TRI-COUNTY EQUIPMENT & LEASING, LLC

Appellant,

vs.

ANGELA KLINKE,

Respondent.

Case No. 55121

FILED
JUL 23 2010
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APPEAL FROM JUDGMENT - FIRST JUDICIAL DISTRICT COURT
STATE OF NEVADA, COUNTY OF CARSON CITY
HONORABLE JAMES T. RUSSELL, DISTRICT COURT JUDGE

# RESPONDENT'S ANSWERING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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# RESPONDENT'S ANSWERING BRIEF

## INTRODUCTION

This was an admitted liability personal injury action arising out of a June 1, 2007, automobile accident. Prior to trial, the district court granted a motion in limine excluding evidence of California worker's compensation benefits as constituting a collateral source of payment. AA2 at p. 291. Appellant subsequently moved for reconsideration and a second district court judge reviewed the issue and again ruled that the California worker's compensation benefits were a collateral source and therefore denied appellant's motion for reconsideration. AA2 at pp. 358-359. Appellant cites no authority for its primary contention that these rulings constituted reversible error. Appellant's other two issues on appeal relate to pay downs or write offs obtained as first-party collateral source benefits. The law in Nevada and the vast majority of jurisdictions in this country is that such write offs or pay downs are inadmissible collateral sources of payment for which appellant is not entitled to any reduction in damages either before or following the entry of a judgment.

## I

## FOREIGN STATE WORKER'S COMPENSATION BENEFITS ARE COLLATERAL SOURCES

Foreign state worker's compensation benefits are collateral sources. Under NRS 616C.215(2), the Nevada statute is limited to claims brought pursuant to NRS Chapters 616A to 616D. It is undisputed that Klinke's claims did not fall within the Nevada

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statute. This Court has previously interpreted NRS 616C.215 and its legislative history and has held:

> ... we conclude that the legislature did not intend NRS 616C.215(10) to eviscerate the collateral source rule. Rather, the statute creates a narrow exception to the rule. Cramer v. Peavy, 16 Nev. 575, 580. (Emphasis added)

Appellant cites no Nevada case or other Nevada authority for the proposition that the reviewing district court judges committed reversible error, but simply argues that California may have a similar statutory scheme to Nevada. This does not affect the validity of the district court rulings that California worker's comp benefits are a collateral source as to a Nevada personal injury action governed by Nevada law. The plain language of this statute has already been narrowly construed as stated above.

II

NO WRITE DOWNS WERE ESTABLISHED BY THE RECORD

A threshold issue prior to consideration of the collateral source rulings is whether or not the record establishes any write-downs accepted by Klinke's providers. The record does not and this appeal should be affirmed on this basis. Olsen v. Reid, 79 Cal.Rptr.3d 255 (Cal.App. 4 Dist. 2008). At page 5 of Appellant's brief, amounts billed and paid are set forth as though that were an established fact. A number of citations to the record follow, but only one document actually contains any information about payments made by the worker's comp carrier. AA8 at p. 1279 This document

raises more questions than it answers about payments made from Angela Klinke's first party collateral source. Specifically, the ambulance bill is $4,516, but the summary shows an ambulance payment of $4,859.09, an amount in excess of the actual billing. The summary also shows future medical of $7,230, but does not address whether these are bills which have been submitted and not paid or exactly what that number means. Any and all claimed write downs could be within this $7,230. The summary also shows outpatient hospital billings of $1,370.40, which appellant interpreted as being the amount paid to Barton Memorial Hospital, but this is far from clear because Barton Memorial Hospital is not even listed as a provider. Neither is Renown Medical Center listed as a provider. Simply put, this summary does not support the contention of appellant that Klinke received any write-downs. Appellant's contention at page 5 of Appellant's Opening Brief, footnote 4 that the ambulatory surgical center payment was actually for Renown Medical Center does not establish a write-down because there is no evidentiary connection between those two entities in the record. To make matters worse, the summary contains handwritten notes of unknown origin.

In Olsen v. Reid, supra, the appellate court held as follows:

> Despite Reid's arguments to the contrary, we find it far from clear as to what was paid, what, if anything, was "written off," and to what extent Olsen remained liable for any further charges. The cryptic notations the court relied upon may reflect payments, or write-



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downs or write-offs; we cannot know, and if any evidence revealed the actual facts, they are not present in the record. Reid claimed she was prepared to demonstrate the amounts Olsen and her insurer actually paid at the time of her motion in limine, yet with this evidence, we cannot find she did so, even under the most permissive standard of review.

We therefore find the trial court erred in reducing the amount of the jury verdict. We reverse this order and direct the trial court to enter a new judgment reflecting the full amount of the jury's verdict.

Olsen v. Reid, 70 Cal.Rptr.3d 255, at p. 257.

The present case is similar to Olsen. Here, appellant's record citations fail to show any actual write-downs for which appellant is seeking a reduction of the judgment. As in Olsen, this court should reject the reduction.

III

NEVADA'S COLLATERAL SOURCE RULE IS CONTROLLING

Appellant seeks to reduce Klinke's recoverable medical expenses on the basis that Klinke has received first party benefits. This is precisely what is prohibited by Nevada's Collateral Source Rule.

Nevada has adopted a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for any purpose. Proctor v. Castelletti, 112 Nev. 88, 911 P.2d 853 (1996); Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103 (2006); Winchell v.

Schiff, 193 P.3d 946 (2008):

> The collateral source rule provides 'that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.'

Proctor v. Castelletti, at page 90.

To reduce respondent's recoverable damages as requested by appellant would be clear error:

> While it is true that this rule eviscerates the trial court's discretion regarding this type of evidence, we nevertheless believe that there is no circumstance in which a district court can properly exercise its discretion in determining that collateral source evidence outweighs its prejudicial effect.

Proctor v. Castelletti, at page 91.

Likewise, in Bass-Davis v. Davis, the Nevada Supreme Court in a 2006 decision reiterated that the:

> "...collateral source rule prohibits the jury from reducing the plaintiff's damages on the ground that he received compensation for his injuries from a source other than the tortfeasor."

Bass-Davis, pp. 453-454.

Likewise, in the 2008 Nevada Supreme Court case of Winchell v. Schiff, the Nevada Supreme Court again held:

> "the collateral source rule is a per se rule that



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bars the admission of a collateral source of payment for a loss or injury into evidence for any purpose. The purpose of the collateral source rule is to prevent the jury from reducing the plaintiff's damages on the ground that he received compensation for his injuries from a source other than the tortfeasor. The collateral source rule provides that where an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor. (Emphasis added) Winchell, supra at 193 P.3d 951.

In this case, it is undisputed that the first party benefits are wholly independent of the defendant/tortfeasor, and it is undisputed that these benefits therefore constitute a collateral source. Nonetheless, Appellant seeks to reduce Klinke's damages in violation of the stated Nevada authorities, many of which were not even cited or discussed by Appellant.

IV

NEVADA FOLLOWS THE MAJORITY RULE

As recently stated by the Supreme Court of Oregon, the "vast majority of courts" follow the majority rule stated in the above Nevada cases:

> 'The vast majority of courts to consider the issue' follow the common-law rule articulated in section 924 of the Restatement and permit plaintiffs to seek the reasonable value of their expenses without limitation to the amount that they pay or that third parties pay on their behalf. See Wills v. Foster, 229 Ill.2d 393, 414,



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> 323 Ill.Dec. 26, 892 N.E.2d 1018, 1031 (2008) (so stating). In Wills, the Illinois Supreme Court relied on its collateral source rule to hold that the plaintiff was entitled to the full amount of her medical expenses, notwithstanding the fact that she had not paid those expenses and would not be required to do so.

White v. Jubitz Corp., 219 P.3d 566, 580 (Or. 2009)

In the Wills v. Foster case cited with approval by the Oregon Supreme Court, the Supreme Court of Illinois reversed a trial court holding which reduced an award of medical expenses to the amount actually paid by Medicaid and Medicare. Wills v. Foster, 229 Ill.2d 393, 892 N.E.2d 1018 (2008). In the Wills case, supra, the trial court reduced after trial the amount of the jury's award from $80,163.47 to $19,005.50. On appeal, the Supreme Court of Illinois reversed, holding that the collateral source rule precluded a reduction of plaintiff's damages:

> Plaintiff was entitled to seek to recover the reasonable value of her medical expenses and her recovery was not limited to the amount actually paid by Medicare and Medicaid. We thus reverse the appellate court's judgment upholding the trial court's reduction as plaintiff's medical expenses award to the amount paid by Medicare and Medicaid, as well as that portion of the circuit court's judgment. We remand the cause to the circuit court for further proceedings.

Wills v. Foster, at 892 N.E.2nd 1034.

This Court is also referred to the recent Supreme Court of Hawaii holding in Bynum v. Magno, 101 P.3d 1149 (Hawaii 2004) in which the Supreme Court of Hawaii specifically held that the



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collateral source rule prohibited reducing damages to reflect discounted Medicare payments:

> Inasmuch as Medicare/Medicaid are social legislation programs, we conclude that the collateral source rule applies to prevent the reduction of plaintiff's award of damages to the discounted amount paid by Medicare/Medicaid.

Bynum v. Magno, at 1157.

This Court is also directed to the recent case of Calva-Cerqueira v. U.S., 281 F.Supp.2d 279 (D.D.C. 2003). In that case, the United States District Court for the District of Columbia specifically held at page 295 of the opinion that the "... collateral source rule explicitly permits compensatory damages to include written-off amounts." The Court went on to state the following:

> The collateral source rule applies in this case because the source of the benefit, the plaintiff's medical care providers' alleged writing-off of costs, is independent of the tortfeasor. The collateral source rule permits the plaintiff to recover all of his medical costs, regardless of any written-off amounts. (emphasis added)

Id. at 296.

V

RECENT CALIFORNIA AUTHORITY FOLLOWS THE MAJORITY VIEW

As pointed out by appellant at AOB page 14, footnote 8, the



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Court of Appeals for the Fourth District in California recently held that a motorist could recover the negotiated rate differential and that the use of a post-trial motion to reduce a jury verdict was unauthorized. Howell v. Hamilton Meats & Provisions, Inc., 101 Cal.Rptr.3d 805 (4th Dist. 2009). In Howell v. Hamilton Meats, the trial judge granted a post-trial motion to reduce to the discounted amount accepted by the provider. The reviewing Court found that the Hanif/Nishihama line of cases relied upon by appellant should have been resolved on an analysis of the injured parties rights under the collateral source rule:

> We disagree with this holding in Nishihama and the reasoning upon which it is based. In our view, the issue of whether Nishihama was entitled to recover damages for past medical expenses based on her medical provider's (CPMC's) normal (i.e., usual and customary) rates or based on the negotiated rates CPMC agreed to accept from her private health care insurer (Blue Cross) as payment in full for the medical services CPMC rendered to her should have been resolved based on an analysis of Nishihama's rights under the collateral source rule, rather than on an analysis of CPMC's lien rights under the HLA. Nishihama was an injured plaintiff whose medical care expenses were covered under private health care insurance she had procured, and her common law compensatory rights under the collateral source rule were independent of, and unrelated to, CPMC's statutory lien



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rights under the HLA. Thus, the fact that CPMC had no lien rights against Nishihama's recovery against the defendant city because CPMC had received from Blue Cross the reduced negotiated payment of $3,600 it was entitled to receive under its agreement with Blue Cross, was not pertinent to the issue of whether Nishihama was entitled under the collateral source rule to recover economic damages in the amount of $17,168 based on CPMC's usual and customary rates. Resolution of that issue required an analysis under the collateral source rule of whether Nishihama, before she received medical care from CPMC, entered into a financial responsibility agreement with that medical provider, and thus whether she incurred pecuniary detriment or loss in the form of personal liability for the medical expenses she would later incur at CPMC's normal rates. Because the holding in Nishihama is not based on such an analysis under California's collateral source rule, Hamilton's reliance on that case is misplaced.

Id. 818.

In addition to the above, the Court of Appeal in Howell v. Hamilton Meats, supra, relied upon the previously discussed case of Olsen v. Reid, 79 Cal.Rptr.3d 255 (Cal.App. 4 Dist. 2008) particularly the discussion of the application of the collateral source rule contained in the concurring opinions. Although Olsen v. Reid was decided on the more narrow grounds of the failure



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to demonstrate in the record any write-downs or write-offs, the concurring opinion sharply criticized the California cases permitting post-trial reduction of medical expenses as being contrary to the collateral source rule and a long line of California cases interpreting the collateral source rule:

> Given this setting, I decline to apply the postverdict hearing schemes set forth in *Hanif/Nishihama* to private insurance situations, absent either statutory authority or endorsement from the Supreme Court. I believe the rule abrogates, in fact if not in law, the collateral source rule and the sound policy behind it. The plaintiff who has insurance receives less than her uninsured counterpart, while the defendant benefits from the plaintiff's prudence. This drastically undermines one of the key policy rationales behind the rule.

Olsen v. Reid, 79 Cal.Rptr.3d 255 at 265.

CONCLUSION

Appellant's primary contention is that foreign state worker's compensation benefits should not be treated under Nevada law as a collateral source. However both the controlling statute and case law are contrary. Appellant has cited no Nevada authority in support of its position. Appellant also failed to make any intelligible record of write downs at the district court level and again offers no relevant Nevada authority that Nevada's long-line of collateral source cases should not control. Under the majority

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view, a provider write-down is simply an additional collateral source benefit. Given these facts, Respondent Angela Klinke respectfully requests that judgment be affirmed.

DATED the 23rd day of July, 2010.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read the Respondent's Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of July, 2010.

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**CERTIFICATE OF SERVICE**

Pursuant to NRAP 25(1)(b), I certify that I am an employee of the law offices of Kilpatrick, Johnston, & Adler, 412 No. Division Street, Carson City, NV 89703, and that on the 23rd day of July, 2010, I gave to Reno Carson Messenger Service for delivery, a copy of RESPONDENT'S ANSWERING BRIEF addressed to:

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