Robert L. Galloway
Tournament Director

To: Participants and Coaches

From: Rob Galloway

Date: February 8, 2018

Re: **Bulletin 2**

(Problem Release Delayed, Trial Brief Assignment, Trial Brief Ballot, Trial Brief Designation, Sample Trial Brief, Hotel Reservations)

The tournament problem will not be released this Thursday as planned. In the meantime, however, I am releasing the trial brief topic to allow teams to start working now. I anticipate the problem will be sent out toward the middle of next week.

Each team will write a trial brief for the defendant on two evidentiary issues. The information you need to get started is described below.

You represent a party wishing to admit two pieces of social media evidence as statements attributable to the opposing party on whose Facebook page they appeared. The first is a statement that the opposing party "liked" on Facebook. The second is a different statement that was shared to the opposing party's Facebook page by a third party. Although the opposing party regularly deleted other shares to her Facebook page (she deleted six others that were shared at or around the time of the share at issue), she did not delete this particular one. Additionally, the opposing party left one other share on her Facebook page but, unlike the one at issue here, she liked the shared posting.

The plaintiff filed a motion in limine seeking a preliminary ruling that the two statements were inadmissible against her. The defendants oppose the motion. The court must decide whether to admit each statement and has asked for briefing on the issue.

The case is pending in South Texas state court, and both are matters of first impression. The Federal Rules of Evidence apply.

When the problem is released, you will get the style of the case, the parties' names, and all other information you need to finalize your trial brief by the March 1st deadline.

Please refer to the local rules for the specific requirements related to the preparation and submission of the trial brief.

I will e-mail your team designation early next week.

I have attached a copy of the trial brief ballot and a sample trial brief based on a prior year's problem.

If you have not already done so, please make your hotel reservations. You may find this information in Bulletin 1 or under the "Hotel" tab on the website.

Let me know if you have any questions or need anything.

Official Trial Brief Ballot

Team Designation _____

Criteria	*Possible*	*Given*
Issue Spotting ***Has the trial brief identified all relevant issues?***	20	
Analysis and appropriate use of authority ***Are the evidentiary arguments developed logically, compelling a conclusion in the writer's favor? Are there citations where needed, regardless of the technical accuracy of the citation form? Are the leading cases used? Do the authorities support a sound legal analysis? Does the brief distinguish cases and important authorities that are unfavorable to its position?***	40	
Writing Style ***Is the brief clear and unambiguous? Does the brief use proper grammar and punctuation?***	20	
Citation Form ***Do citations follow proper Blue Book format?***	10	
Overall Appearance ***Does the trial brief look polished and professional? Does it look like a pleading you would be proud to file with a trial court?***	10	
TOTAL SCORE	100	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH TEXAS

Harry and Leona Lansing, Plaintiffs, v. Alastor City Charity Hospital, Defendant.	§ § § § § § § § § §	No. 15-00019-CV

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO INTRODUCE EVIDENCE OF INSURANCE COVERAGE

Pursuant to Federal Rule of Civil Procedure 7(b)(1), Alastor City Charity Hospital moves to introduce evidence that the cost of a kidney transplant is $120,000.

I. FACTUAL BACKGROUND

The Plaintiffs, Harry and Leona Lansing, are the parents and legal guardians of Reese Lansing ("Lansing"). (Compl. ¶ 3, Nov. 19, 2014). The Plaintiffs filed a diversity action against the Defendant, Alastor City Charity Hospital ("Alastor"), in the District of South Texas for performing surgery on Lansing, a minor, without their consent. (Compl. ¶¶ 1-2). Lansing's kidney was removed during the surgery. (Compl. ¶ 12). The Court granted partial summary judgment on the issue of liability, finding that Alastor committed statutory battery pursuant to § 31.0009 of the South Texas Medical Malpractice Act. (Order Granting Partial Summ. J., Feb. 9, 2015). Lansing carries a genetic trait that increases his chance of developing a kidney disease that, because he has only one remaining kidney, would require a kidney transplant. (Ex. N, Apr.

13, 2001). With insurance, a kidney transplant would cost $120,000. (Ex. V, at 5, Jan. 25, 2015). Without insurance, that procedure would cost $260,000. (Id.).

II. ARGUMENT

This Court should allow evidence that Lansing's future expense for a kidney transplant is $120,000, the cost of a transplant when covered by insurance. (Ex. V, at 5). The Affordable Care Act ("ACA") will require Lansing to have insurance coverage in the future, and failing to obtain insurance will be a failure to mitigate damages. Whether mandated insurance coverage under the ACA is sufficiently certain to be presented to a jury is an issue of first impression for this Court.

Further, the collateral source rule should not prohibit admission of this evidence. South Texas has not adopted the collateral source rule, and it should not do so in this case. The collateral source rule holds that "the plaintiff's recovery is not subject to a setoff for benefits independent of the tortfeasor." Phillips v. W. Co. of N. Am., 953 F.2d 923, 930 (5th Cir. 1992). Applying the rule would be unfair to Alastor because it would result in a windfall to the Plaintiff and twist compensatory damages towards a punitive purpose. Furthermore, the historical justifications for the collateral source rule do not apply. First, the ACA mandates universal insurance coverage, thus people do not need to be incentivized to buy insurance. Second, Alastor would not benefit from Lansing's "foresight"—but from the ACA's coverage. Third, there is no risk that the jury will improperly consider Lansing's insurance coverage. Fourth, Alastor will not be underdeterred by allowing consideration of insurance.

A. Lansing Will Have Insurance Coverage in the Future.

1. Several courts have acknowledged the admissibility of evidence of ACA coverage.

Courts that have addressed the applicability of the ACA to future medical expenses have indicated that evidence regarding mandatory insurance coverage under the ACA should be

admissible. The court in Peralta v. Quintero, No. 12CV3864-FM, 2015 WL 362917, at *10 (S.D.N.Y. Jan. 26, 2015), held that the ACA provided sufficient evidence to demand a hearing regarding reduction of damages. Similar to South Texas, the Peralta court was not bound by the collateral source rule. In Brewster v. Southern Home Rentals, LLC, No. 3:11CV872-WHA, 2012 WL 6101985, at *4 (M.D. Ala. Dec. 7, 2012), the court noted that it would allow evidence at trial of ACA insurance coverage if the plaintiff alleged he would have to pay the full cost of his treatment. Id. Thus, were the court presented with *this* case, it presumably would allow the evidence of ACA coverage because the plaintiff in this case seeks the full cost of the treatment. See id.

Other cases addressing whether the collateral source rule applied to the ACA are either not analogous to this case, or those courts did not decide the question. Two courts refused to abolish the collateral source rule in light of the ACA because the state law they were applying recognized the rule. Halsne v. Avera Health, No. 12-CV-2409 SRN/JJG, 2014 WL 1153504, at *10 (D. Minn. Mar. 21, 2014); Vasquez-Sierra v. Hennepin Faculty Assocs., No. 27-CV-12-1611, 2012 WL 7150829, at *18 (Minn. Dist. Ct. Dec. 14, 2012) ("[T]his court will not re-write long-standing [Minnesota] law regarding collateral sources."). In contrast, South Texas has not established the collateral source rule by statute or common law, thus there is no concern here of disturbing existing law. In another case, the court declined to make a "definitive ruling" about whether evidence of ACA coverage would be admitted at trial. Cowden v. BNSF Ry. Co., 980 F. Supp. 2d 1106, 1130 (E.D. Mo. 2013); see also Leung v. Verdugo Hills Hosp., No. B204908, 2013 WL 221654, at *11 (Cal. Ct. App. Jan. 22, 2013) (designated as unpublished and noncitable) (finding that evidence of insurance coverage under the ACA would be too speculative). In two other cases, courts rejected arguments that a currently uncovered medical

procedure would be covered in the future under the ACA. Donovan v. Philip Morris USA, Inc., No. CIV.A. 06-12234-DJC, 2014 WL 7009086, at *6 (D. Mass. Dec. 12, 2014); Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 20 n.3 (2013) (Lippman, J., dissenting).

2. The cost of a future kidney transplant is certain because the Affordable Care Act mandates that Lansing obtain insurance.

Lansing's future out-of-pocket expense for a kidney transplant is certain in light of the ACA. The common standard for admission of evidence of future damages is whether there is a "reasonable probability" that an expense will occur. See Fisher v. Coastal Transp. Co., 230 S.W.2d 522, 252 (Tex. 1950). Because of the ACA, there is a reasonable probability the cost of his transplant will be $120,000. In 2010, Congress passed the Patient Protection and Affordable Care Act ("ACA"). Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at scattered sections of 26 and 42 U.S.C.). The ACA requires individuals to have health insurance. 26 U.S.C. § 5000A(a) (2010); see Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

Under the ACA's "individual mandate," Lansing must obtain "minimum essential" insurance coverage. 26 U.S.C. § 5000A(a). Before the ACA, it was possible that a private insurer could refuse to cover Lansing due to the possibility of his needing a future kidney transplant. See Bartlett v. Am. Republic Ins. Co., 845 S.W.2d 342, 345 (Tex. App. 1992). But now, an insurer may not deny coverage based on a preexisting condition. See 42 U.S.C. § 300gg-1 (2010). If Lansing does not obtain private insurance, he must have coverage from another source. Before reaching age 26, for example, Lansing remains covered by his parents' insurance plan. Id. § 300gg-14. An employer's insurance plan may also cover Lansing in the future. 26 U.S.C. § 5000A(f)(1)(B). Finally, Lansing may be covered by Medicare[1] or Medicaid. Id.

[1] Even assuming Lansing does not obtain private insurance under the ACA at the time of a kidney transplant, under 42 C.F.R. § 406.5(a)(3) (2015), Lansing would qualify for Medicare

§ 5000A(f)(1)(A)(i)-(ii). In any circumstance, it is certain that Lansing will have health insurance coverage should he need a kidney transplant in the future.[2]

3. If Lansing were to refuse to obtain insurance, he would violate his duty to mitigate damages.

Lansing could choose to forgo obtaining health insurance coverage and instead pay a penalty. 26 U.S.C. § 5000A(b)(1) (2010). But if he did so, he would violate his duty to mitigate damages under tort law. An injured party "is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort." Restatement (Second) of Torts § 918(1); see Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1139 (5th Cir. 1985). This includes a duty to "avoid future damages if that is possible with reasonable effort and without undue expense." Monumental Life Ins. Co. v. Nationwide Ret. Solutions, Inc., 242 F. Supp. 2d 438, 453 (W.D. Ky. 2003). If Lansing did not purchase insurance in the future, he cannot be said to have mitigated future damages.

Expert testimony before this Court establishes that the cost of a kidney transplant without health insurance coverage is $260,000. (Ex. V, at 5). The same procedure, if covered by health insurance, costs $120,000. (Id.). Thus, Lansing would avoid $140,000 of medical expenses simply by purchasing insurance, which would substantially mitigate the cost of a future kidney transplant. And because the ACA requires Lansing to obtain health insurance coverage, it necessarily is a "reasonable effort or expenditure" to mitigate those costs.

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because he would have end-stage renal disease. End-stage renal disease is defined as the "stage of kidney impairment that appears irreversible and permanent and requires . . . kidney transplantation to maintain life." 42 C.F.R. § 406.13(b) (2015).

[2] It is unlikely the ACA will be repealed in the future. The ACA has already survived major constitutional challenges. See Nat'l Fed'n of Indep. Bus., 132 S. Ct. at 2580 (2012) (upholding the individual mandate as a valid application of Congress's taxing power).

Although Lansing would have to pay insurance premiums, such payments do not constitute an "undue expense." See Monumental Life Ins. Co., 242 F. Supp. 2d at 453. Under the ACA, Lansing is required to pay regardless: either in paying insurance premiums or paying the penalty for refusing to obtain insurance. Payment of premiums is a minimal expense when compared to the monumental costs of an uninsured transplant, should he fail to mitigate future damages.

B. Applying the Collateral Source Rule Would Be Unfair to Alastor.

The collateral source rule ("the Rule") bars a jury from considering whether an injured party has already recovered some form of compensation for the injury from a third party. See Johnson v. Cenac Towing Inc., 544 F.3d 296, 304 (5th Cir. 2008). Rather, the jury ought to consider damages based only upon the degree of injury—not whether the injured party has already been compensated in some way. In tort injury cases, the Rule prevents evidence that the injured party was covered by medical insurance from reducing the overall damage award. See Phillips v. W. Co. of N. Am., 953 F.2d 923, 930 (5th Cir. 1992). In this case, however, it would be patently unfair for the Court to apply the Rule.

1. Applying the collateral source rule would give Lansing a windfall.

If Lansing were to suffer any injury in the future, namely to undergo a kidney transplant, the Rule ought not to apply. In such a future situation, Lansing would be covered by insurance under the ACA's regime. Accordingly, the cost of such a transplant would be only $120,000.

If this Court were to apply the Rule, evidence of Lansing's health insurance, specifically the insurance he would be mandated to carry, would necessarily be inadmissible. As such, the jury would calculate damages based upon the uninsured cost of the transplant, which is $260,000. Thus, despite holding insurance that shielded Lansing from the full costs of the kidney

transplant, the jury would be forced to assume through some legal fiction that he never carried insurance, that he was forced to pay for the transplant out-of-pocket, and that he did so in the amount of $260,000.

The Court should not operate under this legal fallacy. Under those circumstances, the Rule no longer acts as a shield for plaintiffs, but instead as a windfall. In this case, the Rule demands that damages be calculated at the substantially higher price, even though Lansing is already covered by insurance. This effectively sets damages $140,000 over the actual price of the kidney transplant, and it presumably sets those damages substantially higher than the amount Lansing would be forced to pay out-of-pocket since he will be insured. In fact, over twenty-five states by statute do not apply the Rule in two circumstances: (1) the damage consideration is after the liability verdict, or (2) in medical malpractice cases. Rebecca Levenson, Note, Modifying the Collateral Source Rule, 160 Pa. L. Rev. 921, 926 n.21 (2012) (citing statutes). Both of those situations apply here.

If left unchecked, plaintiffs can use the Rule as a weapon to ensure higher damages awards. This stands in sharp contrast to the Rule's original function as a tool to ensure that a plaintiff is made whole. This case illustrates one scenario in which, if applied, the Rule would unfairly give Lansing a windfall worth $140,000.

2. Requiring Alastor to pay $260,000 would effectively impose punitive damages.

a. Damages in tort should focus on making Lansing whole.

"[T]he proper measure of damages in a tort action is compensation," which exist "to place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred." Pizani v. M/V Cotton Blossom, 669 F.2d 1084, 1088 (5th Cir. 1982); accord Restatement (Second) of Torts § 903 cmt. a (1979). The insured cost of the kidney

transplant, $120,000, would put Lansing in the same position he would have been in had the wrong not occurred, because Lansing will have insurance at the time of the surgery. The uninsured cost of $260,000, on the other hand, would result in him receiving a $140,000 surplus. Applying the Rule would make Lansing more than whole and would serve a punitive, instead of compensatory, function. See Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 69 (Cal. 1970); see also John G. Fleming, The Collateral Source Rule and Contract Damages, 71 Cal. L. Rev. 56, 59 (1983) (noting the "exclusively compensatory purpose of tort damages").

b. The South Texas legislature made exemplary damages available.

The legislature has expressly provided an avenue for punishment in medical malpractice cases. According to South Texas Medical Malpractice Act § 31.009(E), "A jury may award exemplary damages if a healthcare provider is found to have committed battery under this section." Exemplary damages and compensatory damages are separate and distinct. The "punishment" aspects of exemplary damages should not bleed into those damages meant to compensate a party for his harm. (See Verdict Form, Ex. Z (providing separate questions for awards of compensatory and exemplary damages)). Compensatory damages should not be used as a screw with which to punish Alastor. The legislature has left that role exclusively to exemplary damages.

C. The Reasons to Apply the Collateral Source Rule No Longer Apply.

Applying the Rule in light of the ACA would divorce the Rule from its underlying justifications. In light of the ACA, the following traditional justifications for the Rule do not apply: (1) incentivizing the purchase of health insurance; (2) preventing fortuitous benefit; (3) avoiding prejudice to the jury; (4) and ensuring that a tortfeasor is deterred. The past paradigm of

rare health insurance coverage must not determine the path of the law in the present paradigm of ubiquitous coverage.

1. The collateral source rule no longer incentivizes Lansing to buy insurance.

One of the main rationales for the Rule is to incentivize the purchase of health insurance. See, e.g., Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 66 (1970). Now, however, whatever purpose the Rule served to incentivize people to buy health insurance is redundant in light of the ACA's individual mandate to buy insurance. The Rule no longer rewards plaintiffs who voluntarily make the socially beneficial choice to purchase insurance. Under the ACA, the insured *must* buy and the insurer *must* sell.

When the Rule originated, health insurance coverage was rare and the Rule was robust. John G. Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Cal. L. Rev. 1478, 1478 (1966). As health insurance became more common, many states abandoned strict application of the Rule. Levenson, supra, at 922. Now health insurance is universal by law. Accordingly, the Rule should recede.

2. Alastor does not receive a fortuitous benefit from Lansing's insurance coverage.

Alastor would not benefit from some happy accident that Lansing is covered by insurance. The Fifth Circuit in Davis v. Odeco, Inc., 18 F.3d 1237, 1243 (5th Cir. 1994), explicitly characterized the Rule's primary interest as preventing punishment of a plaintiff's "foresight and prudence." See also Phillips v. W. Co. of N. Am., 953 F.2d 923, 930 (5th Cir. 1992); Bellard v. Am. Cent. Ins. Co., 980 So. 2d 654, 668 (La. 2008) ("[T]he tortfeasor is not allowed to benefit from the victim's *foresight*." (emphasis added)). The ACA *requires* Lansing to buy insurance. Granted, the traditional conception of the Rule did not distinguish between whether a plaintiff bought insurance by choice or not. See Restatement (Second) of Torts § 920A

cmt. b (1979). But there must be a difference between a tortfeasor who gratuitously piggybacks off the injured's choice and the tortfeasor who causes less harm to the injured because of a statutory safety net. Alastor is benefitting from the ACA, not Lansing.

3. Lansing will not be prejudiced by juror knowledge of Lansing's insurance coverage.

When health insurance was uncommon, the Rule served the evidentiary purpose of preventing prejudicial consideration by jurors. See Eichel v. N.Y. Cent. R.R. Co., 375 U.S. 253 (1963) (per curiam). The primary concern was that when the jury was considering both liability and damages, evidence of insurance would lead to improper findings of liability. See id. at 255 ("It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse."); Phillips v. W. Co. of N. Am., 953 F.2d 923, 929-30 (5th Cir. 1992); Deeds v. Univ. of Pa. Med. Ctr., 2015 PA Super 21 (Jan. 30, 2015) ("[T]he violation of the collateral source rule can affect the jury's deliberation and decision on the issue of liability."). This concern does not apply here because only damages are at issue.

There is also little risk that knowledge of insurance coverage would prejudice the jury's damages determination. Continued application of the Rule only makes sense if the jury does not know whether Lansing will have coverage. But as discussed above, the ACA guarantees that Lansing will be covered. Further, if the cost is fixed at $120,000 (as Alastor argues) there is no risk that the jury will reduce their damage award on the speculation that Lansing is attempting to get money already paid by insurance.

4. In the modern insurance regime, Alastor will not be underdeterred by paying only Lansing's out-of-pocket expense.

The potential for underdeterrence is not a sufficient reason to apply the Rule. The legislature foresaw this circumstance and made exemplary damages available, as they are in this

case. Exemplary damages exist to compensate for the potential of underdeterrence should compensatory damages be insufficient to make the injured party whole.. As the tail should not wag the dog, tort damages should be limited to their purpose in making the plaintiff whole so they do not usurp the interests served by punitive damages.

Furthermore, the law has not chosen to extend this logic to other analogous circumstances. For example, consider a hypothetical driver who wrecks into another car. The victim was driving an expensive, safe automobile, and suffered $120,000 of medical harm. If the victim had been driving a cheap, less-safe car, he would have suffered $260,000 of medical harm. As far as deterrence is concerned, this scenario is materially indistinguishable from the present case. The hypothetical victim only suffered a $120,000 out-of-pocket expense (instead of $260,000) because he bought a safer car at a higher price, and yet the law would not require the hypothetical tortfeasor to pay $260,000 for deterrence. Similarly, Lansing will only suffer a $120,000 out-of-pocket expense because he will pay insurance premiums in exchange for coverage. The law should not require the hospital to pay $260,000 for deterrence.

III. CONCLUSION

The Court should admit evidence of Lansing's future insurance coverage under the ACA. Lansing is reasonably certain to have insurance coverage at the time of any potential kidney transplant because the ACA requires Lansing to have insurance. Failure to obtain insurance coverage would violate Lansing's duty to mitigate future damages. Furthermore, South Texas should not apply the Rule. Doing so would give Lansing a $140,000 windfall, making the compensatory damages punitive in nature since the plaintiff would be made more than whole. Also, in light of the ACA, the historical justifications for the Rule no longer apply. For these

reasons, the Court should allow evidence that the insured price of a kidney transplant is $120,000.

Respectfully submitted,

TEAM 3

By: /s/ Team 3 Members
Team 3 Members

ATTORNEYS-IN-CHARGE FOR DEFENDANT
ALASTOR CITY CHARITY HOSPITAL