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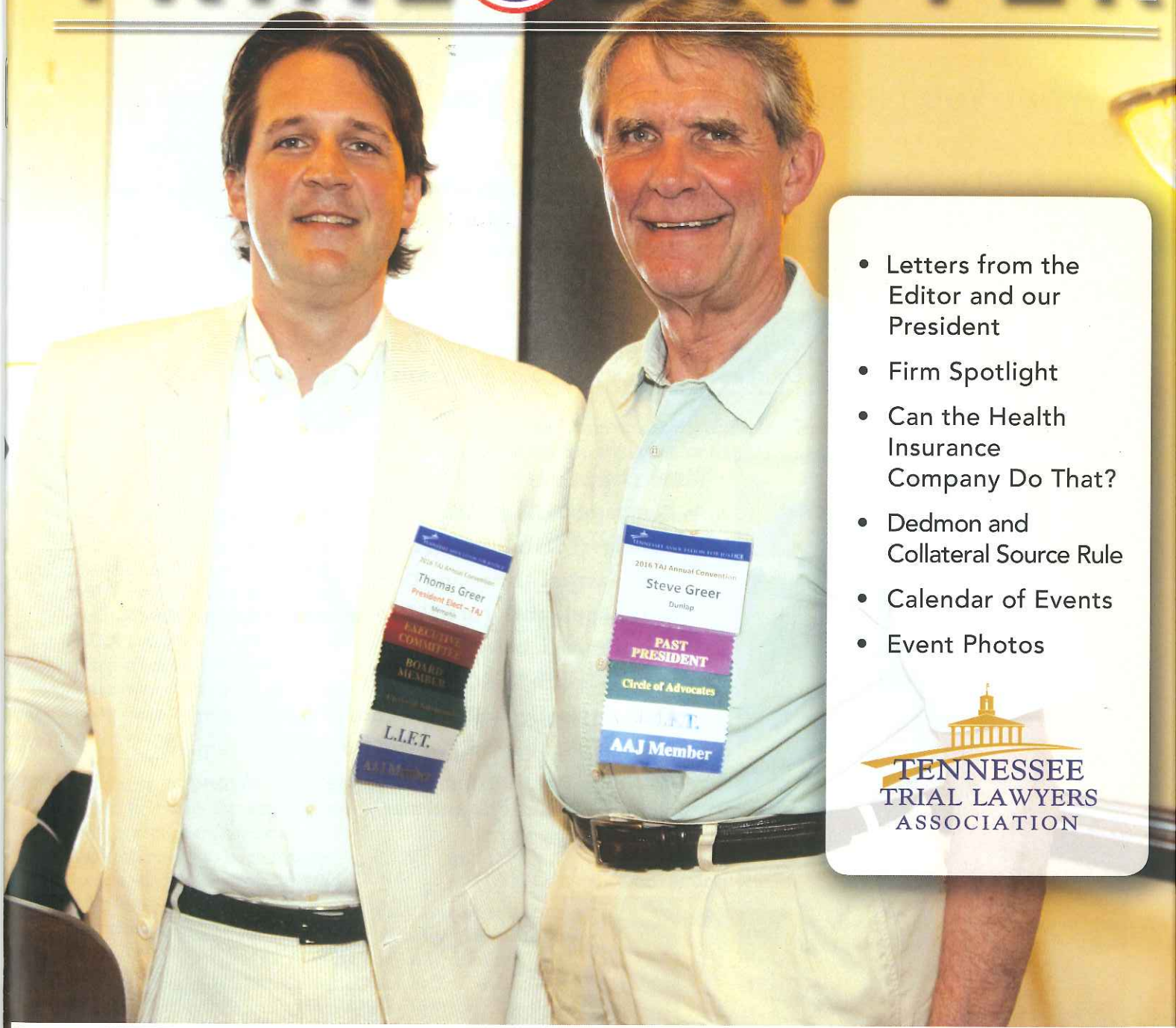




TENNESSEE TRIAL LAWYERS ASSOCIATION

# Death by a Thousand Cuts
## — Dedmon and Collateral Source Rule

by Donald Capparella and Elizabeth Sitgreaves

On June 2, 2016, the Tennessee Court of Appeals issued its opinion in *Dedmon v. Steelman, et al.*, an opinion which raised eyebrows for the possible impact that it could have on the collateral source rule in Tennessee. The majority opinion was authored by Judge Brandon Gibson, with a concurrence by Special Judge Joe G. Riley. On October 21, 2016 the Tennessee State Supreme Court granted an application for permission to appeal. Thus, the ultimate impact of this case is yet to be determined. However, it is already having an impact because of the widely divergent views lawyers and the bench are taking from the opinion.

### BACKGROUND

Jean and Fred Dedmon filed a personal injury lawsuit against John T. Cook to recover medical expenses resulting from a car accident between the parties. Defendant Cook died during the litigation and the co-representatives of his estate, Debbie Steelman and Danny Cates, Sr. were named as defendants in an amended complaint. The sole issue was a dispute regarding the necessity and reasonableness of Ms. Dedmon's medical bills. Ms. Dedmon's medical bills totaling $52,482.87 were attached to her initial complaint. The answer filed by the defendant Cook denied that the medical bills as attached were reasonable or necessary. In a subsequent deposition by one of her treating physicians, a neurological surgeon, the testimony was that the bills were "appropriate, reasonable and necessary."

In response, Defendants filed a motion in limine to exclude the bills, claiming that under the recent Tennessee Supreme Court decision, *West v. Shelby County Healthcare Corp.*, 459 S.W.3d 33 (Tenn. 2014), the medical bills were not evidence of reasonable medical charges. The defendants argued that "reasonable medical expenses are defined as that which the medical provider accepts from medical insurance, as a matter of law," and therefore, Ms. Dedmon should not be permitted to recover any amount in excess of what her medical providers accepted as full payment from her insurance company—$18,255.42.

Plaintiffs opposed the Defendants' motion, asserting that the West decision was confined to the Tennessee Hospital Lien Act (THLA) and did not define reasonableness for medical expenses in personal injury cases. The plaintiffs also argued that existing Tennessee law permitted them to use expert testimony to prove the reasonableness of their medical expenses. They claimed that this broad expansion of West would violate existing statutory and case law, "the Collateral Source Rule, public policy, and would lead to widely disparate, unfair results."

The trial court granted the Defendants' motion *in limine*, stating that although the West case only addressed THLA, the same logic used there must still apply. The trial court granted the plaintiffs permission to seek an interlocutory appeal.

### RULING

On appeal, the plaintiffs raised the issue of whether *West* is limited to THLA or if it is also applicable to personal injury actions filed directly against the alleged tortfeasor. The Court of Appeals determined that it must review this issue *de novo*, in order to determine whether the trial court erred in its decision to grant the motion *in limine*.

#### 1. State of the Law on Reasonable and Necessary Expenses

The Court began its analysis by reviewing the state of the law in Tennessee regarding "necessary and reasonable" medical expenses in personal injury actions. Plaintiffs are entitled to recover their reasonable and medical expenses that were necessary to treat the injury caused by the defendant's negligence. A jury can deny recovery if it determines the expenses were unreasonable or unnecessary. As it is the plaintiff's burden to prove that the medical expenses are necessary and reasonable, the plaintiff must present competent expert testimony that medical expenses were reasonable and necessary or rely upon statutory rebuttable presumptions.

The Court next reviewed litigation in other jurisdictions, noting that courts were split on whether reasonable costs in personal injury litigation were determined from the undiscounted sum of the hospital's bill, or the discounted cost that hospitals negotiated with insurance companies and accepted as full payment.

#### 2. The Argument to Extend *West*

The Court then addressed the Tennessee Supreme Court's *West* decision, which held that hospitals may not maintain liens to recover the unadjusted costs of medical services from third-party tortfeasors after patients' insurance companies paid the adjusted bills. *West* held that non-discounted charges were not reasonable under THLA. First, those charges do not reflect the actual payments being made. Second, hospitals contract with insurance companies, agreeing to accept discounted payments as "reasonable" to further their own economic interests.

The Court looked to the treatment of *West* by the state and federal trial courts. The Court noted an even split in the eight Tennessee trial courts cited by the parties in their briefs, which had addressed "reasonable" costs in personal injury litigation since *West*. It noted those trial courts were equally divided between extending *West's* reasonableness definition to personal injury litigation and limiting it to THLA.

Additionally, the Court looked to three federal courts in the Western District of Tennessee that extended *West* to personal injury cases. In the first case, the judge compensated the plaintiff using the discounted costs. It acknowledged that *West* was

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not controlling in personal injury cases, but extended its logic and found California law persuasive. *Keltner v. U.S.*, No. 2:13-CV-2840-STA-DKV, 2015 WL 3688461 at *3-5 (W.D. Tenn. June 12, 2015) (citing *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal.4th 541, 565 (2011) (holding that discounted charges constitute reasonable medical expenses in personal injury litigation). In the other two cases, the courts granted defendants' motions *in limine* to exclude undiscounted costs under *West's* logic. *Smith v. Lopez-Miranda,* No. 15-CV-2240-SHL-DKV, 2016 WL 1083845, at *1-3 (W.D. Tenn. Feb, 10, 2016); *Hall v. USF Holland, Inc.*, No. 2:14-CV-02494, 2016 WL 361583, at *2 (W.D. Tenn. Jan. 12, 2016). These cases later settled.

While Defendants argued for an expansive interpretation of *West* to apply to all personal injury litigation, the Court of Appeals ultimately sided with the Plaintiffs and rejected the broadening of *West* urged by the Defendants. The Court noted that the *West* Court placed limitations on its own holding, even within the THLA. The Court of Appeals observed that "if the [*West*] court did not intend for its opinion to apply to hospital liens in all circumstances, surely the court did not intend for its opinion to be binding as to all determinations of reasonable medical expenses under Tennessee law."

Defendants had essentially argued that *West* should control the definition of reasonable medical expenses in all personal injury litigation. They argued that the *West* Court's observation that there is a "reasonable and necessary" requirement for medical expenses in personal injury litigation showed that the West definition should apply in those cases. Thus, the Court reversed the trial court's grant of the motion *in limine*.

If the Court of Appeals had stopped there, the case would not have had much impact beyond its ruling for the parties in that case. But it did not stop there.

### 3. Ability to Challenge the Plaintiff's Claim of Reasonable and Necessary

The Court of Appeals then turned to an argument raised by Plaintiffs and it is in these two final paragraphs that, in the authors' opinion--much ado about a parenthetical arose. Plaintiffs argued that Defendants should be barred from introducing evidence of any discounted medical bills based on the decision in *Fye v. Kennedy*, 991 S.W.2d 754 (Tenn. Ct. App. 1998) (holding that a medical bill that was in "some way, legally forgiven"—paid by Medicaid through no contractual basis—was a gratuity and evidence of such is barred by the collateral source rule). The *Dedmon* Court distinguished *Fye*, stating that while it was factually similar, it did not directly address "whether the amount accepted by a medical provider bears on the reasonableness of the medical expense." The Court of Appeals then restated the law in Tennessee, namely, that a plaintiff may present the testimony of a physician who testifies that the amount of medical expenses billed or charged to a plaintiff was reasonable." In contrast, defendants "are permitted to offer proof contradicting the reasonableness of the medical expenses" as long as such proof does not "run afoul of the collateral source rule."

In summary, in *Dedmon*, the Court of Appeals held: 1.) *West* is not expanded; 2.) plaintiffs can present the testimony of a physician as to the medical expenses billed or charged and whether those expenses were reasonable; and 3.) defendants can challenge the reasonableness as long as they don't run afoul of the collateral source rule.

Again, in the authors' opinion, there was nothing---yet---in *Dedmon* that really did any harm to the traditional functioning in the way medical expenses and the collateral source ruled have worked for decades in Tennessee. But then came the parenthetical and footnote that many have seized upon, we submit opportunistically, and made heard round the State. In a "*See, e.g.*" parenthetical, the Court quotes a portion of a Kansas Supreme Court case, *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 222-223 (Kan. 2010), stating: ("the collateral source bars admission of evidence stating that the expenses were paid by a collateral source. However, the rule does not address, much less bar, the admission of evidence indicating that something less than the charged amount has satisfied, or will satisfy, the amount billed.").

Since the *Dedmon* decision came out on June 2, 2016, at least one federal district court has looked to it for guidance on the issue of introduction of reasonable and necessary expenses and the proof that can be used to establish such expenses. The Western District Court for Tennessee denied a defendant's motion *in limine*, which requested the exclusion of the plaintiff's undiscounted medical costs. *Boettcher v. Shelter Mutual Insurance Company*, 2016 WL 3212184 at *# (W.D. Tenn. June 8, 2016). In doing so, the court recognized that it had extended West in the past, but held that the Court of Appeals' recent holding in *Dedmon* and Tennessee statutory law entitled personal injury plaintiffs to the admission of their undiscounted bills. However, the court went on to state that the defendants may present proof contradicting the reasonableness of the plaintiff's medical expenses, and in a footnote cited to the *Dedmon* opinion and the parenthetical from *Martinez* without further elaboration.

The Court of Appeals in Dedmon expressed hope that the Tennessee Supreme Court would review this case and make a final decision on this issue, an urging that may prove true upon the pending application before the Tennessee Supreme Court.

## CONCURRING OPINION

Special Judge Joe G. Riley, a former Tennessee Court of Criminal Appeals and Circuit Court judge in Lake and Dyer counties, wrote a brief concurrence to advocate for the Tennessee Supreme Court's broad application of *West*. He fully concurred with the majority's decision, based on the existing case law, but expressed a concern that non-discounted charges are no longer accurate indicators of reasonable medical expenses—the more realistic standard is the payment that hospitals are willing to accept as full satisfaction. This would prevent the penalizing, in his opinion, of uninsured plaintiffs because they would still be able to recover the non-discounted amount, if that is what the hospital requires. Notably, in restating the majority opinion, Special Judge Riley also appears to cite the majority opinion's parenthetical citation as if it is the holding of the majority. Can a parenthetical really amount to a holding? Further, what impact does a concurring opinion truly have other than perhaps as fur-

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ther encouragement for the Tennessee Supreme Court to grant review?

## COMMENTARY

With the Tennessee Supreme Court granting review of the Court of Appeals ruling, it is unclear what the ultimate impact of the *Dedmon v. Steelman* case will be. Will the Tennessee Supreme Court simply affirm the Court of Appeals' decision that *West* should not be extended? Will the Supreme Court provide some clarity on the parenthetical from *Dedmon*? And if so, will the Supreme Court provide further clarity on how a defendant may present "evidence indicating that something less than the charged amount has satisfied, or will satisfy, the amount billed"? Does the opposition evidence contradicting the plaintiff's expert testimony regarding the reasonableness and necessity of medical bills also require expert testimony? Or can defendants simply introduce what was actually paid by the medical insurance without any expert testimony that what the insurance company paid was really the reasonable amount? For now, the *Dedmon* decision is being relied upon by both sides of this dispute, and is having an impact on personal injury cases right now.

The bench and bar will have to wait for guidance from the Supreme Court. Until then, plaintiffs will continue to argue that a parenthetical does not amount to a holding, and that it is unfair to punish a plaintiff for having the foresight to obtain health insurance. Defendants will argue that it is a windfall for plaintiffs to be allowed to prove the medical expenses they incurred, when in reality their health insurance company paid less than what was charged by plaintiff's health care providers. The authors submit that the windfall is actually going the other way, in favor of the liability insurers who are getting the benefit of the health insurance premiums paid by plaintiffs by lowering the costs that they have to pay for the tortfeasors who they have insured. Plaintiffs should not have to pay twice—first, premiums to get health insurance, and second, a reduction in their damages because they had the foresight to buy insurance. The choice of obtaining health insurance should be a societal good that our legal system should incentivize, not discourage in favor of a narrow interest group; namely liability insurance carriers.

The authors hope that the Supreme Court will clarify the holding in *Dedmon* to not allow the collateral source rule to be destroyed by allowing defendants to introduce into evidence the amount health insurance actually paid for health care received by the patient. The amount of such health insurance payments has nothing to do with the reasonable cost of health care, but is instead the result of the byzantine world of health care pricing negotiated between powerful health insurance companies and medical providers based upon ever-changing market forces. The interpretation of the ruling in *Dedmon* that has been adopted by some courts to allow this change in the law will result in the death of the collateral source rule---a death by a thousand cuts. That would go against the arc of justice in our view.

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