SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James d'Auguste** **PART 55**
Justice

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MEGHAN BROWN,

INDEX NO. 152267/2015

Plaintiff,

- v -

271 MADISON CO., FOX GLASS OF BROOKLYN, INC., BRONX WESTCHESTER TEMPERING, INC.,

Defendants.

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On February 2, 2014, plaintiff Megan Brown ("plaintiff") suffered head trauma and a traumatic brain injury when a large glass entrance door to a building located at 271 Madison Avenue in Manhattan shattered, with large clumps of glass striking her head. On March 28, 2024, a jury rendered an award compensating plaintiff for these injuries. In a decision and order, dated May 12, 2025, the Court denied a motion by defendant 271 Madison Co. ("defendant") [1] seeking to set aside this verdict, except to the extent of agreeing to conduct a collateral source hearing. NYSCEF Doc. No. 320. Familiarity with this determination is presumed. Regarding that part of the award at issue in the collateral source hearing, the Court noted: "Plaintiff also faces the prospect of facing these limitations and needing ever increasing levels of personal assistance for nearly half a century based upon life expectancy tables and the jury's finding that plaintiff would live an additional 45.9 years." *Id.* at 17. The Court also noted that "[p]laintiff's expert testified, and the jury apparently credited, that plaintiff is at high risk of developing dementia by age 60, resulting in a future need for full-time care." *Id.*

[1] Fox Glass of Brooklyn Inc. and Bronx Westchester Tempering Inc. are no longer parties to this action. NYSCEF Doc. No. 195.

It is against this backdrop that defendant has made an application to reduce the jury award based upon its contention that a collateral source, as defined by CPLR 4545, will cover a part of the verdict. Defendant asserts that two aspects of the verdict are subject to a collateral source setoff: (1) medical insurance that plaintiff can arguably purchase (as she is presently uninsured) from an insurance exchange established under the provisions of the Affordable Care Act ("ACA"); and (2) Medicare-paid items which defendant asserts that plaintiff is entitled to receive once she reaches the age of 65.

Addressing the issue of future Medicare coverage first, the Court finds that this cannot be used as a basis for a collateral source offset. This is because CPLR 4545(a) expressly excludes from collateral source coverage "payments as to which there is a statutory right of reimbursement." As a matter of statute, 42 USCA 1395y(2)(A)(ii) provides that Medicare excludes from its coverage care paid by a liability insurance policy. Moreover, if Medicare does mistakenly advance funds for medical treatment for injuries caused by plaintiff's accident, the program, pursuant to 42 USCA 1395y(2)(B)(ii), is entitled to seek repayment for these costs and expenses. In this regard, the United States is statutorily granted subrogation rights, pursuant to 42 USCA 1395y(2)(B)(iv), to seek the recoupment of all such payments. Thus, it should not be a surprise that Medicare and Medicare plans have been found by courts to be entitled to recoup any financial outlays for the treatment of injuries arising out of an accident when a tortfeasor's responsibility is resolved by settlement or judgment. *E.g.*, *Aetna Life Ins. Co. v. Big Y Foods, Inc.*, 52 F.4th 66, 75-76 (2d Cir. 2022). As the prohibition on Medicare as a potential collateral source is resolvable with a straightforward statutory application, the Court disposed of this issue on the record at the time of the hearing.

In concluding that Medicare payments are statutorily excluded from a potential CPLR 4545 setoff, the Court finds that caselaw relied upon by defendant, such as *Kastick v. U-Haul*

Company of Western Michigan, 292 A.D.2d 797 (4th Dep't 2002), is unavailing. *Kastick* addressed past medical liabilities that were written off by hospitals. *Id.* at 798. The Fourth Department determined that the plaintiff is not entitled to recover a financial award for non-existent past medical expenses. *Id.* To the extent defendant is asserting that plaintiff may wrongly seek to have treatment for accident-related injuries covered by Medicare, there is no proof of such a contention. In any event, *Kastick* was issued prior to New York modifying CPLR 4545 (L.2009 ch.494 Part F). The current version of CPLR 4545 expressly prohibits including as a collateral source any source which provides for a statutory right of reimbursement, which Medicare indisputably does pursuant to 42 USCA 1395y. Accordingly, none of the arguments advanced by defendant supports a determination that potential future Medicare coverage may serve as a collateral source entitling it to an offset to the jury award.

Next, it is undisputed that plaintiff presently lacks any health insurance that could serve as a collateral source. Defendant nonetheless argues an entitlement to a collateral source offset based on the purported availability of ACA insurance. In advancing this argument, defendant primarily relies upon the expert opinion of Jodi Loud, a registered nurse with approximately three decades of experience in the health care industry. Loud testified that she believes, based upon her anecdotal personal experience and two summaries of ACA policies available on the Florida ACA insurance exchange, that plaintiff can secure health insurance that would offset parts of the jury award for future care and treatment.[2] By contrast, Dr. Adam Block, called on behalf of plaintiff, testified that the two plans referenced by Loud were unlikely to cover the future expenses awarded by the jury. Unlike Loud, Block specifically reviewed the underlying

[2] Dr. Josefina V. Tranfa-Abboud also testified on behalf of defendant about a potential third scenario. However, this scenario is not premised on an insurance policy, but rather data reported by the Kaiser Family Foundation (the "KFF Survey") for the southern region of the United States. The KFF Survey is not sufficiently certain (given the absence of an actual insurance policy) to form the basis for a collateral source offset.

standard policies for the two insurers, which included policy exclusions and subrogation rights that contractually prohibit attempts to shift responsibility for personal injury losses from tortfeasors and their insurers to the medical insurers. As such, the Court finds that Loud's testimony could not even demonstrate the existence of a collateral source by a "preponderance of the evidence," let alone by the "clear and convincing evidence" standard that applies in these circumstances. *E.g.*, *Stolowski v. 2334E. 178th Street, LLC*, 89 A.D.3d 549, 549 (1st Dep't 2011) ("Defendant bears the burden of establishing by clear and convincing evidence that it is entitled to an offset for any collateral source payment that represents reimbursement for a category of loss for which damages are awarded").

Defendant's reliance on *Liciaga v. New York City Transit Authority*, 231 A.D.3d 250 (2d Dep't 2024), for the proposition that a successful personal injury plaintiff can be required to purchase medical insurance to ameliorate a loss suffered by a property casualty insurer is misplaced. Given its framework, the holding in *Liciaga* merely can stand for the proposition that a defendant has an expansive entitlement to a collateral source hearing to examine potential offsets under CPLR 4545. To the extent that some of the language in *Liciaga* suggests that a plaintiff may be required to obtain insurance, such a holding would be contrary to other legal authority more directly on point. *E.g.*, *Young v. Tops Markets, Inc.*, 283 A.D.2d 923, 926 (4th Dep't 2001); *see also Duma v. Seasons Contracting Corp.*, 12 Misc. 3d 1187(A) (Sup. Ct., N.Y. County 2006) (Kapnick, J.).

As the Court of Appeals has unequivocally held, "CPLR 4545(c) is a statute enacted in derogation of the common law and, as such, is to be strictly construed … in the narrowest sense that its words and underlying purposes permit." *Oden v. Chemung County Indus. Dev. Agency*, 87 N.Y.2d 81, 86 (1995). CPLR 4545 provides in relevant part:

> evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense *was or will, with reasonable certainty, be*

> *replaced or indemnified*, in whole or in part, from any collateral source, except for life insurance and those payments as to which there is a statutory right of reimbursement.... In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the *plaintiff is legally entitled to the continued receipt of such collateral source*, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement.

(Emphasis added). No ordinary construction, let alone a strict construction, of the sentence that allows a defendant to present evidence that a cost or expense "was or will, with reasonable certainty, be replaced or indemnified" would seem to empower an adjudicating court to order that a plaintiff *must* replace or indemnify a future cost in order to maintain the value of their judgment. Indeed, Section 4545's further requirement that a court find that the plaintiff "is" entitled to "continued receipt" of funds appear to refer to a plaintiff's pending contractual rights, not rights in a later contract that a court orders the plaintiff to enter into.

The Fourth Department's decision in *Young* is illustrative in this regard. It held that Section 4545:

> provides that, "[i]n order to find that any future source cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement". Having never applied for Social Security benefits, plaintiff is not "legally entitled" to their "continued receipt".

283 A.D.2d at 926. In other words, the court understood that if the plaintiff was not already "legally entitled" to the "continued receipt" of funds, then that was the end of the collateral source inquiry.

Here, defendant asks the Court to shift the losses from property casualty insurers – which previously received premiums to cover this very loss – to health insurers, which are strangers to this case. That request would transform the Court's limited role in this proceeding under CPLR 4545 from determining whether plaintiff will be receiving a double recovery to judicially

participating in the coercion of a plaintiff to take steps to reduce defendant's liability and shift its losses to others. That is problematic because it: (1) seems to not be good public policy; (2) runs the risk of creating a windfall for defendant, not plaintiff; and (3) potentially runs afoul of due process considerations. Briefly, on the issue of due process concerns, defendant is seeking to coerce plaintiff into procuring a medical insurance policy but has not notified either of the two medical insurers that formed the basis of an application that would transfer losses from defendant's insurer to those insurers. Put differently, if either of the two Florida health insurers' rights will be affected by being forced to assume some of defendant's losses pursuant to a New York court order, then it stands to reason that, in fairness, those insurers should be afforded an opportunity to appear and be heard in protection of their rights.

In sum, defendant has failed to show that the two policies relied upon in the collateral source hearing would be reasonably certain to cover any of the expenses awarded in the jury verdict, and that reason alone is sufficient for the Court to deny defendant's application, pursuant to CPLR 4545, seeking to reduce components of the jury award for plaintiff's future medical care. Moreover, the Court finds unconvincing defendant's argument that, under CPLR 4545, the Court is permitted, under these circumstances, to require plaintiff to purchase medical insurance to ameliorate the losses that defendant, as a tortfeasor, has incurred. Accordingly, the Court denies any collateral source setoff relating to any component of the verdict rendered in this matter.

This constitutes the decision and order of the Court.

11/26/2025
DATE

James d'Auguste, J.S.C.[3]

[3] The Court expresses its appreciation to court attorney Andrew Lorin, Esq. for his assistance in this matter.