¹²⁷ Second, if the presumption is not rebutted, only the amount paid will be considered by the jury.¹²⁸ This represents a substantial departure from earlier decisions interpreting section 490.715 where only the amount billed *or* the amount paid escaped the pretrial hearing.¹²⁹ Going forward, in both potential pretrial outcomes, the jury considers the amount paid. Therefore, the court's decision in *Deck* completely abrogates the common law collateral source rule when viewed in conjunction with section 490.715 because the amount paid reflects an adjusted amount from collateral payments.

IV. DISCUSSION

The collateral source rule has always conflicted with Missouri's compensatory view of damages.¹³⁰ Today, this inherent conflict remains, but the rationales historically used to justify the conflict are antiquated. This Part analyzes whether Missouri's 2005 statutory modification to the collateral source rule is supported by recent trends. Further, this Part argues that, while the modification provided by section 490.715 was intended to reflect these recent trends, the statute did little to reduce the recovery of write-off damag-

and reasonable. *Id.* at 540. During the trial, the plaintiff made an offer of proof to the court that the amount she was billed equaled the value of her care. *Id.* at 540-41.

124. *Id.* at 541-42.

125. *Id.* at 539-40 (the court explained that once a plaintiff submits sufficient evidence to rebut a presumed fact, "the [jury] receives the issue free from any presumption[,] . . . [but] the facts that gave rise to the presumption remain in the case . . . along with the facts to the contrary") (citation omitted).

126. *Id.* at 540. Therefore, if the presumption under section 490.715 is *not* rebutted, the value of write-off amounts cannot be considered by the jury in determining the reasonable value of medical services. *See id.*

127. *Id.*

128. *Id.*

129. *See supra* text accompanying notes 90-99 and sources cited therein.

130. *See supra* text accompanying notes 23-28 and sources cited therein.

es. In response, this Part suggests additional modifications that can and should be made to realize the statute's original intent of limiting the recovery of write-offs in Missouri.

A. *Justifications for Eliminating the Collateral Source Rule*

The rationales supporting the collateral source doctrine recently received increased scrutiny in light of tort reform, bloated litigation costs and insurance premiums, and a struggling economy.¹³¹ Advocates for keeping the collateral source doctrine in force rationalize that eliminating the doctrine would prevent a plaintiff from receiving the benefit of his bargain.¹³² Proponents of this theory lack a fundamental understanding of the actual benefit for the plaintiff. A plaintiff who obtains insurance does so in the interest of security – either to ensure he will receive care if he is financially unable to pay or to protect against an insolvent tortfeasor if his injuries are the result of another's actions.

Mischaracterizing the bargained-for benefit as the amount billed by a medical provider “turns the insurance contract into a wager for . . . a chance at double recovery.”¹³³ It allows plaintiffs to add a non-bargained-for tort judgment to their bargained-for insurance benefits.¹³⁴ The benefit of the bargain theory ignores the reality that a plaintiff who bargains for insurance protection does so for the benefit of security rather than as a wager for a chance at a double recovery.¹³⁵

Another problem with using the benefit of the bargain theory to measure the amount of damages is that it focuses on whether the tort victim was insured by private insurance, Medicare, or Medicaid.¹³⁶ By doing so, “it undermines the collateral source rule by using the plaintiff's [collateral] relationship with a third party to measure the tortfeasor's liability.”¹³⁷ In that respect, the benefit of the bargain is inconsistent since it excludes collateral

131. Wershbaile, *supra* note 11, at 346.

132. *See supra* text accompanying note 32 and cases cited therein (listing the benefit of the bargain theory as the most common justification of the collateral source doctrine).

133. Saine, *supra* note 38, at 1099.

134. *Id.* at 1098.

135. *Id.* at 1100. An alternative approach of allowing plaintiffs to bargain for insurance as a wager for a chance at a windfall creates a perverse incentive for plaintiffs to become tort victims. For a similar argument, see Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1499 (1999) (providing the following examples of this moral-hazard problem: “Homeowners may not take simple low-cost steps to prevent fires, such as installing smoke detectors; a fully insured car owner may park on the street instead of in a safer garage; a contact-lens wearer with insurance against loss may exercise less care in keeping track of the lenses.”).

136. *See, e.g.,* *Wills v. Foster*, 892 N.E.2d 1018, 1026-27 (Ill. 2008).

137. *Id.* at 1027.

sources in some instances, such as preventing the admission of a write-off amount to prove the amount actually paid by a plaintiff for medical services, while simultaneously allowing the admission of third-party relationships collateral to the cause of action.

Perhaps the most glaring deficiency in justifying the collateral source doctrine with the benefit of the bargain theory is the constitutional challenge that has resulted from statutory enactments and judicial decisions that use the benefit of the bargain as their foundation. By distinguishing among plaintiffs whose write-off amounts are the result of Medicare, Medicaid, and private insurance payments, courts have held that the benefit of the bargain approach violates the equal protection clauses of both the federal and state constitutions by creating different categories of plaintiffs.¹³⁸ Under Medicaid, the poor, elderly, and disabled receive funds to assist with their medical expenses.¹³⁹ Therefore, excluding the recoverability of write-offs that are the product of Medicaid payments results in the poor and disabled recovering much less in economic damages than those plaintiffs whose write-off amounts result from a contractual bargain with Medicare or private insurance.¹⁴⁰

Thus, the longstanding rule that damages should only be compensatory has been limited by a doctrine with a main justification that is conceptually mischaracterized, inconsistent in its application, and unconstitutional in the context of medical expense write-offs. The other common justifications for the rule are similarly of little value in supporting the doctrine's retention.

Supporters of the collateral source doctrine also claim that since either the plaintiff or the defendant will receive a windfall, it is more just to allow the plaintiff to collect the windfall.¹⁴¹ This contention presupposes that a windfall must inevitably fall either to the plaintiff or to the defendant.¹⁴² However, this presumption rests on faulty grounds. When a plaintiff has no

138. See, e.g., *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939, 950-51 (Kan. 1985), *holding modified by* *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 221 (Kan. 2010); see also *Farley v. Engelken*, 740 P.2d 1058, 1069 (Kan. 1987) ("If the legislature wishes to change the rules of evidence by abrogating the collateral source rule, it may do so if it is applied equally to all who are injured by the negligent acts of another.").

139. See 42 U.S.C. § 1396 (2006).

140. *Zorogastua*, *supra* note 65, at 492-93.

141. See sources cited *supra* notes 35-36 and accompanying text.

142. For a court expressly noting this presumption, see *State Sec. Ins. Co. v. Frank B. Hall & Co., Inc.*, 109 F.R.D. 95, 96 (N.D. Ill. 1985), providing that:

In a sense any answer to the collateral source question in the typical personal injury case can be viewed as a kind of windfall. To a plaintiff the money from the collateral source, plus the receipt of undiminished damages from the tortfeasor defendant, represents a double recovery. Conversely, to allow a defendant to reduce his or her damages liability by the amount plaintiff has already received from the collateral source would mean the tortfeasor has escaped paying for all the harm caused by his or her wrong.

economic loss requiring compensation, refusing to require a defendant to pay damages for write-off amounts not incurred by the plaintiff does not result in a windfall benefit to the defendant.¹⁴³

Concededly, a legal system where plaintiffs are limited to recovering the amounts they actually paid or are still obligated to pay would certainly benefit defendants. If plaintiffs cannot recover write-off amounts, liability insurers will have reduced payouts on judgments, and this will presumably result in reduced liability insurance premiums for defendants. However, the definition of “windfall” does not include a mere incidental or incremental benefit.¹⁴⁴

The argument that the collateral source rule is justified because it serves as a deterrent to potential tortfeasors also fails to pass muster after a common sense analysis.¹⁴⁵ Claiming that potential windfalls recovered by plaintiffs will deter individuals from engaging in tortious activity is speculative and divorced from real-life behavior. It is unlikely that potential tortfeasors will weigh the consequences of the collateral source rule before they act or fail to act, and practically speaking few even know of the rule’s existence or understand its operation.¹⁴⁶ Further, adopting the collateral source doctrine can only diminish the amount of damages, but it has no effect on a finding of liability.¹⁴⁷ Therefore, deterrence is already served by the penalty of civil liability in general, and the prospect of a windfall by the operation of the collateral source rule adds little to that deterrent.¹⁴⁸

Even if one were not convinced that these theoretical justifications have little merit standing alone, any remaining support for the doctrine is eroded

143. Brandon R. Keel, *Profiting Under the Veil of Compensation: Wills v. Foster and the Application of the Collateral Source Rule to Medicare and Medicaid*, 58 DEPAUL L. REV. 789, 817 (2009) (“[T]he only entity entitled to the difference between the amount paid and the amount charged is the healthcare provider itself. . . . If the healthcare provider has no right to recover that amount, a court’s refusal to require a defendant to pay that amount would not result in a windfall.”).

144. Kades, *supra* note 135, at 1498-99 (“[W]indfall capture makes sense only for larger windfalls. . . . [and] infrequent types of gains.”). Therefore, small, recurring benefits in the form of reduced insurance premiums are by definition not windfalls. *Id.* at 1499.

145. See *supra* notes 37-38 and accompanying text for an overview of the deterrence justification.

146. Amicus Curiae Brief of Ohio Ass’n of Civil Trial Attorneys at 13, *Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994) (No. 92-2382), 1993 WL 13143644.

147. *Id.* at 12.

148. *Id.* Logic dictates that larger liability amounts will always lead to a larger deterrent effect. However, allowing plaintiffs to recover the amount paid often already results in a large recovery. While the amount billed for medical services will always be greater or equal to the amount paid, the potential for a substantial recovery by plaintiffs, using the amount paid, already serves a significant deterrent. Considering the law of diminishing returns, since potential liability amounts are already so large, using the amount billed to justify a deterrent effect has less weight as the liability amounts enlarge.

when viewed in light of current changes to jurisprudential circumstances and societal conditions. America has the most expensive tort system in the world with annual costs representing 2.3% of the nation's gross domestic product.¹⁴⁹ Further, relative to other states, empirical data suggests that Missouri has one of the most costly tort systems in the country.¹⁵⁰ If the system maintains its status quo, Missouri likely will face rising tort liability costs in the future.¹⁵¹ The most effective way to control these variable tort costs is by modifying the substantive and procedural tort rules in Missouri.¹⁵² Tort rules act as "dials that can be turned to influence the final outputs of the tort system."¹⁵³ One such dial that can be turned is the modification of the collateral source rule.¹⁵⁴ Since the presence or absence of the rule can have a significant effect on the recoverable damages in a single case,¹⁵⁵ allowing defendants to introduce evidence of the amount paid or categorically limiting recovery to the amount paid can considerably reduce liability costs on Missouri's tort system as a whole.

The collateral source rule also imposes excessive costs on society in the form of high liability insurance premiums, the availability of health care, and the foregone production of goods and services.¹⁵⁶ Eliminating the collateral source rule affects costs for health care both directly and indirectly: directly, it lowers medical liability insurance premiums, while indirectly it increases access to health care.¹⁵⁷

Because of the substantial difference in the amount paid by a plaintiff and the amount he or she is originally billed, the amount a liability insurer pays on behalf of a defendant is dependent upon the collateral source rule. If plaintiffs are allowed to recover the amount billed, liability insurers' profitability is adversely affected and insurers pass the cost along to society in the form of increased premiums.¹⁵⁸ If plaintiffs are prevented from recovering

149. Paul H. Rubin & Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, 50 J.L. & ECON. 221, 235 (2007). Italy comes in at a distant second with a tort cost of 1.3% of its gross domestic product, and the average cost of other countries is 0.9%. *Id.*

150. MCQUILLAN & ABRAMYAN, *supra* note 8, at 30 (ranking Missouri the fifth highest out of fifty states in terms of tort costs and litigation risks).

151. *Id.* at 68.

152. *Id.* at 39.

153. *Id.*

154. *See id.* at 71 (including modifying the collateral source rule as one type of tort reform that states adopted, which produced statistically significant effects on lower liability costs).

155. *See, e.g.,* Terrell v. Nanda, 33-242 (La. App. 2 Cir. 5/10/00); 759 So. 2d 1026, 1028. In *Terrell*, the plaintiff's medical expenses were originally billed at \$1,110,922.82, but Medicaid only paid the medical service provider \$164,084.82, resulting in a write-off amount of \$946,838. *Id.*

156. *See infra* text accompanying notes 160-67 and sources cited therein.

157. *See infra* text accompanying notes 158-64 and sources cited therein.

158. Rubin & Shepherd, *supra* note 149, at 226.

write-off amounts, the frequency and amount of claims against insured individuals will decrease.¹⁵⁹ As a result, a reduction in losses and enhanced insurer profitability will lower premiums.¹⁶⁰

In the context of medical malpractice claims, healthcare costs increase when medical providers are forced to pay higher insurance premiums.¹⁶¹ With a rise in healthcare costs, the number of uninsured patients also increases.¹⁶² Thus, reducing medical liability premiums by limiting the reach of the collateral source rule would greatly reduce healthcare costs¹⁶³ and consequently decrease the number of those underinsured or uninsured.¹⁶⁴

159. See Ben C.J. van Velthoven, *Empirics of Tort*, in *TORT LAW AND ECONOMICS* 453, 472 (Michael Faure ed., 2d ed. 2009), available at media.leidenuniv.nl/legacy/bv-v-2009-04.pdf (stating empirical evidence shows “[s]tatutes permitting or mandating the offset of collateral benefits reduced both claim frequency and awards”).

160. See *id.* (listing studies that analyzed the effects tort reform, including modifying the collateral source doctrine, has on liability insurance losses and premiums). For an example of how tort reform has already decreased premiums in Missouri, see Amy Lynn Sorrel, *Tort Reform: Damage Cap Struck Down in Georgia, Upheld in Missouri*, AM. MED. NEWS, Apr. 5, 2010, <http://www.ama-assn.org/amednews/2010/04/05/prsb0405.htm> (noting that after implementing a noneconomic damage cap as a part of its 2005 tort reform, Missouri doctors’ liability insurance premiums are now seventeen percent below those in states without caps); see also CONG. BUDGET OFFICE, *COST ESTIMATE OF H.R. 5: HELP EFFICIENT, ACCESSIBLE, LOW-COST, TIMELY HEALTHCARE (HEALTH) ACT OF 2003* 3 (2003) (“[C]ertain tort limitations, primarily caps on awards and rules governing offsets from collateral-source benefits, effectively reduce average [insurance] premiums.”).

161. Michael W. Cromwell, *Cutting the Fat Out of Health-Care Costs: Why Medicare and Medicaid Write-Offs Should Not be Recoverable Under Oklahoma’s Collateral Source Rule*, 62 OKLA. L. REV. 585, 586 (2010) (“Health-care prices are comprised, in part, of the cost of physician services, and ‘[t]he rising cost of malpractice coverage is becoming one of the most important factors driving inflation for physicians’ services.” (alteration in original) (citing Joseph B. Treaster, *Malpractice Rates are Rising Sharply; Health Costs Follow*, N.Y. TIMES, Sept. 10, 2001, at A1)).

162. See LAWRENCE J. MCQUILLAN ET AL., *JACKPOT JUSTICE: THE TRUE COST OF AMERICA’S TORT SYSTEM* 20 (2007), available at http://www.legalwatchdog.org/lib/docs/Jackpot_Justice.pdf (finding that medical-liability concerns resulting in increased health care costs have added 3.4 million to the number of uninsured Americans).

163. MCQUILLAN & ABRAMYAN, *supra* note 8, at 74 (“[T]ort reforms that eliminated unnecessary, defensive medicine would cut health care costs by \$191 billion each year, enabling greater access to health care through more affordable health insurance.”).

164. According to the U.S. Census Bureau, over the past three years an average of 13.5% of Missouri citizens had absolutely no health insurance. U.S. CENSUS BUREAU, *NUMBER AND PERCENTAGE OF PEOPLE WITHOUT HEALTH INSURANCE COVERAGE BY STATE USING 2- AND 3-YEAR AVERAGES: 2006-2007 AND 2008-2009*, www.census.gov/hhes/www/hlthins/data/incpovhlth/2009/state.xls, in CARMEN DENAVAS-WALT ET AL., *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN*

Another indirect cost of the collateral source doctrine is a weakened economy as a result of an increased cost of goods and services.¹⁶⁵ The indirect costs of a burdened tort system, of which the collateral source rule plays a large role, include (1) the opportunity costs of innovation from goods and services withdrawn from the market or delayed introduction, (2) the opportunity costs of goods and services that are not introduced because of liability-induced price increases, and (3) the costs of layoffs and bankruptcies caused by liability problems.¹⁶⁶ If insurance coverage is available only at a high premium, or completely unaffordable, the provision of many beneficial public and private goods and services decreases, and the cost of obtaining those goods and services increases as entities adjust prices upward to cover higher premiums.¹⁶⁷ Preventing the recovery of write-off amounts decreases the cost of obtaining insurance; furthermore, eliminating the collateral source rule has the indirect benefit of increasing the availability of goods and services to American citizens.

Considering the many costs that the collateral source rule imposes, its cessation would remedy burdens on the tort system, insurance and healthcare availability, and society as a whole. Viewed in light of these very *real* justifications for its elimination, the *theoretical* rationales that have historically justified the collateral source doctrine are even less convincing. Accordingly, Missouri's effort to statutorily limit the effects of the collateral source doctrine was certainly warranted. However, the statute's shortcomings do not derive from the legislature's decision to modify the collateral source rule but rather from *how* the statute was modified to calculate the value of medical services rendered and the manner in which Missouri's courts have subsequently interpreted the statute.

B. Calculating the Value of Medical Services

Courts use three approaches to calculate the value of medical services: (1) the benefit of the bargain, (2) the actual amount paid, and (3) the reasonable value of services.¹⁶⁸ The benefit of the bargain approach parallels the underlying theory used to support the collateral source doctrine. Due to the fact that conceptual inconsistencies triggered constitutional challenges, enact-

THE UNITED STATES: 2009 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>.

165. van Velthoven, *supra* note 159, at 489.

166. *Id.* (listing the indirect costs resulting from high litigation costs); see also MCQUILLAN & ABRAMYAN, *supra* note 8, at 21 (stating that society "shoulder[s] the burden of an excessively expensive and inefficient tort liability system through higher prices, lower wages, decreased returns on investments in capital and land, restricted access to health care, and less innovation").

167. For an example of another source making this argument, see Amicus Curiae Brief of Ohio Ass'n of Civil Trial Attorneys, *supra* note 146, at 4.

168. See *supra* Part II.C.

ing a statute that employs the benefit of the bargain approach to calculate the value of medical services is ill advised.¹⁶⁹ Therefore, this Article's analysis of what measure of damages the Missouri legislature should have adopted is confined to the actual amount paid and reasonable value approaches. Since the actual amount paid is sometimes relevant even when using the reasonable value approach,¹⁷⁰ should the amount billed ever be considered in determining damages? Or, stated in the alternative, should the amount actually paid be the amount submitted to juries as the value of medical services? Because in theory and in practice the actual amount paid represents the compensable value of medical services, plaintiffs should be limited to recovering the amount paid as a matter of law.

The purpose of a tort award is to make the aggrieved party whole by awarding damages for a legally recognized loss.¹⁷¹ Compensatory damages are meant to put the plaintiff in the same financial position he or she was in prior to the commission of the tort and to redress the concrete loss suffered by reason of the defendant's conduct.¹⁷² Given that a plaintiff is permitted to be made whole, the amount actually paid is the appropriate measure of compensatory damages for past medical expenses.¹⁷³ Entitling a plaintiff to recover the amount billed for which he incurred "no expense, obligation, or liability" would permit the plaintiff to "exceed compensatory limits."¹⁷⁴ If a healthcare provider is willing to accept a lesser amount than that originally billed, the amount paid is the relevant compensatory damage amount.¹⁷⁵ Permitting a plaintiff to recover an amount he has never and will never incur deeply conflicts with any recognized theory of fair compensation.¹⁷⁶

169. For a more detailed discussion behind the benefit of the bargain's shortcomings, see *supra* Part IV.A.

170. See *supra* notes 62-65 and accompanying text.

171. 22 AM. JUR. 2D *Damages* § 27 (2010).

172. *Id.*

173. See, e.g., *Coop. Leasing, Inc. v. Johnson*, 872 So. 2d 956, 960 (Fla. Dist. Ct. App. 2004) (holding that "the appropriate measure of compensatory damages for past medical expenses . . . does not include the difference between the amount that the [medical] providers agreed to accept and the total amount of the plaintiff's medical bills").

174. *Id.* at 958 (citing *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979)).

175. See 25 C.J.S. *Damages* § 153 (2010) ("Where the amount paid for medical services is in accordance with a contractual schedule of rates, the recovery is limited to that amount although the reasonable value of the services in the absence of contract is higher.").

176. For a decision with this same conclusion, see *Hanif v. Hous. Auth.*, 246 Cal. Rptr. 192, 194-95 (Cal. Ct. App. 1988) (posing the question of "whether the 'reasonable value' measure of recovery means that an injured plaintiff may recover from the tortfeasor more than the actual amount he paid or for which he incurred liability for past medical care and services" and finding that the "[f]undamental principles under-

Practical reasons also explain why the amount paid is the only amount that should be submitted to a jury. Frequently, the amount originally billed is significantly marked up and is hardly, if ever, actually recovered by medical providers.¹⁷⁷ The amount billed has become analogous to that of inflated list prices for new cars: “they are amounts that everyone knows are inaccurate, and no one actually pays them.”¹⁷⁸ Studies that measured the difference between the amount originally billed and the actual value of medical treatment suggest that markup costs average almost 245% of the actual value of health-care services.¹⁷⁹ Therefore, there is a strong argument that the amount billed never represents the reasonable value of medical services.

Categorically adopting the actual amount paid approach has beneficial effects. Since parties negotiate in the shadow of the law, having a definite amount of damages prior to going to trial facilitates settlement negotiations.¹⁸⁰ The reasonable value approach, on the other hand, discourages settlement because it allows evidence of both the amount paid and the amount billed to be submitted to the jury. Negotiations are often impeded by each party’s desire to represent the amount that favors its respective position as the actual value with neither party willing to concede during settlements.¹⁸¹

Further, limiting the value of medical expenses to the amount paid gives practitioners a reasonable expectation of what damages could be potentially recovered at trial and enables them to better advise and advocate for their clients. Submitting only one amount to the jury also removes a burden that fact-finders without knowledge of the medical industry are ill-equipped to

lying recovery of compensatory damages in tort actions compel the following answer: no”).

177. See John Dewar Gleissner, *Proving Medical Expenses: Time for a Change*, 28 AM. J. TRIAL ADVOC. 649, 650 (2005) (stating that while doctors initially bill a certain amount for their services, “in theory, they are usually no longer reimbursed the amount they charge. It is not unusual, for example, for the health insurer to pay only one-third of the stated charge and for the balance to be written off.”).

178. Hernquist, *supra* note 17, at 185.

179. *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 222 (Kan. 2010) (citing a nationwide study that found the average charge-to-cost ratio for hospitals across the country was 244.37% with one hospital’s charge-to-cost ratio at 400%). Compare the charge-to-cost ratios cited, *supra*, with *Deck v. Teasley*, 322 S.W.3d 536, 537 (Mo. 2010) (en banc) (the 282.62% ratio of the amount paid, \$9,904, and the amount billed, \$27,991, infers that the write-off amount was a product of the markup cost being lowered to its actual value).

180. See *Retka*, *supra* note 118 (noting the current rule’s uncertain damage calculation may have prevented settlement in some cases).

181. See *id.* (“One of the objects of public policy is to facilitate settlements,’ . . . ‘[w]hen you have a law like this that is unpredictable in its application, that does the opposite of facilitating settlement. It discourages settlement.’” (quoting Rep. John Burnett, a Missouri plaintiff’s attorney)).

handle;¹⁸² in fact, even some members of the medical industry lack a sufficient understanding of medical expense billing.¹⁸³ Therefore, it is an unwise demand to require jury members to make a determination of the value of medical services when those at the source of billing cannot even make an adequate determination themselves.

Because the amount paid approach makes plaintiffs whole, while the amount billed approach systematically overcompensates plaintiffs, a statute that employs the actual amount paid approach is the most logical. It reflects a compensatory view of damages, while at the same time limiting the recovery of illusory write-off amounts. However, because the most common operation of section 490.715 allows parties to submit evidence of both the amount paid and the amount billed to the jury,¹⁸⁴ Missouri currently employs a reasonable value approach whereby write-off amounts are unlikely to be limited.

C. Missouri's Statutory Approach to Measuring Medical Expenses

The Supreme Court of Missouri's decision in *Deck* illustrates how section 490.715 has now been interpreted to eliminate the collateral source doctrine's influence on medical expenses but not sufficiently limit the recovery of write-off amounts.¹⁸⁵ The fallout from *Deck* remains to be seen, but already both plaintiffs' personal injury attorneys and civil defense attorneys claim that the ruling favors their respective interests.¹⁸⁶ For plaintiffs' attorneys, *Deck* provides a roadmap for how to submit evidence of the amount originally billed to the jury.¹⁸⁷ For defense attorneys, the decision allows evidence of the amount actually paid to be submitted to the jury regardless of the trial judge's ruling at the pretrial hearing.¹⁸⁸

At first glance, the decision appears to greatly limit the ability to recover write-off amounts; plaintiffs are categorically prevented from recovering write-off amounts as damages if the presumption that the amount actually paid represents the value of medical services is not rebutted. However, due to

182. Gleissner, *supra* note 177, at 652 ("Medical bills themselves have become increasingly difficult to read, understand, or interpret over the years. . . . [T]he actual bills have become the end products of extremely complex systems.").

183. *Id.* at 650 ("At their depositions, even excellent doctors frequently express ignorance of medical billing procedures . . .").

184. *Deck v. Teasley*, 322 S.W.3d 536 (Mo. 2010) (en banc).

185. *Id.*; see also MO. REV. STAT. § 490.715 (Supp. 2009).

186. See Donna Walter, *Deck Cuts Both Ways: Each Side Claims Victory in Missouri Supreme Court Decision on Medical Bills*, MO. LAW. MEDIA, Oct. 31, 2010, available at <http://www.allbusiness.com/legal/trial-procedure-decisions-rulings/15270270-1.html>.

187. *Id.*

188. *Id.*

the low evidentiary threshold that Missouri courts require,¹⁸⁹ plaintiffs will almost always be able to rebut the presumption in practice and thereby submit evidence to the jury that the amount originally billed represents the reasonable value of medical services.

Thus, section 490.715's current wording reflects that (1) rebutting the presumption that the amount actually necessary to satisfy the financial obligation represents the reasonable value of medical services is nothing more than a procedural technicality, (2) the trial judge's role is relegated to that of a gatekeeper who merely checks off whether or not the plaintiff has submitted the required evidence, and (3) the jury receives evidence of the amount paid *and* the amount originally billed with no more guidance than trial judges received before *Deck*.¹⁹⁰ Although the Missouri legislature appears to have limited the recovery of write-off amounts by abrogating the common law collateral source doctrine, the plaintiff's ability to submit the amount billed in nearly all circumstances renders the statutory modification one of substance and not form.¹⁹¹

D. Suggested Modifications to Section 490.715

While the judicial construction given to section 490.715 continues to allow the recovery of write-off damages, such an outcome is a result of the statute's current approach to measuring the value of medical services rather than a misapplication by the courts. In fact, the Supreme Court of Missouri had shown a tendency to prevent the recovery of write-off amounts when it was not confined by a statute that required an alternate approach.¹⁹² However, in interpreting section 490.715, the court could not categorically prevent the recovery of write-off amounts because such a finding would have ren-

189. See, e.g., *Deck*, 322 S.W.3d at 540 (requiring "substantial evidence" to rebut the presumption); *Berra v. Danter*, 299 S.W.3d 690, 697 (Mo. App. E.D. 2009) (same); see also Donna Walter, *Plaintiffs Win on Medical Expenses, Says Missouri Supreme Court*, MO. LAW. MEDIA, Oct. 26, 2010, available at http://findarticles.com/p/articles/mi_7992/is_20101026/ai_n56170560/ ("Memo to personal injury plaintiffs' lawyers: You can get a jury to consider the amount of money health care providers billed your client when it's deciding on a verdict. Just follow these easy steps: 1. Present evidence of bills. 2. Present an offer of proof that the amount billed is the value of the medical care received. 3. Present the testimony to back up your claim.").

190. Based on the complexities of medical bills, it is extremely likely that juries will reach arbitrary and inconsistent valuations of medical services when considering both the amount billed and the amount paid. See Gleissner, *supra* note 177, at 652.

191. See *Dierker & Mehan*, *supra* note 82, at § 36:10(3)(d) ("In practice, [section] 490.715 has had little effect other than to cause confusion" and if the statute was intended to import the standard of "excluding from an award sums that were written off or reduced by the providers in the collection process, then it did not accomplish its objective.").

192. See *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818 (Mo. 2003) (en banc); see also *supra* Part III.

dered the statutory language allowing for the recovery of the amount paid and the amount billed superfluous.¹⁹³ Thus, if any further change in the recovery of write-off damages occurs, it will not likely come from the courtroom.

In order to prevent the recovery of write-off damages, the Missouri legislature should consider modifying section 490.715 to limit the recovery of medical expenses to the actual amount paid as a matter of law. The legislative history of the statute shows that an unsuccessful attempt was made to prohibit the introduction of write-off amounts. House Bill 393, as originally introduced, would have amended section 490.715.5 to read:

Parties may introduce evidence of the amount actually paid for medical treatment rendered to a party that was reasonable, necessary, and the proximate result of the negligence of any party. No party may introduce evidence of billing for an amount in excess of the amount actually paid for said medical treatment for which payment was made, and if no payment was made, then a party may only introduce evidence of the amount necessary to satisfy the financial obligation remaining to the health care provider.¹⁹⁴

Aided by hindsight and with knowledge of how the statute is currently employed by courts, the legislature should strongly consider revisiting the topic. Modifying the statute to exclusively limit the recovery of medical expenses to the amount actually paid on behalf of the plaintiff would follow the trend of moving further away from the collateral source rule¹⁹⁵ and limiting the harmful effects of write-off damages.¹⁹⁶

V. CONCLUSION

The general measure of compensation in tort actions dictates that plaintiffs should be restored to their positions before the harm occurred. The recovery of write-off amounts, by operation of the collateral source rule, compensates plaintiffs for medical expenses for which neither they nor anyone else was ever made liable. As a result, plaintiffs collect a windfall at the expense of high insurance premiums and increased healthcare costs passed along to society. The recovery of write-off amounts has now become a fiction of compensation that society can no longer afford to entertain.

193. *Berra v. Danter*, 299 S.W.3d 690, 697-98 (Mo. App. E.D. 2009).

194. H. 393, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005) (unenacted).

195. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (Vernon 2009) (“In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.”).

196. *See supra* Part IV.A for a discussion of the costs that the recoverability of write-off amounts imposes on the court system and society.

In an effort to limit, but not completely abolish, the recoverability of write-off amounts, the Missouri legislature followed recent trends and modified the collateral source rule through section 490.715.¹⁹⁷ By making the presumptive amount of recoverable damages the amount actually paid, the legislature intended to limit windfalls to plaintiffs and reduce the costs imposed on the tort system and the costs imposed on society enabled by the collateral source doctrine.¹⁹⁸

In the context of medical expenses, the collateral source rule is merely a means to an end. The doctrine prevents the admission of the actual amount paid for medical services and therefore is a means for recovering write-off damages. If the rule is eliminated, the actual amount paid will be submitted to the jury. However, if the amount billed is submitted along with the amount paid, the recovery of write-off damages is still possible.

Viewed in the light of limiting write-off damages, Missouri's current approach to measuring the value of medical services should be both commended and constructively criticized. While the Supreme Court of Missouri recently interpreted section 490.715 to limit the collateral source rule by permitting juries to consider the actual amount paid to medical providers, it also reaffirmed the use of an extremely low evidentiary threshold needed to submit the amount billed to the jury.¹⁹⁹ If the legislative intent was to limit the jury's consideration of the amount billed in excess of the amount paid, the current statutory modification did little to realize this objective. Consequently, the recovery of a windfall is still a probable outcome in Missouri. The statute as applied makes Missouri's adversarial system tantamount to a defendant-funded lottery.

197. See MO. REV. STAT. § 490.715 (Supp. 2009).

198. See *supra* note 80 and accompanying text and source cited therein.

199. *Deck v. Teasley*, 322 S.W.3d 536 (Mo. 2010) (en banc).

