NOT FOR PUBLICATION WITHOUT APPROVAL
OF THE COMMITTEE ON OPINION

ANGEL VIRUET, JR. and SARAH VIRUET, Plaintiffs v. FERNANDO MAOINE, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION –CIVIL PART CUMBERLAND COUNTY DOCKET NO. CUM-L-842-14 CIVIL ACTION **SUPPLEMENTAL OPINION**

Before the court is defendant, Fernando Maione's motion to subject plaintiff, Angel Viruet's claim for medical expenses which exceed his limited Personal Injury Protection ("PIP") coverage benefits to the New Jersey Medical Fee Schedule ("Fee Schedule"), *N.J.A.C.* 11:3-29, promulgated by the Commissioner of Banking and Insurance pursuant to *N.J.S.A.* 39:6A-4.6. Plaintiffs strenuously oppose the motion. The court heard oral argument on November 4, 2016, and rendered an oral decision denying defendant's motion. The court issues this Supplemental Opinion augmenting its oral decision pursuant to *Rule* 1:6-2(f).

This case arises from a motor vehicle accident occurring on January 9, 2013. At the time of the accident, plaintiffs were insured by an automobile insurance policy issued by GEICO Insurance Company, on which they had selected limited PIP medical coverage benefits of $15,000. Plaintiff alleges that he incurred medical bills in the amount of $56,321.93 due to injuries he sustained in the accident.

Defendant contends that the medical bills exceeding the $15,000 PIP medical coverage limit are subject to the Fee Schedule. Consequently, defendant further argues that the boardable

medical expenses to be considered by the jury are limited to the Fee Schedule amounts for the medical services provided to plaintiff. For the following reasons, the court respectfully disagrees.

"A plaintiff who is awarded a verdict is entitled to payment for medical expenses which were reasonably required for the examination, treatment and care of injuries proximately caused by the defendant's negligence or other wrongdoing." *Model Civil Jury Charge* 8.11A. Absent law to the contrary, plaintiff may recover the "fair and reasonable value of such medical expenses." *Ibid*. Defendant claims that plaintiff's right to recover medical expenses has been limited by statute.

Pursuant to the Automobile Insurance and Cost Reduction Act of 1998 ("AICRA"), L. 1998, c. 21, c. 22, automobile insurers are required to provide the following medical expense benefit coverage options to policyholders:

> Medical expense benefits in amounts of $150,000, $75,000, $50,000 or $15,000 per person per accident; except that, medical expense benefits shall be paid in an amount not to exceed $250,000 for all medically necessary treatment of permanent or significant brain injury, spinal cord injury or disfigurement or for medically necessary treatment of other permanent or significant injuries rendered at a trauma center or acute care hospital immediately following the accident and until the patient is stable, no longer requires critical care and can be safely discharged or transferred to another facility in the judgment of the attending physician.
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> [*N.J.S.A.* 39:6A-4.3(e).]

Covered medical expenses incurred as a result of an automobile accident are subject to the Fee Schedule promulgated by the Commissioner of Banking and Insurance. The Legislature delegated the task of determining the reasonable and prevailing fees for medical services on a regional basis to the Commissioner.

> The Commissioner of Banking and Insurance shall … promulgate medical fee schedules on a regional basis for the reimbursement of health care providers providing services or equipment for medical expense benefits *for which payment is to be made by an automobile insurer under personal injury protection coverage* pursuant to … [*N.J.S.A.*] 39:6A- et seq., or by an insurer under medical expense benefits coverage pursuant to … [*N.J.S.A.*] 17:28-1.6. These fee schedules shall be

> promulgated on the basis of the type of service provided, and shall incorporate the reasonable and prevailing fees of 75% of the practitioners within the region.
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> [*N.J.S.A.* 39:6A-4.6(a) (emphasis added).]

Plaintiffs elected the lowest medical expense coverage limit of $15,000 on their policy, resulting in a lower policy premium. *See N.J.S.A.* 39:6A-4.3(f). Plaintiff's medical expenses are clearly subject to the Fee Schedule to the extent they are within the $15,000 coverage limit. In that regard, the Act further provides:

> No health care provider may demand or request any payment from any person in excess of those permitted by the medical fee schedules established pursuant to this section, nor shall any person be liable to any health care provider for any amount of money which results from the charging of fees in excess of those permitted by the medical fee schedules established pursuant to this section.
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> [*N.J.S.A.* 39:6A-4.6(e).]

Providers are likewise prohibited by regulation from billing in excess of the fees permitted under the Fee Schedule.

> No health care provider may demand or request any payment from any person in excess of those permitted by the medical fee schedules and this subchapter, nor shall any person be liable to any health care provider for any amount of money that results from the charging of fees in excess of those permitted by the medical fee schedules and this subchapter.
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> [*N.J.A.C.* 11:3-29.6.]

Accordingly, the provider may not bill the patient for, and the patient is not liable for, any amount in excess of the fee schedule for services covered by the policy.

The issue before the court is whether the medical expenses beyond the $15,000 coverage limit are likewise subject to the Fee Schedule and only boardable to the extent of the fee schedule amounts. As noted by two commentators, "neither the statute nor the regulation expressly addresses the question of whether a health care provider can charge more than the fee schedule permits if the patient's expenses are not to be paid under PIP." Craig & Pomeroy, *N.J. Auto Insurance Law*, § 5:2-2(d) at 102 (2016).

The Act's definition of "economic loss" specifically includes "medical expenses." *N.J.S.A.* 39:6A-2(k). In *D'Aloia v. Georges*, 372 *N.J. Super.* 246, 250 (App. Div. 2004), the appellate panel "conclude[ed] that section 2k makes clear that 'economic loss,' which section 12 permits an accident victim to recover from the tortfeasor, includes uncompensated medical expenses." *N.J.S.A.* 39:6A-12 prohibits admission of evidence at trial of losses collectible under personal injury protection. However, "[n]othing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party." *N.J.S.A.* 39:6A-12. Nevertheless, accident victims cannot recover PIP copayments and deductibles from tortfeasors, because "*N.J.S.A.* 39:6A-12 continues to bar lawsuits to recover PIP copayments and deductibles." *D'Aloia, supra*, 372 *N.J. Super.* at 252.

Medical providers bill their patients for the medical services provided. Payment is due and owing from the patient himself, particularly with respect to medical expenses exceeding coverage limits. Because the PIP carrier is not paying the medical expenses above the coverage limit, the Fee Schedule does not apply. As to those services which are not covered by PIP benefits, the medical provider is not limited to the Fee Schedule and may bill the patient for the full cost of the treatment. The patient is then personally responsible for the amount billed, including the portion in excess of the fee schedule. The patient may then seek recovery of that economic loss from the tortfeasor. If successful at trial, the tortfeasor (and in turn, the tortfeasor's insurer) would then be liable for that economic loss, not the plaintiff's PIP carrier. Under these circumstances, plaintiff would only be recovering his actual loss, not a windfall. *See Wise v. Marienski*, 425 *N.J. Super.* 110, 112 (Law Div. 2011).

Ultimately, the court opined in *Wise* that:

> plaintiffs are not having their cake and eating it, too. Their medical expenses are not instantly recoverable. Instead, they must file suit, go through the discovery process, and run the gauntlet of proving defendant's liability, as well as the necessity

> and reasonableness of the medical bills, to a jury. That process typically takes years. Even if they are successful in this endeavor, they will still have to collect their damages, which could be impossible if a defendant is uninsured, or underinsured. So, while plaintiffs have been able to recoup a portion of their medical expenses fairly quickly, they must now labor without the assuredness of the no-fault system and proceed through the tort system to, hopefully, recover the remainder. Moreover, if the excess medical expenses are recovered, it is not a windfall to plaintiffs, because these expenses are owed to their medical providers.
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> [*Id.* at 125.]

"The Legislature has evinced, in clear language, its intention to allow recovery in tort of medical expenses for which an accident victim has not been otherwise compensated." *Id.* at 121. It is precisely those uncompensated medical expenses that plaintiff is attempting to recover in this matter. As explained by Judge Grispin in *Wise*:

> It is incongruous that a standard policyholder, who had chosen a lower option provided for by the Legislature, and accepted the risk of indebtedness to medical providers, would be prohibited from entering his or her expenses into evidence as well. There is little evidence that the Legislature intended to make such a distinction between those who can afford maximum coverage and those who cannot. To the contrary, as illustrated above, the provision for lesser amounts of coverage was to enable lower-income drivers to enter the no-fault system, not have them taken on potentially insurmountable medical bills in the event of a serious accident, with no means of recovery.
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> [*Id.* at 126.]

For these reasons, defendant's motion is denied. Plaintiff is not barred from recovering the full amount of the medical bills in excess of his PIP medical expense coverage limit that were incurred as a result of the accident. Plaintiff's medical expenses are not subject to the Fee Schedule to the extent they exceed his $15,000 medical expenses coverage limit. *See N.J.S.A.* 39:6A-4.6(a). The Fee schedule only applies to medical expenses paid by first-party PIP insurers. *Ibid.* ("The Commissioner of Banking and Insurance shall … promulgate medical fee schedules on a regional basis for the reimbursement of health care providers providing services or equipment for medical expense benefits *for which payment is to be made by an automobile insurer under the personal injury protection coverage pursuant to [N.J.S.A.] 39:6A-1 et seq.*" (emphasis added)).

Plaintiff's medical bills are fully boardable to the extent they were not paid under the PIP coverage afforded by his insurer. Here, plaintiff claims that his uncompensated medical expenses total $41,321.93 ($56,321.93 - $15,000). The jury will decide the fair and reasonable value of such medical expenses if plaintiff prevails as to liability and causality.

CONCLUSION

For the foregoing reasons, defendant's motion is denied. The court has entered an Order reflecting its ruling.

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RICHARD J. GEIGER, J.S.C.

Dated: November 4, 2016