

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 TRI-COUNTY EQUIPMENT &
4 LEASING, LLC,

5 Appellant,

6 vs.

7 ANGELA KLINKE,

8 Respondent.
9

Case No. 55121

Electronically Filed
May 10 2011 10:00 a.m.
Tracie K. Lindeman

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11 **APPELLANT'S PETITION FOR PANEL REHEARING**
12 **NEVADA RULE OF APPELLATE PROCEDURE RULE 40**

13 Appellant Tri-County Equipment & Leasing, LLC ("Tri-County") hereby
14 petitions this Court for a rehearing of the above-captioned matter pursuant to
15 Nevada Rules of Appellate Procedure Rule 40. In this regard, Tri-County believes
16 that the Court, in its Order of Affirmance entered in this matter on April 27, 2011,
17 overlooked and/or misapprehended certain points of law determinative of the
18 issues raised in this appeal.
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20 As the Court is aware, this appeal challenges the manner in which the
21 district court treated evidence demonstrating that the amount of medical expenses
22 actually incurred by Respondent Angela Klinke ("Klinke") as a result of an
23 automobile accident was less than the amount initially billed by her medical
24 providers. Central to such challenge is an issue of first impression in Nevada, to
25 wit, how Nevada courts are to reconcile Nevada's collateral source rule with
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1 Nevada's law on damages and the medical provider discounts prevalent in
2 American healthcare today.

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4 In its April 27, 2011 Order, the Court relied primarily on the application of
5 Nevada's collateral source rule in affirming the district court's refusal to either (i)
6 allow the jury to review evidence of such medical provider discounts, or (ii) adjust
7 the jury's verdict to reflect such discounts. However, Tri-County believes such
8 approach misapprehends the collateral source rule and overlooks Nevada's law
9 on damages. Accordingly, Tri-County seeks a panel rehearing of this appeal.
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11 **1. Standard.**

12 Nevada Rules of Appellate Procedure Rule 40 controls petitions for
13 rehearing on appeal, and provides in pertinent part:
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15 (a) *Procedure and Limitations.*

16 (2) *Contents.* The petition shall state briefly and with
17 particularity the points of law or fact that the petitioner
18 believes the court has overlooked or misapprehended
19 and shall contain such argument in support of the petition
20 as the petitioner desires to present ...; any claim that this
21 court has overlooked or misapprehended a material
22 question of law or has overlooked, misapplied or failed to
23 considered controlling authority shall be supported by a
24 referenced to the page of the brief where petitioner has
25 raised the issue.

26 (c) *Scope of application; when rehearing considered.*

27 (2) The court may consider rehearings in the following
28 circumstances:

(A) When the court has overlooked or
misapprehended a material fact in the record or a
material question of law in the case, or

1 (B) When the court has overlooked, misapplied or
2 failed to consider a statute, procedural rule,
3 regulation or decision directly controlling a
4 dispositive issue in the case.

5 In the present matter, as explained in detail below, it is Tri-County's belief
6 that the Court overlooked or misapprehended a material question of law in its April
7 27, 2011 Order.

8 **2. Argument.**

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10 As the Court is aware, the present matter arises out of a June 1, 2007
11 automobile accident in which Klinke sustained bodily injuries (the "Accident"). The
12 medical expenses Klinke incurred following the Accident totaled \$8,566.79.
13 Notwithstanding this fact, the Judgment entered by the district court in this matter
14 awarded Klinke \$17,510.00 in medical expenses. This difference was attributable
15 to the fact that Klinke's medical providers billed \$8,943.21 more than they
16 accepted in full payment for the medical services they provided to Klinke.
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18 In the district court, Tri-County, in three different ways, sought to preclude
19 Klinke from obtaining such a windfall and to limit Klinke's recovery to her actual
20 damages. First, Tri-County requested that the district court allow the jury to be
21 presented with evidence of the medical provider discounts. (See Appellant's
22 Appendix, Volume 1 ("AA1"), at pp. 31-43). This request was denied by the district
23 court. Second, Tri-County requested that, in presenting evidence of her medical
24 expenses to the jury, Klinke be limited to offering evidence of the amount of
25 medical expenses paid rather than the amount originally billed by the medical
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1 providers. (See AA1, at pp. 44-62, and 158-164). This request was also denied by
2 the district court. Finally, following trial and entry of the jury's verdict, Tri-County
3 requested that the district court adjust the jury's verdict to account for the
4 discrepancy between the amount awarded to Klinke as compensation for her
5 medical expenses and the actual amount of medical expenses she incurred as a
6 result of the Accident. (See AA8, at pp.1238-1245). Again, the district court denied
7 Tri-County's request.
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10 In each of these instances, the district court's action was based on its view
11 of Nevada's collateral source rule, as set forth in Proctor v. Castelletti, 112 Nev.
12 88, 911 P.2d 853 (1996). In its April 27, 2011 Order, this Court affirmed the district
13 court's action, primarily relying on the same application of the collateral source
14 rule.
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16 Again, however, Tri-County submits that, in affirming the district court's
17 orders concerning the evidence of medical provider discounts, this Court
18 overlooked and/or misapprehended a material question of law. This occurred in
19 two respects. First, the Court misapprehended or overlooked the point that, under
20 pertinent Nevada law, medical provider discounts such as those at issue in this
21 matter are not a "collateral source" as contemplated in Proctor v. Castelletti, 112
22 Nev. 88, 911 P.2d 853 (1996). Second, in applying the collateral source rule to
23 preclude evidence of the medical provider discounts and preclude the adjustment
24 of the jury's verdict to account for such discounts, the Court, contrary to Nevada's
25 law on damages, permitted Klinke to recover more than her actual damages.
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1 In Proctor v. Castelletti, the Nevada Supreme Court specifically found that
2 Nevada's collateral source rule "bar[s] the admission of a collateral source of
3 payment for an injury into evidence for any purpose." Proctor v. Castelletti, 112
4 Nev. 88, 90, 911 P.2d 853, 854 (1996). In other words, under Nevada's collateral
5 source rule, evidence that a third party, such as an insurer, has paid some or all of
6 a plaintiff's medical expenses or other accident-related damages is expressly
7 precluded. In the present matter, the medical provider discounts are not a
8 "payment," but rather a reduction in the amount originally billed by the medical
9 providers to reflect to the actual value of the medical service in question.¹ In this
10 regard, in today's healthcare industry, medical provider discounts through private
11 health insurance, Medicare, Medicaid or worker's compensation are the norm, and
12 are the best evidence of the true market value of the medical services at issue. It
13 is Tri-County's belief that this point of law was overlooked by the Court in its April
14 27, 2011 Order.

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16 Additionally, Nevada law precludes a plaintiff from recovering damages in
17 excess of the value of his or her actual injuries. See Grosjean v. Imperial Palace,
18 125 Nev. ____, ____, 212 P.3d 1068, 1083 (2009) (recognizing that "the purpose
19 for allowing the recovery of money damages" in tort actions "is to compensate the
20 plaintiff for his or her injury caused by the defendant's breach of duty or intentional
21 tort"); Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995) (recognizing tort
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27 ¹ This point was raised by Tri-County in its Reply Brief on Appeal, at pages 13 and
28 14.

1 law is designed to afford compensation for injuries sustained by one person as the
2 result of the conduct of another); Topaz Mutual Co. v. Marsh, 108 Nev. 845, 852,
3 839 P.2d 606, 610 (1992) (noting that a plaintiff "is not permitted to recover more
4 than her total loss plus any punitive damages assessed"); and K-Mart v. Ponsock,
5 103 Nev. 39, 49, 732 P.2d 1364, 1371 (1987) (recognizing that tort damages
6 serve to make an injured party whole), *abrogated on other grounds by* Ingersoll-
7 Rand Co. v. McClendon, 498 U.S. 133, 137, 112 L.Ed. 474, 111 S.Ct. 478, 482
8 (1990). As such, billed medical expenses which have been discounted and for
9 which no one became legally obligated to pay are not compensable under Nevada
10 law.² Tri-County believes that the Court overlooked or misapprehended this point
11 of law in that, by affirming the district court's refusal to either allow evidence of the
12 medical provider discounts or adjust the jury verdict to reconcile such discounts,
13 the Court has permitted Klinke to recover an amount in excess of her actual
14 damages.
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16 3. Conclusion.

17 As pointed out in the dissenting opinion included in the Court's April 27,
18 2011 Order, this appeal presents an issue of first impression in Nevada, to wit,
19 how to harmonize the collateral source rule with Nevada's law on damages and
20 the reality of medical provider discounts in today's medical services industry.
21 Addressing this issue through a simple application of the collateral source rule is
22 inconsistent with both the rule itself and Nevada's general rule that a plaintiff not
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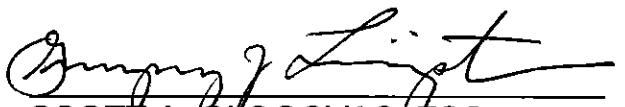
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² This point was raised by Tri-County in its Opening Brief on Appeal, at pages 11 through 13, and in its Reply Brief on Appeal, at page 13.

1 be permitted to recover an amount in excess of his or her actual damages. Tri-
2 County believes that the Court misapprehended these points of law in its April 27,
3 2011 Order. Accordingly, Tri-County respectfully requests a rehearing on the
4 matter pursuant to NRAP Rule 40.
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6 DATED this 10th day of May, 2011.

7 BURTON, BARTLETT & GLOGOVAC

8
9 By: 

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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 Burton, Bartlett & Glogovac, 50 W. Liberty St., Suite 700, Reno, NV 89501, and that on the 10th day of May, 2011, I served the foregoing document(s) described as follows:

**APPELLANT'S PETITION FOR PANEL REHEARING
NEVADA RULE OF APPELLATE PROCEDURE RULE 40**

On the party(s) set forth below by:

- X Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.
- Personal delivery.
- Facsimile (FAX) to the number listed below.
- Federal Express or other overnight delivery.

addressed as follows:

Charles Kilpatrick, Esq.
Kilpatrick, Johnston & Adler
412 N. Division Street
Carson City, NV 89703

DATED this 10th day of May, 2011.

Roni L. Shaffer
Roni L. Shaffer