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While neither Georgia nor the Eleventh Circuit has addressed the reliability of FAIR Health data in this context, other jurisdictions have concluded that this data is unreliable for determining the reasonableness of medical costs, and introduction of evidence based on this information also violates the collateral source rule. Because the information that Ms. Reier has supplied is irrelevant and inadmissible, it should be excluded.

## **II. STATEMENT OF FACTS**

It is undisputed that on August 3, 2017, Plaintiff and Defendant were driving towards the intersection of Fort Street and Andrew Young International Boulevard when Defendant negligently and illegally entered Plaintiff's lane, causing a collision. As a direct and proximate result of injuries caused by the collision, Plaintiff has suffered a herniated disc, headaches, cervical sprain, cervical pain, lumbar sprain, lumbar pain, and muscle spasms.

Plaintiff was treated for his injuries at Ortho Sports and Spine and Orthopedic ASC Sandy Springs for roughly three years. At Ortho Sports & Spine, Plaintiff was billed for medical treatments totaling \$26,023.75. From Orthopedic ASC Sandy Springs, Plaintiff's bills totaled \$43,874.67. Defendant has retained Rebecca Reier to testify that the cost of Plaintiff's orthopedic treatment is unreasonable. See Defendant's Third Supplemental Response to Plaintiff's First Interrogatories #7, attached hereto as Plaintiff's "Exhibit 2".

In her report, Ms. Reier concludes that the cumulative charge of \$69,898.42 from Ortho Sports & Spine South and Orthopedic ASC Sandy Springs is neither customary nor reasonable for similar medical procedures performed in the same geo-zipcode. See Med-Econ Reports 1 & 2, attached hereto as Plaintiff's "Exhibit 3." To form her opinion, Ms. Reier read Mr. Williams's medical reports to find the CPT codes associated with the procedures that he underwent. Ms. Reier

then looked up the prices associated with those CPT codes in the FAIR Health database. Based on this information, Ms. Reier determined that \$69,898.42 fell outside of the 75<sup>th</sup> percentile of what a similar medical professional would charge for the same services in the relevant geo-zipcode. Reier Depo. 37:18-9. Ms. Reier concluded that the reasonable and customary charges for Mr. Williams's procedures were \$39,820.15.

### **III. ARGUMENT AND CITATION TO AUTHORITY**

#### **A. Ms. Reier fails to qualify as an expert witness under Georgia Law**

O.C.G.A. § 24-97-702 governs the admissibility of expert witness testimony and opinions. O.C.G.A. § 24-97-702 and the reliability factors outlined in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) are applied to testimony concerning scientific, technical, or other specialized knowledge. See HNTB Georgia, Inc. v. Hamilton-King, 287 Ga. 641, 642 (2010). Specifically, O.C.G.A. § 24-97-702 provides in relevant part:

- (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if:
  - (1) The testimony is based on sufficient facts or data;
  - (2) The testimony is the product of reliable principles and methods; and
  - (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

Plaintiff contends that Ms. Reier's opinions are not based on sufficient facts and data and are therefore irrelevant for determining the reasonableness of the fees in controversy and inadmissible as expert testimony.

As background, FAIR Health is not a database of rates charged by medical providers. In fact, “[m]edical providers are prohibited from submitting data to FAIR Health.” *Verci v. High*, 161 N.E.3d 249 at ¶30 (Ill. App. Dec. 18, 2019), appeal denied, 439 Ill. Dec. 5, 147 N.E.3d 680 (Ill. 2020) (internal citations and punctuation omitted). The information contained in the FAIR Health database comes from insurance companies and is used to set insurance reimbursement rates. Id.

In *Verci v. High* (161 N.E.3d 249), the Illinois appellate court addressed a case in which the same expert from the instant case, Ms. Reier, was retained to testify that the plaintiff’s charged medical costs were unreasonable and uncustomary. Ms. Reier employed the same methodology that she used in the instant case, basing her opinions almost entirely on the FAIR Health database and other databases that also rely on FAIR Health data.<sup>1</sup> The *Verci* court held that Ms. Reier’s opinion did not establish the reasonableness of health care charges because the FAIR Health data “comes from an unknown number of insurance companies, not healthcare providers.” Id. at ¶30. Because the FAIR Health data only comes from insurance companies, the information lacks the rates that medical providers charge to uninsured patients. Id. The court stressed that the exclusion of the rates that providers charge to uninsured patients has unfairly skewed the information, resulting in unrealistically low charge data because “[p]hysicians charge uninsured patients, on average, more than twice what they charge insurers.” Id. The court determined that, in order to assess the reasonableness of medical charges, the rates charged to uninsured patients would also have to be considered because all patients are not insured, and the defendant could not benefit from

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<sup>1</sup> Ms. Reier also relies heavily on Optum, which is a fee schedule based on FAIR Health data. (Reier Depo. 15:15-20).

the inference that a plaintiff is insured. The court held that “[b]ecause the FAIR Health database does not include amounts charged to uninsured patients, it is not a true representation of what medical providers charge.” *Id.* at ¶30.

In *Belcher v. Kelly* (2021 U.S. Dist. LEXIS 2419\*, 2021 WL 62256), the US District Court for the District of Colorado addressed a case in which the expert testimony offered to establish the reasonableness of medical costs also relied on the FAIR Health Database and employed a methodology almost identical to Ms. Reier’s. The *Belcher* court also emphasized that “FAIR Health’s data represents only the limited universe of what healthcare providers have billed to insurance companies.” *Id.* at 7-8. The *Belcher* court held that the expert’s FAIR Health-based opinions were irrelevant for determining the reasonable value of medical costs because they were not sufficiently tied to the facts of the case.

The question the jury here must answer is not what it might be reasonable to bill some *hypothetical (insured) patient* before he is seen by a physician, but rather whether the expenses [the plaintiff] actually incurred were reasonable and necessary in the circumstances which confronted his doctors at the time he sought their care.

*Belcher v. Kelly*, 2021 U.S. Dist. LEXIS 2419, at \*10-11 (citation and internal quotation marks omitted) (emphasis added).

The reasoning applied in *Belcher* and *Verci* should be persuasive to the Court’s analysis in the instant case. Neither the FAIR Health database nor Ms. Reier’s methodology has changed since the rulings in *Belcher* and *Verci*. The FAIR Health database continues to rely solely on information taken from the select group of insurance companies that choose to contribute. FAIR Health continues to exclude actual medical care providers from contributing to their database. FAIR Health continues to be used by private health insurers to set reimbursement rates. FAIR Health

continues to exclude the rates that medical care providers charge to uninsured patients. Based on the substance of the database, FAIR Health continues to be an unreliable and irrelevant tool for determining the reasonableness of medical costs in a marketplace where uninsured patients are routinely charged at least twice that of an insured patient.

Despite having her testimony excluded in *Verci* only three years ago, Ms. Reier has not taken any steps to mitigate FAIR Health's insurance-skewed data. She has not requested charge information for uninsured patients from any of the service providers located in the relevant geo-zipcode. She has not integrated uninsured charge data into her analysis to give a more realistic and unbiased estimate of reasonable and customary medical costs. She has done nothing more than review the data listed in the FAIR Health database and apply it *as is* to the instant situation.

The reason why Ms. Reier continues to rely on the same previously excluded data and methods is because the vast majority of her clients are insurance companies. (Reier Depo. 29:25-30:4). Ms. Reier, and her clients, are well aware that the FAIR Health database excludes charges from uninsured patients. Ms. Reier and her clients are also aware that uninsured patients are charged at much higher rates than insured patients. The reason that Ms. Reier and her clients continue to rely on the same data and methodology is *not* to establish actual reasonable and customary charges of medical rates but to unfairly reduce the recovery of injured plaintiffs.<sup>2</sup>

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<sup>2</sup> Astoundingly, Ms. Reier testified that her opinions do not reflect what insurers allow or what Medicare allows. She testified that her the information on which she bases her opinions have nothing to do with what is typically paid by insurers or Medicare. (Reier Depo. 54:5-16). This testimony is blatantly and unequivocally false. Not only is it well established that FAIR Health *only* includes data from insurance companies, Ms. Reier acknowledges as much. (Reier Depo. 38:18-23). Ms. Reier also acknowledges that the database from which she gathered charge data on Northside and Emory Hospitals came from a database provided by the Center for Medicaid and Medicare Services.

Like the expert in *Belcher*, Ms. Reier is basing her opinion of reasonableness on a hypothetical insured patient's costs in a real-world situation that does not fit into the parameters of FAIR Health data. Because Ms. Reier's opinions are not based on sufficient data and are irrelevant to the analysis of reasonable and customary medical charges, they should be excluded from evidence in this case.

**B. The data on which Ms. Reier bases her conclusions violates the collateral source rule because it seeks to introduce information of insurance rates for medical services, which are routinely far lower than rates charged to uninsured patients.**

In addition to being unreliable and irrelevant, Ms. Reier's testimony also violates the collateral source rule. "The collateral source rule, stated simply, is that the receipt of benefits or mitigation of loss from sources other than the defendant will not operate to diminish the plaintiff's recovery of damages." Stephens v. Castano-Castano, 346 Ga. App. 284, 290 (2018) (internal citation and punctuation omitted).

[T]here are two consequences of the collateral source rule. One is substantive and is that damages are not reduced by the amount of collateral benefits plaintiff receives. The other consequence of the rule is evidentiary in effect. Because of the substantive consequence of the rule, evidence of collateral benefits is not generally material.

Polito v. Holland, 258 Ga. 54, 56 (1988). "Georgia's common law collateral source rule prevents a tortfeasor from enjoying the benefit of collateral sources (such as insurance payments) that might have paid for damage inflicted by the tortfeasor." Huff v. Patricia Faye Huff, 2006 U.S. Dist. LEXIS 110042, at \*2 (N.D. Ga. Mar. 1, 2006) (internal citation and punctuation omitted).

The courts in both *Belcher* and *Verci* held that, in addition to being irrelevant, FAIR Health data also violated the collateral source rule. Relying on precedent from the Colorado Supreme Court, the *Belcher* court adopted the rule that the introduction of insurance rates to

determine the reasonable value of medical services violates the collateral source rule because it “carries with it the unjustifiable risk that the jury will infer the existence of a collateral source – most commonly an insurer – from the evidence, and thereby improperly diminish the plaintiff’s award.” Belcher v. Kelly, 2021 U.S. Dist. LEXIS 2419, at \*7 (D. Colo. Jan. 6, 2021) (quoting Wal-Mart Stores, Inc. v. Crossgrove, 276 P.3d 562, 566-67 (Colo. 2012)).<sup>3</sup> The court held that introducing FAIR Health data is akin to introducing actual insurance rates because neither are representative of the reasonable value of the services. Id.

Thus, any fee schedule derived from Fair Health’s data represents a healthcare provider’s estimate of what an insurance company is likely to reimburse, which is not necessarily coextensive with the reasonable value of those services. Viewed in that light, the introduction of this evidence would indeed appear to violate the collateral source rule.

Belcher v. Kelly, 2021 U.S. Dist. LEXIS 2419, at \*7 (D. Colo. Jan. 6, 2021).

The *Verci* court held that Ms. Reier’s testimony violated the collateral source rule because FAIR Health data is most commonly used by private insurance companies to set reimbursement rates, and “[t]estimony about reimbursement rates is not only irrelevant but also

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<sup>3</sup> In *Walmart v. Crossgrove*, the plaintiff was billed almost \$250,000 in medical services. The plaintiff’s insurance provider settled the bill for \$40,000. On the defendant’s motion, the trial court admitted evidence of the amount the insurance company paid in regard to the reasonable and necessary value of the rendered medical services. The court of appeals reversed the trial court’s ruling, holding that the admission of information concerning the amount that the insurance company paid to settle the bill violated the collateral source rule. The Colorado Supreme Court affirmed the court of appeals ruling, holding that “a reasonable juror will likely infer the existence of a collateral source if presented with evidence of a lower amount paid to satisfy a higher amount billed because, unlike cases involving uninsured patients, providers routinely accept discounted rates to satisfy insured patients’ bills. The risk of prejudice—in the form of reduced damages—against the insured plaintiff as a result of such an inference justifies the application of the common law pre-verdict collateral source rule instead of the reasonable value rule in collateral source cases.” Wal-Mart Stores, Inc. v. Crossgrove, 276 P.3d 562, 566-67 (Colo. 2012).



violates the collateral source rule.”<sup>4</sup> See also Besaw v. Dorman, 2019 Fla. Cir. LEXIS 3997 at \*6 (Fla. Cir. Ct. Aug. 9, 2019).

In the instant case, Defendant’s attempt to base the reasonableness of medical charges on insurance rates goes against the underlying intent of the collateral source rule. Instead of benefiting from the actual cost of insurance rate reimbursement, Defendant submits this information so that he can benefit from the *inference* of the insurance rate. Allowing Defendant to benefit from this inference would have the same outcome as allowing Defendant to directly submit evidence of payments made by a collateral source. As the Supreme Court of Colorado stated in *Walmart Stores v. Cossgrove*, if presented with evidence of what an insurer paid to determine the reasonableness of medical costs, “a reasonable juror will likely *infer* the existence of a collateral source [...]” and reduce the Plaintiff’s recovery accordingly. Walmart Stores, 276 P.3d at 562. Just as a tortfeasor should not benefit from the actual payments of a collateral source, it should likewise not benefit from the inference of collateral contributions. As the database and methods that Ms. Reier employed are the same as those used in *Belcher* and *Verci*, Plaintiff requests that this Court exclude Ms. Reier’s opinion as inadmissible under the collateral source rule.

**C. Ms. Reier’s methodology also fails to consider the relevant factors for determining the reasonableness of medical costs.**

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<sup>4</sup> Ms. Reier and the expert in *Belcher* offered different descriptions of the FAIR Health Database. In *Verci*, Mrs. Reier claimed, as she does here, that the FAIR Health database is used by insurance companies to set reimbursement rates. This is the same definition relied upon by the court in *Besaw v. Dorman* (2019 Fla. Cir. LEXIS 3997 \*6 (Fla. Cir. Ct. Aug. 9, 2019)). However, the expert in *Belcher* claimed that the data was “based on billed, not reimbursed, amounts and also is used by healthcare providers themselves to set fee schedules.” Belcher v. Kelly, 2021 U.S. Dist. LEXIS 2419 \*7. The *Belcher* court held that this difference in the offered definition did not change the fact that, in either case, what the FAIR Health database offers is insurance rates, which are ultimately violative of the collateral source rule.

While Georgia courts of appeals have not yet addressed which factors should be considered when determining the admissibility of medical costs, Eleventh Circuit courts generally examine the following non-exclusive factors:

- (1) the provider's internal cost structure;
- (2) the usual and customary rates charged and payments received for these services; and
- (3) what other similar medical providers in the relevant market charge for similar services.

Aglogalou v. Dawson, No. 8:20-cv-2024-CEH-AAS, 2021 U.S. Dist. LEXIS 231658, at \*5 (M.D. Fla. Dec. 3, 2021) (internal citations omitted).

As discussed above, Ms. Reier's opinions concerning the usual and customary charges are based almost entirely on the FAIR Health Database and are therefore irrelevant. Additionally, Ms. Reier's investigation to determine what similar medical providers in the relevant market charge for similar services also failed to provide relevant data.

Ms. Reier testified that she did an independent analysis of other providers' medical charges and CPT codes in the relevant geographical area to corroborate the FAIR Health data. To conduct this research, Ms. Reier relied entirely on data from the Center for Medicare and Medicaid Services. Reier Depo. 44:13-45:11. The problem with this data is that it only includes information for what medical providers charge the US government, which tends to be even lower than what medical providers charge insurance companies and several times lower than what providers charge uninsured patients.

[The] government sets the rates that providers who honor public insurance programs, like Medicare and Medicaid, must accept for certain services. These amounts are often significantly lower than those billed by the provider. Thus, as is the case with private insurance companies, healthcare providers accept significantly less than the amount billed for certain services in satisfaction of government-

insured patients' bills. On the other hand, healthcare providers rarely accept discounted amounts to satisfy the bills of uninsured patients.

Wal-Mart Stores, Inc. v. Crossgrove, 276 P.3d 562, 566-67 (Colo. 2012) (internal citation and punctuation omitted). Like the information included in the FAIR Health database, this information only reflects the prices paid by entities with large amounts of bargaining power – the US government and private insurance companies – a bargaining power that uninsured patients simply do not wield. See Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L.Rev. 643, 663 (2008) (“Since uninsured patients are protected in this Darwinian marketplace by neither insurers nor regulators, hospitals are loosed to charge what they will.”). As such, the information on which Ms. Reier relied to find the prices of similar medical services in the same geographic area likewise did not include the data of uninsured patients. Like the FAIR Health Data, this data is not only irrelevant for determining the customary costs of medical charges but also violates the collateral source rule.

Ms. Reier also compared the data from the FAIR Health database to two hospitals – Emory and Northside – to arrive at her conclusions. There are two main issues with Ms. Reier’s reliance on this data. The first and most glaring issue is that she only relied on *two* hospitals to confirm the reasonableness of FAIR Health’s charge data – a Google search of orthopedic medical service providers in the greater Atlanta area returns roughly 278 providers. Also, and importantly, Ms. Reier does not stipulate *who* the hospital charges are for – uninsured patients, insured patients, or Medicare/Medicaid recipients. Without proper context, it is impossible to determine the reliability or relevance of the data that Ms. Reier offers from these two hospitals.

Ms. Reier did not conduct any research into the internal cost structures of Ortho Sports and Spine or Orthopedic ASC Sandy Springs. *See* Med-Econ Reports 1 & 2, p. 7.

Because Ms. Reier's opinions failed to fulfill the factors set out by the 11<sup>th</sup> circuit to determine reasonableness, they should be excluded from evidence.

#### **IV. CONCLUSION**

Ms. Reier's opinions are not admissible as expert testimony. Her reliance on data from FAIR Health and the Center for Medicare and Medicaid Services does not accurately reflect the reasonable cost of medical services because they do not consider the costs borne by uninsured patients. This information also violates the collateral sources rule.

WHEREFORE, Plaintiff respectfully requests that his Motion to exclude Mrs. Rebecca Reier be granted.