

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 TRI-COUNTY EQUIPMENT & LEASING, No. 55121  
3 LLC,

4 Appellant,

5 vs.

6 ANGELA KLINKE,

7 Respondent.  
8

Electronically Filed  
May 27 2011 10:01 a.m.  
Tracie K. Lindeman

9  
10 **PETITION FOR *EN BANC* REHEARING**  
11 **NEVADA RULES OF APPELLATE PROCEDURE, RULE 40A**

12 Appellant Tri-County Equipment & Leasing, LLC ("Tri-County"), by and through its  
13 attorneys, Burton, Bartlett & Glogovac, hereby petitions this Court for *en banc* rehearing  
14 of the above-captioned matter pursuant to Nevada Rules of Appellate Procedure, Rule  
15 40A. The subject matter of this appeal involves a substantial precedential, public policy  
16 issue. This issue was addressed by a Panel of the Nevada Supreme Court in an Order of  
17 Affirmance dated April 27, 2011. A Petition for Panel Rehearing under NRAP 40 was  
18 subsequently filed by Tri-County, and was denied by Order dated May 20, 2011. As  
19 explained below, it is Tri-County's position that the Nevada Supreme Court Panel  
20 overlooked and/or misapprehended certain points of law determinative of the issue raised  
21 in this appeal.<sup>1</sup>

22  
23 **Memorandum of Points and Authorities**

24 This appeal challenges the manner in which the district court treated evidence  
25 showing that the amount of medical expenses actually incurred by Respondent Angela  
26 Klinke ("Klinke") as a result of an automobile accident was less than the amount initially  
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28  
<sup>1</sup> It should be noted that both the April 27, 2011 and May 20, 2011 orders were not  
unanimous decisions by the Panel. Rather, in each order, one of the Justices dissented.

1 billed by her medical providers. Central to such challenge is an issue of first impression in  
2 Nevada, to wit, how Nevada courts are to reconcile Nevada's collateral source rule with  
3 Nevada's law on damages and the medical provider discounts prevalent in Nevada  
4 healthcare today.

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

12  
13 **1. Standard.**

14 Nevada Rules of Appellate Procedure, Rule 40A controls petitions for rehearing on  
15 appeal, and provides in pertinent part:

16 (a) *Grounds for en banc reconsideration.* En banc  
17 reconsideration of a panel decision is not favored and  
18 ordinarily will not be ordered except when (1)  
19 reconsideration by the full court is necessary to secure or  
20 maintain uniformity of its decisions, or (2) the proceeding  
involves a substantial precedential, constitution or public  
policy issue. . . En banc reconsideration is available only  
under the limited circumstances set forth in Rule 40(a). . .

21 . . .  
22 (c) *Content of petition.* . . If the petition is based on grounds that  
23 the proceeding involves a substantial precedential,  
24 constitutional or public policy issue, the petition shall  
25 concisely set forth the issue, shall specify the nature of the  
26 issue, and shall demonstrate the impact of the panel's  
27 decision beyond the litigants involved. The petition shall be  
supported by points and authorities and shall contain such  
argument in support of the petition as the petitioner desires  
to present.  
28 . . .

1 In this appeal, the Panel, in its April 27, 2011 Order, overlooked or  
2 misapprehended a material question of law. This question of law is significant from both a  
3 precedential and public policy standpoint in that it involves an issue (i) which is raised in a  
4 substantial number of personal injury cases filed in Nevada, and (ii) for which there is no  
5 express guidance under existing Nevada law. Again, the issue concerns how Nevada  
6 courts are to treat evidence of the medical provider discounts which are prevalent, if not  
7 the norm, in Nevada healthcare today.  
8

9 **2. Argument.**

10 This case arises out of a June 1, 2007 automobile accident in which Klinke  
11 sustained bodily injuries (the "Accident"). The medical expenses Klinke incurred following  
12 the Accident totaled \$8,566.79. The judgment entered by the district court, however,  
13 awarded Klinke \$17,510.00 in medical expenses. This difference was attributable to the  
14 fact that Klinke's medical providers billed \$8,943.21 more than they accepted in full  
15 payment for the medical services they provided to Klinke.  
16

17 In the district court, Tri-County proposed that Klinke be limited to recovering only  
18 her actual damages, as opposed to being allowed to recover a windfall for medical  
19 expenses she never actually incurred. Tri-County made three requests in this regard.  
20 First, Tri-County requested that the district court allow the jury to be presented with  
21 evidence of the medical provider discounts. (See Appellant's Appendix, Volume 1  
22 ("AA1"), at pp. 31-43). This request was denied. In the alternative, Tri-County requested  
23 that, in presenting evidence of her medical expenses to the jury, Klinke be limited to  
24 offering evidence of the amount of medical expenses paid rather than the amount  
25 originally billed by the medical providers. (See AA1, at pp. 44-62, and 158-164). This  
26 request was also denied. Finally, following trial and entry of the jury's verdict, Tri-County  
27 requested that the district court adjust the jury's verdict to account for the discrepancy  
28

1 between the amount awarded to Klinke as compensation for her medical expenses and  
2 the actual amount of medical expenses she incurred as a result of the Accident. (See  
3 AA8, at pp.1238-1245). Again, this request was denied.

4 In each of these instances, the district court's determination was based on its  
5 perceived view of Nevada's collateral source rule, as set forth in Proctor v. Castelletti,  
6 112 Nev. 88, 911 P.2d 853 (1996). Similarly, the Panel's April 27, 2011 Order, which  
7 affirmed the district court's rulings, relied on the same application of the collateral source  
8 rule.

9  
10 In affirming the district court's rulings, however, the Panel, in two respects,  
11 overlooked and/or misapprehended material questions of law. First, the Panel  
12 misapprehended or overlooked the point that, under Nevada law, medical provider  
13 discounts such as those at issue in this matter are not a "collateral source" as  
14 contemplated in the Proctor v. Castelletti, 112 Nev. 88, 911 P.2d 853 (1996). Second, in  
15 applying the collateral source rule to preclude evidence of the medical provider discounts  
16 and to preclude adjustment of the jury's verdict to account for such discounts, the Panel,  
17 contrary to Nevada's law on damages, permitted Klinke to recover more than her actual  
18 damages.

19  
20 In Proctor v. Castelletti, the Nevada Supreme Court specifically found that  
21 Nevada's collateral source rule "bar[s] the admission of a collateral source of payment for  
22 an injury into evidence for any purpose." Proctor v. Castelletti, 112 Nev. 88, 90, 911 P.2d  
23 853, 854 (1996). In other words, under Nevada's collateral source rule, evidence that a  
24 third party, such as an insurer, has paid some or all of a plaintiff's claimed damages is  
25 expressly precluded. In the present matter, the medical provider discounts are not a  
26 "payment," but rather a reduction in the amount originally billed by the medical providers  
27  
28

1 to reflect to the actual value of the medical service in question.<sup>2</sup> In this regard, in today's  
2 healthcare industry, medical provider discounts through private health insurance,  
3 Medicare, Medicaid or worker's compensation are prevalent, if not the norm, and are the  
4 best evidence of the true market value of the medical services at issue. This point of law,  
5 however, was overlooked by the Panel in its April 27, 2011 Order.

6  
7 Additionally, Nevada law precludes a plaintiff from recovering damages in excess  
8 of the value of his or her actual injuries. See Grosjean v. Imperial Palace, 125 Nev. \_\_\_\_,  
9 \_\_\_\_, 212 P.3d 1068, 1083 (2009) (recognizing that "the purpose for allowing the  
10 recovery of money damages" in tort actions "is to compensate the plaintiff for his or her  
11 injury caused by the defendant's breach of duty or intentional tort"); Greco v. United  
12 States, 111 Nev. 405, 893 P.2d 345 (1995) (recognizing tort law is designed to afford  
13 compensation for injuries sustained by one person as the result of the conduct of  
14 another); Topaz Mutual Co. v. Marsh, 108 Nev. 845, 852, 839 P.2d 606, 610 (1992)  
15 (noting that a plaintiff "is not permitted to recover more than her total loss plus any  
16 punitive damages assessed"); and K-Mart v. Ponsock, 103 Nev. 39, 49, 732 P.2d 1364,  
17 1371 (1987) (recognizing that tort damages serve to make an injured party whole),  
18 *abrogated on other grounds by Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137, 112  
19 L.Ed. 474, 111 S.Ct. 478, 482 (1990).

20  
21  
22 As such, billed medical expenses which have been discounted and for which no  
23 one became legally obligated to pay are not compensable under Nevada law.<sup>3</sup> The Panel  
24 overlooked or misapprehended this point of law because, by affirming the district court's  
25 refusal to either allow evidence of the medical provider discounts or adjust the jury verdict

26  
27 <sup>2</sup> This point was raised by Tri-County in its Reply Brief on Appeal, at pages 13 and 14.

28 <sup>3</sup> 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 to reconcile such discounts, the Panel permitted Klinke to recover an amount in excess of  
2 her actual damages.

3 Finally, there is a substantial precedential and public policy interest in the issue  
4 raised in this appeal. As pointed out above, medical provider discounts through private  
5 health insurance, Medicare, Medicaid or worker's compensation are prevalent, if not the  
6 norm, in Nevada healthcare. As a result, the issue of how to treat those discounts from  
7 an evidentiary and/or damages calculation standpoint will necessarily be raised on  
8 frequent occasion in personal injury actions in this state.<sup>4</sup>

9  
10 Significantly, the case law in Nevada on the collateral source rule was developed  
11 before medical provider discounts pervaded the healthcare industry, and a straight  
12 application of the rule to such discounts is inequitable and contrary to Nevada's law  
13 concerning the recovery of damages. As such, there is no precedent for a trial court to  
14 apply when presented with the issue. For this reason, the issue in this appeal is  
15 appropriate for *en banc* rehearing.

16  
17 **3. Conclusion.**

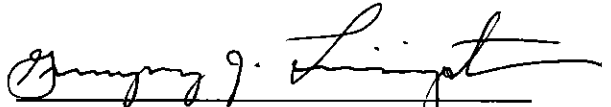
18 As pointed out in the dissenting opinion in the Panel's April 27, 2011 Order, this  
19 appeal presents an issue of first impression in Nevada, to wit, how to harmonize the  
20 collateral source rule with Nevada's law on damages and the reality of medical provider  
21 discounts in today's medical services industry. Addressing this issue through a simple  
22 application of the collateral source rule is inconsistent with both the rule itself and  
23 Nevada's general rule that a plaintiff not be permitted to recover an amount in excess of  
24

25  
26 <sup>4</sup> This point is underscored by the Nevada Justice Association's Motion to Publish  
27 Decision, filed herein on May 10, 2011, in which it is expressly argued that the questions  
28 raised in this appeal (i) involve "an issue of public importance beyond the parties to the  
case," and (2) constitute a matter of first impression under NRAP 36(c)(1) "in that it  
decides the issue of the application of the collateral source rule to medical costs write-  
downs for the first time." See Motion to Publish Decision, filed May 10, 2011, Document  
2011-13840, at p. 1.

1 her actual damages. The Panel misapprehended these points of law in its April 27, 2011  
2 Order. Accordingly, Tri-County respectfully requests *en banc* rehearing of the matter  
3 pursuant to NRAP, Rule 40A.

4 DATED this 27<sup>th</sup> day of May, 2011.

5  
6 BURTON, BARTLETT & GLOGOVAC

7 By: 

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17 Tri-County Equipment & Leasing, LLC

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25(1)(b), I certify that I am an employee of the law offices of  
3 Burton, Bartlett & Glogovac, 50 W. Liberty St., Suite 700, Reno, NV 89501, and that on  
4 the 27<sup>th</sup> day of May, 2011, I served the foregoing document(s) described as follows:  
5

6 **PETITION FOR *EN BANC* REHEARING**  
7 **NEVADA RULES OF APPELLATE PROCEDURE, RULE 40A**

8 On the party(s) set forth below by:

- 9   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  
10 prepaid, following ordinary business practices.  
11        Personal delivery.  
12        Facsimile (FAX) to the number listed below.  
13        Federal Express or other overnight delivery.

14 addressed as follows:

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

18 DATED this 27<sup>th</sup> day of May, 2011.

19 Roni L. Shaffer  
20 Roni L. Shaffer