OP 21-0316

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 309

BARBARA A. GIBSON, as Personal Representative of the Estate of Johnny G. Gibson, and for herself; JOHN TRAVIS MORGAN GIBSON; DIXIE LEE GIBSON,

Plaintiffs and Appellants,

v.

UNITED STATES OF AMERICA,

Defendant and Appellee.

ORIGINAL PROCEEDING: Certified Question, United States Court of Appeals for the Ninth Circuit, Cause No. 20-35333
Honorable Danny J. Boggs, Richard A. Paez, and Paul J. Watford, Presiding Circuit Judges

COUNSEL OF RECORD:

For Appellants:

John M. Morrison, Morrison, Sherwood, Wilson & Deola, PLLP, Helena, Montana

For Appellee:

Leif M. Johnson, Acting United States Attorney, Victoria L. Francis, Assistant United States Attorney, Billings, Montana

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Submitted on Briefs: October 20, 2021

Decided: December 7, 2021

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 The United States Court of Appeals for the Ninth Circuit certified the following questions to this Court:

1. *Under Montana law, for a claim that accrued prior to the effective date of § 27-1-308, MCA (2021), may a plaintiff in a survival action recover the reasonable value of medical care and related services when the costs of such care or services are written off under the provider's charitable care program?*

2. *Under Montana law, for a claim that accrued prior to the effective date of § 27-1-308, MCA (2021), does a charitable care write-off qualify as a collateral source within the meaning of § 27-1-307, MCA? If so, does a charitable care write-off qualify for the "gifts and gratuitous contributions" exception under § 27-1-307(1)(c), MCA?*

We accepted certification by order dated June 29, 2021, and now answer "no" to both questions on the facts presented.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 We summarize the undisputed facts from the Ninth Circuit's Certification Order. In September 2015, Johnny Gibson visited the Central Montana Community Health Center, a federally funded health care center in Lewistown, Montana. He reported experiencing chest pain, pain between the shoulder blades, heartburn, and fatigue. The Center's staff did not treat or examine Gibson for potential heart issues before releasing him, and Gibson died one week later from a myocardial infarction at St. Vincent Hospital in Billings, Montana. Barbara Gibson filed a wrongful death and survival action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2672, on behalf of herself, Gibson's estate (Estate), and Gibson's heirs. The government conceded negligence, and the United States District Court for the District of Montana granted summary judgment to the plaintiffs.

¶3 Following a bench trial, the district court awarded $578,248 to the plaintiffs. It declined, however, to award damages for the reasonable value of medical expenses Gibson incurred. The court found that the hospital and the ambulance service forgave $165,661.50 under their charity care programs and did not attempt to collect payment from Gibson's estate or family. Of that amount, $991.28 was for ambulance services and the remainder for hospital services. Although the providers sent Gibson bills for their services, both stated that the amounts were forgiven in full, and both showed a balance of zero. The hospital did not reserve a right to collect payment in the event the Estate recovered from a third-party tortfeasor. Interpreting Montana law, the trial court concluded that the Estate could not recover damages for medical expenses in excess of the amount actually paid, and it limited recovery accordingly.

¶4 On Gibson's appeal, the Ninth Circuit Court of Appeals observed that this Court has not addressed whether a charitable write-off of medical expenses may be recovered as damages or is subject to the collateral source rule. It certified those issues for this Court's determination.

STANDARD OF REVIEW

¶5 "When answering a certified question from another qualifying court as permitted by M. R. App. P. 15(3), our review is purely an interpretation of the law as applied to the agreed facts underlying the action." *Van Orden v. United Servs. Auto. Ass'n*, 2014 MT 45, ¶ 10, 374 Mont. 62, 318 P.3d 1042 (internal quotation and citations omitted).

DISCUSSION

¶6 Section 27-1-308, MCA (2019), provides in pertinent part:

> (1) In an action arising from bodily injury or death when the total award against all defendants is in excess of $50,000 and the plaintiff will be fully compensated for the plaintiff's damages, exclusive of court costs and attorney fees, a plaintiff's recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right.

The Montana Legislature amended the statute in 2021. It now provides that:

> a plaintiff's recovery may not exceed amounts actually: (a) paid by or on behalf of the plaintiff to health care providers that rendered reasonable and necessary medical services or treatment to the plaintiff; [and] (b) necessary to satisfy charges that have been incurred and at the time of trial are still owing and payable to health care providers for reasonable and necessary medical services or treatment rendered to the plaintiff[.]

Section 27-1-308(2)(a)-(b), MCA (2021). The bill expressly made the amendment applicable to claims that accrue on or after its effective date. *Senate Bill 251: An Act Generally Revising Laws Related to Damages in Lawsuits*, 67th Leg. 327, § 6 (2021). Because Gibson's claims accrued and were filed prior to the effective date, and as the Certification Order reflects, we consider and apply the 2019 version of the law. Accordingly, all statutory references are to the 2019 Montana Code Annotated, unless indicated otherwise.[1]

¶7 *1. Under Montana law, for a claim that accrued prior to the effective date of § 27-1-308, MCA (2021), may a plaintiff in a survival action recover the reasonable value of medical care and related services when the costs of such care or services are written off under the provider's charitable care program?*

[1] Johnny Gibson's injuries occurred in September 2015, and the Estate filed suit in 2018. All of the statutes relevant to this case and cited in this Opinion remained unchanged from the date of his injuries until the 2021 amendments. We use the most recent version of the applicable statutes for convenience.

¶8 "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation for it in money, which is called damages." Section 27-1-202, MCA. The law defines "detriment" as "a loss or harm suffered in person or property." Section 27-1-201, MCA.

¶9 Gibson argues that Montana law permits an injured tort victim to recover the reasonable value of medical treatment received because of the tortfeasor's negligence, including any amount written off. Gibson traces this premise to a 1984 case, *Kuhnke v. Fisher*, 210 Mont. 114, 683 P.2d 916 (1984).

¶10 In *Kuhnke*, a wrongful death action, we considered whether it was improper for defense counsel to refer to the plaintiff's unpaid funeral bill during the final summation. 210 Mont. at 120, 123, 683 P.2d at 918, 921. We reversed for a new trial, stating, "It was completely irrelevant to the cause of action . . . that the funeral bill was not paid at the time of trial[.]" *Kuhnke*, 210 Mont. at 124-26, 683 P.2d at 921-22. We analogized the payment of funeral expenses to that of medical bills, explaining that "*payment* of medical bills [is not required] before payment can be recovered in a wrongful death cause." *Kuhnke*, 210 Mont. at 124, 683 P.2d at 921 (emphasis in original). We explained that "when a person is injured . . . the incurrence of the medical bills and the funeral costs, without more, is sufficient to establish a basis for the recovery of damages." *Kuhnke*, 210 Mont. at 124, 683 P.2d at 921. The mere fact that a funeral bill was unpaid did not foreclose the possibility of the plaintiff's recovery, and therefore it was improper for defense counsel to comment on it. We did not consider whether a plaintiff who was neither charged nor

accountable for medical or funeral expenses could recover the reasonable value of those services in damages.

¶11 Both parties discuss a handful of cases we have decided since *Kuhnke* that address recovery of medical or other expenses, most in the context of insurance contracts. Though none of these cases are dispositive here, we agree they are instructive. *Newbury v. State Farm Fire & Casualty Insurance Co.* was an action to recover medical expenses arising from an employment-related car accident. 2008 MT 156, ¶¶ 7-8, 343 Mont. 279, 184 P.3d 1021. Newbury incurred $18,405.80 in medical expenses, of which workers' compensation paid $17,230. *Newbury*, ¶ 8. He also carried automobile insurance through State Farm, which provided a total medical payment coverage of $10,000. *Newbury*, ¶ 9. His policy stated that "there is no coverage to the extent workers' compensation benefits are required to be payable." *Newbury*, ¶ 9 (quotation omitted). Newbury submitted a claim to State Farm seeking payment of the full $10,000, but State Farm paid only the remaining $1,175.80 of Newbury's medical expenses that the workers' compensation insurer did not pay. *Newbury*, ¶ 10. Newbury sued to recover the remaining $8,824.20. We considered whether the workers' compensation provision violated public policy by violating Newbury's reasonable expectations or by defeating coverage for which valuable consideration was paid, and we held that it did not. *Newbury*, ¶¶ 33, 41-42, 48. We concluded that it was not reasonable for Newbury under the terms of his policy to expect compensation for medical payments that were paid in full and for which he was not liable. *Newbury*, ¶¶ 38-39. We observed that permitting Newbury to recover $8,824.20 in excess of his medical expenses "would result in a windfall[.]" *Newbury*, ¶ 47.

¶12 Five years after *Newbury*, we decided *Conway v. Benefis Health System*, 2013 MT 73, 369 Mont. 309, 297 P.3d 1200. Conway was treated by Benefis for injuries he sustained in a car accident. *Conway*, ¶ 6. His medical costs totaled $2,073.65. *Conway*, ¶ 7. Conway had healthcare coverage through TRICARE and automobile coverage through Kemper. *Conway*, ¶ 7. Benefis accepted $662.74 from TRICARE in full satisfaction of Conway's bill pursuant to a preferred provider agreement. *Conway*, ¶ 7. Kemper subsequently paid Benefis $1,866.29, and Benefis reimbursed TRICARE's full payment because TRICARE functioned as a secondary payer. *Conway*, ¶ 7. Conway sued Benefis to recover the $1,203.55 difference between TRICARE's payment and Kemper's payment, alleging that he was entitled to that amount in damages. *Conway*, ¶¶ 8, 33. We reversed the district court's order of summary judgment for Conway because "Conway [did] not owe Benefis any remaining amount" and was not entitled to "pocket excess medical payments[.]" *Conway*, ¶ 35. Permitting Conway to recover an additional $1,203.55 would result in "the type of windfall recovery expressly disapproved in *Newbury*." *Conway*, ¶ 35.

¶13 In *Van Orden*, we considered whether the "made whole" doctrine entitles an insured whose property damages have been paid in full to recover damages for bodily injury under the tortfeasor's discrete property liability coverage. *Van Orden*, ¶ 2. Van Orden sustained bodily injuries and suffered $12,981.75 in property damage in a car accident. *Van Orden*, ¶¶ 6-7. Van Orden carried automobile insurance through United Services Automobile Association (USAA), which paid the full amount of his property damage. *Van Orden*, ¶¶ 4, 6. His policy also included underinsured motorist (UIM) coverage with

bodily injury limits of $25,000 per person and $50,000 per accident. *Van Orden*, ¶ 4. For his bodily injuries, Van Orden recovered $24,430.19 from the at-fault driver's insurer and $50,000 from his USAA UIM coverage. *Van Orden*, ¶ 7. USAA subsequently sought, and recovered, subrogation for the $12,981.75 in property damage expenses from the tortfeasor's insurer. *Van Orden*, ¶ 8. Van Orden sued USAA, alleging that he had not been fully compensated for his personal injuries and, therefore, USAA should not have secured subrogation for property damage loss from the tortfeasor's insurer. *Van Orden*, ¶ 9. He argued that the amount USAA recovered from the tortfeasor's insurer should go toward making him whole for his bodily injuries. *Van Orden*, ¶ 21. We recognized longstanding law that, "when the insured has sustained a loss in excess of the reimbursement by the insurer, the insured is entitled to be made whole for his entire loss . . . before the insurer can assert its right of legal subrogation[.]" *Van Orden*, ¶ 12 (citing *Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 528, 565 P.2d 628, 631 (1977)). We reiterated that "[w]hen the sum recovered by the Insured from the Tortfeasor is less than the total loss and thus either the Insured or the Insurer must to some extent go unpaid, *the loss should be borne by the insurer[,] for that is a risk the insured has paid it to assume*." *Van Orden*, ¶ 13 (quoting *Skauge*, 172 Mont. at 528, 565 P.2d at 632). We held, however, that USAA was entitled to subrogation for Van Orden's property damage expenses, the "full amount" of which USAA had paid "under a separate and optional property damage portion of his policy, [when] USAA received that amount from a separate property damage liability limit of the at-fault driver's insurance policy." *Van Orden*, ¶ 17. Van Orden had been made whole for "the element of damage for which he purchased insurance." *Van Orden*, ¶ 17.

We explained that *Newbury* and *Conway* had made clear that "an insured's receipt of duplicate payments for the same element of loss may constitute a windfall to the insured if the coverage is limited to a discrete item, such as payment of medical expenses." *Van Orden*, ¶ 20. We rejected the proposition that "a separate property liability portion of a tortfeasor's insurance policy may be received as compensation for [the plaintiff's] personal injury damages." *Van Orden*, ¶ 21. We held that allowing Van Orden to recover under the tortfeasor's property liability limit would result in "double recovery for the same element of loss" because his property damages had been paid in full. *Van Orden*, ¶ 23. An award in excess of the plaintiff's loss constitutes an impermissible "windfall." *Van Orden*, ¶ 20 (citation omitted).

¶14 In *Winter v. State Farm Mutual Automobile Insurance Co.*, we considered whether an insured had "incurred" medical expenses within the meaning of his insurance policy. 2014 MT 168, ¶ 10, 375 Mont. 351, 328 P.3d 665. Winter injured his knee while working on his truck, resulting in $7,929.83 in medical expenses. *Winter*, ¶ 4. Winter had automobile insurance through State Farm and healthcare insurance through Blue Cross Blue Shield (BCBS). *Winter*, ¶ 4. BCBS paid nearly all of Winter's medical bills, and State Farm paid the remaining $25.02. *Winter*, ¶ 5. Winter's State Farm policy, however, provided medical payment coverage of up to $15,000, and Winter sought to recover the full amount. *Winter*, ¶ 4. After State Farm refused, Winter sued for breach of contract. *Winter*, ¶ 5. His policy stated that State Farm would pay "medical expenses *incurred* because of bodily injury that is sustained by an insured and caused by a motor vehicle accident." *Winter*, ¶ 6 (emphasis added). Stipulating that none of the exclusions in the

policy applied to Winter, State Farm argued that Winter had not "incurred" any payments because he neither paid nor was liable for any medical expenses at the time of his claim. *Winter*, ¶ 7. Because the dispute was one of insurance contract interpretation, we applied the "ordinary consumer" standard to determine whether the term "incurred" was ambiguous. *Winter*, ¶¶ 13, 16 (citing *Newbury*, ¶ 19). We stated that a "consumer of average intelligence not trained in the law or insurance business" would interpret the term "incurred" to mean "at the time the services are rendered." *Winter*, ¶¶ 13, 16. We noted in particular that:

> When a patient presents at a hospital or doctor's office, the provider makes clear that the patient is responsible for any and all charges, whether or not insurance or some other third party ultimately pays them. The provider does not agree to hold the patient harmless for the services rendered on his behalf, nor does an insurer assume liability for payment of all medical expenses simply by issuing the policy.

Winter, ¶ 16. We distinguished *Newbury* and *Conway* on the ground that Winter's insurance policy did not contain a double recovery exclusion as did the contracts in those cases. *Winter*, ¶ 21. Similarly, we distinguished *Van Orden* on the ground that, there, "the insured could not demonstrate any right to recover medical expenses under property insurance coverage." *Winter*, ¶ 25. We observed that, "Although our holdings in those cases barred double recovery, we have never declared as a general principle that an insured may never recover duplicate payments under separate insurance policies. In fact, the law recognizes that duplicate payments are possible." *Winter*, ¶ 21. We clarified that our holding in *Winter*, like our previous cases, hinged on the specific insurance policy at issue: "Based on the plain language of the policy, using the common sense meaning of the term

'incurred,' there is no limitation that prevents Winter from receiving a duplicate payment for medical expenses under separately purchased, uncoordinated insurance policies." *Winter*, ¶ 28.

¶15 One year after *Van Orde*n and *Winter*, we decided *Meek v. Montana Eighth Judicial District Court*, a survival and wrongful death action that came before the Court on a petition for supervisory control. 2015 MT 130, ¶¶ 1, 3, 379 Mont. 150, 349 P.3d 493. Gibson contends that *Meek* instructs a recovery for the Estate here, notwithstanding the absence of any expectation of payment of the written-off expenses. Meek incurred $197,154.93 in medical costs, of which her insurance paid $70,711.26. *Meek*, ¶ 4. The remainder was written-off by the medical provider. *Meek*, ¶¶ 4, 18. The sole issue we considered was whether the total amount of Meek's medical bills, including the write-off, was admissible at trial. *Meek*, ¶¶ 11, 14. We held that it was. *Meek*, ¶ 14. Because reasonableness of medical expenses as a measure of damages "is a matter to be determined by the jury," we determined that both parties were entitled to present evidence to show the "reasonable measure of the value of the services provided." *Meek*, ¶¶ 16, 22. Beyond their relevance to show the reasonable value of services, we explained that "medical bills received by a tort victim can be relevant evidence of issues such as the nature and severity of the injuries." *Meek*, ¶ 14 (citing *Chapman v. Mazda Motors of Am.*, 7 F. Supp. 2d 1123, 1125 (D. Mont. 1998)). We explicitly declined to address what damages the plaintiff could recover for medical expenses because "that [was] an issue that [could] be adequately addressed on appeal if necessary." *Meek*, ¶ 11. We rejected the defendants' contention that permitting the plaintiff to present evidence of Meek's total

medical bills would result in a "windfall," as that was beyond the scope of our review. *Meek*, ¶ 19. We distinguished *Newbury* and *Conway* on the ground that those cases involved contract disputes over the application of specific policy language. *Meek*, ¶ 20. Applying *Meek*, the trial court here considered the amount of the written-off medical bills "in evaluating the nature and severity of Johnny Gibson's injuries stemming from the negligence of Defendant."

¶16 Gibson reads too much into *Meek*. The case does not stand for a categorical rule that an injured tort victim may recover medical expenses written off by her provider. To the contrary, we made clear that "[t]he only issue we address in this pretrial proceeding is whether the District Court properly limited the evidence that is admissible at trial regarding medical expenses"; we did "not address Meek's claim regarding the damages she may recover for medical expenses[.]" *Meek*, ¶ 11. In *Chapman*, which *Meek* cited, the United States District Court for the District of Montana held that the plaintiff was not permitted to recover "more than the actual amount paid on her behalf by Medicaid for past medical expenses," even though she was permitted to introduce evidence of her forgiven medical expenses to prove the "nature and extent of her injuries." *Chapman*, 7 F. Supp. 2d at 1125. Our holding in *Meek*, therefore, does not dictate the outcome Gibson suggests.

¶17 The purpose of compensatory damages "is to redress the concrete loss that a plaintiff has suffered by reason of a defendant's wrongful conduct." *Seltzer v. Morton*, 2007 MT 62, ¶ 148, 336 Mont. 225, 154 P.3d 561 (citation omitted). "The law of torts [aims to] restore[ ] an injured party as near as possible to the party's pre-tort position[.]" *Lampi v. Speed*, 2011

MT 231, ¶ 21, 362 Mont. 122, 261 P.3d 1000 (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 32, 338 Mont. 259, 165 P.3d 1079). The law cautions that "damages must in all cases be reasonable[.]" Section 27-1-302(1), MCA.

¶18 Our precedents make clear that, as a general rule, a plaintiff is not permitted to recover an element of damages she does not in fact suffer, like excess medical expenses, except in circumstances in which she has contracted for such potentially duplicative payments under an insurance policy, as did the plaintiff in *Winter*. The cost of Gibson's medical care was forgiven, with no payment or any expectation of payment from Gibson, from a government healthcare insurer, or from any insurer with which Gibson had contracted. The Estate is not liable for those costs, and the providers reserved no right to collect.

¶19 Relying on *Winter*, Gibson argues nonetheless that she "incurred" $165,661.50 at the time the services were rendered. Therefore, regardless of whether she is liable to pay that amount, she asserts that the Estate is entitled to recover damages for all "incurred" medical expenses arising from the tortfeasor's negligence. *See Winter*, ¶ 16. Gibson ignores critical dissimilarities between the present case and *Winter*. First, in *Winter*, the defendant insurer had a contractual obligation to compensate Winter for the amount of policy limits that Winter, having paid premiums for the coverage, was entitled to receive. *Winter*, ¶¶ 22-25. Second, our interpretation of the word "incurred" was grounded in the specific policy at issue and how an "ordinary consumer" would understand the policy language. *Winter*, ¶ 18. Gibson's argument requires us to assume a second unstated premise: that, even if the Estate "incurred" the unbilled expenses, those expenses

necessarily are compensable under the law of torts despite the providers having completely written them off and zeroed out the bill. We find no support for this unstated premise, and Gibson has failed to convince us that the above cases imply such a broad-sweeping rule.

¶20 Gibson makes several equitable arguments why denying compensation for the reasonable value of a charitable write-off would lead to unfair outcomes. She points out that § 27-1-308(1), MCA, recognizes the right of a tort victim to be "fully compensated" for her injuries before her recovery will be reduced by amounts payable from a collateral source. Gibson argues that a patient who can afford insurance will be allowed recovery based on the amount of medical bills, whereas the Estate is not because the Gibson family is financially destitute. Gibson contends that the Estate was not fully compensated in this case after the trial court reduced Gibson's non-economic damages to meet the $250,000 statutory cap, which is not at issue here. *See* § 25-9-411, MCA. The Government responds with countervailing policy arguments why charity care write-offs should not be included in a tort claimant's damage award because they are never paid. The Government also points out that the Legislature conclusively resolved the policy going forward.

¶21 Having considered the parties' arguments, the collateral source statute, and the applicable case law, we conclude that allowing Gibson to recover the value of the medical bills that St. Vincent Hospital and the ambulance service forgave would not compensate her for a detriment to the Estate from Gibson's necessary medical care or "redress [a] concrete loss that [Gibson] suffered by reason of [the government's] wrongful conduct." *See Seltzer*, ¶ 148. Gibson does not develop a supported legal argument that, divorced from subrogation, either the collateral source statute or the equitable made-whole doctrine

leads a shortfall in non-economic damages to "spill over" to an economic damages award for a loss the Estate did not actually suffer under the facts presented. *See Van Orden*, ¶ 21; *Skauge*, 172 Mont. at 528, 565 P.2d at 632. The providers here have "h[e]ld the patient harmless for the services rendered on his behalf[.]" *See Winter*, ¶ 16. Failing to compensate Gibson for the forgiven expenses "is not taking any money out of [her] pocket." *See Van Orden*, ¶ 21. Because the written-off costs of medical services were never a detriment the Estate suffered from the Government's negligence, we answer "no" to the first certified question.

¶22 *2. Under Montana law, for a claim that accrued prior to the effective date of § 27-1-308, MCA (2021), does a charitable care write-off qualify as a collateral source within the meaning of § 27-1-307, MCA? If so, does a charitable care write-off qualify for the "gifts and gratuitous contributions" exception under § 27-1-307(1)(c), MCA?*

¶23 As applicable here, the collateral source rule requires "that a jury determine its award 'without consideration of any collateral source.'" *Meek*, ¶ 17 (quoting § 27-1-308(3), MCA). Section 27-1-307(1), MCA, defines "collateral source" as "a payment for something that is later included in a tort award and that is made to or for the benefit of a plaintiff or is otherwise available to the plaintiff[.]" The statute identifies five categories of payments that meet the definition of a collateral source. Section 27-1-307(1)(a)-(e), MCA. Among those is a payment "under any contract or agreement . . . to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, *except* gifts or gratuitous contributions or assistance[.]" Section 27-1-307(1)(c), MCA (emphasis added). Gibson argues that because a charitable write-off (a) is not a "payment" and (b) is "gratuitous assistance," it is not a collateral

source subject to reduction under § 27-1-308, MCA. The Government agrees with Gibson's first premise and argues that the analysis ends there.

¶24 We begin with the opening language in subsection (1). *See Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶¶ 113-14, 303 Mont. 274, 16 P.3d 1002 (determining first that Schuff's Social Security survivor benefits qualified as a potential collateral source under subsection (1), and then analyzing subparts (a) through (e)). "In the construction of a statute, we look first to its plain language[.]" *State v. Felde*, 2021 MT 1, ¶ 16, 402 Mont. 391, 478 P.3d 825. Therefore, we first consider whether the $165,661.50 charitable write-off is a "payment for something that is later included in a tort award." *See* § 27-1-307(1), MCA.

¶25 "We give words in the statute their usual, ordinary meaning." *Felde*, ¶ 16. Our role in construing a statute is to "ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. Under Montana law, "Performance of an obligation for the delivery of money only is called payment." Section 28-1-101(2), MCA. An obligation arises either by contract or by operation of law. Section 28-1-102, MCA. Black's Law Dictionary defines "payment" similarly as the "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation[,]" or, "[t]he money or other valuable thing so delivered in satisfaction of an obligation." *Payment*, Black's Law Dictionary (11th ed. 2019).

¶26 Citing *Schuff*, ¶ 115, Gibson emphasizes that the collateral source statute must be strictly construed because it "limit[s] a party's remedy." Because there was no payment

and the providers' acts of charity were "gratuitous assistance" to the Gibson family, Gibson asserts that there is no collateral source. No collateral source equals no reduction. She concludes that the statute thus entitles her to recover the full amount of the charitable write-off without reduction.

¶27 Gibson's argument runs into a circularity problem. The parties agree that the Estate has not received and will not receive any "payment" related to the written-off expenses of Johnny Gibson's care. Added to our conclusion above, the charitable write-off is not "later included in a tort award." Gibson essentially claims that she is entitled to recover the written-off expenses precisely because she received no payment of them from any other source. But that is because she never owed those expenses to the providers. The decision to write off the expenses did not involve a payment of any kind, and no amount was at any time paid or payable by the hospital, by the ambulance service, or by any third party. Finally, at least on the facts with which we have been provided, there was no "contract or agreement" to "provide, pay for, or reimburse" Gibson's medical expenses, and any "gratuitous contributions or assistance" would exclude the written-off expenses from the definition of collateral source. Section 27-1-307(1)(c), MCA. The statute simply has no application.[2]

[2] Given the limited scope of our review on a certified question, we do not here consider or express opinion on a different situation, such as a provider writing off an existing debt after unsuccessful collection attempts or after a patient initiates litigation, retains counsel, or otherwise secures relief from a billed service. Though Gibson's reply brief references Gibson's financial assistance application to the hospital, it does not show such circumstances and we rest our conclusions on the facts stated in the Certification Order. *See* M. R. App. P. 15(6)(a)(ii).

¶28 A review of the legislative history shows the central concern of the collateral source statute to prevent "double recoveries" and "windfalls." *House Bill 567: Hearing on H.B. 567 Before the Comm. on Judiciary*, 50th Leg. 628 (1987) (testimonies of Gerald J. Neeley and Eric Thuesen, Feb. 11, 1987). The Montana Trial Lawyers Association proposed an amendment to the bill to include a definition of "payments." Montana Trial Lawyers Association, *An Evaluation of Proposals to Eliminate the Collateral Source Rule*, H.B. 567, 50th Leg. 628, 2 (Feb. 11, 1987) [hereinafter *MTLA Report*]. It stated, "'Payments' refer to economic losses paid or payable by collateral sources for wage loss, medical costs, rehabilitation costs, services, and other out-of-pocket costs incurred by or on behalf of a claimant for which that party is claiming recovery through a tort suit." *MTLA Report*. This definition comports with the common-sense reading we have given the statute's plain language. There was no out-of-pocket cost to the Estate and no payment to be counted as a collateral source by which any recovery could be reduced; the trial court's exclusion of the charitable write-off from the total damages prevented any arguable windfall.

¶29 We conclude that the hospital's and ambulance service's write-off of Gibson's medical bill is not a "payment" as the word ordinarily is understood and as it was intended by the Legislature. Because the write-off is not a "payment for something that is later included in a tort award," it does not fall within the collateral source rule. *See* § 27-1-307(1), MCA. Though Gibson makes reference to the *Restatement (Second) of Torts* and the common-law collateral source rule, we find those discussions immaterial. "In this state there is no common law in any case where the law is declared by statute."

Section 1-1-108, MCA. The certified question calls for an interpretation of the statute and does not require us to consider the common-law collateral source rule. We therefore answer "no" to the second certified question.

CONCLUSION

¶30 We conclude that for a claim that accrued prior to the effective date of § 27-1-308, MCA (2021), a plaintiff in a survival action may not recover the reasonable value of medical care and related services when the costs of such care or services are wholly written off under the provider's charitable care program and the patient receives a zero-balance bill. We also conclude that for a claim that accrued prior to the effective date of § 27-1-308, MCA (2021), such a charitable care write-off is not a collateral source within the meaning of § 27-1-307, MCA.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON
/S/ JIM RICE